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:

'it was an essential ingredient to the operation of s.246(1) in the present case that the Secretary demonstrate that the amounts in question were paid to Mr Kalwy. Only by identifying the recipient of the payments in question was it possible to have the statutory debt to the Commonwealth created in any effective sense. In our opinion the Tribunal did not, in truth, address this question and failed to make any specific finding, positive or negative, on the point.'

(110 ALR 38, cited in Reasons, p.3)

In coming to a decision on the question of what amount Kalwy received, the AAT referred to its own Act which does not bind it to the strict rules of evidence (*Administrative Appeals Tribunal Act* 1975, s.33(1)(c)). Of course, this still requires 'logically probative material' to be put before the Tribunal.

There was evidence that Kalwy's bank account balances had increased and the AAT was asked to infer that this occurred as a result of the fraud. The AAT said that this did not prove the actual amounts received but did raise strong probative material that he was involved in the conspiracy. The Tribunal also referred to a tape recording of a conversation involving the other conspirator in which it was said that Kalwy received half of the amounts obtained. But this was not acknowledged in the evidence of the co-conspirator.

The AAT therefore was in the position of being unable to say what amount Kalwy actually received. The allegation of a general deficiency was clearly insufficient according to the Federal Court. It is necessary to trace the funds into the hands of Kalwy.

Kalwy did not concede that he had received any amounts as he claimed he had no part in the conspiracy. But the AAT was satisfied that Kalwy received some of the moneys fraudulently obtained. The tape recording at least confirmed the participation of Kalwy in the conspiracy and according to the AAT '[t]he secretly recorded conversation no doubt forms the more accurate account of how the moneys were divided' (Reasons, para.8).

The AAT concluded that at least half of the amount obtained was received by Kalwy.

Formal decision

The AAT set aside the decision under review and remitted the matter to the DSS to determine what action should be taken to recover this sum of $27,099 from Kalwy.

[B.S.]

Compensation preclusion: special circumstances

SECRETARY TO DSS and TURNER

(No. 8739)

Decided: 26 May 1993 by D.W. Muller, A.M. Brennan, J.B. Morley.

On 5 February 1986 Turner was seriously injured at work. He returned to work, but had a number of periods off work on compensation. He finally ceased work in November 1988. On 26 November 1991 he accepted a lump sum compensation payment of $250,000 in settlement of his claim, from which he paid $23,000 in legal costs. The DSS advised Turner that he would be precluded from receiving a social security benefit for about 4.5 years. Turner requested review of that decision and on 3 August 1992 the SSAT reduced the preclusion period so that it ended on 27 July 1992, not 23 January 1996. The DSS requested review of this decision by the AAT.

The facts

Turner was injured when he was 32 years old. He had worked since he was 14 years old following his father's death. During periods of unemployment he had never applied for unemployment benefits. Turner was married with 4 children aged between 5 and 18 years.

As a result of his injury Turner had his spleen removed and then an operation on his back in November 1988. A psychiatric report stated that Turner was irritable, lacked motivation and self-esteem, was socially withdrawn and suicidal.

Turner's wife could not work because of a bad back.

Before Turner settled his claim he had been forced to sell his home, and had accumulated debts of $9000. He sought financial advice from an expert after he received his settlement, and was told that he should avoid paying rent and buy another home. Turner moved to Queensland and bought a house for $140,000, a car for $28,000 and paid off loans of $14,000. Turner was not advised until after he bought his home that he would be precluded from receiving a social security benefit. By the time of the SSAT hearing, Turner had only $12,000 left. He had been receiving the disability support pension since the SSAT decision.

Special circumstances

Pursuant to s.1184 of the *Social Security Act* 1991, the AAT could treat the whole or part of the lump sum compensation payment as not having been made in the special circumstances of the case.

The AAT considered whether Turner had been reckless by spending most of his compensation money. It concluded that Turner had acted responsibly by seeking financial advice and following it, although he had spent too much on a car. This could be attributed to Turner's psychiatric problems. The AAT referred to the fact that prior to his injury, Turner had been highly motivated and energetic, and concluded:

'the family needs a period in which to catch its breath. Mr Turner needs time to recover. Within a reasonable time span he will probably get going again.'

(Reasons, para. 8)

The intention of the legislation is that a person should use the compensation payment in lieu of wages for a reasonable time. The AAT set out Turner's history referring, in particular, to the fact that the injury to Turner had changed his whole way of life. He had not used the compensation money extravagantly, receiving the money nearly 6 years after the accident. Turner had acted on expert advice and bought a modest home. If the preclusion period was not reduced, Turner would have to sell his home and rent accommodation for his family. He would not be able to buy another home. This would be disastrous for the family and result in more government money being spent on the family. It would be less likely that Turner would obtain rehabilitation and return to the workforce. For these reasons the AAT found that special circumstances existed and that the preclusion period should be reduced so that it ended on 27 July 1992.

Formal decision

The AAT affirmed the decision under review.

[C.H.]