

debt and substituted a decision that the debt should be waived.

The facts

The assurance of support was signed on 16 October 1986. Kratochvil's mother lived in Australia for a year before the document was signed. She returned to Australia in June 1988 and left again in March 1990, returning in June 1990. She was granted Australian citizenship on 3 April 1991. In June 1988 Kratochvil's mother applied for special benefits even though she was living with Kratochvil and her family. In a statement to the DSS it was recorded that Kratochvil supported her mother but could not pay her an allowance for her personal needs. Special benefit was paid at one-third of the single rate.

In September 1989 Kratochvil's mother went to live with her son. She was paid the full rate of special benefit because she had to pay board and lodging. At the AAT the DSS was unable to state with certainty that Kratochvil was aware that her mother was being paid a benefit. The DSS's instructions required the assessor of support to be notified. Kratochvil's daughter gave evidence that she and her mother had been present when the DSS initially interviewed Kratochvil's mother concerning the special benefit. The AAT found that Kratochvil knew that her mother had been granted special benefit but not that the benefit had been increased in September 1989. Even though Kratochvil had submitted that her brother should be responsible for her mother's support because he had invited her to Australia, the AAT found that Kratochvil understood that she had accepted responsibility for her mother's support.

Kratochvil is employed as a cleaner with a weekly income after tax of less than \$300 per week. Her husband suffers from a terminal illness but refuses to apply for a social security benefit. Kratochvil bought a new (small) car in 1993 which she is paying off.

The assurance of support

Pursuant to s.1227(1) of the *Social Security Act* if a person is liable to pay an assurance of support debt, then that debt is recoverable by the Commonwealth. An 'assurance of support debt' is defined in s.23 as a debt due and payable because of the operation of certain regulations of the *Migration Regulations* and in respect of certain social security payments paid under the *Social Security Act 1991* and the *Social Security Act 1947*. The special benefit paid to Kratochvil's mother

was such a payment.

In October 1986 Kratochvil signed an assurance of support although reg. 22(1) of the *Migration Regulations* in force at that time referred to a maintenance guarantee. Regulation 22(1) states that if a person who is the subject of a maintenance guarantee, is paid an amount of maintenance by the Commonwealth, then that amount is recoverable from the person who gave the guarantee. The AAT concluded that the debt did not arise under s.1227 of the *Social Security Act 1991*, but under reg. 22(1). The only issue for the AAT was whether recovery of the debt should be waived.

Waiver

Because the recovery of debt provisions of the *SS Act 1991* includes debts incurred under the *Social Security Act 1947*, it was appropriate to consider the waiver provisions of the *Social Security Act 1991*. At the date of hearing s.1237 provided that the Commonwealth's right to recover a debt could be waived. Subsequent to the hearing, and before the AAT made its decision, s.1237 was repealed and replaced with ss.1236A, 1237 and 1237A with effect from 24 December 1993. Section 1236A provides that the new provisions apply to all debts whenever incurred arising under the *Social Security Act 1991* and the *Social Security Act 1947*. The AAT referred to s.8 of the *Act Interpretation Act 1901* and noted that this section:

'preserves the applicant's [DSS] right to have the decision of the SSAT reviewed under the legislation applicable at the time it applied for review in this Tribunal. There is nothing in Act 121 of 1993 [the amending Act] which suggests that section 8 does not apply on the facts in this case.'

(Reasons, para.37)

The AAT considered the following circumstances when considering whether recovery of the debt should be waived. Kratochvil knew she had signed an assurance of support on behalf of her mother and she agreed with the payment of special benefit to her mother. However Kratochvil was not advised of the increased benefit paid to her mother. The AAT concluded that it was not appropriate to waive that part of the debt which represented the amount of special benefit paid to Kratochvil's mother at one-third of the single rate. The debt representing the increased payment of special benefit paid after 3 September 1989 should be waived because Kratochvil had not been advised of the increased payment to her mother. The AAT stated:

'There is an essential issue of fairness in a situation where a person has given an Assurance of Support but is not consulted in any way by the Department when it proceeds to pay out special benefits to the person who is the beneficiary of the Assurance of Support.'

(Reasons, para.35)

Formal decision

The AAT set aside the SSAT decision and substituted a decision that recovery of so much of the debt exceeding \$74.74 per fortnight paid as special benefit to Kratochvil's mother be waived.

[C.H.]

[Editor's note: The DSS has appealed to the Federal Court.]

Waiver: longer custodial sentence

DENNIS and SECRETARY TO DSS,

SECRETARY TO DSS and DENNIS (No. 9306)

Decided: 15 February 1994 by D.W. Muller.

Both Dennis and the DSS sought review of an SSAT decision to waive half the debt owed by Dennis to the Commonwealth. The debt is \$28,876.71 and Dennis maintained that the whole of the debt should be waived, while the DSS maintained that none of the debt should be waived.

The debt

The facts were not in dispute. Dennis perpetrated a large number of fraudulent acts on the DSS between 1981 and 1986. He pleaded guilty to 6 offences on 26 August 1988 and a further 32 matters were taken into account when Dennis was sentenced. The total debt was alleged to be \$48,498.20. Dennis advised the court that he had no assets and could not offer restitution. In sentencing Dennis, the judge took into account that Dennis was not in a position to make any restitution. Dennis was sentenced to 2 years imprisonment on each charge, concurrent. He was released on parole after 12 months and was granted sickness benefits.

