bly the lesser matter to be made out that the reason was not within the person's control'. (Reasons, p.16.)

The Court considered that to forget an appointment was something that was within a person's control.

The meaning of 'reasonably foreseeable'

The term 'reasonably foreseeable' requires an objective assessment of the relevant facts in relation to a particular person with that person's health, knowledge and background. The Court said that the AAT had erred in concluding that as Ferguson had forgotten the appointment it was not reasonably foreseeable by him. This did not involve an objective assessment of the circumstances which prevented him from complying. It was reasonably foreseeable that he may forget, that is why he had placed the letter on his refrigerator door. It was also reasonably foreseeable that, in going to Western Australia, Ferguson would be unable to attend the interview.

When is a person taking reasonable steps to comply?

Just because there is a failure to comply which is within a person's control and/or is reasonably foreseeable by them, it does not necessarily follow that the person is not taking reasonable steps to comply. Section 45(5)(b) poses a wider question as to the conduct of the person in relation to the CMAA, which does not confine itself to the particular failure. Whether the person is taking reasonable steps depends on the person's attitude to performance of the terms of the agreement, attendances on other occasions, attempts to seek work and the range of information. That decision was not addressed by the AAT in Ferguson's case. Thus the Court remitted the matter to the AAT to determine whether Ferguson was taking reasonable steps to comply with the terms of his CMAA, as required by s.45(5)(b).

The relationship between the *Employment Services Act* and the *Social Security Act*

The Court noted that the consequences of a person not being qualified for newstart allowance because of the operation of s.45 of the *Employment Services Act 1994*, are set out at ss.608, 626 and 630C of the *Social Security Act 1991*. Those sections provide that the allowance will not be payable for an activity test deferment period and set out the length of such a period. Although s.630B provides for the implementation of an activity test deferment period by way of written notice from the Secretary, that process was not followed in this case. Instead the benefit was cancelled under s.660I of the *Social Security Act*. The Court observed, without having to decide the matter, that the structure of the provisions seems to contemplate a period of non-entitlement to payment by way of suspension, rather than total loss of benefit by way of cancellation.

Formal decision

The appeal was allowed and the application remitted to the AAT for further consideration in accordance with the Court's reasons.

[A.T.]

SSAT decisions

Age pension: valuation of assets — granny flat interest

A and Secretary to the DSS

Decided: 30 May 1997

A owned farming property consisting of two allotments (hereafter referred to as 1 and 2). His principal home was located on allotment 2. In 1994, A transferred his interest in allotment 1 to his son, by way of a transfer in which the consideration was expressed to be A's desire to transfer the property to his son. Evidence was given however, that A's son had worked for many years on the farm for no wages, and that he had been unwilling to continue working the farm without some guarantee of ownership in the farm's assets. A gave evidence that the transfer occurred because, without his son, the farm would have to be sold and the underlying consideration was the wages his son had forgone over the years.

Allotment 2 was transferred to A's son and his son's wife as trustees of a family trust in 1996, by way of agreement entered into on 18 January 1996. The agreement was subject to A being granted a right to reside in the farmhouse for life. The purchase price of $87,000 was based on the presupposition that the value of the granny flat interest was $172,000. This initial agreement was subsequently rescinded and replaced by another agreement entered into on 10 April 1996. A made an application for age pension on 23 January 1996.

The 1994 transaction

In relation to the transfer of allotment 1, the SSAT felt unable to give a value to the potential claim by A's son for unpaid wages. Any claim prior to May 1988 would have been statute barred. As there was insufficient information about the amount involved after that date, it could not find that there had been adequate consideration for the transfer. It considered that such information needed to be obtained, and if the value of the allotment exceeded the value of the potential claim for unpaid wages after May 1988 the excess amount should be maintained as a disposal of an asset.

When must payability of a pension be assessed?

In relation to the 1996 transaction, the first issue which the SSAT considered was at what point A's eligibility for age pension should be assessed, given the changes which had occurred in relation to the contractual arrangements relating to allotment 2. The SSAT noted that the *Social Security Act 1991* allows for a person's provisional commencement date to be up to 3 months after the date on which they lodge a claim for age pension if they qualify for the pension within that period. There is no similar provision relating to payability however, and the SSAT concluded that it had to consider whether age pension was payable to A as at the date he made his claim and not some later date. On that date the contract of 18 January 1996 was on foot, it had not yet been rescinded, and the effect of the contract entered into on 10 April 1996 could not be taken into account.

When did the 1996 transaction take effect?

The DSS argued that the land in question remained the asset of A until its transfer to the trustees of the family trust was registered. The evidence showed that this process was still in train. A argued that the land became an asset of the family trust on the signing of the agreement.

The SSAT accepted that it is the equitable or beneficial interest rather than the legal interest, which should be considered under the assets test. The beneficial

ownership passed on the signing of the contract on 18 January 1996. Allotment 2 was, therefore, to be treated as an asset in the hands of the family trust from that date, although the debt to A under the contract was to be maintained as an asset in A's hands from the same date. If the value of the debt was less then the value of the interest disposed of to the trustees, then the difference would need to be treated as a disposal of an asset under ss.1123 to 1124A of the Act.

Valuing the granny flat interest

The agreement of 18 January 1996 created a right to reside in the farmhouse for life. This met the definition of a granny flat interest set out in s.12A(2) of the Act. Under s.1118(1)(ga) this interest is an exempt asset and its value is not taken into account in applying the assets test. However the value of the rest of the property had to be taken into account. Section 1147(1C) provides for a method of valuing a granny flat interest, being the total amount paid or agreed to be paid for the resident's right to live in the granny flat. Here A was in effect retaining his right to live at the farmhouse rather than acquiring it. The amount being paid for the interest was in fact nil. The SSAT instead applied s.1147(1D) which enables the Secretary to value a granny flat interest at an alternative amount to that being paid, if the Secretary is satisfied that there is a special reason in any particular case. The SSAT considered that if the Department were forced to treat the granny flat interest as having a nil value this would create a nonsense and this was in itself a special reason to justify the use of the discretion set out in s.1147(1D).

The next issue was to consider the value to be attributed to the granny flat interest. The DSS used guidelines based on actuarial tables setting out life expectancies in order to determine the value of the life interest. Although the SSAT considered the policy to be lawful, it did not consider the departmental guidelines should be applied in A's case. Those guidelines were appropriate to the types of arrangements originally envisaged by the granny flat provisions contained in s.1147, that is arrangements whereby elderly move to bungalows or units in a family member's backyard, or extend or build at their own home to be near family members who can help care for them. That was not the case here. Because the contract was not an 'arm's length' transaction, the SSAT also did not accept the value of the interest as set out in the agreement of $172,000, which was said to be based on more up to date actuarial tables. Instead the SSAT directed the DSS to obtain an actuarial valuation of the granny flat interest.

[A.T.]

Background

Changes to debt recovery

There are further significant changes due to come into effect in relation to the raising and recovery of debts from 1 October 1997. In particular, there will be legislative authority to raise debts in a far greater range of circumstances than is presently the case. In summary:

- a recoverable debt will exist where a person has been paid and they were either not qualified *or* the amount was not payable (s.1223(1));
- a recoverable debt will exist where a person has received more than their entitlement, regardless of the reason for the overpayment (s.1223(5));
- a debt may still be waived if it was paid to a recipient as a result of administrative error, but this will not apply if the DSS raises the debt within 6 weeks of the first payment that caused the debt or the end of any notification period, whichever is the later (s.1237A(1A));
- a debt can only be written off if the debt is irrecoverable at law, the debtor has no capacity to repay, the debtor's whereabouts are unknown, or the debtor is not receiving social security payments and it is not cost effective to take action to recover the debt (s.1236(1A)).

Section 1223 as amended only applies to amounts paid after 1 October 1997, but s.1237A(1A) applies to debts arising before, on or after that date. The amended write-off provisions will apply in relation to debts arising on or after 1 October 1997, and any amounts still outstanding if the debt arose before that date.

The amending legislation also contains transitional provisions which require the new provisions to be applied to cases already in the course of review proceedings.

[A.T.]

AUSTUDY update

Some of the departmental practices relating to the administration of the actual means test in 1997 have now been given legislative backing with the introduction of amendments to the AUSTUDY Regulations in June. The amendments operate retrospectively from 1 January 1997, and involve the following.

1. Definitions for key terms are included, 'net rental property loss', 'rental property', 'business', 'business activity', and 'interest' in relation to a trust.
2. Where a person is primarily a wage and salary earner but claims a tax deduction for a business loss they will be a designated parent, spouse or student. However, this will not include a loss which consists only of a net rental property loss.
3. The actual means of a designated parent, spouse or student does not include expenditure:
   - relating to an exchange of assets (although the transaction costs of the sale and purchase of assets are not exempted);
   - to acquire or modify property used to assist a family member with a disability;
   - of a loan taken out to purchase the principal residence, an interest in land, or a car, aircraft or watercraft (however, repayments of principal and interest made during the year will be assessed);
   - to repay the principal or interest in relation to money borrowed for any other purpose (although the actual expenditure of the loan money used to acquire an item will be taken into account at the point of expenditure);
   - from an amount of AUSTUDY or financial supplement to which the parent or a family member may be entitled;
   - from the income of a business activity of the parent or a family member (being a business in which the person is engaged for at least 17.5 hours a week);
   - from any pay and allowances mentioned in s.23(s) of the *Income Tax Assessment Act 1936* up to $6000 (Reserve Defence Force income);