into account irrelevant factors and had failed to take into account relevant factors such as the legal costs of Haidar at the hearing.

The adequacy of the reasons

The Court noted that the AAT was required to give adequate reasons and a failure to do so would constitute an error of law. However it noted:

> 'The reasons of the Tribunal should not be looked at pedantically nor should an attempt be made to find some lacuna in the reasons when overall the Tribunal has dealt with the substantial issue in the case'.

(Reasons, p.8)

The Court preferred to consider whether the AAT took into account irrelevant considerations, or came to an unreasonable decision rather than examining the reasoning process to see whether there was an error of law. Where the decision maker is exercising a discretion, it is difficult to argue that there is a question of law because the decision maker has placed undue weight on a relevant matter. There would be an error if the decision maker had failed to give weight to a relevant factor.

Irrelevant matters

Hill J noted that the AAT took into account 3 matters when exercising its discretion. The first of these was that the preclusion period had been served by Haidair and, if he was successful, the DSS would have to pay him a sum of money. The Court found that the requirement that the DSS might have to pay Haidar a sum of money was not a relevant matter. It accepted that it would have been relevant if Haidar had had to pay money to the DSS, but that was not the case here.

The second matter was the hardship and difficulties experienced by Haidar and his family before, during and after the preclusion period. According to Hill J these matters were relevant, although there may be some difficulty accepting that the period after the preclusion period was relevant.

The third matter the AAT had considered was Haidar's present circumstances, that is, his circumstances at the time of the AAT hearing. Haidar's circumstances had improved considerably and this seemed to be an important factor for the AAT.

Hill J noted that:

> 'The question whether the matter is indeed irrelevant must likewise be determined by reference to the subject matter, scope and purpose of the legislation, pursuant to which the discretion is conferred.'

(Reasons, p.12)

The Court referred to the legislative history of s.1184(1) and noted that there was an attempt to balance budgetary considerations against the interests of the social security recipient. The purpose of the legislation was to prevent a person receiving both social security benefits and compensation benefits at the same time. The legislature had been conscious of the possible harshness of the operation of the rules, and had provided for that harshness to be ameliorated by s.1184. The Court concluded that even where the preclusion period had finished, it could not be said that events at the time of the AAT hearing would necessarily be irrelevant. The AAT must take into accounts the facts as they exist at the time the matter is heard, to the extent they are relevant to the decision. The AAT is not limited to taking into account events which occurred at the time of the original decision. Even where a person's financial circumstances had improved because of the receipt of the lump sum, the decision maker could take into account the financial circumstances existing at the time of the decision. This was because those circumstances were relevant to whether or not a social security benefit should be paid. However, an event which occurred after the preclusion period which was wholly unrelated to the lump sum would not have significance.

> 'Events after the expiration of the ordained preclusion period could only have relevance as factors to be considered in the exercise of discretion if those facts in some way related to the events occurring during the preclusion period.'

(Reasons, p.14)

Haidar's financial situation had improved because following the preclusion period he was paid the sole parent pension and CDA. According to Hill J this was irrelevant given the legislative policy behind this part of the Act.

The hardship and difficulties suffered by Haidar and his family in the preclusion period were undoubtedly relevant.

Unreasonableness

Hill J noted that Haidar's circmstances were indeed special. The AAT recognised this and reduced the preclusion period. According to the Court, 'in the circumstances of the case that was a small reduction indeed': Reasons, p. 15. This did not suggest that the preclusion period should be reduced to nil, but rather that the preclusion period could be reduced to a range of weeks. The Court concluded that the AAT's decision was unreasonable.

Formal decision

The Federal Court allowed the appeal, set aside the AAT decision and remitted the matter back to a differently constituted Tribunal to be determined.

[C.H.]

FOI : 'Dob in' – reasonable expectation of confidentiality

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

Decided: 25 June 1997 by Heerey J.

Bartlett appealed to the Federal Court about a decision of the AAT concerned with release of documents under the *Freedom of Information Act* (the FOI Act). The document in question was a referral by the DSS to the Federal Police. It had been released to Bartlett with a number of deletions.

The law

Section 37(1)(b) of the FOI Act states that a document is to be exempt if its disclosure would or could reasonably be expected to enable a person to ascertain the existence or identity of a confidential source of information in relation to the enforcement or administration of the law.

The AAT decision

During the hearing, the document was presented to the AAT, and the contents of the document were discussed with the representative of the DSS whilst the applicant was absent from the hearing. The AAT later summarised in general terms the effect of the discussion.

The AAT decided that the document in question contained information which, if disclosed, could reasonably be expected to reveal to Bartlett the identity of the person who denounced him. The AAT found that even when confidentiality was not expressly agreed to by the person who gave the information, it could be implied by the type of information given (possible breaches of the law), that it was given under a pledge of confidentiality.

'A reasonable expectation'

Bartlett argued that the AAT had misconstrued s.37(1)(b) of the FOI Act. The section required a reasonable expectation that the information, if disclosed, would enable a person to identify a confidential source. The AAT equated a reasonable expectation with a reasonable possibility. Heerey J found that it was not in dispute that the requirement that disclosure 'would or could reasonably be expected to', is a higher standard than possibility. It requires more than a possibility or risk of an event occurring. The AAT had referred to it being reasonably possible and this amounted to an error of law.