The DSS deducted 14% from Dennis' sickness benefit payment to repay his debt. Dennis considered declaring himself bankrupt to force the DSS to cease withholding part of his

payments. He was advised by the DSS that this would not make any difference. Dennis was declared bankrupt in 1989.

The amount of the overpayment had been recalculated twice, reducing the debt to \$28,866.71 and then increasing it to approximately \$35,000 at the time of the AAT hearing.

Waiver

Dennis submitted that his debt to the Commonwealth should be waived pursuant to s.1237 of the *Social Security Act 1991*. The AAT should take into account his bankruptcy, his gaol sentence, his ill health, his destitution and the fact that at the present rate of repayment Dennis would be repaying the debt until he was well into his eighties.

Section 1237 was repealed and replaced by ss.1236A, 1237 and 1237A from 24 December 1993. The AAT noted that when the decision under review was made, and when the matter was heard by the AAT, s.1237 allowed the DSS to waive the right to recover the debt if there were special circumstances. By the date of the decision, s.1236A applied so that the new ss.1237 and 1237A applied to all debts whenever incurred arising under the *Social Security Act 1991* or the *Social Security Act 1947*. Section 1237A allowed the DSS to waive the whole of a debt in certain defined circumstances. These are summarised as administrative error, conviction for an offence, incorrect valuation of property, and debt less than \$200.

The AAT then analysed Dennis' particular circumstances to see if these fell within the requirements set out in s.1237.

Bankruptcy

The AAT referred to the Federal Court case of *Taylor v Secretary, DSS* (1988) 43 SSR 554 and the AAT decision of *Stewart and Secretary, DSS* (1985) 29 SSR 359, both of which analysed the effect of bankruptcy on the power of the DSS to collect a debt. These cases concluded, after referring to s.181 (now s.1231), that the collection of the debt from a social security beneficiary was an 'administrative adjustment from particular statutory payments': Reasons, para.11. The DSS does not enforce a remedy against the property of a bankrupt. Therefore bankruptcy is no bar to recovery of a debt.

Restitution

The AAT noted that a debt was not extinguished by a criminal conviction and punishment, although restitution was a significant matter which should

be taken into account when considering waiver. The AAT found:

'that Mr Dennis received a longer custodial sentence than he would have if he had been willing and able to make restitution.'

(Reasons, para.15)

Financial circumstances

Dennis had been receiving a social security benefit or worker's compensation since he had been released from gaol. He lives in 'backpacker' type accommodation.

The AAT noted that Dennis' financial circumstances were no longer relevant under the new s.1237. Pursuant to s.1237(3) the AAT was compelled to waive the whole of the debt because of the finding that Dennis had received a longer sentence because he was unable to repay the debt. The AAT indicated that it would only have waived half the debt if it had been deciding this matter under the old s.1237.

Formal decision

The AAT set aside the SSAT decision and substituted its decision that the whole of the debt should be waived.

[C.H.]

Issue of departure certificate

SECRETARY TO DSS and SMARAGDIS

(No. 9373)

Decided: 14 March 1993 by B.A. Barbour.

The Secretary asked the AAT to review an SSAT decision of 25 June 1993 that age pension was payable to Smaragdis. This followed the cancellation of her pension on the basis that she had not obtained a pre-departure certificate when she left Australia. The issues concerned whether the DSS had notified Smaragdis that she needed to tell the DSS if she left Australia; whether she in fact did tell the DSS of her impending departure; whether the *Social Security Act 1947* or the *Social Security Act 1991* applied to her case; and whether the DSS's decision to cancel her pension was correct. Uncontested evidence showed that Smaragdis, who was in receipt of age pension, left Australia on 28 February 1991 and has since that time lived in Greece.

Smaragdis' daughter-in-law told the AAT that at no time prior to her mother-in-law's departure for Greece was she aware that she had received a notice under s.163 of the 1947 Act requiring her to notify the DSS if events or changes of circumstances specified occurred, for example, leaving Australia. Section 163 of the 1947 Act provided that the Secretary could give a notice to any person being paid under the Act requiring that person to notify the DSS if an event or change of circumstance specified in the notice occurred within the period and in the manner specified in the notice.

Critically, the DSS was unable to locate any copies of s.163 notices sent to Smaragdis on the file or in microfiche records. The only evidence proffered by the DSS on this issue was evidence as to its normal practice in forwarding s.163 notices to pension recipients. It was suggested that the AAT should 'presume regularity' and conclude from that general practice that the notice had been sent.

The AAT referred to other decisions involving s.163 notices and said that 'it finds it strange that the DSS's evidence in this case was so much weaker than in those two matters. The most likely explanation, and the Tribunal's finding is that the s.163 notices were not sent to the respondent, and that she did not receive them': Reasons, para. 8.

Smaragdis' evidence, given by her daughter-in-law in an affidavit, was that she did not know that she had to inform the DSS that she intended to leave Australia. Despite this, she had sent a letter to her local Social Security Office advising of the departure and seeking re-direction of her mail. The AAT also noted that there was no material on Smaragdis' file between 21 December 1988 and 7 September 1992 and concluded that the most likely explanation for this was that the DSS had misplaced papers relating to Smaragdis and her pension.

The AAT found that a notice of intended departure was sent by Anna Smaragdis (the daughter-in-law) four or five days prior to her mother-in-law's departure, in the ordinary course of the mail, and was in fact received by the DSS sometime in late February.

Pre-departure certificate

Section 60A(1) of the 1947 Act provided that where a person in receipt of pension proposes to leave Australia; the person notifies the DSS as required by a s.163 notice and the Secretary is satisfied that the person is qualified to