finds that an error was committed by Mr Varricchio.'

(Reasons, para. 27)

On the other hand it considered that because Mr Varricchio's answer

'did not in fact answer the question, and should have created a doubt in the mind of the respondent such as to cause inquiry as to the exact nature of the pension or allowance [an administrative error] was made in so far as there was a failure to verify the assumption made on the basis of the information provided by [Mr Varricchio] in the relevant answer.'

(Reasons, para. 26)

The AAT could not waive the debt under s.289(1) as the debt was not due solely to administrative error, and it did not find any circumstances sufficiently special to waive the debt under s.290C of the Act.

Formal decision

The AAT affirmed the decision under review.

[K.deH.]

Federal Court

Lump sum compensation payment: income

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

Decided: 3 October 1997 by Foster J.

The DSS appealed to the Federal Court against a decision of the AAT that the sum of $58,775.00 received by Cunnaan as a result of a workers compensation claim was not a lump sum compensation payment. Cunnaan lodged a claim for workers compensation because of a back condition. She had not worked since 18 August 1988, and was paid a social security benefit from 13 September 1988. Her claim was settled and an award was made by the Compensation Court (NSW) that a total amount of $58,775.00 was payable to her. That sum was made up of $2500 of weekly compensation payments from August 1988 to March 1994 (the date of settlement), $31,275 for permanent impairment of the back and legs, $15,000 for pain and suffering, $8725 in interest and $10,000 for medical expenses.

The law

Section 1165(1) of the *Social Security Act 1991* (the Act) provides that where a person is qualified for a 'compensation affected payment' and receives a lump sum compensation payment, the benefit will not be payable for the 'lump sum preclusion period'. The term 'compensation' is defined in s. 17(2) and includes:

'(c) a payment (with or without admission of liability) in settlement of a claim for damages or a claim under such an insurance scheme,

...

(e) made wholly or partly in respect of loss earnings or lost capacity to earn.'

Section 17(4A) provides that a payment of arrears of periodic compensation payments is not a lump sum compensation payment. Section 1165(4) sets out a formula by which a preclusion period is calculated, and it was accepted before the Court that if Cunnaan had received a lump sum compensation payment, the preclusion period had been correctly calculated. According to s.1184(1), the DSS has the discretion to treat the whole or part of the compensation payment as not having been made if it is appropriate to do so in the special circumstances of the case

The AAT's decision

The SSAT's decision was to apply a preclusion period of 52 weeks dating from the award of the compensation court. The AAT had first considered the payment of $2500 which represented $8.60 a week periodical compensation payments. It applied s.17(4A) of the Act, and found that this could not be a lump sum compensation payment, and should be excluded from the total amount received by Cunnaan under the Award. As the remaining amounts were not for lost earnings or lost capacity to earn, they did not fall under the definition of lump sum compensation payment.

Compensation or income

It had also been argued before the AAT in the alternative, that the amount received by Cunnaan should be classified as income pursuant to s.8(1) of the Act. The AAT followed an earlier AAT decision of *Hungerford and the Repatriation Commission* (1989) 21 ALD 568, in which it was decided that income must relate to gains derived by a person in consideration of personal exertion or other services, or the disposition of property.

Lump sum compensation

Foster J agreed that for a lump sum compensation payment to be subject to a preclusion period it must be made wholly or partly in respect of lost earnings or lost capacity to earn. The Court was satisfied that s.17(4A) should not be given the extended meaning given to it by the AAT. Foster J referred to the Explanatory Memorandum accompanying the Amendment to the Act inserting s.17(4A), and noted that the purpose of the provision was to ensure that where a lump sum payment was simply a total of previously unpaid periodic payments, it would not be characterised as a 'lump sum compensation payment'. According to the Court it was not intended that this section apply where there was a component of arrears of periodical payments in a compensation award. The payment should be characterised by the total sum payable, not the individual parts.

Foster J referred to an earlier Federal Court decision of *Secretary to the DSS* v *Banks* (1990) 23 FCR 416, and found that the Act was little different from when this decision had been made by the Federal Court. In that decision the Court had recorded that the purpose of the legislation was to prevent 'double dipping'. It was appropriate to apply the same reasoning in this case. If the lump sum was regarded as a whole, then the $2500 clearly related to lost earnings or lost capacity to earn, and thus the total sum should have been regarded as a 'lump sum compensation payment'.

Special circumstances

Because the AAT had not made any findings in relation to special circumstances, the Court simply noted that if the application of the law in this case resulted in genuine hardship then the provisions of s.1184 gave a discretion to alleviate that hardship.

Income

Foster J said that the AAT should not have followed *Hungerford* but rather *Read* v *The Commonwealth* (1988) 167 CLR 57. In that appeal Brennan J had considered the definition of *income* under the *Social Security Act 1947*, which according to the Court was indistinguishable from the definition in the present Act. In *Read* the Court had found that the

definition was couched in the widest terms, and this was to ensure that public expenditure was directed to those who stand in actual need of income support. The definition was wide enough to embrace receipts of a capital nature as well as income. Therefore the AAT had erred in following *Hungerford* and accepting a narrower definition.

