clothing, medical, dental and optical expenses. He acknowledged that Ms Elliot recently paid $80 towards a major school excursion. Mr Elliot had the children on his Health Care Card and he was responsible for taking them for medical and dental treatment. When the children were with Ms Elliot she provided their food.

Ms Elliot told the AAT that when she had the children she made decisions regarding their school attendance and their after school activities. She did not consult Mr Elliot on these matters. She signed school forms for them and in the previous year paid for toiletries and clothes associated with a school excursion. She paid a quarter of the excursion fees as this was in proportion to the time she had the children. Ms Elliot also supervised the children's homework when the children were with her. She also addressed their other needs as required, such as the purchase of clothing or medicine.

Was the mother entitled to family payment?

The AAT considered the relevance of the father's formal custody of the children. In *Van Huc Lo* (1987) 40 *SSR* 510 the Federal Court held that whether a person had 'custody, care and control' of a child was primarily a question of fact. In *Field* (1989) 52 *SSR* 694 the Federal Court had concluded that a Family Court order for access gave the person a right to make decisions about the daily care and control of the child. The Court in *Field* did not want to lay down strict rules about the length of access required because of the variation from case to case. But the Court stated that:

(a) Factual custody, care and control was not in itself sufficient for a child to be considered a dependent child. There also had to be a legal right to make decisions concerning the daily care and control of the child;

(b) A person's rights of access to a child under a Family Court order could give that person a right to make decisions concerning the daily care and control of the child. This would depend on the facts and the way in which the order was framed;

(c) The length of access appears relevant: intermittency of access days might prevent a conclusion that the person has the right to daily care and control of the child, but access for a long period (in the case of *Field* 14 days, the period for which supporting parent's benefit was paid) of consecutive days suggests that for practical reasons such access would ordinarily be regarded as carrying with it the right to make decisions concerning the daily care and control of the child.

The AAT then commented:

> 'The Tribunal notes that although Ms Elliot has significant costs associated with her period of access for 26% of the time, it is probable that her proportion of costs are less than 26% of the total costs of maintaining the children. However, entitlement to Family Payment arises from a parent having "care and control" of a "dependent child". Entitlement does not arise out of the proportion of the costs of maintenance borne by each parent.
>
> Subsection 5(2) of the Act does not refer to the concept of "custody". The legal issue of "custody" is not something about which we are concerned in this matter. The Act now refers only to the "daily care and control" of the children. Nonetheless, within these restrictions the decision in Re Field gives direction and guidance to the Tribunal in the matter before us. Furthermore, insofar as the issues before the Tribunal are consistent with Re Field we are required to apply the law as it is interpreted by the Full Court in that case. Whether or not Ms Elliot has the right to make decisions regarding school excursions and medical treatment is not the issue before us. It is necessary for us to consider whether she has "the daily care and control"d of the children, albeit for 26% of each six week period'.

(Reasons, paras 26-27)

The Tribunal then concluded that the children were in the care and control of Ms Elliot during the periods of access under the terms of the Family Court order. While the pattern of access was in one sense intermittent given the 6-week cycle over which access occurred, the AAT thought it could be distinguished from *Field* in that the nature of the intermittency was different and Ms Elliot could be characterised as having the daily care and control of the children during the periods of access. Thus the AAT found that as Ms Elliot exercised actual daily care and control of the children during 26% of the time she met the requirements for family payment.

Was she entitled to 26% of family payment?

There was nothing in s.869(2) of the Act which specifies the proportion of time a person must spend providing daily care and control of children before the Secretary can be satisfied that the person is qualified for the payment. While this clearly requires departmental guidelines for the sake of consistency, the DSS had indicated to the AAT that it was prepared to accept the SSAT decision and waive its own guidelines. The Tribunal considered that it was not its role to bind the Department to its own administrative policy when there was no actual percentage written into the Act.

Formal decision

The AAT affirmed the decision under review.

[B.S.]

Debts: recipient notification notice

ANDERSON and SECRETARY TO DSS
(No. 9586)
Decided: 7 July 1994 by R.D. Fayle.

Anderson asked the AAT to review a decision of the delegate, affirmed by the Social Security Appeals Tribunal (SSAT) that he had been overpaid $11,205.60 which was a debt to the Commonwealth pursuant to s.1224 of the Act. The appeal was made on two grounds: first, whether the debt should be waived, and second, if not, then whether any of the overpayment was void because the notices sent to Anderson by the DSS did not bear the inscription that they were 'recipient notification notices'.

The waiver issue

Anderson's submission concerning waiver focused on one fact in issue: whether he delivered his tax return for the year ended 30 June 1991 to the Midland branch office of the DSS as he claimed that he did. The department's records indicate that the first occasion on which the tax return was received was 4 December 1992. However, Anderson claimed that he delivered it on 15 August 1991. If his evidence on this matter was accepted, then, subject to the Tribunal being satisfied that the amounts he received were received in good faith, the overpayment must be waived under s.1237(2) of the Act.

