The late lodgment over the Christmas period was not regarded as a breach of the Act. Anhoukh's JSA was cancelled from 27 December 1991 and the DSS wrote to him on 3 March 1992 advising that he had been overpaid $275.41 due to the prepayment for the period 13 to 26 December 1991.

The AAT found that Anhoukh had not made a false statement or representation nor had he failed or omitted to comply with the Act.

The legislation

The issue concerned interpretation of s.1223AA(1) of the Act. Subsection 1223AA(2) at the relevant date provided that 'prepayment means a payment under section 569, 652, 722 or 755 (prepayment because of public holiday etc)'. Subsection 1223AA(1) provided as follows:

> 'If:
>
> (a) a person has received a prepayment of social security benefit for a period; and
>
> (b) the amount of the prepayment is more than the amount (if any) (in this subsection called the "right amount") of social security benefit that would have been payable to the person for the period if:
>
> (i) the prepayment had not been made; and
>
> (ii) the person had not made a false statement or representation in relation to matters that affect payment for the period; and
>
> (iii) the person had not failed or omitted to comply with a provision of this Act in relation to matters that affect payment for the period;
>
> the difference between the prepayment and the right amount is a debt due to the Commonwealth and recoverable by the Commonwealth . . .'

The SSAT had interpreted the subsection to mean that no calculation of the 'right amount' could be made unless all three elements mentioned in subparas (i) to (iii) were present, viz a prepayment, a false statement or representation and a failure or omission to comply with the Act. If there was no 'right amount' the debt was nil.

Deputy President Forrest in *Secretary, DSS and Williamson* (1993) 76 *SSR* 1102 took a different view of the subsection. He thought that the language of the subsection did not admit of an interpretation that required any fault or contravention of the Act by the recipient as a precondition of a debt. The Deputy President saw no ambiguity in the legislation and therefore found it unnecessary to examine the second reading speech for assistance in construing the statute.

In the present case, Senior Member Mrs Dwyer disagreed with the view of the SSAT, which she said amounted to reading s.1223AA(1)(a) as if it incorporated sub-paras (ii) and (iii) of para. (2)(b). If the conditions in sub-paras (ii) and (iii) were alternative and not cumulative, the prepayment would have been recoverable under s.1224(1) and there would have been no need to insert s.1223AA(1). Also, if prepayment was an independently sufficient precondition for a debt under the subsection, there would have been no need to add the other fault-based conditions in subparas (ii) and (iii).

The Senior Member found the legislation ambiguous and resorted to the second reading speech to assist in interpretation, as permitted by s.15AB of the *Acts Interpretation Act 1901* (Cth). She found that the speech suggested that the legislation was intended to have the effect of rendering a prepayment of benefit to a person who was later found not to have been entitled to the payment, a 'recoverable overpayment'. The interpretation in *Williamson* was consistent with the intention indicated by the Minister's speech, and was the preferable interpretation.

The AAT pointed out that s.1223AA had been amended by Act No. 36 of 1993, but the amended provision retained the obscure wording of its predecessor.

Formal decision

The AAT set aside the decision and substituted a decision that the prepayment was a debt due to and recoverable by the Commonwealth.

[P.O'C.]

Overpayment: recipient notification notice

SECRETARY TO DSS and PRIOR (No. 9384)

Decided: 25 March 1994 by D.W.Muller.

The SSAT had determined that although Prior was overpaid family allowance for the period 9 January 1992 to 12 November 1992, there was no debt owing by her to the Commonwealth.

Prior was receiving family allowance payments in respect of her children. In November 1989 she notified the DSS that the combined taxable income of her and her partner was $50,500 in 1989-90.

On 21 December 1991 the DSS wrote to her (a letter which the DSS conceded she did not receive) requiring her to notify within 14 days if combined taxable income for 1990-91 was more than $64,167. The DSS continued to pay family allowance to Prior in 1992.

In November 1992 the DSS learned that Prior's combined taxable income for 1991-92 was $69,245.

The DSS cancelled her family payments and on 12 November 1992 wrote to Prior informing her that she had been overpaid $1127.20 for the period 9 January 1992 to 12 November 1992 because the taxable income for 1990-91 was in excess of the limit for the 1992 calendar year of $67,377.

The legislation

The legislation identified by the AAT as relevant to the decision was in Part 2.17 of the *Social Security Act 1991* before the Part was repealed and replaced with new provisions from 26 June 1992. Section 838 states that a person is qualified for family allowance if, inter alia, the person satisfies the FA taxable income test. Section 840A sets out the method for calculating whether a person satisfies that test. Under s.840A(7), a person's taxable income for a tax year is taken to include that of the person's partner if the person is a member of a couple.

The AAT found that Prior was not qualified to receive family allowance for the relevant period, and had been overpaid $1127.20. That amount was recoverable as a debt due to the Commonwealth pursuant to s.1222A and 1223.

Was a valid notice a precondition to cancellation?

