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