But there was nothing to stop the DSS from giving Sawyer a further notice which strictly complies with s.11(1), and then taking further action to recover the overpayment. The AAT also recommended the DSS reconsider the form of its standard letter.

Formal decision

1. The Tribunal set aside the decision under review.
2. The Tribunal remitted the matter to the Secretary to the DSS for reconsideration in accordance with the recommendation that a further notice strictly complying with s.11(1) of the Data-Matching Act be given to Sawyer before any further action is taken to recover the overpayment of personal assistance made to her.

[M.A.N.]

Debt recovery: garnishee notice

YOUNG and SECRETARY TO DSS (No. 11309)

Decided: 11 October 1996 by J.R. Dwyer.

Young requested that the AAT review an SSAT decision which affirmed the DSS decision to garnishee an amount of $8,078.60 as part recovery of a debt owed by Young to the Commonwealth.

The facts

Young owed a debt to the Commonwealth because she had received sole parent pension (SPP) and had failed to declare that she was receiving superannuation payments at the same time. Young pleaded guilty in the Magistrates Court to a number of charges under the *Social Security Act 1947*. The DPP advised that a non-custodial sentence was imposed because Young had repaid the amount set out in the Garnishee Notice. The total amount of the overpayment was $46,918.90. Young did not dispute that she owed the money nor that it was as a result of her failure to disclose the superannuation payments. The DSS continues to recover the overpayment at the rate of $500 a month. Young disagreed with the DSS submission that the Magistrate imposed a non-custodial sentence because she had repaid a large part of the debt. She argued that it was because it was her first offence.

As a consequence of an assault, Young had been awarded $5000 by the Crimes Compensation Tribunal in Victoria.

The issue

Young argued that the sum of $5000 should not have been included in the Garnishee Notice because it was an award by the Crimes Compensation Tribunal for pain and suffering as a result of the assault. The *Criminal Injuries Compensation Act 1983* (Vic.) provides in s.24(3) that an award of compensation shall not have any claim set off against it, and therefore the DSS could not claim the $5000.

The AAT identified one of the issues as whether or not the SSAT and the AAT had jurisdiction to review the issuing of a Garnishee Notice by the DSS. Section 1224 of the *Social Security Act 1991* (the Act) provides that an amount is a debt due to the Commonwealth if a person failed to comply with the provisions of the Act, and as a result was paid a social security payment. Such a debt is recoverable by the Commonwealth by way of a Garnishee Notice (s.1224(2)(c)). Section 1223(1) states that if a debt is recoverable pursuant to s.1224 of the Act, the DSS may give a notice to another party and require that party to pay the amount in the notice to the Commonwealth. According to s.1223(7F):

> 'This section applies to money in spite of any law of a State or Territory (however expressed) under which the amount is inalienable.'

Section 1253 provides:

> '(3) Subject to sub-section (4), the Social Security Appeals Tribunal may,
>
> for the purpose of reviewing a decision under this Act, exercise all the powers and discretions that are conferred by this Act on the Secretary.
>
> (4) The reference in sub-section (3) to powers and discretions conferred by
>
> this Act does not include a reference to powers and discretions conferred by:
>
> ...
>
> (f) Section 1233 Garnishee Notice.'

In *Walker and Secretary to DSS* (decided 8 March 1996) the AAT had agreed with the SSAT that it had no power to change the decision of the DSS to recover a debt by way of a Garnishee Notice. It was argued by the DSS that this decision is inconsistent with an earlier AAT decision *Secretary to the DSS and Matthews* (decided 15 March 1989). That decision dealt with the *Social Security Act 1947*, although those provisions are similar to those in the 1991 Act. It was suggested by the DSS that *Matthews* had decided that the decision to issue a Garnishee Notice was reviewable, but the SSAT and the AAT cannot themselves issue a Garnishee Notice. The AAT disagreed with that interpretation of *Matthews*. The decision dealt with whether the amount of the debt had been correctly calculated. The AAT decided that the debt could be recalculated even though a Garnishee Notice had been issued. The AAT concluded that in *Walker* and *Matthews,* the AAT had decided it does not have the jurisdiction or power to review a decision to give a Garnishee Notice.

The adjournment

The Tribunal was subsequently advised by the DSS that the decision of *Walker* had been appealed to the Federal Court. The AAT decided to adjourn awaiting the outcome of the Federal Court decision, even though this was a rare occurrence by the AAT. Because the Federal Court will be directly dealing with the issue of whether or not the SSAT and the AAT have power to review the issuing of a Garnishee Notice, it was appropriate to adjourn this matter because it was directly on point. The delay would not be of inconvenience to the parties.

The Tribunal was also of the opinion that it was appropriate to adjourn the matter to enable the parties to make submissions on whether the award from the Crimes Compensation Tribunal was inalienable. As the AAT pointed out, s.24(3) of the State Act was inconsistent with the Act, and the *Australian Constitution 1901* provides that the Commonwealth Act should prevail.

Formal decision

The AAT adjourned to a date to be fixed after the Federal Court has finalised *Walker v Secretary to the DSS.*

[C.H.]

