

- to affirm the SSAT decision to recover this debt.

In relation to the second decision the AAT decided:

- to vary the SSAT decision to that there was no additional parenting allowance debt; and
- to affirm the SSAT decision to cancel payment of additional parenting allowance.

[G.H.]

Disability support pension: hardship provisions, unrealisable assets

**McCORMACK AND
McCORMACK and SECRETARY
TO THE DSS
(No. 12076)**

Decided: 31 July 1997 by W.H. Eyre.

The issue

The sole issue for consideration by the AAT was whether a property 'Walwa' owned by Mr and Mrs McCormack was an 'unrealisable asset' for the purpose of disability support pension (DSP), and additional parenting allowance respectively.

Background

The McCormacks had operated a successful sheep stud business in the ACT for many years. In 1986 the McCormacks sold other properties they owned and purchased 'Walwa' which was then debt free. Subsequently another property purchased in 1990 had to be sold at considerable loss after falls in the wool price and drought. Mr McCormack had to cease work in 1992 due to spinal cord damage. In 1993 Ovine Johne's disease was confirmed on the Walwa property causing the cessation of stud activity, and forcing the slaughter of many sheep and, in turn, considerable loss in annual farm income compared to previous levels.

Walwa subsequently was used as security for a term loan and overdraft from Westpac, the total of which was \$1.72 million in May 1997, and in addition to which \$155,000 was owed to Elders. The amounts borrowed from Westpac had increased even after the respective applica-

tions by the McCormacks had been lodged. The Australian Valuation Office (AVO) had, in July 1996, valued Walwa at \$2.8 million including \$300,000 for the house and curtilage. Mr McCormack gave evidence to the AAT that he did not believe the property could be sold, and would in any case fetch no more than \$1.5 to \$2 million.

The law

The financial hardship rules contained in s.1131 of the *Social Security Act 1991* (the Act) allow access to a social security benefit to a person who would otherwise be unable to receive the benefit due to the application of the assets test, where 'the person or the person's partner has an unrealisable asset'. If unrealisable, the value of the asset is to be discounted in determining whether a social security benefit is payable. The term 'unrealisable asset' is defined in s.11 of the Act which provides:

'(12) An asset of a person is an unrealisable asset if:

(a) the person cannot sell or realise the asset; and

(b) the person cannot use the asset as a security for borrowing.

(13) For the purpose of the application of this Act to a social security pension, an asset of a person is also an unrealisable asset if:

(a) the person could not reasonably be expected to sell or realise the asset; and

(b) the person could not reasonably be expected to use the asset as a security for borrowing.'

The AAT was required to consider the application of s.11(12) and (13) in relation to Walwa.

Hardship

The AAT accepted that in the absence of other evidence, the AVO valuation should be accepted as the true market value of Walwa. It found that at the dates of the respective applications by the McCormacks, the net value of Walwa was well above the appropriate asset test limits for parenting allowance and DSP purposes.

The AAT considered whether the notion of 'reasonableness' should be implied into s.11(12) of the Act, concluding that the difference between s.11(12) and (13) is explicable in that:

'subsection (13) allows for factors more particular to the person to be taken into account ... whereas subsection (12) contemplates that only factors relating to the asset itself are to be considered in determining whether the person can sell it or use it as security for borrowing.'

(Reasons, para. 17)

The AAT added that:

'where the circumstances which pertain are so far beyond what one might reasonably expect when trying to sell the asset or to borrow against it that they can be seen as very unfair to the asset owner or unconscionable so far as the potential purchaser or lender is concerned, [then] it can properly be said, the asset is "unrealisable" within subsection (12).'

(Reasons, para. 17)

Noting the value of the Walwa property, and the existing loan arrangement with Westpac, the AAT concluded that Walwa is not an 'unrealisable asset' as it was able to be used as security for borrowing. The evidence of this lay in the fact that borrowing through Westpac against that security, had continued. The AAT commented that the purpose of borrowing (in this case to meet, in essence, the day-to-day living expenses of the McCormacks) may be relevant to whether a person should reasonably be expected to use the asset as security, but added that:

'Regard must however be had to the whole purpose of an assets test and its basis that those who may meet income criteria ... but have assets should be required to use those assets for their support before taxpayer funded assistance is to be made available.'

(Reasons, para. 37)

Formal decision

The AAT affirmed the decisions under review.

[P.A.S.]

Overpayment of DSP; recipient in gaol; waiver of debt

**SECRETARY TO THE DSS AND
PERKICH
(No. 12148)**

Decided: 22 August 1997 by J Dwyer.

Perkich received disability support pension (DSP) during a period of imprisonment in 1994. He had told prison authorities when he was gaoled that he was on a pension but he did not tell the DSS. His bank account was accessed by another person during his imprisonment. The recovery of the debt raised by the DSS largely had been effected by the date of the AAT hearing. At the previous levels of review (authorised review officer and SSAT) the existence of the debt and the decision to recover it, had been affirmed.

Perkich told the Tribunal he believed pension payments would stop when he was imprisoned because he had told prison authorities he was receiving the DSP. Perkich suffered a rare nervous disorder which required high doses of medication so that his judgement and function was compromised at the time he was imprisoned. He was not expecting a custodial sentence when it was imposed, and this further added to levels of anxiety at the time.

Perkich agreed that he had received notices from time to time while in receipt of the DSP prior to imprisonment, and he accepted that such notices contained the necessary information requiring him to notify within 14 days if he went to gaol.

When he was in gaol his bank account was accessed by a friend, to whom he had given withdrawal slips. This was confirmed by evidence from his bank.

Withholdings to recover the debt had been in place from the end of 1994. Perkich requested a review of the decision to recover the overpayment in 1996. In the course of that review it was found that the amount of the debt had been miscalculated, and it was increased. Despite a favourable social work report compiled by a DSS social worker at the time of the request for review, the decision to continue to recover the debt remained unchanged.

The issues

The issues were whether there was an overpayment that was a recoverable debt under the *Social Security Act* (the Act), and whether any part of the debt should be written off or waived.

The legislation

Section 1224(1) of the Act provides that if an amount is paid to a person because the person failed or omitted to comply with a provision of the Act, there will be a debt recoverable by the Commonwealth. Section 132(1) provides for the giving of notice to a person in receipt of DSP requiring the person to advise of certain events.

Section 1237AAD allows for waiver of a debt in special circumstances. This provision was introduced into the Act on 1 January 1996, at which time \$1448 of Perkich's debt, which through various recalculations was ultimately found to total \$2332, remained outstanding.

Is there a debt

As Perkich was at all times qualified for DSP, there could only be a debt in this case if there had been a failure or omission to comply with a provision of the Act. That failure was not notifying being in gaol.

The Tribunal considered the analysis of the equivalent provisions to subsections 132(1) and (5) by the President, Mathews J in *Vitalone and Secretary to the DSS* 38 ALD 169. Social work evidence at the time of imprisonment was suggestive of the possibility of relying on 'reasonable excuse' within the meaning of subsection 132(5), if the interpretation by Mathews J in *Vitalone* of the interaction between subsections (1) and (5) were followed.

Perkich was given the opportunity to consider whether he wished to argue that no debt arose, on the basis of 'reasonable excuse'. Perkich elected not to pursue that issue and chose to rely only on the waiver provisions. His choice appeared to have been motivated by a desire to have the matter resolved speedily. Despite there being no need to address the issue of the existence of a debt further, the AAT did recommend that the present uncertainty in the law in regard to notices under s.132 should be clarified by legislative amendment: Reasons : para. 20.

Special circumstances

The Tribunal found that whilst Perkich did fail to comply with a provision of the Act he did not do so knowingly, as he did not appreciate that he had to personally notify the DSS. Hence it was open for the Tribunal to consider the application of the 'special circumstances' provisions to that part of the debt that remained outstanding when he sought review in 1996 (*Lee v Secretary to the DSS* (1996) 139 ALR 57).

The special circumstances which the Tribunal found to exist were:

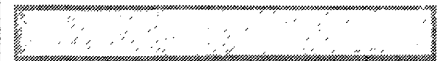
- **Health:** Perkich was found to have severe and unusual health problems that had been difficult to diagnose and occasioned him great stress. Furthermore he had a borderline personality disorder and dysfunctionality in family and social life.
- **Social circumstances:** Because of assaults on him where he had previously lived he was assisted to relocate by his counsellor, but to an area where he has no counselling support. The difficult circumstances of his family life were again referred to under this heading.
- **Circumstances surrounding the overpayment:** Reference was here made to Perkich's belief that prison authorities would pass on the information. The AAT also accepted the evidence that he had not had the benefit of the larger part of the moneys received, because a friend had made the withdrawals. A restraining order against Perkich prevented him approaching that person about the moneys.

- **Financial circumstances:** These are best described in the Tribunal's words: 'I have rarely seen a person whose financial circumstances were as desperate as those of Mr Perkich.'

Formal decision

The AAT varied the decision under review to provide that whilst there was a debt due to the Commonwealth, so much of the debt as was outstanding at the time of the social work report was prepared in March 1996, should be waived on the grounds of special circumstances so that Perkich was to be refunded amounts recovered since that time, and be relieved of the obligation to pay the remaining amount unpaid at the date of delivery of the AAT decision.

[M.C.]



Newstart allowance: breach of CMAA

SECRETARY TO THE DEETYA AND HALL
(No. 11908)

Decided: 23 April 1997 by A.M. Blow.

The facts

Hall received newstart allowance (NSA). He entered a case management activity agreement (CMAA) on 13 October 1995. In November 1995, he was offered a placement which entailed attending a training course and working for a company named Tasmanian Devil Jet Pty Ltd. Hall initially accepted the offer of the placement. However, he later changed his mind and did not attend any part of the training course. Nor did he attend the company premises to commence work. The DSS decided that Hall had failed to take reasonable steps to comply with his CMAA, and cancelled his NSA. The SSAT set aside the DEETYA decision and substituted its decision that Hall's NSA should not have been cancelled.

The Act

Section 45(5) of the *Employment Services Act 1994* requires that to be qualified for newstart allowance a person must satisfy the Employment Secretary that they are taking reasonable steps to comply with the terms of their CMAA. Pursuant to s.39(2)(a) and (b) of that Act, a CMAA is taken to include terms requiring a person to: