ice) and that '. . . this was sufficient for [Smith] to have complied with her obligation to the Department': Reasons, para. 27.

Responding to the contention by the Department that Smith was also obliged to notify of the details of her husband's earnings, the AAT referred *to Vitalone and Secretary, Department of Social Security* (1995) 38 ALD 169 and in particular the comment in that case (at para. 31) that:

> '. . . Non compliance . . . is potentially punishable by imprisonment. Accordingly, it needs to be interpreted in a manner which is favourable to the individual concerned. It should certainly not be construed so as to impose strict liability . . .'

The AAT concluded that Smith had not failed or omitted to comply with an obligation under the Act, and hence that no debt under s.1224 existed. In this event, there was no need to consider waiver but, in passing, the Tribunal concluded that waiver would have in any case been appropriate. Her husband having enquired of the Department as to the effect of his wages upon his wife's age pension payments, the Tribunal determined that Smith had no reason to doubt her entitlement to the payments she continued to receive and, as such, received them in good faith (*Secretary, Department of Employment, Education, Training and Youth Affairs v Prince* (1997) 152 ALR 127), whilst the debt was solely due to administrative error by the Department in failing to act upon the advice given to it by Mr Smith.

In addition, the Tribunal noted the health conditions suffered by Smith and the circumstances under which the debt arose. Applying *Re Beadle and Director-General of Social Security* (1984) 6 ALD 1 and *Re Krzywak and Director-General of Social Security* (1988) 15 ALD 690, the Tribunal concluded that there were special circumstances sufficient to require the waiver of any debt pursuant to s.1237AAD.

Formal decision

The AAT set aside the decision under review and substituted the decision that there was no debt owing by Smith.

[P.A.S.]

Debt: notification obligations

BRUNEAU and SECRETARY TO THE DFaCS (No. 19990048)

Decided : 28 January 1999 by Dr J. Campbell.

The issue

The question before the AAT was whether debts in relation to home child care allowance (for the period September 1994 to April 1995), family payment and parenting allowance (for the period February 1996 to May 1997) should be recovered.

Background

Bruneau worked for Telecom for 20 years before she and her husband purchased a newsagency in 1991. In her application for continuing family payment (FP) lodged in October 1993 she described her occupation as 'home duties' and advised that her partner was self-employed. In a later claim for home child care allowance (HCCA) lodged in August 1994 she indicated that she received no salary or wages, and did not indicate that she was self-employed and the part-owner of a business. Following the FP application, Bruneau in May 1994 provided Taxation Notices of Assessment for herself and her partner for the 1992/93 year (disclosing a family income above the relevant threshold for HCCA), and in the HCCA application itself Bruneau and her partner authorised the Department to seek information from the Australian Taxation Office regarding her claim and income details. In April 1995 Bruneau applied for parenting allowance (PA) at which point she did advise of her income from wages, and that she and her partner were part-owners of a business. Bruneau, following these claims, was sent notification letters by the Department in September 1994 and July 1995, in both cases requiring her to notify of changes in income or the commencement of employment, and advising her of the income basis on which the respective payments of HCCA and PA were based.

Bruneau agreed that the notification letter in September 1994 had advised her of the obligation to notify changes in income or employment, but argued that she was not receiving a wage notwithstanding the income position disclosed in her taxation returns. She contended that she had met the notification obligations through provision of her income tax assessments and authorisation to the Department to access family tax information.

The legislation

Section 872 of the *Social Security Act 1991* (the Act) provides that a notice may be given to a recipient of FP requiring notification to the Department of certain events or changes in circumstances.

Similar provisions were at the time in question contained in s.943 (regarding HCCA) and s.950 (regarding PA). Section 1069-H11 of the Act at that time provided for FP to be paid free of the income test to a recipient of PA.

Section 1224 of the Act enables a debt to be raised where a person has been overpaid because they failed to comply with a provision of the Act or made a false statement.

The debts

The AAT considered separately each of the three payments in respect of which a debt was raised.

In relation to HCCA, the AAT concluded that, even though the claim had been incorrectly completed, by provision of taxation assessment details in May 1994 Bruneau had made available the necessary material upon which the Department could have made a correct decision as to entitlement. The AAT added that:

> '. . . if a more diligent approach had been taken to harness and assess the available information [by the Department] at the time of the decision, a correct decision would have been made'

(Reasons, para. 30).

Thus, although a debt of HCCA had arisen the AAT concluded that the debt was solely due to administrative error by the Department, and as Bruneau had received the HCCA payments in good faith and had not knowingly made a false statement or representation, this debt should be waived.

Regarding PA, the AAT agreed with the parties that Bruneau's application and the decision to grant PA were correct. The AAT noted the assertion by Bruneau that details of the 1994/95 taxation returns were sent to the Department by fax, but that the Department's files indicated their receipt on 5 June 1997. Bruneau was unable to produce additional evidence as to any earlier date when these details might have been supplied, and in these circumstances the AAT determined that no advice as to family income for 1994/95 was tendered by Bruneau between February 1996 and June 1997. The AAT noted that Bruneau would have been aware of the change in family taxable income by February 1996 when taxation returns for the 1994/95 year were completed, but did not advise the

Department nor make the taxation details available until June 1997. Accordingly, the amounts of PA paid during February 1996 to May 1997 were an overpayment and recoverable.

