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: