24 May 1993. A copy sent to the DSS was received on 26 May 1993. The decision and reasons were sent to Hughes, and the DSS External Appeals Section in Brisbane also sent a copy to DEET's Brisbane North office. A covering minute noted that the appeal period expired on 23 June 1993 and asked the Authorised Review Officer at Brisbane North to advise External Appeals as to whether DEET wished to appeal. This procedure was in accordance with the protocol between the two departments relating to arrangements between them in these cases.

However, there is no evidence that DEET received the department's minute enclosing the SSAT decision until 1 July 1993. After various communications between officers of DEET commencing on 1 July 1993, on either 2 or 3 August 1993 (both date stamps of the AAT appear on the application), DEET lodged an application for review. It also lodged on 2 August 1993 an application for extension of time which was based upon a failure by the DSS to advise of the SSAT decision. It was also noted by the AAT that in this period following the SSAT decision, Hughes had received an arrears payment for the period during which he had not been paid his newstart allowance. He had spent all of that money to the date of the application. Finally, following DEET's application, the DSS lodged a further application for review and an application for a stay of the operation of the SSAT decision on 27 August 1993. Those applications named the DSS as the applicant. The DSS otherwise relied on the application for an extension of time lodged by DEET on 2 August 1993.

Who is the applicant?

After pointing out that the powers under the *Social Security Act* are vested in the Secretary rather than the Secretary's department, the AAT noted that it is more usual for applications to be made in the name of the Secretary. However, as this was not argued, the AAT did not make a final decision on this point.

Turning to the reliance by the DSS on the DEET application, the AAT noted that the only way in which this application could be relied on would be if the officers of DEET were acting on behalf of the Secretary to the DSS or the Department of Social Security. However, there is nothing in the *Social Security Act* to suggest that the Employment Secretary or his officers may exercise any powers of the Secretary other than those specifically delegated to them, and there is no evidence that the Secretary to DSS has delegated his powers to lodge an application for review or an application for an extension of time in the AAT. Nor, in the absence of evidence of an express delegation, was the AAT able to infer from the delegation of powers to make the decisions under ss.627(1) and 597(1) to officers of DEET, that those officers had been delegated powers to seek review of decisions subsequently made by the SSAT when reviewing those decisions. And, the protocol between the two departments does not add to this, and the AAT noted that all the indications in the protocol would seem to be to be contrary. This is because it clearly states that the DSS 'will prepare all documentation, including section 37 statements, and arrange all investigations and representation. DEET's role is to provide decisions but, it would seem, not to take any action itself': Reasons, para. 21.

Having expressed doubts as to whether DSS could rely on the application for an extension of time lodged by DEET, the AAT then turned to consider whether DEET itself may lodge an application. The AAT considered s.27 of the *AAT Act* which provides that an application may be made to the Tribunal 'by or on behalf of any person or persons (including the Commonwealth) . . . whose interests are affected by the decision'.

While s.1285 of the Act expressly provides that the Secretary is a person whose interests are affected by the SSAT's decision within the meaning of s.27(1) of the *AAT Act*, no mention is made of the Employment Secretary.

Are DEET's interests affected?

The AAT considered a decision of Davies J in *Re Control Investment Pty Ltd and Ors and ABT (No. 1)* (1983) 3 ALD 74 on the question of who is a person affected (in the context of joinder of parties) and, after considering the application of those principles to this case, stated that it was not clear whether DEET does have interests which are affected by the SSAT's decision. However, the AAT did not consider it necessary to decide the point finally, having come to the conclusion that DEET failed on the merits of its application.

Extension of time

The AAT quoted extensively from a judgment of Wilcox J in *Hunter Valley Developments Ltd v Minister for Home Affairs and Environment* (1984) 58 ALR 305, in which he set out a number of principles to be taken into account in relation to applications for extensions of time. Having agreed with the Department that an application by it should be treated no differently from an application by any other person, the AAT noted that two matters were of particular concern. The first related to the delay between the time when DEET first became aware of the SSAT decision and its application being lodged. The AAT had found that DEET was aware of the SSAT decision on 30 June 1993 or 1 July 1993, only some 7 or 8 days after the expiration of the appeal period, yet it took another month to lodge the application. Nor was the AAT satisfied with the reason given, that DEET had never lodged an application in respect of a Queensland matter before, as DEET had procedures it was supposed to have followed set out in the Protocol. Moreover, the application was prepared in DEET's central office in Canberra.

The second matter related to the fact that the SSAT decision had already been implemented and Hughes had been paid a sum of approximately $900. In reliance on that decision, he had spent the money and was not in a position to repay it on demand should he have been unsuccessful on any review. The AAT also noted that without an outline of the facts DEET hopes to prove at a substantive hearing, it was unable to assess the merits of any substantive application for review lodged by it. Bearing all these factors in mind, the AAT did not consider this an appropriate case in which to exercise the discretion to grant the application for an extension of time.

Formal decision

The AAT refused the application for an extension of time

[R.G.]

Procedure: stay of decision

SECRETARY TO DSS and FIORITO

(No. 9234)

Decided: 13 January 1994 by A.M. Blow.

