covered the period 1 July 1983 to 23 September 1983. The DSS did not bank this cheque for some nine to ten months after its receipt.

In May 1986 the applicant responded to a DSS amnesty and advised the Department that he was no longer entitled to rent assistance as he had purchased his own house in October 1985. The following week the DSS advised him that his rate of invalid pension had been reduced. The applicant thought that his rate had been reduced because the DSS had received notice of the amount of weekly compensation payments he was to receive.

In July 1986 the applicant began to receive rehabilitation allowance. This payment stopped in December 1988. In May 1989 the DSS received notice that the applicant was receiving compensation payments and had been so since 1983. In July 1989 the applicant completed an income review form. From the evidence presented in relation to the completion of this form it appeared that back payment of compensation payments only occurred in April 1986. There was also evidence that the applicant had engaged in a business venture from which he claimed to receive an income of $2350 per month when he applied for a personal loan in September 1989. This business operated between July 1989 and July 1990.

In March 1991 the DSS raised an overpayment against the applicant of $5,033.60. In 1992 Mr Sherlock inherited $42,000, but after expenses and various items were purchased only $10,000 remained. At the time of the hearing the household income, which included pension, family allowance, compensation and a son's Austudy payments totalled $550.00 per week. The applicant's assets came to just over $10,000 in savings and a mortgaged house worth $80,000. The applicant was also paying off the overpayment at the rate of $40 per week and $3,612,10 remained to be paid.

Should recovery be waived?

There was no dispute that the applicant owed the amount claimed by the DSS. The only issue was whether the amount should be waived or written off in accordance with the Ministerial Guidelines issued in July 1991. Those guidelines provide that the DSS may waive recovery under s.1237 of the *Social Security Act* 1991:

> '(a) where the debt was caused solely by administrative error on the part of the Commonwealth, and was received by the person in good faith, and recovery would cause financial hardship to the person . . .
>
> (g) where in the opinion of the Secretary special circumstances apply such that the circumstances are extremely unusual, uncommon or exceptional.' [as discussed by the Federal Court of Australia in *Beadle v Director-General of Social Security* (1985) 7 ALD 670].

The applicant contended that in determining the application of these guidelines the situation of the applicant at the date of the SSAT hearing only should be considered. This would result in ignoring the inheritance received by the applicant since that date. The AAT rejected this contention.

> 'Following the principles in *Tiknaz* (1981) 4 ALN N44, we are of the view that we may have regard to evidence which may become known and new events which may occur after the date on which we are considering the waiver. Considering whether payment will cause financial hardship or whether circumstances are special, for example, is no different from determining whether an incapacity is permanent or not. Both require a certain amount of conjecture although that conjecture takes place within the boundaries of the evidence and reasoned analysis of it. When subsequent evidence reveals what was in fact the situation at a particular time and removes it from the realms of conjecture, it is relevant in the determination of the issue and regard should be paid to it.'

(Reasons, para.10)

Paragraph (a) of the guidelines

The AAT could not find that the overpayment occurred as the result of administrative error. The applicant could have done more to establish whether he had to repay more than the amount he initially repaid. He had focused on only one period in respect of sickness benefits and had not sought information on the effect of compensation payments on his general entitlement to sickness benefits and invalid pension.

Paragraph (b) of the guidelines

The AAT did not consider the circumstances of the case to be 'special' and decided that there should not be waiver of the payment or any part of it. The applicant had received money to which he was not entitled even though he did not do so because of any lack of good faith on his part. The DSS procedures also left something to be desired, said the Tribunal:

> 'It seemed not to know what to do with the cheque when it received it and that should have been the time at which it looked at Mr Sherlock's situation. Instead it delayed for nine or ten months before banking it and then another two years before looking at Mr Sherlock's situation again. A further two years followed to the Department's pursuing recovery although no further overpayments have been made since 1989 it would seem.'

(Reasons, para.13)

But the applicant had been repaying the debt by instalments since 1989 and had received an inheritance in 1992 which would have enabled him to repay it.

> 'His wish to spend the inheritance upon some comforts for his family is understandable but is a factor which militates against his being in special circumstances. He chose to spend it in that way rather than to repay his debt. When the family's assets and income are viewed overall, and we consider that they must be for we take an overall view of the family's expenses in a case such as this, he cannot be said to be in financial hardship.'

(Reasons, para.13)

Formal decision

The AAT affirmed the decision under review.

[B.S.]

[Editor's Note: The AAT's decision was given prior to the decision of the Full Federal Court in *Riddell* (see 73 *SSR* 1067.]

Overpayment of family allowance: changed custody arrangements

GILBERT and SECRETARY TO DSS

(No. 8631)

Decided: 2 April 1993 by A.M. Blow.

The applicant asked the AAT to review a DSS decision to recover an overpayment of $1,230.20 in family allowance.