As to FA the Tribunal concluded that as Bruneau ceased (due to the family income level) to be entitled to PA after February 1996, she also ceased to be eligible for FA from this date and entitlement thereafter was subject to the income test. The FA paid to Bruneau from February 1996 to May 1997 was thus also a debt.

Waiver

The AAT considered whether the amounts of PA and FA paid to Bruneau between February 1996 and May 1997 should be waived. The Tribunal concluded there was no evidence of any administrative error by the Department, there had been a failure or omission to comply with a provision of the Act by Bruneau in not advising of changes in income and, in addition, there were no special circumstances sufficient to warrant the application of the waiver provisions contained in s.1237AAD.

The formal decision

The Tribunal waived recovery of the debt of HCCA, but confirmed the decisions to raise and recover debts in relation to PA and FA.

[P.A.S.]

Family payment: form not a request for payment on estimate

SECRETARY TO THE DFaCS and FLORES
(No. 19990069)

Decided: 5 February 1999 by H.E. Hallowes.

Background

Flores was in receipt of sole parent pension and family payment. She reconciled with her husband on 25 June 1996 and notified the Department of this event as she was required to do. Mr and Mrs Flores' combined taxable income for the 1994/95 tax year was $27,598 and for the 1995/96 tax year was $29,511. On 24 July 1996 Flores lodged a form with the Department in which she estimated that her and her husband's combined taxable income for the 1996/97 tax year would be $28,000. The Department calculated Flores's rate of family payment from 1 August 1996 on the basis of that estimate. From 1 January 1997 the Department continued to assess Flores's family payment rate having regard to the same estimate. On 1 May 1997 Flores commenced work and notified the Department of this. On 29 May 1997 Flores lodged a form with the Department in which she estimated that her and her husband's combined taxable income for the 1996/97 tax year would be $29,500. Flores was paid family payment on the basis of that estimate from payday 19 June 1997. Flores's actual combined taxable income for the 1996/97 tax year was $39,010. In January 1998, Centrelink sought to raise and recover a family payment debt of $5059.60 for the period 1 August 1996 to 16 June 1997.

The issues

Did Flores make requests to the Secretary to use her estimate to calculate a rate of family payment and were the forms used approved by the Secretary?

The legislation

Section 861 provides that the rate of family payment is worked out using the Family Payment Rate Calculator at the end of s.1069. The relevant parts of s.1069 are H18, H21 and H22.

'**1069-H18**. If:

(a) a notifiable event occurs in relation to a person; and

(b) the person's income for the tax year in which the notifiable event occurs exceeds:

(i) 110% of the person's income for the base tax year; and

(ii) 110% of the person's income free area;

the appropriate tax year, for the purpose of applying this Module to the person for the remainder of the family payment period, is the tax year in which the notifiable event occurs.

1069-H21. If:

(a) family payment:

(i) is not payable to a person because of this Module; or

(ii) is payable at a reduced rate because of this Module; and

(b) the person gives the Secretary an estimate of the person's income for a tax year; and

(c) the person requests the Secretary to make a determination under this point; and

(d) the person agrees that the person's rate of family payment for that tax year is to be recalculated if the person's actual income for that tax year exceeds 110% of the amount estimated by the person;

the Secretary must determine that the appropriate tax year, for the purpose of applying this Module to the person for a family payment payday on or after the day on which the request is made, is the tax year in which the request is made.

1069-H22. A request under point 1069-H21 must be made in writing in accordance with a form approved by the Secretary.'

Forms approved

The Tribunal found that the forms completed by Flores, SC162/9603 were forms approved by the Secretary under s.1069-H22 as the documentation provided by the Department satisfied the Tribunal on that point.

Forms not a request for estimate

Flores argued that completion of the forms was not a request to the Secretary to use her estimate to calculate a rate of family payment. Flores noted the requirement that a client complete one of the boxes under Question 6 on the form with respect to changes in circumstances which included a box to tick if no changes had occurred. If no change had occurred, clients were advised on the form that they did not need to complete any more questions. However, if there had been a change of circumstances, Question 8 asked for more recent details about estimated taxable income for the current financial year, the form covering both the financial years ending 30 June 1996 and 30 June 1997. Flores argued that the wording on the form suggested it was compulsory to answer the questions rather than the wording being a request under s.1069-H22. Flores put to the Tribunal that the questions on the form were directed towards notifiable events rather than the form being a request that an estimate be used to calculate her rate.

Flores relied on the decision of *Stuart and Secretary, Department of Social Security* (1998) 3(4) *SSR* 42. In that matter the AAT found that the questions on the form had been approved by the Secretary but that they did not constitute a request that the appropriate tax year be changed.

The Department referred to the decision of *Secretary, Department of Social Security and Jones* (1998) 50 ALD 248. In that case the AAT decided that although there was not a form specifically designed for the purpose of allowing a recipient of family payment to request that the family payment be calculated by reference to an estimate of income, it was appropriate for the Secretary to treat the information supplied by a client as such a request as the client was sufficiently conversant with the system of social security to realise when she filled in relevant forms that she would be paid on the basis of her estimate.

The Tribunal adopted the reasoning of *Stuart*. It found that in the circum-