Procedural fairness

It was also argued that Bartlett had been denied natural justice because the AAT had failed to allow him an opportunity to put evidence about the likelihood of his being able to identify the confidential source. The Court was not satisfied that Bartlett had been denied natural justice. The transcript showed that Barlett had been given the opportunity to call other evidence if he wished. Bartlett was advised of the section of the FOI Act which was relevant. The critical questions arising under that section were determined from the nature of the document itself.

The Court was also satisfied that the source of the information was confidential. It was open to the Tribunal to make such a finding of fact having regard to the nature of the document.

Formal decision

The Federal Court allowed the appeal and remitted the matter back to the AAT to be determined.

[C.H.]

ABSTUDY debt: jurisdiction of AAT and SSAT

SECRETARY TO THE DEETYA v MASON ALLEN, SENIOR MEMBER, AAT AND ANOTHER (Federal Court of Australia)

Decided: 5 March 1998 by Burchett J.

The DEETYA had applied for judicial review of a preliminary decision of the AAT under the *Administrative Decisions (Judicial Review) Act 1977* (the Judicial Review Act). It was agreed that pursuant to *Director-General of Social Services v Chaney* (1980) 31 ALR 571, a preliminary decision of the AAT was not reviewable under the *Administrative Appeals Tribunal Act 1975*. Such a decision could only be reviewed under the Judicial Review Act. The Court was satisfied that a significant benefit would be obtained by an early decision on the particular point in question.

The facts

Kanak was an Aborigine who had obtained benefits under the ABSTUDY scheme for 3 years between 1992 and 1994. During some of this period he was overpaid $14,255.03. A considerable proportion of that amount had been recovered by deductions and by garnisheeing Kanak's accounts.

Kanak disagreed with the DEETYA decision to recover money from him and to issue the garnishee notices.

The SSAT decision

The SSAT decided to vary the DEETYA decision and waived a certain amount of the debt. The SSAT also decided that it did not have jurisdiction to decide whether the debt had been correctly raised because ABSTUDY was a special educational assistance scheme and did not fall within the ordinary provisions of the *Student and Youth Assistance Act 1973* (the SYA Act). However the SSAT decided that it did have the power to waive the debt pursuant to s.309(c) of that Act.

The DEETYA argued that the SSAT did not have the power to waive the debt, and Kanak argued that the SSAT had the power to look at whether the debt had been correctly raised.

The AAT decision

At a preliminary hearing the AAT decided that it had the power to review the DEETYA decision concerning raising the debt as well as the power to waive the debt in the appropriate circumstances.

The ABSTUDY scheme

It was argued that ABSTUDY was a special administrative arrangement and not a statutory scheme. The Court looked at the particular sections of the SYA Act relevant to the ABSTUDY scheme. Section 42 defined 'recoverable amount' as including a special educational assistance scheme overpayment. Section 42(2) provides:

> 'This section applies where:
>
> (a) the liability of a person (in this section called the 'debtor') to the Commonwealth in relation to a recoverable amount has not been fully satisfied; and
>
> (b) there is another person (in this section called the 'third party'):
>
> (i) by whom any money is due, or may become due, to the debtor; or
>
> (ii) who holds, or may subsequently hold, money for the debtor; or
>
> (iii) who holds, or may subsequently hold, money for some other person for payment to the debtor; or
>
> (iv) who has authority from some other person to pay money to the debtor.
>
> 42.(3) The Secretary may, by written notice given to the third party, require the third party to pay to the Commonwealth:
>
> (a) a specified amount, not being an amount more than:
>
> (i) the amount then due to the Commonwealth in relation to the recoverable amount; or
>
> (ii) the amount of the money referred to in whichever of the subparagraphs of paragraph (2)(b) is applicable; or
>
> (b) a specified amount out of each payment that the third party becomes liable from time to time to make to the debtor until the total of the amounts paid to the Commonwealth under the notice equals the amount then due to the Commonwealth in relation to the recoverable amount.'

The definition of 'special educational assistance scheme overpayment' in s.3 refers to an amount paid under a current special educational assistance scheme that should not have been paid. A current special educational assistance scheme includes the ABSTUDY scheme.

The Court concluded that although ABSTUDY was not a statutory scheme, it was clear that the provisions in ss.42 and 43 apply to ABSTUDY overpayments. Section 42 applies to an overpayment, where the liability to repay that overpayment has not been fully satisfied. When this situation occurs, the DEETYA is empowered to serve a garnishee notice. Before this occurs, the DEETYA must decide what the overpayment is and how much of it remains to be paid. That is, once the DEETYA applies the garnishee provisions, decisions will be made under the Act. Once those decisions are made, s.43 also applies which then refers to the waiver provisions in s.289.

The garnishee provisions

Similarly to the *Social Security Act 1991*, there is a provision in the SYA Act that excludes from reviewable decisions, a decision to issue a garnishee notice. Section 302 sets out the decisions which can be reviewed and includes 'all decisions of an officer under this Act relating to the recovery of amounts paid under a current special educational assistance scheme'. According to the Court the expression 'all decisions ... relating to the recovery' was wide enough to go beyond the decision in s.42(3), the decision to issue a garnishee notice. The term 'relating to' does not require ordinarily a direct or immediate connection unless indicated by the context. The term is designed to catch things which have sufficient nexus to the subject. Birchett J decided:

> 'Similar considerations favour a wide meaning in section 309, where the words "relating to" define the extent of a power of review by a body, which is certainly bound to act judicially, of decisions that may not otherwise be reviewable. Such a provision is plainly of a remedial character.'

(Reasons, p. 5)

The Court found that the power to review extended to decisions concerning the amount of overpayments to be recovered, as well as decisions not to waive recovery.