Formal decision

The Federal Court set aside the decision of the AAT and remitted the matter back to the AAT for reconsideration.

[C. H.]

Overpayment: received in good faith

SECRETARY TO THE DEETYA v PRINCE
(Federal Court of Australia)

Decided: 21 November 1997 by Finn J.

The DEETYA appealed an AAT decision that the debt owed by Prince to the Commonwealth should be waived pursuant to s.289 of the *Student and Youth Assistance Act 1973*. This debt was incurred because Prince received AUSTUDY payments to which he was not entitled.

The law

Section 289 of the *Student and Youth Assistance Act* provides that the DEETYA must waive a debt to the Commonwealth if there was administrative error, and 'the person received in good faith the payment or payments that gave rise to the debt'.

Background

Prince received AUSTUDY payments in 1993. He took steps to cancel those payments on 22 December 1993 because he realised he would not be qualified to receive payments in 1994. The DEETYA continued to pay Prince to March 1994 in error. In May 1994 the DEETYA advised Prince that there was a debt which he must repay. Between December 1993 and February 1994 Prince was not aware that he was receiving the AUSTUDY payments. At some stage in February he became aware of the payments, and took steps to have them cancelled.

The AAT's decision

The AAT waived the debt because it found that there had been administrative error, and Prince had received the payments in good faith. The AAT interpreted 'received' as having occurred when the payments were made into Prince's account. The Tribunal found that the payments received up until February 1994 were received in good faith because Prince had been unaware that he was continuing to receive AUSTUDY payments. After Prince became aware that the payments were continuing, the AAT decided that, the fact that Prince had appropriated the moneys was only one of the factors to be taken into account to decide whether or not the money had been received in good faith. Other factors included his attempts to advise the DEETYA so that they would stop paying the money.

'Received in good faith'

Finn J found a clear and culpable error of law in the AAT's decision.

The AAT:

> 'correctly concluded that payments were "received" when they were available for Mr Prince's use and that occurred when they were deposited in his bank account. It likewise correctly noted that the formula "good faith" derives its meaning from its particular context.'

(Reasons, p.4)

In the Court's opinion the question of whether or not the payments were received in good faith was not answered by considering whether Prince acted in good faith towards the DEETYA. 'Its sole concern is with whether a particular state of affairs existed at the time a payment (or payments) is received': Reasons, p.4.

Finn J found that 'received in good faith' was concerned with a person's state of mind when they received the payments. If the person had reason to know that he or she was not entitled to the payment, then the person did not receive the payment in good faith. The person must believe that she or he is entitled to receive the payments.

Prince knew that he was not entitled to receive the AUSTUDY payments, and therefore it could not be said that he had received them in good faith. This was so even though for part of the period he was not aware that payments were being made. Prince was never able to assert that any payments that were made to him by mistake, were ones to which he believed he was entitled.

Formal decision

The Federal Court set aside the decision of the AAT and substituted its decision that the original decision to raise and recover the debt is to be affirmed.

[C.H.]

Overpayment: special circumstances and financial hardship

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

Decided: 16 March 1998 by French J.

Hales has been receiving the disability support pension (DSP) since 29 August 1991 for chronic fatigue syndrome. Her partner Reddy, commenced employment on 5 March 1994 receiving gross wages of $385.00 a week. Hales commenced working on 26 October 1995 receiving a gross weekly wage of $418.70. On 27 October 1995 Hales told the DSS that she and Reddy had commenced employment. She continued to receive the pension until 21 March 1996 when it was cancelled following a review of her medical condition.

Hales was overpaid DSP of $8740.90 and the DSS sought recovery of that amount. On review the SSAT agreed that Hales had been overpaid $8740.90, and that this was a debt to the Commonwealth. The SSAT decided that so much of the debt that had occurred after 27 October 1995 was attributable to departmental error and thus should be waived. Hales requested review by the AAT who decided that the total amount should be waived.

Notices

Hales received a letter from the DSS on 16 January 1993 telling her that she must inform the DSS within 14 days if her combined income exceeded $76.00 a week. She received a further letter dated 24 March 1993 to that affect, and in a letter dated 22 March 1993 Hales was asked to give the DSS her partner's tax file number. Hales complied with that request.

The AAT's decision

The AAT found that Hales had been overpaid $8740.90, and it was conceded by the DSS that the amount paid after 26 October 1995, $1839.60, should be waived because of administrative error and because Hales had received the payments in good faith. This matter was not disputed by the DSS before the Federal Court.

With respect to the balance of the overpayment of $6901.30, the AAT found that Hales had failed to comply with the notices she had received and had been overpaid DSP under s.1224(1) of the *Social Security Act 1991* (the Act).