capable of entitling a person or persons to the pension.'

(Reasons, para. 7)

The Court then considered the history of s.251 and noted that the section had been in the *Social Security Act 1947*. When the 1947 Act had been repealed and replaced by the 1991 Act, Parliament made clear that the new Act was intended to reflect existing policy but in clear English. Section 52 of the 1947 Act did not use the expression 'an SPP child of only one person at a time'. It simply provided that where the child was a qualifying child of two or more persons, a determination was to be made that the child was a qualifying child of one person only. Section 251 was not intended to amend the law but to make it simpler to understand. Therefore the original form of s.52, can be used to confirm that construction of s.251.

The Full Court found that the judge at first instance was incorrect to require the young person to be in the adult's immediate physical presence at all times over a fortnightly period. It was noted that most children would attend school, visit relatives and go on holidays, without their parent. During that time the child remained a dependent child of the caring parent. The Court referred to the meaning of 'care' as outlined in several AAT and Federal Court decisions and found that 'care' had a broad meaning.

Dependent child

In *Secretary to the DSS v Field* (1989) 25 FCR 425; (1989) 52 *SSR* 694 the Full Court of the Federal Court considered the definition of 'dependent child' in the Act which then referred to the parent having the right to make decisions about the child's care and control. The Court recognised that a right of access to the child may also involve the right to have and make decisions concerning the child's care and control. However, the corollary of that finding was that the custodial parent will continue to have a right to care and control of the child during short access periods even where those periods are frequent. The Court noted that amendments to the *Family Law Act* in 1996 had shifted the focus from parental rights to parental responsibilities with respect to the child. However, it found that this did not affect the earlier court decisions that the custodial parent retained the right to care and control during short periods of absence of the child.

The Court endorsed the conclusion in *Vidler v Secretary to the DSS* (1995) 61 FCR 370 that, where the care of the child is shared, there is nonetheless a statutory obligation to make a choice in favour of one of the competing parties to the exclusion of the other.

Qualification for pension

At first instance the judge had found that neither parent was qualified for the pension for the whole of the pension period before the pension was paid. That is, the legislation did not apply to a parent who had the care of a child for a series of discontinuous periods. The Full Court referred to *Secretary to the DSS v Wetter* (1993) 40 FCR 22; (1993) 73 *SSR* 1065 and concluded:

> 'These authorities are united in suggesting that the whole of the arrangements for the care of a child should be considered when a determination is made as to whether the child is in a particular parent's care. It is not appropriate to dissect overall arrangements into discrete segments, unless those segments are sufficiently to substantial to attract the principle discussed in *Field*.'

(Reasons, para. 14)

The Full Court found that the care of Sarina was shared by both her parents and it was not appropriate to regard either of them as having the care of Sarina in an exclusive sense each alternate week. The arrangement for making decisions about Sarina's care was agreed between the parents so they did not exercise their responsibilities exclusively. The Court quoted with approval the AAT decision of *Vidler and Secretary to the DSS* (1994) 20 AAR 223; (1994) 82 *SSR* 1194 where the AAT had found a consistent pattern of care and control between the two parents, alternating every few days. This meant that both parents had the child as a dependent child for the whole of the period. The Court concluded that this was also the case here. Lowe and Schembri had care of Sarina through the whole of the period.

Formal decision

The Full Court allowed the appeal.

Because Schembri had not been joined as a party to the proceedings and because Lowe's appeal had been dismissed at first instance, the Full Court had to elaborate on the Order to reflect its reasons for judgment. It made a declaration that the AAT did not err in law in awarding the sole parent pension to Ms Schembri.

[C.H.]

Case management activity agreement: notices

ARNOLD v SECRETARY TO THE DEETYA
(Federal Court of Australia)

Decided: 18 December 1998 by Wilcox J.

Arnold appealed against the decision of the AAT that she had failed to enter a new Case Management Activity Agreement (CMAA). This was a breach of the *Employment Services Act 1994* (the ESA Act) and payment of her newstart allowance was cancelled.

The facts

In late 1995 Arnold was being paid newstart allowance and had entered into a CMAA. In October 1995 the DEETYA wrote to Arnold requesting that she attend an interview. Arnold failed to attend that interview. On 30 November 1995 a further letter was sent to Arnold requesting that she attend an interview on 8 December 1995. Arnold contacted her case manager and advised she was unable to attend because of an exam. A new appointment was made for 18 December and Arnold was sent a letter on 11 December. The letter advised of the date and place of the interview and stated 'the focus of this interview is to complete a case management activity agreement'. On the same day Arnold was sent a letter from her local office referring to the interview and advising that a new agreement would focus on helping her obtain work. Arnold did not attend the interview on 18 December. As a result, a further letter was sent to her stating 'I am satisfied that you have unreasonably delayed entering into an agreement'.

'Requirement' in section 38

Section 38(5) of the ESA Act provides:

> '(5) If the person is required to enter into a Case Management Activity Agreement under subsection (3) or (4), the Employment Secretary must give the person written notice of: . . .'

Arnold argued that if a notice is to comply with s.38(5) it must use the word 'require'. Because the letters did not use that word, they did not comply with s.38(5). The Court agreed with the AAT that the letters had been sufficiently clear because they had referred to 'the focus of the interview' as being to complete a CMAA. There was an expectation a new

agreement would be made. This was reinforced by a later paragraph in the letter advising Arnold that if she did not attend, then newstart allowance would cease to be paid to her. According to Wilcox J the intention behind s.38(5) was to make clear to the recipient of newstart allowance that the purpose of the interview was to enter into a new CMAA.

Section 44 notice

Arnold argued that the letter advising her that she had failed to enter into the agreement pursuant to s.44 was void because it did not comply with s.44(3) which provides:

> 'The Employment Secretary may give the person a written notice stating that the person is being taken to have failed to enter into the agreement. If such a notice is given, the person is taken to have failed to enter into the agreement.'

According to Wilcox J the letter sent to Arnold complied with this provision. The letter of 30 November left the reader in no doubt that the purpose of the interview was to enter into a new agreement.

Formal decision

The Federal Court dismissed the appeal.

[C.H.]

Jobsearch allowance debt: collateral attack

COFFEY v SECRETARY TO THE DSS
(Federal Court of Australia)

Decided: 7 April 1999 by von Doussa, Branson and Sundberg JJ.

Coffey sued the DSS for damages and other relief in the Federal Court. At first instance his claim was dismissed.

The facts

Coffey received employment benefits between 1988 and 1993. Between November 1990 and March 1992 Coffey was employed on a casual basis. His entitlement to benefits was reviewed and the DSS decided that he had been overpaid $3245.01 because he had not accurately declared his casual earnings. The debt was recovered by withholding his benefits. In January 1993 Coffey was advised that the DSS was considering prosecuting him, and he was invited for an interview.

In February 1993 Coffey was interviewed and a report prepared recommending that he be charged with 32 offences. The Department Public Prosecutions (the DPP) issued a summons against Coffey. Coffey sought copies of his income declaration forms and was advised that there were only two available. As a result the DPP decided to withdraw the summons on the basis there was insufficient evidence. However, the DPP noted that Coffey could be charged with recklessly making false statements under s.1346 of the *Social Security Act 1991* (the Act). The judge at first instance found that service of the summons had caused Coffey distress and anxiety.

Coffey had sought review of the original decision by an authorised review officer and the SSAT. The decision to raise and recover the debt was affirmed although the amount was varied. Coffey then requested review by the AAT which dismissed his appeal in November 1994. He did not appeal to the Federal Court at that time. In June 1997 Coffey applied for review by the AAT once again and the appeal was dismissed by the AAT on the basis that it did not have jurisdiction. Once again Coffey did not appeal to the Federal Court.

Coffey alleged that the decision to prosecute him was an abuse of process. He submitted that the reason for interviewing him was to induce him to incriminate himself, that he was not informed the interview was to be taped or the evidence used against him, that he was not cautioned, and that he was disoriented and confused at the interview. Coffey also alleged the prosecution was malicious. He submitted that the summons was withdrawn by the DPP because there was insufficient evidence. At the interview with the DSS he had been assured that no further action would be taken against him without him being notified in writing. He thought he would have the right to review that decision. The DSS argued that the written notification was the summons.

The judge at first instance decided that the Court did not have jurisdiction to hear Coffey's claim. Section 19(1) of the *Federal Court of Australia Act (1976)* did not grant jurisdiction directly and s.32 was of no assistance because there was no associated, accrued or pendent jurisdiction. This was because in no other matter was the court's jurisdiction properly invoked. It was also not possible to invoke the cross-vesting jurisdiction.

The judge then went on to consider whether there was any merit to Coffey's claim. Mansfield J found there was little prospect of success in relation to either abuse of process or malicious prosecution. In relation to the tort of malicious prosecution, Coffey must show that the DSS instituted criminal proceedings against him, that it terminated those proceedings in favour of Coffey, that there was an absence of reasonable and probable cause for instituting those proceedings, and that there was malicious intent. The first two grounds could be established but the last two could not. The DPP decided not to prosecute because of lack of supporting documentation. This lack of documentation had not been revealed during the routine internal process of investigating the case. It was noted, however, that the DPP had considered there was adequate evidence to prosecute on other charges.

Mansfield J also considered whether Coffey had made out the tort of misfeasance in public office. To establish this, it must be shown that there was an invalid or unauthorised act done maliciously by a public officer in purported discharge of a public duty which caused loss or harm to Coffey. There was no invalid or unauthorised act as it was part of the duties of the DSS officers to investigate and consider the possibility of prosecution.

Fresh evidence

Coffey sought to introduce fresh evidence before the Full Court. He argued that he had been unable to present this evidence to the judge at first instance because he had believed that the judge was only deciding jurisdiction. The Full Court read the transcript of the proceedings and concluded that the process had been explained to Coffey, but that as he was unrepresented he may have been confused by the process. They agreed to allow the fresh evidence to be presented.

Coffey produced two documents, one being a file note in December 1992 and the second, the letter inviting him for the interview concerning prosecution. The file note referred to Coffey 'Already being prosecuted by Control Review and Recovery'. The letter in January 1993 invited Coffey for an interview so the prosecution could be considered. Coffey submitted that this proved that the DSS had already made up its mind before they interviewed him.

Jurisdiction

The Full Court referred to s.1224(1) of the Act noting that it provides that if an amount has been paid to a recipient as a result of a false statement, then it is a debt due to the Commonwealth by the recipient. The Commonwealth may recover the debt by legal proceedings, garnishee notice or deductions from payments if the recipient is still receiving a social security payment. Coffey had argued that he did not make a false statement and the