

1996/97 financial year showed primary production losses and tax losses carried forward from earlier years. The trust accounts recorded that a subordination agreement had been entered into between the trustee company and Calleja to subordinate the beneficiary's loan to the trust. In the trust financial statements at the end of the 1996/97 tax year only an amount of some \$10,000 showed as owing to Calleja. Calleja's accountant gave evidence that there had been an agreement to limit loan repayments rather than show the whole amount of the loan in any one year. This enabled the trust to show a small surplus in trust funds at the end of the 1996/97 financial year. The evidence before the Tribunal at hearing was that by the end of the 1996/97 tax year the loan had been reduced from \$153,243 to \$106,936. The repayment was made possible because Calleja's aunt had loaned money to the trust.

The Tribunal held that the value of the loan was its full amount at any time, not the \$10,000 showing on the books. The Tribunal found that the proper value of the loan at the time of claim (April 1997) was its face value. The Tribunal was satisfied on the evidence that at the time of claim that was \$106,936. It was not correct to take the full amount loaned at June 1996 as was contended by the Department.

The accountant also gave evidence that the trustee company faced the decision of whether to liquidate the trust in view of its poor financial position. Certain sales had been completed and primary production stock had been disposed of. However, the AAT considered that Calleja had the sole capacity to wind up the trust and may decide to continue it to utilise the tax loss credits. It was not, therefore, a situation where the loan was unrealisable.

The Tribunal noted that Calleja had made an application to the Department to have the loan disregarded under the financial hardship rules on the basis that the loan was an unrealisable asset. That application to apply the hardship provisions had been rejected by the Department. However Calleja had not sought review of that decision, so the Tribunal could not look at that issue.

[M.C.]

Parenting allowance: overpayment; waiver or write off

SECRETARY TO THE DFaCS and WHITE
(No. 9900016)

Decided: 15 January 1999 by E. Christie.

The issue

The issue for consideration by the AAT was whether the debt of parenting allowance (PA) raised against Mrs White should be written off, or waived wholly or in part due to administrative error or special circumstances. The amount of the debt was, at the date of hearing, \$8021 and was for the period March 1996 until May 1997. The decision by the Department to raise and recover the debt had been set aside on 15 May 1998 by the SSAT which concluded that although the debt had not arisen solely through administrative error, and therefore could not be waived, special circumstances did exist sufficient to write off the recovery of the debt until October 2001, when White's youngest child would have turned 18 years.

Background

White claimed PA in December 1995, declaring her income at that time to be \$370 a fortnight. Her husband received newstart allowance from November 1995 until March 1996 and declared his wife's fortnightly earnings on his newstart forms submitted in this period. Due to Department error White's fortnightly income was coded as \$0 in March 1996 when her allowance was reclassified.

From December 1995 until June 1996 White had received 11 Department letters notifying her of her PA entitlements (including 4 such notifications after March 1996 when the Department error occurred), but her husband contended that he and his wife 'did not know what to make of the notification notices' and did not read the backs of the notices they received. At no stage had White queried whether the amounts specified in the notification notices were correct.

Evidence was given that Mr and Mrs White were both discharged bankrupts, with considerable debts due to a failed business, including a loan to Mrs White's parents. Mr White had also received treatment for depression during the period in question. Evidence was also given that Mrs White understood that entitle-

ment to PA was based on her income alone, rather than joint family income.

The law

Section 1237A of the *Social Security Act 1991* (the Act) sets out the circumstances in which waiver of a debt *must* occur:

'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.

Section 1237AAD provides further that waiver may occur in situations amounting to 'special circumstances' —

1237AAD. The Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that:

- (a) the debt did not result wholly or partly from the debtor or another person knowingly:
 - (i) making a false statement or false representation; or
 - (ii) failing or omitting to comply with a provision of this Act or the 1947 Act; and
- (b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and
- (c) it is more appropriate to waive than to write off the debt or part of the debt.

A debt may be written off only if the provisions of section 1236 are satisfied —

1236.(1) Subject to subsection (1A), the Secretary may, on behalf of the Commonwealth, decide to write off a debt, for a stated period or otherwise.

1236.(1A) The Secretary may decide to write off a debt under subsection (1) if, and only if:

- (a) the debt is irrecoverable at law; or
- (b) the debtor has no capacity to repay the debt; or
- (c) the debtor's whereabouts are unknown after all reasonable efforts have been made to locate the debtor; or
- (d) the debtor is not receiving a social security payment under this Act and it is not cost effective for the Commonwealth to take action to recover the debt.'

Discussion

The AAT found that White had contributed to the debt by her failure to respond to the notices sent to her by the Department. As such the debt could not be said to have arisen 'solely' through administrative error, and so it could not be waived under the provisions of s.1237A(1).

As to whether special circumstances existed sufficient to justify waiver under s.1237AAD, the AAT considered the benchmark decision of *Beadle and Director General of Social Security* (1984) 6 ALD 1; (1984) 20 SSR 210 that, to be 'special', the circumstances needed to be:

'... unusual, uncommon or exceptional ... This is not to say the circumstances must be unique but they must have a particular quality of unusualness that permits them to be described as special.'