The AAT canvassed in some considerable detail the history of Anderson's receipt of age pension, and his part-time earnings from employment at Muresk Agricultural College where he lectured in farm

machinery assessment. There was considerable correspondence passing between Anderson and the DSS up to the period November 1990 when Anderson's pension was cancelled. At that time, his accountant wrote to the DSS asking that his pension be assessed on 'a current income basis'. He lodged a fresh application on 9 January 1990, and pension was granted with payment commencing 8 November 1990. Thereafter, the DSS wrote to Anderson on several occasions specifically asking to be advised if he had recommenced work at the college and, if so, what his wage would be. No reply was received. This situation persisted through 5 different letters sent to him between January 1991 and September 1992, and on each occasion he did not respond. Anderson maintained that the reason he did not reply was that he did not consider the requests relevant to his situation. He believed that his pension was assessed on his annual income as disclosed in his income tax returns. This was despite his request that he be assessed on current income earnings.

Income

Anderson also believed during that period (and this was found by the AAT) that his income would be assessed by taking account of deductions. Once again, this belief was erroneous since s.1072C provides that only income derived from a business may be reduced by specified expenses incurred in the course of deriving that income. That provision does not apply to income derived by an employee. Despite this, when the original calculation of the debt was reviewed by the authorised review officer, that officer took account of some deductions incurred in deriving his income from the college and reduced the debt to the amount currently in question of $11,205.60.

The AAT, referring to the Full Federal Court decision in *Secretary to DSS v Garvey* (1989) 53 *SSR* 711 noted that 'the definition of "income" in the Act does not permit the "negative yield" of one source of income to be offset against the yield from other sources'. Therefore, the AAT noted that even if he was under the impression that he could set off his farm losses against his earned income from his college employment, this was not open to him in accordance with the decision of the Full Federal Court.

The AAT went on to hold that, notwithstanding its findings that Anderson was an honest witness, he did not deliver his tax return to the office in August 1991 and the DSS did not receive a copy of it until 4 December 1992.

Recipient notification notices

The AAT noted that if the notices sent to Anderson advising him of relevant information were invalid, then the failure to respond could not be considered in any overpayment calculation. Accordingly, it became necessary to decide if those notices were valid notices. The AAT considered each of the notices in turn by reference to the applicable legislation at the time (the 1947 Act was repealed and from 1 July 1991, the 1991 Act came into force). Therefore, what had previously been notices under s.163 of the 1947 Act became notices issued pursuant to s.68 of the 1991 Act. Section 68(3) of the 1991 Act provided, until it was amended in 1991, that a notice issued under that section must *inter alia* specify that it is given under that section. However, by Act No. 194 of 1991, s.68(3)(e) was amended to say that the notice 'must specify that the notice is a recipient notification notice given under this Act'.

None of the notices used the word 'this is a recipient notification notice'. The AAT then considered a number of cases which had considered this issue. In *Peretti v Secretary to DSS* (1993) 77 *SSR* 1123 the AAT had distinguished the earlier case of *Secretary to DSS v Carruthers* (1993) 76 *SSR* 1100. In *Carruthers* the AAT had held a notice to be invalid because it had failed to comply strictly with the requirements of the legislation. However, in *Peretti*, the AAT had said that strict literal word-by-word compliance is not what is required, and distinguished *Carruthers* on the basis that the non-compliance there was on a matter of substance. Applying that to this case, the AAT here decided that the non-compliance with the strict literal words was no more than a mere formality and, indeed, the result was to provide a more meaningful explanation to Anderson in this case.

Decision

For these reasons, the Tribunal found that the 5 notices in question were valid and went on to affirm the decision to raise the debt.

[R.G]

Overpayment: conspiracy to defraud the DSS

SECRETARY TO DSS and KALWY
No. 9589
Decided: 5 July 1994 by B.A. Barbour, J.Campbell and I.Way.

The DSS had in May 1989 issued notices under s. 162 of the *Social Security Act* 1947 addressed to the Westpac Bank. The notices required the Bank to pay to the Commonwealth out of funds due to Kalwy an amount that the Commonwealth believed was owed to it in consequence of Kalwy's participation in a fraudulent conspiracy. The DSS alleged that Kalwy, a DSS officer at the time of the fraud, conspired with G, a CES officer, to falsely claim benefits in fictitious names thereby depriving the Commonwealth of some $40,000 between 1986 and 1989. The DSS further alleged that Kalwy received $27,099 of the proceeds of the conspiracy. The sum recovered pursuant to the notice to Westpac was $20,711.73.

History of prior proceedings

The decision under review was a decision of the SSAT made in August 1990 which set aside a decision of the DSS and remitted the matter for reconsideration in accordance with the direction that there was no evidence that Kalwy was indebted to the Commonwealth under s.246 of the *Social Security Act 1947*.

In *Kalwy* (1992) 67 *SSR* 950 the AAT found that Kalwy was a party to the conspiracy and had received proceeds of the fraud. It decided that he was indebted to the Commonwealth. On appeal, the Federal Court set aside the AAT's decision (*Kalwy* (FC) (No. 1) (1992) 70 *SSR* 996). The Court said it was not enough to find that Kalwy had been a party to the conspiracy; it was essential that the Secretary demonstrate that the amounts in question were paid to Kalwy and this had not been established. The matter was remitted to the AAT for re-determination.

On the rehearing the AAT ('the second Tribunal') found that Kalwy had received at least $27,000 from the proceeds of the conspiracy, and remitted the matter to the DSS for recovery of that sum. Kalwy again appealed the decision to the Federal Court, where Beazley J on 22 December 1993 remitted the matter for re-determination by a fresh panel of the