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

Full Court concluded that his claim was either that he had a statutory entitlement to the money or he had a claim for restitution of the money recovered from him.

As to whether the Federal Court had jurisdiction to hear this matter, the Full Court referred to s.39B(1A)(c) of the *Judiciary Act (1988)* which confers jurisdiction on the Federal Court in matters arising under a law made by Parliament. The Court agreed with the judge at first instance that there was no jurisdiction pursuant to s.19(1) or s.32 of the *Federal Court of Australia Act* or under the cross-vesting rules. The issue for the Court was whether this was a matter arising under a law made by Parliament. The test for determining whether this was, is whether the right or duty that is sought to be enforced owes its existence to a provision of a law made by the Parliament. The Court found that this dispute concerned the quantum of benefit payable to Coffey. That is, a determination of the correct rate by applying the benefit rate calculator in s.1068 of the Act. The DSS had argued that Coffey had understated his ordinary income and as a result had been paid more than his entitlement. Coffey argued that he was paid his correct entitlement. Therefore, the matter in dispute arose under an Act of Parliament and s.39B(1)(c) of the *Judiciary Act (1988)* applied and the Court had jurisdiction.

Abuse of process

The court referred to the review process set up in the *Social Security Act* and noted that Parliament has made available a comprehensive and multi-level process for the review of decisions made under the Act. Coffey had three reviews involving considerable expense for the DSS. The Court noted:

> 'An attempt to litigate in the Court a dispute or issue which has been resolved in earlier litigation in another court or tribunal may constitute an abuse of process even though the earlier proceedings did not give rise to raised *res judicata* or *issue estoppel.*'

(Reasons, para. 25)

The Full Court decided that to allow Coffey to re-litigate his claim would be to permit a process which was unfair to the DSS. On this basis the claim should be dismissed.

Collateral attacks

The Full Court also found that to allow Coffey to continue with his claim would be a collateral attack on the decision.

> 'By collateral attack we mean a challenge the primary object of which is not to set a decision aside, but to determine other issues in the course of which the validity of the decision arises.'

(Reasons, para. 26)

In this case Coffey's claim was primarily to recover the amount of the deductions and to do this he must show that the decision to raise the debt was defective.

Malicious prosecution

The Full Court agreed with the judge at first instance that this claim was not made out. In the Court's opinion the new evidence did not support Coffey's claim. The file note was simply a misunderstanding of the processes and probably referred to the civil claim rather than the criminal prosecution. In any case, the decision to prosecute was the DPP's and not the DSS's.

Formal decision

The Federal Court decided to dismiss the appeal with costs.

[C.H.]

SSAT Decisions

Important note: *Decisions of the Social Security Appeals Tribunal, unlike decisions of the Administrative Appeals Tribunal and other courts, are subject to stringent confidentiality requirements. The decisions and the reasons for decisions are not public documents. In the following summaries, names and other identifying details have been altered. Further details of these decisions are not available from either the Social Security Appeals Tribunal or the Social Security Reporter.*

Family payment: notifiable event

SH

Decided: 3 February 1999.

SH was receiving sole parent pension for her two children. She married in July 1996, advised of her combined taxable income for 1994/1995 and gave an estimate of her combined taxable income for 1996/1997. She was paid family payment based on the 1994/1995 income. On her review form (at the end of 1996) SH advised of the 1995/1996 income and her rate was increased from 1 January 1997 based on the 1995/1996 income. SH lodged a review form in October 1997 stating her income for 1996/1997, which had increased. Her family payment was reduced from 1 January 1998. In March 1998 a data matching exercise showed SH's 1996/1997 income to be $3700 greater than the amount she had declared. In October 1998 SH was asked to provide her husband's notice of assessment for 1996/1997, which she did. A decision was made to raise an overpayment of more than $2500 for the period August 1996 to December 1997. It was alleged that SH had been paid on an estimate, and that her income had been greater than 110% of the estimate.

The Tribunal pointed out that it was appropriate to use the base year for family payment in 1996 unless the person requests otherwise, or there is an assumed notifiable event. Therefore, the base tax year should have been used. Later in 1996 SH was issued with an appropriate notice and a notifiable event occurred. According to point 1069-18 of the *Social Security Act 1991* the appropriate tax year then became the 1996/1997 financial year. SH failed to notify of the event and her income in 1996 exceeded 110% of the income free area and the base year and, therefore, there was an overpayment. The overpayment ran until the end of the 1996 calender year. Point 1069-H18 states that it applies for the family payment period. That term is defined in s.6 as ending on 31 December of the year. However s.886 refers to the rate of family payment being recalculated on the basis of the person's appropriate tax year rather than the family payment period. The Tribunal overcame this contradiction by referring to s.861 which states that the rate of family payment is to be calculated using s.1069. In 1997 SH should have been paid on the base year of 1995/1996. She was paid on that basis and therefore she received her correct entitlement.