descendents of the founder and a few employees.

Method of valuation of shares

The DSS valued Brown's shares at $119,075, based upon a written opinion from the company's auditors as to the fair value of each class of share. The auditors had taken the view that an appropriate basis of calculation was to have regard to the earning and dividend paying capacity of the company and to capitalise at an earning rate equal to that which would be expected by an investor in such a company. The auditors' calculations were provided to the AAT.

Brown argued that the restrictions on transfer imposed by the company's Articles of Association meant that there was no ready market for the shares, and that the best price that he had been offered by a member of the company willing to purchase them was $49,135. He submitted that the value of the shares should by ascertained primarily by reference to the dividends paid by the company. Based on the dividend yield in recent years, it was said that the value of the shareholding was unlikely to exceed $50,000.

Brown challenged the auditors' method of valuing the shares on several grounds. Firstly, the procedure for share transfers set out in the Articles of Association had never been followed in practice. The directors had resisted allowing shareholding to be transferred. Secondly, the auditor's valuation assumed a reasonable percentage of profits to be paid out as dividends as either 60% or 80%, but the policy of the company was to pay out only about 10% of profits as dividends in order to retain funds required for expansion. Thirdly, the auditors' valuation related to the company as a whole, not to a small parcel of shares.

The auditors' valuation allowed a 15% discount for non negotiability of shares, a standard allowance for valuation of shares in private companies. The auditors took the view that the company's policy of retaining 90% of profit for reserves was excessive and it was reasonable to anticipate higher dividends in the future.

The AAT accepted the auditors' valuation in preference to that proposed by Brown. Referring to the judgment of Williams J in *Abrahams v the Federal Commissioner of Taxation* (1945) 70 CLR 23 at 29-30, the AAT said that in assessing the value of the shares in a company, the concept of a willing but not anxious buyer and seller should be the basis adopted.

The AAT rejected all Brown's objections to the auditors' valuation. The restriction on transfer of shares without approval of the directors was not unusual in a private company. It was appropriate to assess the share value by reference to the company's earnings rather than its recent dividend payments, particularly as the company had high asset backing for the shares. As to Brown's third objection, the auditors' valuation had related specifically to a small minority shareholding and did not require further adjustment on that score.

[P.O'C.]

AAT's power to stay DSS decisions

TREWIN and SECRETARY TO DSS
(No. Q93/547)

Decided: 26 October 1993 by S.A. Forgie.

In August 1993, Jennylee Trewin applied to the AAT for review of a decision of the SSAT. The SSAT had affirmed a decision of the DSS that Trewin had been overpaid unemployment benefits of $19,350.79 during a period when she was undertaking full time study. The DSS was deducting $39 a fortnight from Trewin's current benefits in order to recover the overpayment.

On 9 September 1993, Trewin applied to the AAT for an order staying the implementation of the decision under review.

The legislation

Section 41(2) of the *AAT Act* 1975 gives the AAT the power, where an application for review has been lodged, to make an order staying 'the operation or implementation of the decision to which the relevant proceeding relates'.

The social security review jurisdiction of the AAT depends on s.1283(1) of the *Social Security Act* 1991, which allows an application to be made to the AAT, for review of a decision of the SSAT which has affirmed, varied or set aside a decision of a delegate of the Secretary.

The narrow view of section 41(2)

Several earlier decisions of the AAT had taken the view that, because the AAT reviews decisions of the SSAT and not decisions of the Secretary's delegates, any stay order under s.41(2) could only affect the SSAT's decision and would leave the delegate's decision undisturbed. That view was taken in *Hawat* 28 ALD 1805; *Beigman* (1992) 71 *SSR* 1028; and other cases.

A wider review of the stay power

In the present case, the AAT referred to s.1283(2) of the *Social Security Act* 1991, which declared that, for the purpose of an application to the AAT under s.1283(1), the decision made by the SSAT is taken to be:

> '(a) where the SSAT affirms a decision, the decision as affirmed by the SSAT;
>
> (b) where the SSAT varies a decision, the decision as varied by the SSAT;
>
> (c) where the SSAT sets aside a decision and makes a new decision, the new decision; and
>
> (d) where the SSAT sets aside a decision and remits the matter to the secretary with directions or recommendations, the directions or recommendations of the SSAT.'

The AAT said:

> 'It seems to me that the clear emphasis of s.1283(2) is upon the operative decision, i.e. the decision as affirmed, the decision as varied, the new decision or the SSAT's directions or recommendations. In doing so, it is my view that it ensures that this Tribunal can review the decision which actually affects the rights and liabilities of the person affected by the decision and not simply the decision to affirm, vary or set aside the earlier decision.'

(Reasons, para. 10)

The AAT noted that the pattern employed in s.1283(2) was also used in s.1247(1A), which defined the decision to be reviewed by the SSAT following review by an authorised review officer; so that, where the SSAT was asked under s.1247(1) to review a decision of an authorised review officer, the SSAT would review the decision which actually affected the rights and liabilities of the applicant and would not confine its review to the merits of the authorised review officer's decision to affirm the primary decision: Reasons, para. 14.

The AAT then referred to its earlier decision in *Gee* (1981) 3 ALD 132; 5 *SSR* 49, which (the AAT said) established that the affirmation of a decision simply left the original decision in place, so that in administrative review proceedings the original decision, rather than the affirmation, remained operative and was the subject of the review. That approach, the AAT said, was also consistent with the decision of Davies J (then President of the AAT) in *RC* (1981) 3 ALD 33; 4 *SSR* 36, and the decision of a previous President, Brennan J, in *Seaton and Minister for the ACT* (1978) 1 ALD 141.

