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.

The SSAT as an administrative tribunal reviews decisions on their merits, making the correct or preferable decision on the material before the Tribunal. To do this it has all the powers and discretions conferred on the Secretary to DEETYA. However, it does not have the power to issue garnishee notices. Birchett J followed his judgment in *Walker v Secretary to the DSS* (1997) 147 ALR 263, where it was decided that the SSAT does not have the power to review the decision to issue a garnishee notice, but does have the power to review the decision to recover a certain amount, being a debt to the Commonwealth. The SSAT and the AAT had the power to review all the 'anterior decisions relating to the recovery of the alleged debt': Reasons, p. 7. That is, the AAT had the power to review the decision that Kanak had an overpayment and that his liability to repay that overpayment had not been fully satisfied.

The AAT's jurisdiction

It had been argued that because the SSAT had decided that it did not have the power to review the decision about the amount of the overpayment, the AAT would also be unable to review that decision. The Federal Court rejected that argument stating that the SSAT had varied the original decision and implicitly affirmed the amount to be recovered. Even though the SSAT had wrongly excluded that aspect of the decision from its review, that was an error in the exercise of its powers and not a refusal to exercise those powers.

Formal decision

The Federal Court dismissed the appeal.

[C.H.]

SSAT Decision

Valuation of assets: units in a unit trust; discretion to disregard

GA

Decided: 5 August 1998.

X had been in receipt of jobsearch and sickness allowance from 27 November 1992 to 9 March 1995. He reclaimed sickness allowance on 9 February 1996. In the process of assessing his claim, the DSS became aware of a range of assets, which did not appear to have been previously declared. The claim was rejected, and a debt was raised in respect of all payments previously made (totalling $17,256.05), on the basis that GA's assets would have reduced his entitlement to nil.

The assets in question related to a number of business entities and debts. GA's late father had set up a complex business structure including a discretionary family trust, a unit trust, and a separate proprietary company. GA held 100 of the 414 units in the unit trust, which entitled him to that proportion of the unit trust's capital. The major tangible asset of the unit trust was a rental property valued (according to the unit trust accounts throughout the period) at over 2 million dollars. There were also a number of debts between the various business entities, and debts owed to various of those entities by third parties (including the estate of GA's late father, a business operated by GA's brother, and a business operated by GA). According to the accounts of the unit trust, its net assets were sufficiently high that GA's unit holding (valued at 100/446 of the unit trust's net assets) would have reduced the rate of job search and sickness allowance to nil throughout the period he was paid.

GA was also a beneficiary of the family trust, and had received various distributions, which had been credited to his beneficiary loan account. In the later part of the period he had been a shareholder in companies, and a partner in a partnership through which he operated a business with a third party. GA had not declared any of these matters in the various forms he had completed while receiving jobsearch and sickness allowance.

GA argued that the value of his units was negligible as the market price of a minority unit holding in a family-controlled entity would be heavily discounted. Also, the sale of the units (either to the trustee or to third parties) was subject to the permission of the trustee, which would not automatically be granted. The unit trust would not vest for a very long time, and GA was not in a position to force early vesting or distribution of its assets.

To the extent that the net asset value of the unit trust affected the value of the units, GA argued that the accounts grossly overstated their value. An assessment by a real estate agent suggested the rental property was worth only $890,000 rather than over $2 million. Most of the debts from third parties were irrecoverable, as they had no capacity to repay. As the only tangible asset within the family's business entities was the rental property, they had no capacity to pay their debts to each other and so the debts should be written down.

GA also argued that, although he had been a director and company secretary of the proprietary company and the trustee companies for the family trust and the unit trust, he had not been aware of his situation. He had been severely affected by chronic fatigue syndrome throughout the period in question.

The valuation of the units was a question of fact. There was no expert evidence as to the value of the units. The DSS argued they should be assessed at net asset value. GA submitted that they were of negligible value. A number of AAT decisions on valuing shares in a proprietary family company, which were considered to be analogous to units in a unit trust, were referred to. The SSAT concluded that some discount on the net asset value might be appropriate where a unit holder was not in a position to influence or control decisions affecting the value of their units. However, GA was a director of the trustee company of the unit trust, and in conjunction with his mother could control decisions affecting his units. GA's mother had already demonstrated her willingness to make non-commercial decisions to help her son (lending money to their businesses against her accountant's advice), and could be expected to support him in such matters. As GA was in a position to influence decisions of the trustee, it was not appropriate to discount the units' value, and they should be val-