The AAT concluded that such circumstances did not exist in White's case, and therefore waiver under s.1237AAD was also not possible.

In relation to the power to write off a debt, the Tribunal considered the factors enunciated in *Director General of Social Security v Hales* (1983) 47 ALR 281; (1983) 13 SSR 136 and summarised in *Waller and Secretary, Department of Social Security* (1985) 8 ALD 42. In this regard, the AAT noted that White had received moneys to which she was not entitled, but that on the balance of probabilities this had occurred through innocent mistake. The family financial situation indicated a severe negative cash flow sufficient for the Tribunal to conclude that financial hardship would result if recovery were pursued at that time. The Tribunal also noted that there were compassionate considerations (Mr White's psychiatric condition) and that recovery at a later time was possible, and concluded that the preferable decision was to write off recovery of the debt.

Formal decision

The AAT varied the decision under review to provide for the debt to be written off, with recovery to be pursued at some future time should the family financial circumstances change.

[P.A.S.]

Overpayment of family payment: prescribed student child; waiver

BARTLETT and SECRETARY TO THE DSS
(No. 13398)

Decided: 26 October 1998 by
J.T.C. Brassil.

Background

Bartlett sought review of a decision to recover an amount of family payment made to her for her son Daniel during 1997. He turned 16 years on 27 March 1997 and became eligible for and was paid AUSTUDY from early April. A debt for the family payment paid between April and November 1997 was raised by the Department. In the course of the review processes, the amount to be recovered was reduced by the Social Security

Appeals Tribunal. The SSAT waived the overpayment after September 1997, as that post-dated a claim for newstart allowance lodged by Bartlett's husband which set out the amount of AUSTUDY being paid to Daniel. After September the SSAT characterised the debt as being attributable solely to administrative error. Bartlett did not dispute that the overpayment had occurred. Her argument was largely directed to issues of recovery. The representative of the Department did not argue that the SSAT's decision to waive the part after September was incorrect.

The issues

The AAT characterised the issues as being:

- whether Bartlett had notified a change of circumstances and whether an overpayment had been made;
- whether, if there was an overpayment between April and August 1997, any part of it was caused solely as a result of administrative error;
- whether, if there was a debt, there were any special circumstances such that the whole or part of the debt should be waived or written off.

The legislation

The *Social Security Act 1991* (the Act) provides for the issuing of notices in regard to the different types of payments to recipients. In the case of family payment recipients, this is provided for in s.872 of the Act:

'872.(1) The Secretary may give a recipient of family payment a notice that requires the recipient to inform the Department if:

- (a) a specified event or change of circumstances occurs; or
- (b) the recipient becomes aware that a specified event or change of circumstances is likely to occur.'

Failure to respond to notices within specified time limits can result in debts arising under the Act. Not all debts that are found to exist under the Act necessarily are to be recovered. Two provisions that frequently arise in review concerning issues of recovery are where there has been administrative error by the department or where there are special circumstances, as long as the person has not 'knowingly' contributed to the events that gave rise to the debt occurring. These two circumstances of waiver are available under the Act in ss.1237A and 1237AAD respectively. It was these sections that the AAT looked at most closely in the decision:

'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.

1237AAD. The Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that:

- (a) the debt did not result wholly or partly from the debtor or another person knowingly:
 - (i) making a false statement or false representation; or
 - (ii) failing or omitting to comply with a provision of this Act or the 1947 Act; and
- (b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and
- (c) it is more appropriate to waive than to write off the debt or part of the debt.'

If 1237A is found to apply the debt must be waived. Section 1237AAD is discretionary.

The requirement of notice

The evidence before the AAT was that a notice was issued to Bartlett on 26 March 1997 which required her to notify if a dependant 'claims or is granted AUSTUDY or other Commonwealth Student Assistance Scheme payment'. That notice also referred to the existence of data-matching as a check to detect or prevent incorrect payments.

Bartlett's evidence was that on 13 March she had lodged a claim for parenting allowance, where she listed her children's dates of birth and notated in parenthesis beside Daniel's birth date '16- AUSTUDY ??' On that same date her husband lodged a claim for sickness allowance in which he notified that Daniel was going to claim AUSTUDY.

These two claims were lodged immediately after Bartlett was released from hospital following a mastectomy. The evidence before the AAT was Bartlett spent 5 days in hospital, followed by home nursing and then an ongoing course of chemotherapy. She was reliant totally on her husband during her recovery phase. The evidence in regard to his health was that he too was unwell. A period of Workcover and personal income insurance had predated his March claim for sickness allowance. By the time of the AAT hearing he was in receipt of disability support pension primarily for an anxiety depressive state for which the department accepted a rating of 30-40 points under the relevant Tables, which signifies the presence of serious to major psychiatric illness.

Bartlett had no specific recall of the notice that was issued on 26 March 1997. Her argument was that as they had already told the Department prior to the notice issuing that AUSTUDY was going to be claimed, they had in fact complied with the notice. The advocate for the Department argued, on the other