The facts

The applicant and her husband separated in November 1990. From that date their two children lived with her hus-

band. Prior to the separation the applicant had been receiving family allowance. Payments were made into a bank account operated jointly with her husband. Upon their separation the applicant gave the passbook for this bank account to her husband on the basis that he should now receive the allowance. During the period that the alleged overpayment was made into the bank account, the husband looked after the children. The DSS had no knowledge of this arrangement as the husband saw no reason to apply for family allowance in his own name.

When the applicant applied for job search allowance in January 1992 the above arrangements came to the attention of the Department. It was then ascertained that she did not have the custody, care and control of her children and had not been entitled to family allowance since November 1990.

Was the overpayment recoverable?

Section 1224 of the 1991 Act provides that where a payment has been paid as a result of a false statement or false representation or a failure to comply with a provision of the Act or the 1947 Act then the amount paid is a debt due to the Commonwealth.

There was no question that the applicant was not entitled to family allowance. Although the husband withdrew the amounts from the bank account, in law the payments were made to the applicant. She had also made statements on an entitlement review form, which, although innocent, were misleading in that they conveyed to the DSS that she was still entitled to the payments in respect of the elder child. This information only applied to the elder child because the forms only requested information for that child.

The DSS argued that a standard letter sent to the applicant had the effect of requiring her to supply information with respect to the younger child. This letter was claimed to have been sent in accordance with the then s.163 of the *Social Security Act* 1947 which required the supply of information relating to changes in circumstances where the Secretary of the DSS requires that information. Penalties attached to non-compliance with that section. The AAT doubted whether the applicant had received a notice in that form but also said that, even if she did, it failed to comply with s.163 because it was not given by the Secretary.

> 'It could have been given by a delegate of the Secretary pursuant to s.14 of the 1947 Act, but as I have said, it did not purport to have been. It did not make it clear that it was a notice imposing a requirement, as distinct from a memorandum advising the recipient of existing legal duties. Section 163 is penal in nature. Non-compliance with it was punishable by imprisonment. It should therefore be construed strictly . . . I believe that a defendant charged under s.163 would be entitled to be acquitted if he or she had received a notice from a Regional Manager or Acting Regional Manager which did not purport to come from a delegate of the Secretary. If the notice does not on its face purport to come from a delegate of the Secretary, it may as well be unsigned or anonymous.'

(Reasons, para.9)

As a consequence, only the overpayment of family allowance in respect of the elder child was recoverable under s.1224 of the *Social Security Act* 1991.

Should the overpayment be recovered?

Section 1237 of the Act authorised the DSS to waive recovery of overpayments and debts in accordance with ministerial determinations made from time to time. A determination had been issued in July 1991. This was revoked in May 1992 but the AAT held that the possible waiver of the applicant's debt had to be determined in accordance with the earlier determination because her liability arose prior to the issue of the May 1992 determination.

The only relevant part of the ministerial determination of 1991 was paragraph (g) which provided that the debt could be waived where there were 'special circumstances such that the circumstances are extremely unusual, uncommon or exceptional'.

The AAT examined the circumstances:

> 'The applicant did not act fraudulently or dishonestly. She only ever intended that the payments of family allowance should go to benefit the two children and the parent who was their primary carer. That is to say, she intended precisely what the Parliament intended.
>
> The end result of the overpayments to the applicant is that the moneys paid out reached the destination that they should have reached but by an irregular route.'

(Reasons, para.14)

This made the case unique according to the AAT. The circumstances were extremely unusual, uncommon and exceptional. Thus there was a discretion to waive recovery pursuant to paragraph (g) of the ministerial determination.

Formal decision

The AAT set aside the decision under review and substituted a decision that recovery of the overpayment be waived and that the moneys already recovered from the applicant be refunded to her forthwith.

[B.S.]

[Editor's note: The AAT's decision was given prior to the decision of the Full Federal Court in *Riddell* (see 73 *SSR* 1067.]

Debt: evidence of fraudulent receipt of benefits

SECRETARY TO DSS and KALWY

(No. 7818A)

Decided: 16 April 1993 by M.D. Allen, J. Kalowski and G.D. Stanford.

This case was returned to the AAT following a successful appeal to the Federal Court. The appeal concerned the interpretation of s.246 of the *Social Security Act* 1991.

Section 246 provides:

> 'Where, in consequence of a false statement or representation, or in consequence of a failure or omission to comply with any provision of this Act, an amount has been paid by way of pension, allowance or benefit under this Act which would not have been paid but for the false statement or representation, failure or omission, the amount so paid is a debt due to the Commonwealth.'

The Tribunal in its earlier decision had found that on the balance of probabilities Kalwy had conspired with another person to fraudulently obtain benefits from the DSS to which he was not entitled. This had been achieved by the use of fictitious names. It also found that Kalwy was jointly and severally liable for the total amount obtained with the other person. It also noted that the DSS had held Kalwy responsible for only half of the amount and saw no reason to interfere with that determination.

The Federal Court had held that the AAT had erred in law in its interpretation of s.246 and had failed to make a finding as to the amounts, if any, which had come to Kalwy as a result of the conspiracy. The Federal Court said: