(a) section 1302A of this Act applies to a notice of a decision under this Act; or

(b) sections 28A and 29 of the *Acts Interpretation Act 1901* apply to a notice under this Act;

section 1302A applies, or sections 28A and 29 apply, to the notice even if the Secretary is satisfied that the person did not actually receive the notice.'

The DSS argued that s.1302A(2) had been met because the notice of 25 August 1995 had been properly addressed, prepaid and posted, and that s.1302A(2) was not limited by s.1302A(1). It was also argued that s.1302A(1) gave the Secretary a choice between either a person's last known business or last known residential address when effecting notice.

Mangano argued that he had provided his residential address but it had not been placed on the DSS's computer records, and that his enquiries relating to age pension, following the decision to reject his first claim, should be treated as requests for review of that decision.

Correct address for notification purposes

The first issue before the AAT was whether the notice of decision should have been sent to Mangano's last known business address, last known residential address, or the last address provided by Mangano. The evidence established that Mangano continued to operate the business and receive departmental mail at that address. The AAT determined that s.1302A(1)(c) enabled the Secretary to send a notice to either the last known business or last known residential address.

Review of original decision

The AAT noted that the Secretary may review a decision if there is sufficient reason for so doing under s.1239(1). In the circumstances of Mangano's case the Tribunal proposed to exercise that power. This decision was reached on the basis that the DSS could have delayed making a decision about Mangano's claim until he had provided evidence of his income, and could have more actively pursued that information from Mangano. In addition, the enquiries made by Mangano about the outcome of his pension claim could have been treated as a request for review under s.1240(1) of the Act.

Formal decision

The decision of the SSAT was affirmed.

[A.T.]

[Editor's note: Section 1302A(1)(c) was amended with effect from 29 September 1995. The words 'address of a place of residence or business' have been omitted and substituted with 'postal address'.]

Student Assistance Decisions

AUSTUDY: discounting business assets

A. & Z. OVARI and SECRETARY TO THE DEETYA (No. 11973)

Decided: 23 June 1997 by W.H. Eyre and I.B. Gration.

The DEETYA rejected Attila and Zoltan Ovari's claims for AUSTUDY for 1996 on the basis that the family's assets exceeded the allowable maximum of $393,750 in value. The Ovari family's assets included business assets relating to a company named AGAZO International, which was operated as a partnership involving Mr and Mrs Ovari and their two children. The activities of the business included product distribution on an international basis, consultancy services and business property management. The major assets in contention were the three rental properties managed by AGAZO International.

The legislation

Regulation 19 of the AUSTUDY Regulations provides:

'(2) Fifty per cent of a person's interest in the value of a business is disregarded if the person, or his or her spouse, is wholly or mainly engaged in the business and the business:

(a) is owned by the person; or

(b) is a partnership in which the person is a partner; or

(c) is a company in which the person has shares; or

(d) is a trust.

(3) The discounting by 50% in subregulation (2) does not apply to . . .

(d) assets leased out by the business, unless leasing is a major activity of the business . . . '

Meaning of the term 'wholly or mainly engaged in the business'

The first issue for the Tribunal to determine was whether the Ovaris were entitled to the concession set out in regulation 19 in relation to business assets. This required the AAT to consider whether Mr and Mrs Ovari, and their son Zoltan, who worked in the business, were wholly or mainly engaged in AGAZO International.

The AAT looked the Departmental Policy Manual and considered that it did not accurately reflect the requirements set out in the Regulations. The Guide stated at reference 7.8.3.6:

'The business/farm must be the principal place of employment of at least one assessable person, normally because the person works for an average of no less than 17.5 hours per week in the business/farm.'

The AAT commented that the figure of 17.5 hours per week had no statutory basis. The question to be answered does not depend on finding a particular number of hours per week spent on the business. Time involvement and a comparison with the person's other activities is required. It was significant that the test had formerly been whether a person was 'substantially' engaged in the business. The current test had much stricter requirements.

The AAT found that Mr and Mrs Ovari had resigned from their previous employment to become wholly engaged in AGAZO International. In relation to their son, Zoltan, evidence was given that Zoltan managed the rental properties. The AAT did not consider that a full-time tertiary student could be regarded as being 'mainly engaged' in another activity, namely business. Nor did it accept that the management of 3 rental properties was likely to be greater than the time and effort involved in being a full-time student.

In any event, the AAT found that for the purposes of regulation 19, it was only Mr and Mrs Ovari who had an interest in the value of AGAZO International of 50% each, despite evidence regarding the active participation of Zoltan, and to a lesser extent Attila, and drawings made in the children's favour.

Was leasing a major activity of the business?

In order for the interest of Mr and Mrs Ovari in the 3 rental properties to be disregarded, leasing had to be a major

activity of the business. The Departmental Policy Manual also stated :

> 'The 50% discount does not apply to business/farm assets in the form of:
>
> - rental and investments, property, other investments
> - assets not used for the principal activity of the business/farm (for example, assets leased out to others unless leasing is a major activity).'

The AAT pointed out that the Regulations do not refer to assets having to be used for the principal activity of the business/farm. The DEETYA argued that the principal activity of AGAZO International was product distribution, that the leasing of the 3 properties was merely a form of investment and therefore could not properly be considered as business assets. The AAT indicated that it was not necessary to determine whether the renting of the properties was properly to be considered as a business, as regulation 19 required only that the leasing be a major activity of the business. Although it did not need to be the larger activity if there were a number of activities undertaken by a business, the AAT considered that rental management of 3 properties was something that would require modest time involvement, and when compared with the greater activity of product distribution, leasing could not be said to be the major activity. The only activity which could be said to be major in the case of AGAZO International was the product distribution. This meant that the 50% discount could not apply to Mr and Mrs Ovari's interest in the 3 rental properties.

The AAT also said that even if the leasing activity were to be regarded as a separate business, neither Mr, Mrs or Zoltan Ovari were wholly or mainly engaged in such business, and therefore their interest could not be discounted.

The AAT then went on to consider the value of all assets owned by the Ovaris and concluded that their total assets amounted to $400,613.31.

Formal decision

Neither Attila nor Zoltan Ovari were entitled to AUSTUDY in 1996 as the family's assets exceeded $393,750.

[A.T.]

Federal Court

Garnishee action: power of SSAT, requirement to afford natural justice

WALKER v SECRETARY TO THE DSS
(Federal Court of Australia)

Decided: 3 July 1997 by Burchett, Drummond and Mansfield JJ.

History of appeal

Walker had an existing debt to the DSS of $20,287 being moneys fraudulently obtained during the years 1984 to 1987. In 1988, he applied for sickness benefits but was rejected. On appeal it was determined that Walker was entitled to sickness benefits for the period October 1988 to April 1989 of $2134.40. On 5 April 1995 this amount was paid into Walker's bank account. On the same date, the DSS issued to Walker's bank a garnishee notice under s.1233(1) of the *Social Security Act 1991* (the Act), in order to recover this sum toward repayment of the debt Walker owed to the DSS. Walker sought review of the decision to issue the garnishee notice.

After an unsuccessful review by an authorised review officer, Walker applied to the SSAT complaining that he had been denied natural justice because the DSS had failed to notify him of its intention to issue the notice before doing so, thereby depriving him of the opportunity to address the DSS on a matter relevant to its decision to take garnishee action, namely, his financial situation. The SSAT considered that it had 'no power to direct that garnishee action proceed in a manner different from that manner in which the DSS proceeded to take' that action, and affirmed the decision to recover the sum of $2134.40. Subsequently the AAT took the view that neither the SSAT nor the AAT had power to review the decision to recover the debt by way of garnishee action and also affirmed the decision.

Walker appealed to a single judge of the Federal Court. The primary judge accepted that the AAT had fallen into error in failing to recognise that the SSAT had limited jurisdiction to review the decision to garnishee, but that the AAT was correct in holding that the SSAT 'had no power or any discretion to enable it to change' that decision because of the limitations placed on the SSAT by s.1253(4)(f). There was thus no point in remitting the matter back to the AAT because the limitations placed by s.1253(4) on the SSAT's power prevented it and the AAT from correcting any error complained of by Walker.

The issues

Walker then appealed to the Full Court. He again argued that he had been denied natural justice and that the DSS had failed to take into account relevant considerations. The appeal raised a question as to the power of the SSAT in reviewing decisions of the Secretary to the DSS relating to matters falling within s.1253 of the Act. That section provides in part:

> '1253.(1) If a person applies to the Social Security Appeals Tribunal (SSAT) for review of a decision (other than a decision referred to in subsection (7)), the Tribunal must:
>
> (a) affirm the decision; or
>
> (b) vary the decision; or
>
> (c) set the decision aside and:
>
> (i) substitute a new decision; or
>
> (ii) send the matter back to the Secretary for reconsideration in accordance with any directions or recommendations of the Tribunal.
>
> 1253.(3) Subject to subsection (4), the Social Security Appeals Tribunal may, for the purposes of reviewing a decision under this Act, exercise all the powers and discretions that are conferred by this Act on the Secretary.
>
> 1253.(4) The reference in subsection (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); or . . .'

The power of the SSAT in reviewing a DSS decision to issue a garnishee notice

The majority of the Court read s.1254(4):

> 'as permitting the SSAT to review decisions within s.1253(4) for any error of fact or law, but preventing the SSAT, even where it identifies error in such a decision, from making any decision of its own on the merits. That is the sole province of the Secretary. But that the SSAT cannot do more than set aside an erroneous DSS decision within s.1253(4) and remit it to the DSS for reconsideration does not absolve the SSAT from examining the DSS decision for error. It follows that the only orders the SSAT may make on the review it can conduct of decisions within s.1253(4) are either to affirm the decision or to set it aside and, if it sets the decision aside to remit the decision for recon-