(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.

The legislation

Section 1223(1) of the *Social Security Act* 1991 provides that an amount paid to a person by way of allowance is, in specified circumstances, a debt due to the Commonwealth. Section 1223(2) excepted from the operation of sub-section (1) certain amounts paid to a person 'in advance' in circumstances that did not involve a breach of the Act.

Section 1223AA provided in substance that where a person has received a 'prepayment' of social security benefit for a period and the amount of the prepayment is more than the 'right amount' payable, the difference is a debt due to the Commonwealth.

'Prepayment' or payment 'in advance'?

The issue was whether the amount in question was a prepayment of social security benefit, or a 'payment in advance' within the meaning of s.1223(2). The SSAT had found that the payment was made in advance and that as the other conditions of s.1223(2) were met, s.1223(1) did not apply and the amount was not a debt.

While the Act did not define a payment 'in advance', a 'prepayment' was defined in s.1223AA(2) to include a payment under s.652. That provision empowers the Secretary to make payments earlier than usual to take account of a holiday period. While in common parlance the two terms may overlap, as used in the Act a distinction was intended. A payment made on the spot in an emergency situation would be a payment 'in advance' rather than a prepayment.

The AAT concluded that the amount in question was a prepayment for the purposes of s.1223AA and that s.1223 did not apply. As all the conditions in s.1223AA(1)(b) were satisfied, the amount was recoverable as a debt to the Commonwealth. The provision did not require any fault or falsity on the part of the recipient as a precondition to the creation of debt, and its language did not admit of any such interpretation.

Formal decision

The AAT set aside the decision under review and substituted a decision that the amount of $396.41 was a debt to the Commonwealth.

[P.O'C.]

Disability support pension: continuing inability to work

LOKNAR and SECRETARY TO DSS (No. 8399A)

Decided: 3 August 1993 by D.P. Breen, J.G. Billings and R.A. Joske.

Josip Loknar was granted an invalid pension in August 1990. When disability support pension (DSP) was introduced in November 1991, Loknar was reviewed and the DSS decided to cancel his pension.

On review, the SSAT affirmed that decision. Loknar appealed to the AAT.

Continuing inability to work

It was accepted that Loknar had at least a 20% impairment, as required by s. 94(1)(a) and (b) of the *Social Security Act* 1991.

The issue before the AAT was whether Loknar had a 'continuing inability to work' — that being one of the requirements to qualify for DSP: s.94(1)(c) of the Act.

According to s.94(2) of the Act, the concept of 'continuing inability to work' requires that:

- the person's impairment of itself prevent the person doing the person's usual work and work for which the person is currently skilled: s.94(2)(a); and
- either the impairment of itself prevent the person undertaking educational or vocational training during the next 2 years: s.94(2)(b)(i); or only permit the person to undertake such educational or vocational training as would not be likely to equip the person to do work for which he or she is currently unskilled: s.94(2)(b)(ii).

The AAT accepted the DSS's concession that Loknar satisfied s.94(2)(a), because his impairment prevented him undertaking work for which he was currently skilled.

The AAT then decided that Loknar's inability to undertake educational or vocational training was in part due to his illiteracy, age and lack of academic ability and not due solely to his impairment, so that he could not satisfy s.94(2)(b)(i).

The AAT then turned to consider whether, as an alternative, Loknar could satisfy s.94(2)(b)(ii).

The AAT said that the work referred to in that provision (that is, the work for which educational or vocational training could equip the person) must be skilled and not unskilled work.

The structure of the provisions, and the reference to work for which a person was 'currently skilled', demonstrated that the question posed by s.94(2)(b)(ii) was 'can he be retrained so as to undertake other *skilled* work?' The notion of *unskilled* jobs would seem to be impliedly excluded by the framework of the legislation: Reasons, para. 28.

Looking at Loknar's age, virtual illiteracy and limited academic ability, he was not a suitable candidate for rehabilitation. Educational and vocational training, the AAT said, would not equip Loknar to do work for which he was currently unskilled within the next 2 years.

It followed, the AAT said, that Loknar satisfied s.94(2)(b)(ii) and he had a continuing inability to work as required by s.94(1)(c).

Formal decision

The AAT set aside the decision and review and substituted a decision that Loknar was eligible for DSP from the date of its cancellation.

[P.H.]

Child disability allowance: meaning of 'disabled child'

BLADES and SECRETARY TO DSS (No. 8825)

Decided: 7 July 1993 by S.A. Forgie, A.M. Brennan and B.A. Smithurst.

The DSS had rejected Mrs Blades' application for child disability allowance. This decision was affirmed by a Social Security Appeals Tribunal and she then applied to the AAT for review of that decision.

The facts

The applicant's daughter was four years old. The child had suffered from colic until she was 12 months old and did not put on any weight between 13 months and 2 and a half years. She also suffered