satisfy the activity test and failed to qualify for newstart allowance.

Murray stated that he realised he had to attend the meeting on 1 May at Tumut Skillshare centre. His car ran out of petrol on the way. He walked the rest of the way to the centre, but was worried about his car because it was unregistered. He advised the organiser of the meeting he was leaving, but he did not return to the meeting. He rang the organiser to explain, and said he would be back the next morning. Overnight he decided that the implications of driving an unregistered car were too risky. He rang his case manager who advised him to ring the organiser at Tumut. He did this but she was busy. Murray did not do anything further until he received his breach notice.

Murray submitted that he was unaware of the implications of the agreement at the time of signing the CMAA. Murray also said that he never caught public transport and would not ask his neighbours for a lift. He denied discussing transport arrangements with his case manager or the organiser of Skillshare, despite there being departmental file notes to this effect.

Murray submitted that he had complied with the terms of the agreement. The terms had been strictly construed, and the AAT was referred to *Re Wan and Secretary, Department of Social Security* 1972 *SSR* 1035. Murray had applied for the advance payment and attended the information session. The agreement did not list what he had to do after the information session. Additionally, he argued that the terms had to be undertaken in a specified order. The key requirement was the solving of Murray's transport problems, and as the registration had not occurred prior to 1 May, the obligation to proceed further with the terms of the CMAA were not made out. Further Murray submitted that the failure to comply had to be a substantial failure in relation to the agreement as a whole.

Alternatively, if the Tribunal found there was a failure to comply, then the failure was within the exemptions. Murray's transport problems were outside his control and the failure to settle the transport problem was not foreseeable.

The DEETYA argued that the decision turned on the factual dispute between the parties about what occurred, particularly on 1 and 2 May 1995. As well, the DEETYA submitted that the legislation required compliance with the terms of the agreement and not just the activities listed in the agreement. The DEETYA said there was no doubt that one of the terms of the agreement was that Murray agreed to accept an offer of placement under the NWO program, and that Murray was aware of his obligation.

The DEETYA agreed that the main reason for failing to comply with the agreement was the transport problem, but that this was within Murray's control. He could have found alternative means of transport.

The AAT endorsed the approach that the legislative provisions relating to failure to comply with a CMAA must be strictly construed because they are quasi-penal. It referred to two recent tribunal decisions: *Ferguson and Secretary Department of Employment, Education, Training and Youth Affairs* (1996) 2(4) *SSR* 47 and *Secretary Department of Employment, Education, Training and Youth Affairs and Ruiz* (1996) 2(5) *SSR* 62.

The AAT accepted that Murray was in substantial compliance with the activities listed in handwriting in the CMAA. However, Murray's compliance with requirements of the CMAA became problematic after his brief attendance on 1 May. The Tribunal was satisfied that Murray was aware of his continuing responsibilities to attend the REEP program, and of the likely consequences if he failed to return to Tumut. The Tribunal found that Murray's subsequent conduct 'in remaining at home awaiting further instructions by mail amounted . . . to a substantial failure to comply with the terms of the CMAA and, in particular, clause 4 of that agreement': Reasons, para. 56.

The AAT was further satisfied that Murray's failure was within his control, or reasonably foreseeable by him. The Tribunal found that Murray was offered assistance regarding his transport problems during his earlier conversations with the case manager and Skillshare organiser. He ignored this offer of help and chose to sit at home and wait for something to be done.

> 'This was not an adequate response — there were factors within his control which were as simple as making a further phone call that would almost certainly have provided an outcome other than the eventual breach of his CMAA on 10 May.'

(Reasons, para. 59)

The AAT commented in affirming the decision, that it did so with reluctance. It commented that a 6-week deferral of payment seemed a very severe penalty in the circumstances. The AAT considered that:

> 'there would seem to be good reasons to review the CMAA program and the way it is structured, in order to simplify what appear to be unduly complex procedures which create burdens for both those administering the program, and those hopefully benefiting from it. Part of any such review should be the provision of far less draconian measures for non-compliance.'

(Reasons, para. 62)

**Formal decision**

The Tribunal affirmed the decision under review.

**[M.A.N.]**

# Family payment: dependent child

**SHORTER and SECRETARY TO DSS AND MCDONALD (No. 11076)**

**Decided:** 19 July 1996 by G. Ettinger.

**Background**

Shorter and McDonald were the parents of one child, a daughter, Jantaara. Following their separation in 1993, pursuant to Consent Orders of the Family Court, McDonald had sole custody of Jantaara, there was joint guardianship, and Shorter was given access to the child every Wednesday from 4.30 to 7.30 p.m., every second Friday from 4.30 p.m. to Sunday 7.30 p.m., half the school holidays and half of Christmas day. Each party was free to attend pre-school concerts, sports and other school functions. The Consent Orders also provided that Shorter was to be kept informed of all significant medical treatment, provided with all medication on access visits and advised of the treating medical practitioner. Except in cases of emergency the father was not to embark on any medical treatment without McDonald's prior consent.

Shorter applied for family payment in respect of his daughter. The DSS determined that the child spent 24% of her time with her father, and Shorter was advised that his application for family payment had been rejected because of the DSS policy that family payment can only be paid in respect of a child if the child is in the applicant's care for more than 30% of the time. When the matter came before an authorised review officer it was determined that the child was not a dependent child because the level of care and control exercised by Shorter in regard to his daughter was not substantial, and Shorter was not therefore qualified for family payment. Shorter unsuccessfully appealed to the SSAT and then to the AAT.

