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)-

(d) of s.68(3), were complied with in the standard form of letters that were sent to the applicants. However, the issue was whether the notice satisfied s.68(3)(e), i.e. did it specify that the notice was a recipient notification notice given under the Act.

The letter sent to Gellin stated 'Section 68 of the *Social Security Act* is the authority for this notice'. The Department submitted that s.68(3)(e) was directory rather than mandatory, and that that statement constituted substantial compliance with it.

The AAT decided that the issue of the legal effect of non-compliance with a statutory procedural requirement is not to be decided by merely labelling the relevant requirement as mandatory or directory. Rather, the intention of the legislature has to be ascertained by reference to the nature of the procedural requirement, its place in the statutory' scheme and the degree and seriousness of the alleged non-compliance. Here, the AAT decided that the legislature intended the requirement in s.68(3)(e) to be mandatory in the sense that, unless complied with, a notice given under s.68(1) would be invalid. In support of this conclusion, the Tribunal noted that the requirement was prefaced by the word 'must' and, most importantly, that a punitive sanction was prescribed by s.68(5) in the event of a recipient's failure without reasonable excuse to comply with such a notice.

Was the requirement complied with?

The AAT decided that the statement 's.68 of the *Social Security Act* is the authority for this notice' — sufficiently complies with the requirement prescribed by s.68(3)(e) of the Act. This is because that statement clearly and unequivocally conveys to the recipient of such a notice the most important piece of information — namely, the source of the Department's authority to give the notice. In the Tribunal's view, a statement in the terms 'This is a recipient notification notice given under this Act' would not be as informative to a recipient as the statement in the notice in the present case. However, despite that, the AAT suggested that it would put the issue of compliance beyond doubt if the Department were in future to include in its notices the statement 'This is a recipient notification notice given under s.68(1) of the Social Security Act'.

Formal decision

The AAT affirmed the decision under review.

[R.G.]

Job search allowance: recipient statement notice

EISEN and SECRETARY TO DSS (No. 8983)

Decided: 8 September 1993 by A.M. Blow.

Emily Eisen was receiving job search allowance (JSA) in January 1992. The DSS decided to cancel her JSA because she had not returned a form sent to her by the DSS.

On review, the SSAT affirmed the DSS decision. Eisen asked the AAT to review that decision.

The legislation

Section 581(1) of the *Social Security Act* 1991 provides that JSA ceases to be payable to a person if he or she is given a notice under s.575 and fails to comply with that notice.

Section 575(1) authorises the Secretary to give a JSA recipient a notice requiring the recipient to provide the DSS with a statement.

According to s.575(2), the notice must be in writing, may be given personally or by post, must specify how and within what period the statement is to be given to the DSS, and must specify that the notice is a 'recipient statement notice' under the Act.

No section 575 notice

Each fortnight, the DSS sent Eisen a form for completion and return. She misplaced the form sent to her on 3 January 1992 and, therefore, failed to lodge it. The AAT found that the form stated that, if Eisen wanted her payment to continue, she should fill in the form and return it to the DSS. The form contained a further statement that it had been issued under s.575 of the *Social Security Act*.

The AAT decided that the notice sent to Eisen by the DSS was not a notice within s.575 because it did not require her to give the DSS a statement but offered her the option of doing so. The form was not an exercise of the power conferred by s.575(1), 'since it did not appear on the face of it that it amounted to an exercise of the power that s.575 confers: *Bannerman v Mildura Fruit Juices* (1984) 55 ALR 365 per Bowen CJ and Neaves J at 370': Reasons, para. 5.

The AAT said that, as there had been no notice issued under s. 575, any failure on the part of Eisen to make a statement in response to the document was not a failure to comply with a s.575 notice; and s.581(1) did not operate so as to make JSA not payable to Eisen.

The discretion to excuse non-compliance

In any event, the AAT said, if there had been a valid s.575 notice, there were sufficient grounds to exercise the discretion conferred by s.581(2), which allowed non-compliance with a s.575 notice to be excused because of 'the special circumstances of the case'.

Eisen had been undertaking seasonal work some 200 kilometres from the DSS office on the 2 days when she was told to lodge her statement. That was sufficiently special to warrant exercising the discretion in s.581(2).

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that Eisen's JSA did not cease to be payable because of any failure to comply with a notice.

[P.H.]

Newstart allowance: prepayment or advance payment?

SECRETARY TO DSS and WILLIAMSON (No. 8913)

Decided: 13 August 1993 by B.M. Forrest.

Williamson was receiving newstart allowance from 20 February 1992. He returned to full-time employment on 6 April 1992 and on 15 April he lodged with the DSS his fortnightly continuation form as he was required to do, informing the DSS of his commencement of employment. On that same day he received a payment for the previous fortnight, paid two days early because of the Easter period.

The DSS made a demand upon him to repay an amount of $396.41 overpaid for the period 6 April to 15 April. The SSAT found that the amount was not a debt under the Act. The DSS sought review of that decision.