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.

Age pension: notification and reasons for decision as to rate

FA
Decided: 7 January 1999.

FA was receiving age pension at the married rate. FA's daughter contacted Centrelink in October 1998 requesting that she be paid at the single rate. The evidence showed that FA had separated from her husband due to her husband being unable to cope with her dementia. FA's daughter was her guardian. The Tribunal found that FA and her husband had lived in separate rooms from 1995. FA's husband left Australia in August 1997. At that time FA had been receiving partner allowance which increased in June 1997 after Centrelink was told that FA had moved into a nursing home. Age pension was granted from August 1998 at the married rate. The letter to FA advising of the grant of pension and the rate did not state the basis for setting that rate.

The Tribunal found that although the notice did not give enough information for FA to ascertain the reasons for Centrelink's decision it was none the less the ultimate decision which was the operative decision. The Tribunal referred to the AAT decisions of *Sting* (1996) 2(1) *SSR* 3 and *McAllan* (1998) 3(5) *SSR* 62 and noted that s.80(3) required notice of the making of a previous decision. *McAllan* had thought that this meant the reasons for the decision must be given. The Tribunal disagreed with that interpretation finding simply that it meant the decision had to have been made. It was noted that in the *Administrative Appeals Tribunal Act 1975* and the *Administrative Decisions (Judicial Review) Act 1977* the concepts of making a decision and providing reasons for a decision are distinct. The Tribunal followed the reasoning in *Sting* and found that the notice of the decision in this case had been adequate.

Dependent child: effect of amendments to legislation

RD
Decided: 30 December 1998

RD and his ex-wife have a child L born in 1994. They separated in early 1995 and a Family Court order in January 1997 provided that L live with her mother and have contact with her father each alternate weekend and half of the school holidays. RD was paid 6% of the family allowance. The access arrangements were varied in July 1997 so that RD had L from Thursday afternoon to Sunday afternoon in each alternate week. L also stayed with RD for extra days with her mother's consent. RD supplied L's clothes, food and any medicine she needed when she was staying with him. L had her own toys and a bedroom at RD's place. She attended kindergarten and her mother paid the fees. The kindergarten had contacted RD on two occasions to give him progress reports. L's mother gave evidence that it cost her a lot more than it did RD to care for L. L's contact with RD would reduce when she started school because she would not be able to miss a day of school each fortnight.

Centrelink had decided to pay RD 6% of the family allowance. It relied on *Field* (1989) 52 *SSR* 694, *Wetter* (1993) 73 *SSR* 1065 and *Elliott* (1996) 2(1) *SSR* 10 to come to the decision. The SSAT pointed out that these cases were all decided prior to 11 June 1996 when the amendment to the *Family Law Act 1975* came into effect. The definition of '*dependent child*' in s.5(2) was different from the present definition. The current definition reflects the amendments to the *Family Law Act*. The Explanatory Memorandum introducing the amendment to s.5(2) stated that the amendments were not intended to change the qualification criteria, but were intended to make the *Social Security Act* consistent with the new concepts introduced into the *Family Law Act*. The new family law concepts shifted the emphasis from parental rights and ownership of children which were illustrated in the terms 'custody' and 'guardianship' to concepts of 'parental responsibility', 'residence' and 'contact'. There was an underlying philosophy that children have the right to know and be cared for by both parents. The decisions of *Field*, *Wetter* and *Elliott* all relied upon rights conferred by custody and access orders. In *Lowe* the Federal Court had expressed the view that *Field* and *Wetter* were of little relevance because of the significant changes to the *Family Law Act*.

In this case L was to live with her mother and have contact with her father. There was a specific issue order that the mother was to have sole responsibility for L's day to day care, welfare and development. She was to keep RD regularly informed of those issues. RD and L's mother had joint responsibility for the long-term care, welfare and development of L.

According to s.61D(2) of the *Family Law Act* a parenting order does not diminish a parent's responsibility for the child except if it is expressly provided or it is necessary to give effect to the order. RD had L for three nights each fortnight and half the school holidays, and during those periods he made decisions about L's day to day needs. The SSAT found that to give effect to RD's contact order it was necessarily implied that he would have legal responsibility for her day to day care during the periods of contact. This interpretation complied with the objectives of the *Family Law Act* s.60(B) by giving L the right to know and be cared for by both her parents. The SSAT found that at all times when RD had L in his care she was his dependent child within the meaning of s.5(2). The Tribunal found that L spent 28% of her time with RD and 72% her mother. However, because L's mother had greater financial responsibility for L it was appropriate that RD be paid 15% of the family allowance.

Youth allowance: independent rate; unsatisfactory living conditions

RW
Decided: 18 November 1998

RW claimed youth allowance at the independent rate. Section 1067D sets out the requirements for a person to be taken to live away from home. If the person is not 'independent' and does not live at the parents' home, then it must be determined that the person needs to live away from home for education, training or to search for employment or that the person's chances of becoming employed will be significantly increased. RW was not 'independent' and did not live at the home of his parents. He moved away from his mother's home because the living conditions were noisy, overcrowded and stressful and as a result his school work suffered. His mother's house was a considerable distance from the school and it took a long time for him to travel there everyday. The Tribunal referred to the departmental guidelines and found that unsatisfactory living conditions included crowding or noise. RW had told the Tribunal that he had applied for this benefit on at least four occasions. The Tribunal could find no evidence of this on the file, but suggested that Centrelink check their records and pay arrears if it were appropriate. Given that RW clearly qualified for the homeless rate under the guide it was appropriate for Centrelink to consider paying arrears. **[C.H.]**