tion to advise of a change in Mrs Callaghan's income but had omitted to do so.

The law

The AAT considered whether it should apply the waiver provisions current at 28 September 1995, the date on which waiver had been considered by the DSS, or whether it should apply the new waiver provisions introduced by the *Social Security Amendment (Carer Pension and Other Measures) Act 1995*, on 1 January 1996.

The AAT considered the case of *Patti-Mae Lee v Secretary DSS* (1996) 139 ALR 57 (pp.10-12) and the case of *Esber v Commonwealth* (1992) 106 ALR 577 and said that according to the principles stated in those decisions, a debtor had the right to have waiver considered on review according to the law in force at the date that waiver was first considered. The AAT said it was 'bound to apply the waiver provisions in force at that date unless the 1995 Amendment Act intended that its provisions should apply and that any accrued rights should be altered': Reasons, para. 8.

The AAT decided that because of the specific directions contained in the new s.1236A, the new waiver provisions applied to that part of the debt which arose before 1 January 1996 and which was neither waived nor paid before that date, that is, to that part which was still outstanding at 1 January 1996.

As to a debt or part of a debt which was paid before 1 January 1996 and in respect of which waiver was refused before that date the pre-1 January provisions applied.

The AAT, in considering the application of the law to the facts before it, said that no part of the debts paid before 1 January 1996 should be waived because s.1237(2), the only provision that might have been applicable, did not authorise waiver as the Tribunal was not satisfied that the Commonwealth had made an administrative error. If it had, the debt did not arise solely from it, as Mr and Mrs Callaghan had failed to notify the DSS of Mrs Callaghan's AUSTUDY payments.

The AAT also said that the debts outstanding on and after 1 January 1996 could not be waived under s.1237AAD, which was the only provision which might be applicable. Section 1237AAD states:

> '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 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 to write off the debt or part of the debt.'

The AAT said that the word 'knowingly' is understood, from case law, to mean actual knowledge, unless the legislation specifies otherwise. It found that there is nothing in s.1237AAD to suggest that it should be given any meaning other than that the person has actual knowledge that he or she is making a false statement or representation or is failing or omitting to comply with a provision of the Act.

The AAT found that Mr Callaghan knew he had an obligation to advise of a change in Mrs Callaghan's income and he knowingly omitted to comply with a provision of the Act when he failed to advise of the change. The AAT was also satisfied that Mr and Mrs Callaghan knowingly omitted to notify the DSS, in the sickness allowance forms, of Mrs Callaghan's AUSTUDY payment. The AAT said it drew a distinction between 'knowingly omitting' and 'fraudulently omitting' and applied the distinction in favour of Mr and Mrs Callaghan.

However, it concluded that as Mr and Mrs Callaghan had known that they had omitted to include the AUSTUDY benefit in the sickness allowance forms, they had knowingly omitted to comply with a provision of the Act.

It followed that the debt could not be waived in accordance with s.1237AAD for each of its three paragraphs must be satisfied for waver to apply.

Formal decision

The AAT affirmed the decision of the SSAT.

[G.H.]

Overpayment of job search allowance: recoverable from undischarged bankrupt?

SECRETARY TO DSS and SOUTHCOTT (No. 11741)

Decided: 2 April 1997 by J. Dwyer.

The DSS sought review of a decision of the SSAT that although a recoverable debt existed in this case, the debt should be waived by the DSS pursuant to s.1237AD of the *Social Security Act 1991* (the Act).

The facts

Southcott received unemployment benefit/newstart/job search allowance between May 1991 and June 1994. However, during that time he and his estranged wife had owned a truck, and had been in partnership as a trucking subcontractor for Boral. Monthly cheques in payment for his driving were sent to the matrimonial hom,e and banked by his wife. Southcott ceased driving the truck at some point, and his wife hired a driver to continue to drive it.

The DSS, in a data check under the *Data-Matching Act* between the DSS and tax records, found an inconsistency between statements which Southcott had made when applying for benefits, and his declared tax income. The AAT accepted that Southcott was confused and not trying to deceive officers of the DSS, and that he was half owner of the trucking business, and entitled to half the income, although his wife received 100% of the profit. However, it found that he knew he was entitled to half the income, and was in fact allowing his wife to use his income.

The DSS sought to recover the overpaid benefits as a debt at a time when Southcott had been declared bankrupt, but was working for a salary and was not in receipt of any social security benefits.

Recoverable debt

The AAT found that there was a recoverable debt in respect of overpaid benefits under s.1224(1) of the Act because Southcott had made false statements when applying for the benefits when he stated that he was not a part owner of the

trucking business. The fact that he did not intend to deceive the DSS did not mean the statements were not false: *Pepi v DSS* (1984) 7 ALD 155; *McAuliffe v DSS* (1992) 28 ALD 609.

Debt not recoverable because of circumstances

Section 1224(2) of the Act states that a debt due to the Commonwealth is recoverable by means of:

> '(a) if the person is receiving a social security payment under this Act — deductions from that person's social security payment; or . . .
> (b) legal proceedings; or
> (c) garnishee notice.'

