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-

sion to comply with any provision of the Act, the amount so paid was a debt due to the Commonwealth.

Section 163(1) of the Act authorised the Secretary to give a person a notice requiring the person to notify the DSS, in the manner specified in the notice, of a change in circumstances.

Section 163(5) made it an offence for a recipient of a notice under s.163(1) to fail to comply with that notice.

Not valid notices

The notices given to Carruthers directed her to 'tell the Department' if she received additional income.

The AAT said that, given that s.163(5) attached penalties for failure to comply with a s.163(1) notice, s.163(1) should be construed strictly. The AAT referred to the earlier decisions in *Doravelu* (1992) 67 *SSR* 961, *Wan* (1992, unreported) and to a House of Lords decision which established a similar principle: *London & North Eastern Railway Co v Beriman* [1946] AC 278.

The AAT said:

> 'The verb "to tell" is synonymous with the verb "to notify", albeit with fewer syllables, and may be regarded as plainer way of expressing the same obligation. It does not, however, specify a manner of notification, be it by writing, telephoning or visiting, as required by the legislation'

(Reasons, para. 10)

Because the notice given to Carruthers had not been a valid s.163(1) notice, she had not failed or omitted to comply with the Act when she did not 'tell the Department' of her additional income.

Earlier notices not relevant

The AAT rejected an argument by the DSS that, if the s.163(1) notice was invalid, another notice given to Carruthers some years earlier under the predecessor of s.163, s.135TE, had been valid and continued to require Carruthers to report her changes in circumstances. The AAT said that the s.135TE notices had referred specifically to supporting parent's benefit, whereas Carruthers' alleged failure had occurred after she had been transferred to widow's pension:

> 'The Department has a variety of pensions, benefits and allowances, all of which have different and specific qualifying criteria as well as different procedural requirements. It is quite unacceptable, in our view, to expect a recipient of one type of pension to look to the procedural requirements of another type of pension to determine her obligations to the Department.
>
> 18 . . . It would place an onerous burden on pension beneficiaries if a notice issued under one type of pension was held to remain operative despite any new notice that might be issued under a different type of pension. This particularly so as the Department itself differentiates in terms of its procedures and qualifying criteria.'

(Reasons, paras 17, 18)

Formal decision

The AAT affirmed the decision of the SSAT.

[P.H.]

Departure certificate: recipient notification notice

GELLIN AND SECRETARY to DSS (No. 8899)

Decided: 23 July 1993 by S.D. Hotop.

Christe Gellin asked the AAT to review a decision of the SSAT, which in turn affirmed a delegate's decision that payment of age pension cease on 24 September 1992 owing to Gellin's absence from Australia for more than six months.

There was no real dispute about the facts. Gellin was granted age pension in 1982. On 20 March 1992 he left Australia to visit family in Greece. He did not inform the Department of his proposed departure, and did not receive a departure certificate under s.1219(1) of the *Social Security Act* 1991. He returned to Australia on 27 November 1992, whereupon he made a fresh claim for age pension which was granted with effect from 3 December 1992.

Gellin told the AAT that he was unaware that he was required to notify the Department of absences overseas, and was unaware of the need to obtain a departure certificate. This was because he was unable to read letters received from the Department. The Department had become aware of his absence when his daughter mentioned it in a conversation about her mother's pension.

The legislation

The relevant provisions of the 1991 Act are s.1213, which provides that a person's right to continue to receive age pension is not affected by the person's leaving Australia, and ss.1218 and 1219 (departure certificates) to which s.1213 is subject. Section 1218(1) provides that if a person leaves Australia and has not received a departure certificate under s.1219 and remains absent from Australia for more than 6 months, the person ceases, at the end of the period of 6 months, to be qualified for, amongst other things, age pension. Section 1218(2) provides that if a person ceases to be qualified in that way, the person remains disqualified for the pension or allowance until the person returns to Australia.

Section 1219 provides that if a person who is receiving an age pension proposes to leave Australia and notifies the Department of the proposed departure as required by a recipient notification notice, and the Secretary is satisfied that the person is in Australia and is qualified for the pension or allowance, the Secretary must give the person a certificate that acknowledges the notification and states that the Secretary is satisfied that the person is qualified for the pension or allowance.

Section 23(1) of the Act defines 'recipient notification notice' as a notice given by the Secretary under, amongst other sections, s.68. Section 68 provides that the Secretary may give a person to whom an age pension is being paid a notice that requires the person to inform the Department if some specified event or change of circumstances occurs that might affect the payment of pension. Section 68(3) sets out the requirements for a notice under subsection (1): it must be in writing, may be given personally or by post, must specify how the person is to give the information to the Department, must specify the period within which the person is to give the information to the Department and, must specify that the notice is a recipient notification notice given under this Act.

Recipient notification notice

The AAT decided that by force of s.1218(1), Gellin ceased to qualify for an age pension at the end of the period of six months after his departure from Australia — namely, on 20 September 1992. The AAT decided that the operation of s.1218(1) of the Act does not necessarily depend on the prior giving by the Department of a 'recipient notification notice' under s.68 of the Act. Despite that, the AAT was satisfied that such a notice was given to the applicant in this case.

The Department tendered a computer print-out of a letter sent to the applicant which was a standard form letter sent to all pensioners informing about rises in the CPI and directing pensioners to notify the Department of a series of events including, 'If . . . you decide to leave Australia, even if just for a holiday'. The Department submitted that this letter and similar letters constituted 'recipient notification notices' under s.68.

The AAT decided that the first four formalities specified in paragraphs (a)-