**The legislation**

The issue before the AAT was whether Jantaara was a dependent child of Shorter within the meaning of s.5(2)(a) of the *Social Security Act 1991* which provides, in part, that a child under 16 is a depend-

ent child of another person if that person has the right '(i) to have the daily care and control of the young person; and (ii) to make decisions about the daily care and control of the young person'.

**Daily care and control**

The AAT followed the Federal Court decisions of *Secretary, DSS v Field* (1989) 18 ALD 5 and *Secretary, DSS v Wetter* (1993) 112 ALR 151. It was noted that in *Field*, the Full Court stated that a Family Court order for access could give a person a right to make decisions about the daily care and control of a child even though he or she had not been awarded legal custody. In that case the father had access periods from Thursday morning to Sunday night one week, followed by access from Friday afternoon to Monday morning alternate weeks, and parts of the school holidays. While the Federal Court regarded this as involving a right to have and make decisions concerning the child's 'care and control', the intermittency of access days meant that there was no right to have the 'daily care and control' of the child.

The AAT considered that the pattern of access in the case before it was indistinguishable from that considered by the Federal Court in *Field*. The AAT pointed out that the amount of money spent by each parent in caring for Jantaara was not relevant to the issue of 'daily care and control'. It pointed to relevant factors which confirmed that McDonald was the parent who had the right to 'daily care and control', namely the fact that she organised and made decisions about Jantaara's activities such as pre-school, swimming and the like, provided for her every day needs, and made decisions about her medical treatment as demonstrated by the Family Court Consent Orders. The fact that those orders gave Shorter the right to attend pre-school concerts, sports and other school functions was seen by the AAT as emphasising the intermittent pattern of the access exercised by him.

As Shorter did not have the 'daily care and control' of Jantaara, she was not his 'dependent child' pursuant to s.5(2) of the Act and therefore Shorter was not qualified for family payment.

**Formal decision**

The AAT affirmed the decision under review.

**[A.T.]**

# Assurance of support benefit: waiver; special circumstances

**STOJANOVIC and SECRETARY TO DSS (No. 11216)**

**Decided:** 2 September 1996 by D. Chappell, I. Way and S. Bullock.

**Background**

Stojanovic sought review of the decision of the SSAT affirming a debt raised against him amounting to $7933.40, and owed under an assurance of support entered into by him in respect of his sister, Milenkovic, nephew and niece. The primary issue before the Tribunal was whether there were any grounds to waive the debt under s. 1237AAD of the *Social Security Act 1991*, which provides:

> 'The Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that:
>
> (a) the debt did not result wholly or partly from the debtor or another person knowingly:
>
> (i) making a false statement or false representation; or
>
> (ii) failing or omitting to comply with a provision of this Act or the 1947 Act; and
>
> (b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and
>
> (c) it is more appropriate to waive than write off the debt or part of the debt.'

**The facts**

Following the Milenkovic family's arrival in Australia on 1 January 1993, they resided with Stojanovic and his family until 12 August 1993. On 30 July 1993 Milenkovic made a claim for job search allowance, which was granted on 17 August 1993, after investigation by the DSS of her circumstances, and an interview with Stojanovic as assuror. Stojanovic, at that interview, indicated that his family was moving to Oakdale, away from relevant services and schools to which his sister and children required access. He also stated that his business had suffered as a result of his inability to work for a time through injury, the family was in debt and no longer able to support his sister's family. It was apparently also agreed by Stojanovic and Milenkovic at this interview, that a $3500 bond lodged with the Department of Immigration, Local Government and Ethnic Affairs at the time the assurance of support was entered into, would be used to enable Milenkovic to stay in town, but after this amount was expended, Milenkovic would return to live with her brother.

Following this, Stojanovic was contacted by the DSS after allegations were made by Milenkovic that she had been forced from his home. He denied that this was the case. However, following a number of interviews by a DSS social worker with Milenkovic, it was recommended that job search allowance should continue to be paid to her, as it would be intolerable for her to return to live with her brother.

**The evidence**

There was conflicting evidence before the AAT as to the circumstances surrounding Milenkovic's departure from Stojanovic's home. Stojanovic gave evidence to the effect that his sister had concocted the story that she had been forced from his home, in order to gain Ministry of Housing accommodation, and a benefit from the DSS. Milenkovic gave evidence that she and her children had been affected by Stojanovic's heavy drinking, moodiness, and aggressiveness, and that, on the night of 12 August 1993, her brother told her to leave his home after a major argument.

**Conclusions**

The AAT made an assessment of the credibility of the principal witnesses and preferred the evidence of Stojanovic. Having accepted Stojanovic's version of the events, by implication it rejected the veracity of the evidence given by Milenkovic on behalf of the DSS. It was a condition precedent to waiver under s. 1237AAD that 'the debt did not result wholly or partly from the debtor or another person knowingly making a false statement or representation'. Therefore, it was an ironic consequence that waiver could not apply because of Milenkovic's knowing involvement in the making of a false statement or false representation to the DSS, this having led to the payment of job search allowance to her and the raising of the debt.

**Formal decision**

The AAT affirmed the decision under review and determined that Stojanovic was liable to repay the debt of $7933.40 under an assurance of support.

**[A.T.]**