[Editor's Note: Two aspects of this decision of the AAT should be commented on. The first is the decision of the Tribunal to adjourn. Pursuant to s.40(1)(c) of the *Administrative Appeals Tribunal Act 1975* (the AAT Act), the AAT may adjourn proceedings from time to time for the purposes of reviewing a decision. In this matter, the AAT appears to have made a decision to adjourn. According to s.43(1) of the AAT Act when the AAT makes a decision in writing that decision will be either to affirm, vary, or set aside the decision and substitute another decision or remit the matter back with directions. There would not appear to be power to make a decision in writing to adjourn. The AAT has identified one of the issues in this matter as whether the SSAT and the AAT had jurisdiction to review the decision of the DSS to issue a Garnishee Notice. However, the application for review by Young did not complain about the issuing of a Garnishee Notice but rather about the amount set out in the Garnishee Notice. Young's complaint was that the $5000 should not be included in the amount garnisheed. A careful reading of s.1233 of the Act reveals that it deals with the issuing of a Garnishee Notice. There does not appear to be any provision of the Act which precludes either the SSAT or

the AAT from reviewing the amount of a Garnishee Notice, rather than the issuing of a Garnishee Notice. The Federal Court decision in Walker should clarify the matter.]

Practice and procedure: stay order

SECRETARY TO DSS and GIASOUMI (No. 11361)

Decided: 6 November 1996 by J.R. Dwyer.

On 5 September 1996 the SSAT decided the Giasoumis' application for review, by remitting the matter back to the DSS with directions that their age pension be recalculated on the basis that certain amounts not be included in their assets. The DSS applied to the AAT for a direction that that decision be stayed until the DSS's application for review by the AAT had been heard.

The background

The DSS asserted that the Giasoumis' assets included a number of loans to trusts. The SSAT had decided that the sums of $388,133 and $47,913 were not assets for the purposes of the assets test. Mr Giasoumi was working full time as an estate agent and earned approximately $180 a week. It was submitted that if the Giasoumis' assets were calculated in accordance with the SSAT's direction, the Giasoumis could be entitled to either a full or part aged pension. As their claim had been lodged in October 1994, the arrears of a full aged pension to both the Giasoumi's would be approximately $29,000.

The law

Section 41(2) of the *Administrative Appeals Tribunal Act 1975* enables the AAT to make an order staying the operation and implementation of an SSAT decision. In *Dart and Director General of Social Services* (1982) 4 ALD 553, Davies J considered the AAT's power to make a stay order, noting that it was a balance between hardship to the pensioner and convenience to the DSS.

The issues

The DSS submitted that the substantive issues to be decided in this matter were complex. The case dealt with the actual date of disposition of assets, whether there had been adequate consideration, and whether a loan is an asset which is recoverable. There were a number of trusts and partnerships involved. The DSS submitted that it was appropriate to make a stay order in this matter for three reasons:

- there would be difficulty recovering any age pension paid as a result of the SSAT decision, if the AAT subsequently upheld the DSS's application for review;
- the DSS case had merit; and
- there was no evidence of hardship to the Giasoumis if the stay order was granted.

The AAT accepted that ss.1223AB and 1223(1) of the *Social Security Act 1991* (the Act) do not seem to allow for recovery of amounts paid pursuant to a decision of the SSAT if that decision is later set aside by the AAT. The AAT also found that the DSS does not have the power to recover those moneys by any other means than those set out in the Act.

On behalf of the Giasoumis it was submitted that there were sufficient funds available to allow the DSS to recover any moneys which might be paid to them. The AAT noted that the complexity of the Giasoumi's financial arrangements meant that it was most unclear whether the DSS would be able to recover any outstanding moneys. The AAT also had considerable doubt that the DSS had the authority to recover such moneys pursuant to the Act. It did not consider that recovery could be effected by withholdings from any future entitlement to the age pension. The AAT took into account the doubts concerning recoverability when considering whether a stay order should be issued.

The AAT was of the opinion that the DSS had a prospect of succeeding in its application for review at the substantive hearing. This was also a relevant factor. The AAT was careful not to use the stay proceedings as a preliminary trial of the issues, but noted that the DSS had arguable case.

With respect to whether the Giasoumis were suffering financial hardship, the AAT recorded that they were living with their daughter and son-in-law and four grandchildren in a four bedroom home. Mr Giasoumi earned approximately $180 a week. Tax returns were provided to the AAT, but the AAT found that there was not enough information contained in those returns to enable it to find that the Giasoumi's were in financial hardship. No further information was provided.

Finally, the AAT noted that if it did not grant a stay order, and age pension was paid to the Giasoumis, the substantial hearing of the matter would be ineffective because any moneys paid would not be recoverable.

Formal decision

The AAT granted an order staying the SSAT's decision of 5 September 1996.

[C.H.]

Newstart allowance: unreasonably delaying entering into a CMAA

SECRETARY TO THE DEETYA and O'CONNELL (No. 11345)

Decided: 31 October 1996 by H.E. Hallowes.

Background

The Secretary to the DEETYA requested a review of a decision of the SSAT made on 29 February 1996. The SSAT had set aside a decision to cancel O'Connell's newstart allowance on the basis that there was no evidence of a written notice having been given to her under s.44(3) of the *Employment Services Act 1994* (the Act), advising her that she was being taken to have failed to enter into a Case Management Activity Agreement (CMAA). It was not disputed that O'Connell was sent and received two notices pursuant to s.38(5) of the Act requiring her to enter into such an agreement and giving the place and time at which the agreement was to be negotiated. She did not attend the interviews specified in those notices.

The legislation

The AAT considered the following provisions of the Act:

'44.(1) This section applies if:

(a) a person has been given notice under subsection 38(5) of a requirement to enter into a Case Management Activity Agreement; and

(b) the Employment Secretary is satisfied that the person is unreasonably delaying entering into the agreement.

(2) The Employment Secretary may be so satisfied: