charged on her compliance with the reparation order. Even if the judge had exceeded his powers in making the orders he did, the AAT rejected the DSS submission that the order would be void. It would merely be voidable by a court or appeal body. Wornes's case was not the subject of an appeal.

As a result the DSS had only the power to pursue recovery of the overpayment for the earlier period, which was not the subject of the prosecution, and which, by consent, was reduced to July 1974 to March 1979. From this sum an amount of $492.80 was to be deducted, being the amount paid by Wornes to the Commonwealth in excess of the requirements of the reparation order.

Formal decision

The AAT affirmed the decision under review.

[A.T.]

Newstart allowance: loss of eligibility but not payability

SECRETARY TO THE DSS and FARRELL
(No. 12308)

Decided: 17 October 1997 by H.E. Hallowes.

The SSAT had decided that although Farrell had delayed entering into a case management agreement (CMAA) under the *Employment Services Act* (the ESA), the decision to cancel Farrell's newstart allowance (NSA) should be set aside with the direction that payment should continue until written notice was given to Farrell of the commencement of an activity test deferment period.

The DSS sought review of that decision on the basis that the SSAT had wrongly decided that allowance was still payable despite Farrell's loss of qualification.

Background

Farrell was in case management when he was sent letters asking him to attend for interviews to complete a CMAA. These were notices under s.38(5) of the ESA. Farrell failed to attend the interviews.

Farrell did not attend the hearing either before the SSAT or the AAT. The SSAT found that he had delayed entering

into a CMAA. The AAT in this review was also to so find. However, the essential issues before the Tribunal were the complex legislative provisions that co-exist in the ESA and *Social Security Act 1991* (the Act), and govern the case management systems through the two Acts — the interpretation of which has been assisted by the recent decisions of the Federal Court in *Secretary to the DEETYA v O'Connell* (1997) 2(10) *SSR* 143 and *Secretary to the DEETYA v Ferguson* (1997) 2(10) *SSR* 144.

The issues

The issues before the AAT were:
- the application of ss.44 and 45 of ESA and s.660I of the Act, under which provision a person's NSA may be cancelled;
- whether s.41 of the Act could apply to the cancellation of the NSA.

The law

In the original decision the DSS delegate had applied s.38 and subsection 45(5) of the ESA, and ss.607(1) and 660I of the Act. The AAT observed that no time had been allowed for Farrell to exercise his rights for review under s.44(1)(b) of the ESA.

As referred to above, the SSAT in their decision had set aside the original decision to cancel newstart allowance, saying that payment should be resumed until the DSS gave written notice of an activity test deferment period (ss.625 and 630B of the Act).

The SSAT was of the view that s.660I of the Act was not available to authorise cancellation of NSA, as that section provides for cancellation where the DSS is satisfied that an allowance is not payable. Section 660I provides:

'If the Secretary is satisfied that a newstart allowance is being paid to a person to whom it is not or was not payable under this Act, the Secretary is to determine that the allowance is to be cancelled or suspended.'

Section 45(5) of the ESA, on the other hand addresses 'qualification' not payability. The SSAT considered that s.41 of the Act did not operate to make a link between qualification and payability issues, as s.41, according to the SSAT's interpretation, only applies in relation to the grant of an allowance, not its cancellation.

Section 41 *Social Security Act*

The analysis of the function of s.41 of the Act by the SSAT is set out at some length in the AAT reasons. According to the SSAT, while argument could be put that s.41 could be read to provide for non-payability wherever there is non-qualification (that is whether the circumstances were of granting, continuing or ceasing

an allowance), the use of the word 'before' limited s.41 to the grant of an allowance. The SSAT held that the cancellation was unsustainable (even though Farrell was not qualified) without the necessary step of the imposition of a deferment period for breach of the activity test, mandatory under s.630B.

In argument before the AAT it was put by the DSS that the proper section to apply to the facts was s.44 rather than s.45 of the Act, and the Tribunal accepted the correctness of this (applying *O'Connell*). Though no time had been allowed to Farrell to exercise his rights, the AAT found that s.44 had sufficiently been complied with.

On the proper application of s.41 of the Act, the Tribunal found, contrary to the SSAT's expressed view, that 'section 41 has a broader focus than that given to it by the SSAT': Reasons, para. 18.

The AAT found however, that s.41 of the Act provides for:

'payment of social security payment to a person who is qualified for the payment when no provision provides it is not payable. There are two hurdles to entitlement. "Before" means in front of or preceding in time. Mr Farrell was not qualified for NSA. His social security payment is not payable to him and under s.660I of the *Social Security Act* his NSA should be cancelled or suspended.'

(Reasons, para. 18)

Formal decision

The AAT set aside the decision under review. The matter was remitted to the DSS to reconsider on the basis that Farrell was not qualified for NSA and that payment should be cancelled or suspended under s.660I of the *Social Security Act*.

[M.C.]

[Contributor's Note: It is unfortunate that the reasoning process of the AAT is not more transparent in reaching this interpretation of the operation of s.41 in the Act. While the changes to s.1223 of the Act that came into effect in October 1997 remove some of the issues that arose in the past in regard to s.41, cases will still arise where the interpretation of the section is important. It will be interesting to see if *Farrell* settles the law on this point.]