decision but the authorised review officer affirmed it, although reducing the amount of the debt, and the DSS conceded a further reduction to $2646.56.

The law

The sole issue for determination in this matter was whether the debt, or part of it, ought to be waived. The relevant legislative provisions are contained in s.1237A of the *Social Security Act 1991* (the Act) which provides:

> *'Administrative error*
>
> 1237A.(1) Subject to subsection (1A), the Secretary must waive the right to recover the proportion of a debt that is attributable solely to an administrative error made by the Commonwealth if the debtor received in good faith the payment or payments that gave rise to that proportion of the debt.'

The decision

The AAT considered that the question of overpayment and its recovery had to be determined in relation to three periods of time:

- 15 March to 17 April 1996 (the first period) — during which Macrow received the first of two lump sum compensation arrears payments, representing his entitlement to 7 April 1996. The effect of this payment is that Macrow had no NSA entitlement during the first period. After discharge from hospital Macrow had visited the local DSS office to enquire about the effects of any compensation, which at that point he was not yet receiving. The Tribunal found that the overpayment in the first period had arisen because DSS was unaware that Macrow was receiving compensation. Although the DSS had given notice to Macrow of his obligations, it was not until well after the commencement of compensation payments that the DSS was notified of them. The Tribunal concluded that the debt in respect of this period could not be said to be *solely* due to an administrative error, and therefore waiver of it was not appropriate. The Tribunal did not accept that the delay by DSS in raising the debt constituted administrative error, as '[a]ny delay in raising the debt and notifying the applicant of such debt has no relevance whatsoever to the actual cause of the debt in the first period . . .': Reasons, para. 28.
- 18 April to 12 June 1996 (the second period) — in this period Macrow received fortnightly compensation payments which he declared on his fortnightly NSA forms. The DSS incorrectly assessed his rate of payment and continued his NSA but at a reduced rate, when in fact NSA payments to him should have been cancelled. The DSS conceded that that portion of the debt attributable to the second period should be waived on the basis that it arose solely through administrative error and that, having advised DSS of his compensation payments on his fortnightly NSA forms, Macrow had received the payments in this period in good faith.
- 13 June to 4 September 1996 — on 13 June the DSS made a further administrative error by removing compensation payments from Macrow's record altogether, resulting in return of his NSA payments to the maximum rate. In August 1996 Macrow received the second compensation arrears payment. The Tribunal found that the debt in this period was partially attributable to the DSS in that had the error it made in the second period not occurred and had Macrow's NSA payment been cancelled as it should have been, the debt in the third period would not have occurred. The DSS had made a further error in erasing compensation details from Macrow's records.

The Tribunal considered whether the debt in the third period could be said to be solely due to administrative error, concluding that the word 'solely' must be given its ordinary meaning. The tribunal noted the matter of *Gerhardt* (unreported AAT 10941; 17 May 1996) where the term 'solely' in the *Student and Youth Assistance Act 1973* was held to mean '. . . only or to the exclusion of all else . . .' The Tribunal concluded, in Macrow's case, that the DSS was entitled to rely on the accuracy of the information given to it, and that Macrow was under an onus to supply correct and reliable information. As he had not supplied full details of his compensation on his fortnightly NSA forms, Macrow had himself also partially contributed to the debt. As such, the debt was not solely due to administrative error, and so could not be waived.

In passing, the Tribunal considered the question of good faith, concluding that '. . . the very fact that [Macrow] was aware throughout the whole of the time he was receiving compensation that his newstart allowance should be reduced is such as to constitute an absence of good faith': Reasons, para. 35. The Tribunal affirmed the interpretation of 'good faith' in *Secretary, Department of Education, Training and Youth Affairs v Prince* (1997) 152 ALR 127 where it was held that

> '. . . Knowing that, in the relevant period, [the applicant] had no entitlement to receive . . . payment, he was never in a position to be able to assert that any mistaken payment made to him was one to which he had an entitlement . . . .'

and added in relation to Macrow that

> '. . . wilful blindness to one's financial affairs set against a background of awareness that one's entitlement to benefit will change upon certain events in clearly not indicative of good faith . . .'

(Reasons, para. 38)

Formal decision

The Tribunal affirmed the decision to recover the debts arising in the first and third periods in dispute.

[P.A.S.]

FOI: 'dob in' letter

HENRY and SECRETARY TO THE DSS (No. 13271)

Decided: 10 September 1998 by J. Dwyer.

Henry requested review of a DSS decision that had refused her access to information recorded by an officer of the DSS following a telephone call in relation to payment of benefits to Henry.

The facts

Henry was in receipt of a social security benefit in March 1997 when a caller rang the DSS to provide information about her. The officer recorded in the box provided that the caller did not have an objection to their name and address being released under the FOI Act. The original decision maker decided not to release the information on the basis that the information had been provided confidentially. Henry argued that the caller had specifically stated that the information about the caller's identity could be released.

The decision was reviewed and the review officer contacted the informant who asked that their identity remain confidential.

The law

Section 37(1)(b) provides that a document is to be FOI exempt if disclosure could or would reasonably be expected to disclose the identity of a confidential source of information.

