In 1996, Jozic commenced a Diploma of Jazz Performance at Northern Melbourne Institute of TAFE. It was a prerequisite of the course that he attend a summer school program between 4 and 18 January 1996. Prior to commencing the course, Jozic received NSA and worked one day a week at a hotel. Jozic applied for AUSTUDY, which was not paid until 13 March 1996.

Data-matching information requested by DEET revealed that Jozic was paid AUSTUDY from 26 February to 31 December 1996. It was unclear what was the correct commencement date of the course. A DSS officer believed that the course commenced on 5 February. Applying the '3-week rule', AUSTUDY should have commenced on 26 February 1996. However, NSA had been paid to 8 March 1996. It was on this basis that an overpayment was alleged against Jozic.

The legislation

Section 613(1) of the *Social Security Act 1991* provided that NSA is not payable to a person who is enrolled in a full-time course of education as from the date the person commenced the course. Section 614(6) of the Act provided that if a person enrolled in a full-time course and applied for AUSTUDY, then NSA is payable either until their AUSTUDY application is determined or for 3 weeks from the date when the course started. Section 614(4) stated that NSA is not payable for a period where the person also received AUSTUDY.

The DSS alleged that 2 debts to the Commonwealth arose. First, it was alleged that Jozic received both NSA and AUSTUDY for the period from 26 February to 8 March 1996. Second, a debt arose for the period 25 January to 25 February because Jozic breached s.1224(1) of the Act. This section provided that where a person received payment because he or she made a false statement or failed to comply with a provision of the Act, then the payment was a debt due to the Commonwealth.

The findings

The AAT considered all the conflicting information about the commencement date of the course and found that Jozic commenced a full-time course of education on 4 January 1996. Accordingly, the AAT found that from 4 January to 13 March 1996, Jozic was eligible for AUSTUDY and not entitled to NSA. The AAT also found that Jozic was correctly granted a 3-week concession pursuant to s.614(6) of the Act for the period from 4 to 24 January 1996, during which he continued to receive NSA.

The AAT then considered the period from 25 January to 25 February 1996, where the DSS alleged he had made a 'false statement or false representation' pursuant to s.1224(1)(b)(i) of the Act. The DSS alleged that Jozic had falsely stated that he returned to full-time study on 10 February 1996, when the course had commenced on 4 January 1996. However, the DSS was unable to provide the AAT with copies of his fortnightly NSA continuation forms.

In light of the conflicting information about the commencement date of the course, the AAT found that Jozic was not aware that, for the purposes of AUSTUDY, the course commencement date encompassed the summer school period.

Turning to the missing fortnightly NSA continuation forms, the AAT stated it was prepared to infer that Jozic did continue to submit fortnightly NSA continuation forms. However, the AAT considered that Jozic did not make a false statement or representation to the DSS. The AAT noted that Jozic had informed the DSS that he was returning to a full-time course of study in February 1996. The AAT found, on the balance of probabilities that Jozic genuinely believed that the course commencement date was in February 1996, and thereby did not make a false statement or false representation.

The AAT commented on the difficulties that can arise when government departments do not keep adequate records of 'customer contacts' and do not obtain accurate information as to the commencement date of courses.

The decision

The decision was set aside. There was no debt due to the Commonwealth.

[H.B.]

Wife pension: deemed entitlement to Widow B pension

GWIAZDA and SECRETARY TO THE DFaCS (No. 13558)

Decided: 18 December 1998 by A. Cunningham.

The issue

The question for consideration by the Tribunal was whether payment of wife pension to Mrs Gwiazda should have been cancelled in February 1998. This decision had been affirmed by an Authorised Review Officer in February 1998 and by the SSAT in March 1998.

Background

The applicant's husband died on 22 October 1997, prior to which he was in receipt of age pension. Subsequently on 19 December 1997 her wife pension was cancelled with effect from 5 February 1998. Gwiazda had returned to Poland to live, and contended that she needed some form of Australian pension or benefit in order to survive in Poland, where she was unable to work due to her age. She advised that she had lived in Australia since 1961 and had become an Australian citizen on 16 March 1966.

The law

The primary qualification for wife pension is set out in s.147 of the *Social Security Act 1991* (the Act) which provides:

> '147.(1) A woman is qualified for a wife pension if the woman:
>
> (a) is a member of a couple; and
>
> (b) has a partner who:
>
> (i) is receiving an age pension, disability support pension or disability wage supplement; or
>
> (ii) is receiving a rehabilitation allowance and was, immediately before he became qualified for that allowance, receiving an invalid pension.'

This was cancelled following the death of Gwiazda's husband. Section 362A of the Act further provides:

> '362A.(1) In spite of anything else in this Part, a widow B pension must not be granted to a woman unless:
>
> (a) the woman's claim for the pension is lodged before 20 March 1997; and
>
> (b) the woman is qualified for the pension before that day.'