Fiorito was in receipt of a wife pension. The DSS had decided to cancel that payment and Fiorito then successfully appealed to the SSAT against that can-

cellation. The DSS appealed to the AAT and asked the Tribunal to stay the order of the SSAT until the hearing of the appeal by the AAT. This application only relates to this procedural matter.

Should the AAT stay the decision of the SSAT?

Under s.41(2) of the *Administrative Appeals Tribunal Act 1975* the AAT has a discretion to stay the operation of a decision to which proceedings before it relate. The AAT noted that in exercising this decision it must take into account the chances of the DSS recovering the money that would be paid to Fiorito if she was unsuccessful in the matter, and in addition, the Tribunal must consider any possible hardship or inconvenience on the part of Fiorito.

Fiorito lived in Italy and there was some chance that the DSS would be successful in its appeal, although the AAT hastened to add that this was not to express a concluded view on the principal proceedings. If the arrears were paid (about 18 months of pension payments) there would be some difficulty in recovering the amount if the DSS won the appeal. There was no evidence that Fiorito was living in hardship as she had been living without the payments since July 1992. She had not received the payments prior to them being granted in March 1991. She was also in receipt of an Italian pension, and there was no evidence that she would suffer special hardship if a stay order was not made.

The Tribunal concluded:

> 'I believe the inconvenience that the applicant [the DSS] would suffer if the operation and the implementation of the decision under review were not stayed is so great that it outweighs whatever inconvenience and hardship the respondent [Fiorito] might continue to suffer if she did not receive any Australian pension payments until the principal application before this Tribunal is dealt with.'
>
> (Reasons, para. 3)

Formal decision

The AAT ordered that the operation and implementation of the decision under review be stayed until the determination of the application for review or further order.

[B.S.]

[Editor's note: The Tribunal might have been wise to ask the DSS to indicate whether Fiorito's pension arrangements were shared between Italy and Australia pursuant to the reciprocal agreement between the two countries. It may have been the case that Fiorito was not in receipt of a full Italian pension and that the loss of her Australian pension was effective in reducing her income below the full pension rate.

The DSS could also have been asked to explain what arrangements have been made between Italy and Australia to recover overpayments made by one country to pensioners living in the other country. Although there is no specific mention of recovery of overpayments in the reciprocal agreement there is a provision dealing with mutual assistance. This might cover such matters.

In any event, as social security is rapidly becoming internationalised, appellate bodies might have to become more inquisitive with respect to matters such as actual rates of payment, hardship and the actual difficulties of overseas recovery of overpayments. This is particularly necessary when one of the parties is unlikely to be present.]

Unemployment benefit - engaged in a course of education

VAN-XUAN HUYNH and SECRETARY TO DSS

(No.9286)

Decided: 3 February 1994 by B.H. Burns.

Background

Huynh asked the AAT to review a decision of the SSAT affirming a delegate's decision to raise and recover an overpayment of unemployment benefit of $10,684.28 paid to him between March 1988 and October 1989.

Huynh had been studying at Macquarie University. In 1987 he was enrolled as part-time, while throughout 1988 and 1989 university records show that he was a full-time student. From 1987 through to the end of 1989, Huynh was paid unemployment benefit. This was cancelled on 21 December 1989 following an interview in November 1989. The applicant asked the Department to review the decision on 10 January 1991, and on 31 May 1991 the decision that there was a recoverable debt was affirmed, but it was also decided to waive the amount paid following 12 January 1990 on the basis that it had been paid due to administrative error.

Delegation

The AAT then considered various issues arising from the level of officer who had made the decision. Ultimately, the AAT found that the delegate who purported to waive the amount paid after it had been decided that Huynh was not qualified, was not authorised to do so and, therefore, there was no decision as to waiver for the ARO to review. (However, the amount of the debt considered by the AAT was the total amount paid minus the amount purportedly waived.)

Issue before the Tribunal

The AAT said that the main issue was whether there was a debt due by Huynh to the Commonwealth in the amount of $10,684.28 and, if so, whether or not any part of that debt should be waived in accordance with s.1237 of the *Social Security Act 1991*.

Qualification for unemployment benefit

Section 116 of the *Social Security Act 1947* applied at the relevant time and set out the qualifications for unemployment benefit. After considering Huynh's evidence, his involvement in his university degree and his efforts to obtain paid employment, the Tribunal found that Huynh did not qualify for unemployment benefit 'as he was not willing to undertake paid work and did not during the relevant period take reasonable steps to obtain such work as required by s.116(c) [sic] of the Act': Reasons, para. 28. In the event that the Tribunal was wrong in determining that he did not qualify for unemployment benefit, the Tribunal turned to consider whether he was otherwise precluded from receiving the payments.

'Engaged' in a course of education on a full-time basis

The Tribunal then considered s.136 of the 1947 Act as it provided at the relevant time. That provision precluded from receipt of unemployment benefit a person engaged in a course of education on a full-time basis. This phrase was considered extensively by the full Federal Court in *Harradine and Secretary to DSS* (1989) 50 *SSR* 663.

The Tribunal took the view that *Harradine*

> 'is authority for the proposition that a student who does not spend the normal or required number of hours each day attending lectures, tutorials or studying may still be engaged in a course of study