

from 1 July 1978 to 5 November 1981 received benefits totalling that amount, and that the applicant's income during the relevant period precluded all entitlement.

The AAT found that the decision that there was a recoverable debt could only have been made under s.1224(1) of the *Social Security Act 1991*. The overall scheme of the Act was to vest the administration of the Act in the Secretary unless delegated by written instrument. There was no evidence that the Secretary had delegated the power under s.1224(1). The AAT was not satisfied that the delegate was authorised to make a decision under s.1224, and it followed that there was no decision properly before the SSAT and therefore no decision reviewable by the AAT.

Although it lacked jurisdiction, the AAT expressed its views on the issues argued by the parties.

Whether the proceedings were contrary to an indemnity

On 27 September 1990 the applicant and the Director of Public Prosecutions (DPP) agreed in writing that the applicant would plead guilty to certain charges of conspiracy to defraud the Commonwealth. The DPP agreed that no additional federal charges would be laid against Alvaro in relation to the same matter, and that the DPP would not apply for confiscation of alleged profits under the *Proceeds of Crime Act 1987*.

It was argued for Alvaro that by reason of the agreement there was no debt due to the Commonwealth, the agreement constituting a 'compromise, accord and satisfaction'. It was argued that the indemnity against further 'charges' must be taken to include the action taken by the DSS to recover the overpayment.

The AAT preferred the submission of counsel for the DSS that the word 'charge or charges' in the agreement imported the conventional legal meaning, being a criminal accusation, and did not include the civil debt recovery proceedings brought by the DSS. The agreement therefore did not in any way preclude the DSS from taking proceedings for recovery of an overpayment debt under the social security legislation. The AAT added that there were no grounds for waiving any debt which may be recoverable.

Formal decision

The AAT dismissed the application.

[P.O'C.]

Finance direction: act of grace payment

HAMILTON and SECRETARY TO
DSS

(No. 8835)

Decided: 13 July 1993 by M.T. Lewis.

Background

Hamilton had applied for special benefit and her claim had been rejected on the ground that she was not residentially qualified. This decision was affirmed by the SSAT on 23 April 1993. Hamilton had asked the SSAT to consider making a recommendation to the Minister for Finance that she receive an act of grace payment if she was found not eligible for special benefit, but the SSAT declined to do so.

When the matter came before the AAT, Hamilton conceded that as she was not an Australian resident she did not meet the requirements of s.729 and was, therefore, not eligible for payment of special benefit. On this basis, given her concession, the AAT affirmed the decision that Hamilton was not qualified to receive special benefit. However, 'the real purpose of the application for review was, having failed to receive support from the SSAT for a recommendation of an act of grace payment, to enlist assistance from [the AAT] to support such recommendation': Reasons, para. 7.

Hamilton had first lived in Australia in 1974 and she lived and worked here until 1983 when she received her return residence visa. In that year she went overseas again, but prior to her anticipated return in 1986, she was prevented from returning and applied for an extension of her return residence visa. She told the AAT that her application was lost, and since 1986 she has been trying to regain entry to Australia.

The AAT documented much of the history of her attempts to re-establish permanent residence status, during which she entered Australia on a one-month temporary entry permit. In February 1992 she was detained as an illegal entrant at the Detention Centre at Villawood.

Hamilton had proceedings pending before the Federal Court concerning her application for permanent residence. She was living in considerable hardship with her mother and her son in her mother's Housing Commission premises and was supported by them, with some help from charities. She told the AAT that employment was avail-

able to her if she were permitted to work by DILGEA but she was not, and she submitted that her lack of income or financial resources was causing tension within her family and was affecting her ability to conduct her Federal Court litigation.

After reviewing the evidence concerning her legal claims before the Federal Court, the AAT turned to consider the circumstances under which it might be appropriate to consider an act of grace payment. Of those, the only one considered relevant was 'where in a particular case there are special circumstances which lead to the conclusion that there is a moral obligation on the Commonwealth to make payment'. The Department submitted that because the matters in issue here were not the fault of the Department of Social Security, the best solution would be for the applicant to be granted permission to undertake paid work.

The AAT noted that act of grace payments are made by the Minister for Finance, and are non-departmental in that sense. However, the only route through which recommendations can be made to the Minister for Finance is through Departmental channels. As the issues raised in the AAT related to the applicant's need for income support until her litigation with DILGEA had been completed, or until she was permitted to undertake paid employment, the AAT considered it appropriate for a submission to the Minister for Finance to be made via the Department of Social Security as income support is the responsibility of the Department of Social Security.

At the hearing the Department agreed that it was open to the AAT to consider making a recommendation for an act of grace payment, despite the fact that the SSAT and the Department did not support such a recommendation.

Formal decision

The AAT affirmed the decision that Hamilton did not qualify for special benefit, and recommended through the Secretary to DSS to the Minister for Finance that because of the very unique circumstances of this case, which could be construed as 'a moral obligation on the Commonwealth to make payment', an act of grace payment equivalent to what she would receive in special benefit should be paid to Hamilton until such time as restrictions on her undertaking paid employment are waived, or until she is granted permanent residence status, or alternatively until she is deported.

[R.G.]