The decision

The Tribunal noted that, in some circumstances, where a woman is in receipt of wife pension and becomes bereaved, a

claim for Widow B Pension may not be required (s.369(3)). However, the Tribunal concluded that the provisions of s.362A were overriding, and that therefore any deemed entitlement to Widow B pension had to arise before 20 March 1997 — clearly an impossibility in Gwiazda's situation as her husband died in October 1997. As she was neither qualified for, nor had she lodged a claim for, Widow B Pension before 20 March 1997, she could not be paid that pension. In addition the Tribunal concluded that as she had not yet reached age pension age she was not entitled to any other social security payment from Australia.

Formal decision

The Tribunal affirmed the decision under review.

[P.A.S.]

Compensation preclusion: special circumstances; lack of causal connection

SECRETARY TO THE DFaCS and ROMANOSKI (No. 13529)

Decided: 10 December 1998 by J.T.C. Brassil.

Background

Romanoski was receiving newstart allowance (NSA) for the period March 1990 to 4 October 1995. Since 5 October 1995 he was receiving disability support pension (DSP). On 11 July 1993 he was injured in a motor vehicle accident. His compensation claim was settled for $170,000 in December 1997.

The Department applied a preclusion period from 11 July 1993 to 19 July 1997, pursuant to s.1165 of the *Social Security Act 1991*.

The SSAT decided that there were special circumstances for the period up to 4 October 1995, which would justify the use of the discretion in s.1184(1), pursuant to which the Secretary may treat whole or part of the compensation payment as not having been made. The 'special circumstances' were that there was no causal connection between the payment Romanoski was receiving from Centrelink and the compensation payment.

The issue

The issue for the AAT was whether special circumstances existed which would make it appropriate to treat the compensation payments made prior to 5 October as if they had not been made.

The legislation

Section 1163(9) of the Act, inserted in 1993, specifically states that a causal connection is not necessary before a payment can be a 'compensation affected payment'.

Discussion

The AAT stated that:

> 'it is necessary to look further than the lack of a causal connection to determine whether appropriate special circumstances exist in respect of the respondent.'

(Reasons, para. 34)

The AAT accepted the views of Hill J in *Haidir v Secretary, DSS* (1998) 994 FCA 20 August 1998:

> 'Without putting too fine a point upon it, the purpose of the basic thrust of the legislation was to avoid a claimant being entitled to both social security benefits and benefits in the nature of income through lump sum payments.'

(Reasons, para. 36)

The AAT was sympathetic to the circumstances of Romanoski, who was in difficult circumstances due to ill health following the motor vehicle accident, and who had insufficient assets. However, the AAT must apply the tests in *Beadle* (1984) 20 *SSR* 210 as to special circumstances. Romanoski's circumstances, while 'not desirable for anyone to endure . . . unfortunately, are not uncommon or unusual or exceptional in our society'.

Formal decision

The AAT set aside that part of the SSAT's decision which found special circumstances to exist for the period 11 July 1993 to 4 October 1995.

[K.deH.]

Sole parent pension: assets test, loans to trust

CALLEJA and SECRETARY TO THE DFaCS (No. 13576)

Decided: 23 December 1998 by W.G. McLean.

Background

Calleja lodged a claim for sole parent pension in 1997 in which she declared personal and business assets and income. The information declared showed that she was the sole shareholder and director of a family company as well as the beneficiary of a family trust of which the family company was the trustee. The trust accounts showed a loan by the beneficiary to the trust. The loan, some $153,243, was made by Calleja to the trust in 1996.

The issue

The issues before the AAT were:

- what was the value of the loan for social security purposes; and
- was the loan an unrealisable asset and hence to be disregarded for purposes of the assets test?

The legislation

The *Social Security Act 1991* (the Act) provides that in valuing assets for pension or benefit calculations, loans are valued in terms of the amount that remains unpaid on them. This is provided for in s.1122 of the Act:

> 'If a person lends an amount after 27 October 1986, the value of the assets of the person for the purposes of this Act includes so much of that amount as remains unpaid but does not include any amount payable by way of interest under the loan.'

The Act makes provision for assets to be disregarded in circumstances of severe financial hardship and where it can be shown that an asset is unrealisable. This is provided for in s.1129 and s.1130:

> '1130.(1) If s.1129 applies to a person, the value of:
>
> (a) any unrealisable asset of the person; and
>
> (b) any unrealisable asset of the person's partner;
>
> is to be disregarded in working out the person's social security pension rate.'

The loan

By the time of the AAT hearing, certain amounts had been agreed between the parties as the value of Calleja's personal assets. The tax return for the trust in the