Section 1232 of the Act states that a debt recoverable under s.1224(1) is recoverable in a court of competent jurisdiction. Section 1233 states that the DSS can recover the debt by requiring persons who have authority to pay money to the debtor to deduct amounts and pay them to the DSS (a garnishee procedure).

The AAT found that the DSS was unable to recover the debt from Southcott in his particular circumstances, for the reasons discussed below.

1. As Southcott was not in receipt of social security payments, s.1224(2)(a) could not apply.
2. As Southcott had been declared bankrupt, the provisions of the *Bankruptcy Act* became relevant. By virtue of s.58 of the *Bankruptcy Act,* Southcott's property vests in the Official Trustee, and a creditor cannot enforce any remedy against the person or property of the bankrupt in respect of a provable debt or commence any proceeding, except with leave of the court (apart from rights of a secured creditor). The AAT found that the garnishee notice under s.1233 would be a remedy against the property of the bankrupt, and so was not allowed by the *Bankruptcy Act.* While the DSS is effectively a secured creditor, its security is limited to any payments from the DSS to which the bankrupt might be entitled; if he is not entitled to any benefit payments, there is no security.
3. The DSS thus only had a right to prove in bankruptcy, but could not recover in this way because Southcott's weekly income was below that at which a contribution is required to be made.

Data-Matching Act

Finally, the AAT considered whether the notice sent to Southcott complied with the provisions of the *Data-Matching Act.* The AAT found that the notice did not comply with requirements to give sufficient information regarding the information obtained by the DSS in its data matching exercise, the proposed action of the DSS and Southcott's rights to contest the notice.

Conclusion

The AAT found that Southcott had received overpayments of benefits and that there was a recoverable debt. However, by virtue of Southcott's bankruptcy, and the fact that he was not in receipt of social security payments, the debt was not recoverable by the DSS. While Southcott was bankrupt, the DSS could only recover the debt by contributions from his income which was at the time under the relevant threshold. Even if this occurred, before the debt could be recovered, the DSS would have to issue an adequate notice which complied with the *Data-Matching Act.*

Formal decision

The AAT varied the decision of the SSAT so:

- Southcott owed a debt to the Commonwealth; and
- the debt could not be recovered because:

(i) the DSS had not given Southcott a notice which complied with the *Data-Matching Act;*

(ii) the DSS had not lodged a proof of debt in Southcott's bankruptcy;

(iii) Southcott was not in receipt of a social security benefit.

[M.S.]

The meaning of rent

SECRETARY TO DSS and MONTGOMERY (No. 11134)

Decided: 8 August 1996 by S.D. Hotop.

Background

On 22 August 1994 the Montgomerys started living in a Perth retirement village under the terms of a Licence Agreement.

The Licence Agreement granted exclusive occupation and use of a unit and the Montgomerys agreed to pay an 'ingoing sum' of $69,000 prior to occupation as well as $27 a week to cover 'operating costs' for the term of their occupation.

The Licence Agreement provided for determination of the Licence in specified circumstances. Upon determination a formula was applied to calculate how much of the 'ingoing sum' was returned to the resident. This formula deducted $4700 each year from the 'ingoing sum', which in the Montgomery's case occurred every 22 August (Clause 8(3) of the Licence Agreement).

Mr Montgomery moved to a nursing home in early 1995 for health reasons.

Mrs Montgomery, at age 81, was granted an age pension from 9 February 1995, on the basis she was a 'retirement village resident' and a 'member of an illness separated couple', as defined in ss.4 and 12 of the *Social Security Act 1991* (the Act).

Mrs Montgomery applied for Rent Assistance under the Act in July 1995 but on 3 August 1995 her request was refused by a delegate on the basis the $27 a week payment to cover operating costs was below the then $31.30 a week threshold for payment of rent assistance. The letter of rejection characterised the annual deduction of $4700 as being related to the $69,000 which was regarded as an asset by the DSS for the purposes of assessing the amount of pension paid.

On 17 October 1995 an Authorised Review Officer (ARO) affirmed the delegate's original decision. Mrs Montgomery went to the SSAT which on 19 February 1996 set aside the ARO's decision and decided she was eligible for rental assistance from the time of her original application on or about 24 July 1995.

The DSS appealed to the AAT on 19 March 1996.

Legislation

The case turned on 3 sections of the Act: ss.13, 1094-D1 and 1147. A person is entitled to rental assistance if the qualifications set out in s.1064-D1 of the Act are met. The section states:

> 'An additional amount to help cover the cost of rent is to be added to a person's maximum basic rate if:
>
> (a) the person is not an ineligible homeowner; and . . .
>
> (c) the person pays, or is liable to pay, rent (other than Government) rent: and
>
> (d) the rent is payable at a rate of more than the rent threshold rate; and
>
> (e) the person is in Australia; and
>
> (f) either:
>
> (i) neither the person nor the person's partner is qualified for additional family payment for a dependent child of the person; or
>
> (ii) the person is a member of an illness separated or respite care couple or temporarily separated couple and is the partner of the person who is receiving additional family payment.'

The DSS conceded the respondent satisfied elements (a), (c), (e) and (f)(ii) of the section but did not satisfy element (d).