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Section 1237 was repealed and replaced by ss.1236A, 1237 and 1237A from 24 December 1993.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

receive pension, the Secretary shall give the person a certificate acknowledging the notification of the proposed departure.

The AAT stated that Smaragdis was in receipt of age pension, was qualified for it, and had notified the DSS of her impending departure. On the basis of these findings, the Tribunal decided that the Secretary ought to have given her a certificate acknowledging that departure. However, there was no dispute that such a departure certificate had not been issued.

Because Smaragdis had not received a pre-departure certificate, her pension was cancelled on 15 December 1992, with effect from 28 August 1991, that is, six months after she left Australia. This decision was subsequently affirmed by an authorised review officer. It was this decision that was set aside by the SSAT which substituted a new decision that age pension remained payable to Smaragdis under s.60A of the 1947 Act.

1947 or 1991 Act?

It was argued for Smaragdis that the correct Act to apply was the 1947 Act. This was because she left Australia in February 1991 while that Act was still operative. As she had accrued rights under that Act, it was argued that a pension could only be taken away in accordance with that Act. And, as the Savings and Transitional Provisions contained in Schedule 1A of the 1991 Act did not specifically apply to this particular fact situation, it was argued that s.8 of the *Acts Interpretation Act* preserved her rights to have her entitlements determined under the 1947 Act. Section 8 of that Act provides that a repeal of an Act shall not, unless the contrary intention appears '. . . (c) affect any right privilege obligation or liability acquired, accrued or incurred under any Act so repealed . . .'

The DSS, on the other hand, submitted that the operative date was the date that the pension was cancelled and that decision was made in December 1992. The date of effect of that decision was 31 August 1991 and both these events occurred after the date upon which the 1991 Act came into force.

The AAT considered the various decisions on the issue of which Act applied, and found that, as the DSS should have issued Smaragdis with a departure certificate under s.60A(1) of the 1947 Act, to that extent she had a right to have a certificate issued and a right that affected her entitlement to age pension. Since the provisions of s.60A(1) directly affect her right to receive a pension and are not merely procedural, it was held that this case falls to be decided under the 1947 Act.

Sub-section 60(A)(3) of the 1947 Act provided that where a person leaves Australia and has not received a certificate under s.60A acknowledging the notification of their departure, and their absence continues for more than six months, 'the person is not qualified to receive a pension at any time after the first 6 months of the absence while the person remains absent . . .'

The AAT considered this provision in the context of the history of this case. Having found that the DSS had acted unlawfully in not issuing Smaragdis with a departure certificate, the AAT considered that it had the power to direct that the departure certificate be issued to her so that she could satisfy the requirements of s.60A(3). The AAT decided that the power to order the issue of a certificate was within its powers under ss.1283 and 1285 of the 1991 Act:

> 'The Tribunal has often remarked that social security legislation is welfare legislation that should be administered beneficially. How unjust it would be if, in circumstances where the pension recipient has done all that is required, and because the Secretary or the Secretary's delegate acts unlawfully in not issuing a departure certificate, the recipient's pension is cancelled.'

(Reasons, para. 30)

The AAT decided that it was in its power to set aside the decision under review and remit the matter to the Secretary with directions that the Secretary give Smaragdis a certificate acknowledging the notification of her proposed departure, and stating that the Secretary was satisfied that the respondent was a person qualified to receive age pension prior to the giving of the certificate. The AAT also pointed out that the practical effect of this decision was the same as affirming the decision of the SSAT under review though the legal basis of the decision was different. The Tribunal commented that it was

> 'sufficiently concerned by the evidence or the lack thereof in this matter to express its dismay at the record keeping procedures of the department. For the period under review, and particularly 1991, there are no documents before the Tribunal . . . In such circumstances, if the department is unable to support its submissions because of a lack of documentary evidence, the Tribunal will, where conflict exists between the parties, have no option but to accept the uncontroverted evidence of pension recipients.'

(Reasons, para.34)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with directions that

(i) the Secretary give Smaragdis a certificate acknowledging the notification of the proposed departure and stating that the Secretary was satisfied that she was qualified to receive age pension prior to giving the certificate; and

(ii) Smaragdis remained qualified to receive age pension on and after 28 August 1991.

[R.G.]

Extension of time

McIVER and SECRETARY TO DSS (No. 9334)

Decided: 1 March 1994 by D.J. Grimes.

McIver lodged an application under s.29(7) of the *AAT Act* asking for an extension of time for appealing against a decision of the SSAT made on 11 July 1989. That Tribunal had reviewed a DSS decision to recover an overpayment of unemployment benefits. The SSAT had varied the decision by reducing the period of the overpayment to a shorter period than the DSS had originally sought.

The AAT referred to decisions of the Federal Court relating to the power to extend the time for making an application for review. In the most recent decision referred to, *Pulitano and Telstra Corporation Limited* (27 July 1993), it was stated that the Tribunal is to '. . . do what is just and equitable between the parties'.

The AAT said that it was appropriate to focus on the explanation given by the applicant for the delay, the possible prejudice that may be caused to the respondent, the merits of the substantive application and whether the applicant had 'rested on his rights': Reasons, para. 6.

McIver said that he could not recall receiving a notice of the SSAT decision in 1989. However, he did acknowledge that he knew of the decision after being contacted by the DSS. Between the time of the decision in 1989 and December