The AAT rejected Prior's submission that family payment can only be cancelled retrospectively (so as to create an overpayment) where a valid 'recipient notification notice' has first been given. [It appears that this was a reference to the fact that the letter of 21 December 1991 was not received.] The AAT said that the DSS may become aware of matters relating to qualification by a variety of means, not necessarily involving the sending of a notice, and

may act on the information to cancel payments.

The AAT distinguished the present case from four earlier AAT decisions cited by counsel for Prior. In *Doravelu*,(1992) 67 *SSR* 961, *Eisen* (1993) 76 *SSR* 1102 and *Carruthers* (1993) 76 *SSR* 1100 the AAT had held that there had been no valid recipient notification notice and that there was no proper basis for cancellation, but in each of these cases the recipient was otherwise qualified for the payment. In *Gellin* (1993) 76 *SSR* 1101 the cancellation after six months absence from Australia was mechanical and not discretionary, and was not affected by the giving of a valid notice.

The AAT found, without further discussion, that there were no grounds for the debt to be waived or written off.

Formal decision

The AAT set aside the decision under review and determined that the sum of $1127.20 received by Prior was a debt due to the Commonwealth, and the debt was not to be waived or written off.

[P.O'C.]

Disability support pension: continuing inability to work

BUTTON and SECRETARY TO DSS

(No.9148)

Decided: 30 November 1993 by W.J.F. Purcell, J.T.B. Linn and D.J. Trowse.

Button, aged 49 had served in the Royal Australian Airforce for 12 years as a maintenance engineer and a maintenance fitter. He received a disability pension from the Department of Veterans Affairs for problems with his neck, back and shoulders. He had completed an equivalent to matriculation and had been responsible for the training of other personnel.

After being discharged in 1976, he undertook various jobs before starting his own business in 1981. As his neck and shoulder problems gradually deteriorated, he ceased any 'hands on' work which came to be undertaken by other staff. Due to financial difficulties, the company went into liquidation in September 1991.

Button applied for a disability support pension (DSP) on 8 September 1992. His claim was rejected on the grounds that he could be retrained and equipped with light skilled or unskilled duties within 2 years. This decision was affirmed by the SSAT. Button appealed to the AAT.

Legislation

Section 94(1) requires that to qualify for a DSP as well as other requirements, a person must have a continuing inability to work: s.94(1)(c).

The concept of continuing inability to work is amplified by s. 94(2). To meet the requirement, a person's impairment must:

- prevent the person from doing their usual work and work for which they are currently skilled: s.94(2)(a); and
- prevent a person from undertaking educational or vocational training during the next 2 years which would be likely to equip the person within the next 2 years to do work for which the person is currently unskilled: s.94(2)(b).

Educational or vocational training is defined in s.94(5) as not including a program designed specifically for people with physical, intellectual or or psychiatric impairments.

Impairment

The DSS did not dispute that Button had an impairment of more than 20% under the Impairment Tables referred to in s.94(1) of the Act.

Continuing inability to work

The DSS contended that Button did not have a continuing inability to work as he was able to do work for which he was currently skilled and, in addition, his impairment did not prevent him from undertaking educational or vocational training as required by s.94(2)(b).

At the time of the AAT hearing Button was undertaking a 12 week 'back care and office duties' course run by TAFE which was designed specifically for people with back problems. The AAT found that this was not educational or vocational training.It was expressly excluded by s.94(5) as it was designed specifically for people with a physical impairment.

Mr Buitenhuis, a disability job seeker adviser gave evidence that he met with Button on 30 April 1993. He was of the opinion that Button could be trained as an instructor given his extensive experience as a tradesperson. Mr Buitenhuis believed that Button could be equipped with new skills within 12 months of commencement of an educational or vocational course.

The AAT found that Button's impairment did not prevent him from undertaking training which would equip him within the next 2 years to do work for which he was currently unskilled. The AAT noted that Button was an articulate and highly skilled tradesperson who had skills and potential to offer the workplace. The AAT found that Button did not satisfy the requirements of s.94(1)(c).

Formal decision

The AAT affirmed the decision of the SSAT. Button was not eligible to receive a DSP.

[H.B.]

Disability support pension: 'severely disabled'

SECRETARY TO DSS and TSAKRIOS

(No. 9313)

Decided: 18 February 1994 by D.W.Muller.

The DSS asked the AAT to review a decision of the SSAT that Tsakrios was 'severely disabled' for the purposes of s.23(4B)(a) of the *Social Security Act 1991*. If Tsakrios was held to be severely disabled then she would be able to receive disability support pension after 12 months absence from Australia. The evidence suggested that Tsakrios had returned to Greece permanently.

The legislation

The relevant part of s.23(4B)(a) provides that a person is 'severely disabled' if:

> 'a physical impairment, a psychiatric impairment, an intellectual impairment, or 2 or all of such impairments, of the person make the person, without taking into account any other factor, totally unable:
>
> (i) to work for at least the next 2 years; and
>
> (ii) unable to benefit within the next 2 years from participation in a program of assistance or a rehabilitation program . . .'