Confidential source of information

The AAT adopted the test set out in previous cases of:

> 'A source is confidential if the information was provided under an express or implied pledge of confidentiality.'

(Reasons, p.11)

Thus the relevant time to ascertain whether or not the source was confidential was when the information was given, and not when the informant was con-

tacted when the decision was being reviewed.

The AAT heard evidence from the officer who had recorded the information that she possibly made a mistake, but it was unlikely. The AAT concluded that the officer did not make an error.

Unreasonable disclosure

The AAT then referred to s.41 of the FOI Act which states that a document is exempt if disclosure would involve the unreasonable disclosure of personal information about any person. The AAT decided that even though the informant had not stated that the information was to be kept confidential when provided, under s.41 it must consider whether it would be unreasonable to disclose information about the person now that the person had expressed a desire to keep that information confidential.

Henry told the Tribunal that apart from the 'dob-ins' she had been pestered by prank calls, had her home broken into and complaints made to the welfare office in her country town.

The AAT decided that there was a two-step process involved under s.41. First, whether releasing the information would involve the disclosure of personal information about the person, and second, whether any disclosure would be unreasonable. The information concerned was the person's name and address, and so the AAT found that the information was indeed personal.

In a number of cases the Federal Court had decided that unreasonable disclosure had public interest considerations at its core. That is, exempting the information from disclosure was in the public interest, and would serve the purpose of the legislation. The DSS argued that it relied on the public to assist it in the proper administration of the *Social Security Act 1991*. According to the Federal Court, if the information to be disclosed was not relevant to the affairs of government but would disclose personal information, then disclosure would be unreasonable. The AAT concluded that it would be unreasonable to release the information.

The AAT advised Henry to make a formal complaint to the police about the harassment.

It noted that the DSS had failed to comply with s.59A(3) of the Act requiring the DSS to advise the person whose personal information was the subject of an FOI claim, if a matter was taken on review to the AAT.

Formal decision

The AAT affirmed the decision under review.

[C.H.]

Student Assistance Decisions

AUSTUDY debt: recovery from bankrupt; waiver of interest and late payment charges

CANE and SECRETARY TO THE DEETYA
(No. 13245)

Decided: 2 September 1998 by D.P. Breen.

Background

The DEETYA sought to recover two overpayments of AUSTUDY occurring in 1994. In 1994, both Elton and Ellis Cane were students, Ellis, in year 12 and Elton, the eldest, studying business/journalism at university. The previous year, on 9 May 1993, their parents were declared bankrupt after a business failure. The debts arose because in completing the AUSTUDY application forms, parental income estimates for the financial year 1992/93, were given as 'nil', whereas the parents had in fact drawn $47,000 in wages prior to the bankruptcy. Mr and Mrs Cane had written that their income would be 'nil' on the advice of an officer at either the DSS or the DEETYA, after they had indicated to the officer that they were bankrupt. Both Ellis and Elton received the maximum rate of AUSTUDY based on the parental income estimate of 'nil'. As Ellis was under 18 years of age at the time, his AUSTUDY was actually paid to his parents and a debt was raised against them in the amount of $3333.20. It was also determined that Elton owed a debt of $4647.69 representing the whole of the AUSTUDY payments received in 1994.

The SSAT decided on 8 May 1997 to vary the decision of the DEETYA in that it determined that, for the purposes of the AUSTUDY parental income test, no account should be taken of an amount of $1041, being the amount of job search allowance paid to their father in the 1992/93 financial year and that no late payment penalties or interest charges ought to be applied to either debt. The matter was remitted to the respondent to re-calculate the debts in accordance with the terms of the SSAT decision. The effect of this re-calculation would be to reduce each overpayment debt by a small amount.

Both parties appealed to the AAT. The DEETYA appealed against that part of the SSAT decision reducing the overpayment debts whilst the Cane brothers appealed to extend the waiver to the entirety of each overpayment. It was not in dispute that the overpayments had in fact occurred and that these were debts pursuant to s.40 of the *Student and Youth Assistance Act 1973*.

Recovery from a bankrupt

The overpayment of AUSTUDY in respect of Ellis Cane arose at a time when the parents, to whom the AUSTUDY was paid, were bankrupt. The AAT noted that, like any other debt attributable to a bankrupt person, it could only be recovered via the formula prescribed in Part VI of the *Bankruptcy Act 1966*. Section 108 provides:

> 'Except as otherwise provided by this Act, all debts proved in a Bankruptcy rank equally and, if the proceeds of the property of the bankrupt are insufficient to meet them in full, they shall be paid proportionately.'

Given that s.82 of the Bankruptcy Act provides that 'all debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at the time of bankruptcy . . . are provable in his or her bankruptcy', the AAT concluded that the only method the Commonwealth had of recovering the debt against the parents was through the normal mechanism of the *Bankruptcy Act 1966*. It was not a debt which could be given priority under s.109 of that Act. As the parents had been discharged from bankruptcy they were also discharged from the obligation of re-paying the AUSTUDY debt. In the absence of a finding against the integrity