Should the power be exercised?

Having decided that it could stay the operation of the original decision that Trewin had been overpaid, the AAT turned to the question whether this was

an appropriate case to exercise that power.

The AAT decided that a stay order was not appropriate. In coming to that conclusion, the AAT dealt with 2 considerations: Trewin's prospects of success in her substantive appeal; and the hardship to her in allowing the DSS to continue to recover $39 a fortnight.

The AAT said that, although Trewin appeared to have an arguable case on her appeal, it was not possible to assess her chances of success, because they largely depended upon issues of credibility.

So far as hardship was concerned, the AAT noted that Trewin was now living with her mother and other relatives and could not afford to find her own accommodation. Her living arrangements were unsatisfactory, but she did have a place to live. The hardship was:

> 'not such that review of the decision would be pointless unless an order for stay or another order affecting the operation or implementation of the decision were made.'

(Reasons, para. 32)

Formal decision

The AAT refused to grant an order staying or otherwise affecting the operation of the decision under review.

[P.H.]

SSAT's review jurisdiction

SECRETARY TO DSS and KARAVOKYRIS (No. 8977)

Decided: 7 September 1993 by J. Handley.

Mr and Mrs Karavokyris claimed disability support pension (DSP). A delegate of the Secretary rejected their claims because one of them had received a lump sum payment of compensation; and they were precluded from receiving pension for the 'preclusion period'.

Mr and Mrs Karavokyris then advised the DSS that they wished to appeal against the rejection. A DSS officer referred the appeals simultaneously to an authorised review officer (ARO) and to the SSAT.

The SSAT registered the appeals as applications for review under s.1247(1) of the *Social Security Act* 1991. One week later, the ARO affirmed the delegate's decision to refuse the claims for pension.

Six weeks after the decision of the ARO, the SSAT conducted its review, leading to a decision to reduce the preclusion period. The DSS asked the AAT to review the decision of the SSAT.

The legislation

Section 1165(2) of the *Social Security Act* 1991 provides that, if a person is qualified for (amongst other payments) DSP and the person is a member of a couple and the person or the person's partner receives lump sum compensation, then DSP and certain other payments are not payable to the person or the person's partner during the lump sum preclusion period.

Section 1247(1) of the Act provides that if the Secretary or an authorised review officer has, under s.1243 of the Act, reviewed a primary decision, a person whose interests are affected by the decision may apply to the SSAT for review of the decision of the Secretary or the authorised review officer.

No jurisdiction in SSAT

The AAT found that the SSAT had lacked jurisdiction to review the delegate's decision — for 2 reasons.

First, the AAT said that an application to the SSAT could only be made for review of a decision made under s.1243 by the Secretary or an ARO. Such an application to the SSAT could not be made before the decision to be reviewed had been made. Here, the application to the SSAT had been made before the ARO's decision.

Although the absence of an application for review of a decision might be cured through the applicant making oral application to the SSAT under s.1257 of the Act after the s.1243 decision of the ARO, there was no record of Mr and Mrs Karavokyris having made such an oral application.

Second, the AAT said that a person could only be precluded from receiving a pension under s.1165(2) of the *Social Security Act* if the person had a qualification for pension in the first place. Here, the delegate had not dealt with the question of qualification for DSP but had decided that, in any event, DSP could not be paid during the preclusion period as Mr and Mrs Karavokyris were precluded from receiving DSP by the operation of s.1165(2). The AAT concluded:

> 'The decision therefore to preclude a pension for which qualification has never been established is a decision which in my view is incapable of review because it is made outside the operation of the legislation.'

(Reasons, para. 6)

A person could not be precluded, the AAT said, from receiving a pension for which qualification had not been assessed. The delegate should have made a decision as to qualification for DSP and then considered whether Mr and Mrs Karavokyris were precluded from receiving DSP by the operation of s.1165(2).

Formal decision

The AAT decided that the SSAT had lacked jurisdiction; and remitted the matter to the Secretary for reconsideration.

[P.H.]

[Editor's note: The AAT suggests that, quite apart from the circumstance that the application to the SSAT was premature, the SSAT did not have power to review an invalid decision. The AAT did not discuss cases such as *Collector of Customs v Brian Lawlor Automotive Pty Ltd* (1979) 2 ALD 1, *Secretary to DSS and Sinclair* (1992) 66 *SSR* 939; *Anderson and Secretary to DSS* (1992) 70 *SSR* 998 which held that the AAT has power to review a decision made in purported exercise of power conferred by an Act even if the decision is invalid.]

Recipient notification notice: strict compliance

SECRETARY TO DSS and CARRUTHERS (No. 9086)

Decided: 29 October 1993 by D.F. O'Connor J, M. Allen, H. Julian.

Marie Carruthers was receiving supporting parent's benefit. In August 1988, she was transferred to widow's pension.

In December 1991, the DSS decided that Carruthers had been overpaid $24,360.70, between March 1989 and December 1991, because she had received payments of pension not payable to her; and the receipt of those payments was in consequence of Carruthers' failure to comply with notices given to her (requiring her to report any income she received).

On review, the SSAT set aside that decision. It decided that the notices given to Carruthers had not been valid notices under the *Social Security Act* 1947; so that no overpayment had arisen in consequence of her failure to comply with her obligations under the Act.

The Secretary appealed to the AAT.

The legislation

Section 246(1) of the *Social Security Act* 1947 provided that, where pension was paid in consequence of a failure or omis-