

*Callaghan 2(9) SSR 125* which said 'knowingly' should be construed as meaning

'that a person has actual knowledge, rather than constructive knowledge, that he or she is making a false statement or representation or that he or she is failing or omitting to comply with a provision of the Act. That actual knowledge is to be ascertained by reference to the statements of the person as to his or her actual state of knowledge at the time and to events surrounding the false statement or the act or omission.'

#### **Incorrect advice from Centrelink staff**

In relation to the misinformation given to Jazazievska by Centrelink staff, the Tribunal referred to the previous AAT decision of *McAvoy (1997) 2(7) SSR 95*, which held that the giving of wrong advice was a special circumstance within the terms of the Act. In that case, the AAT said:

'Citizens are entitled to act upon the advice given to them by representatives of government through its departments and agencies. Citizens are also entitled to have confidence in the advice that they are given by persons in authority and who represent government departments and agencies. Citizens should be entitled to expect nothing less.'

The AAT held that the incorrect advice from Centrelink did constitute 'special circumstances' which warranted a waiver of the debt.

#### **The decision of the AAT**

The AAT varied the decision of the SSAT. The first 2 payments were debts to be recovered by the Commonwealth. However, the third payment was waived due to the existence of special circumstances.

The AAT recommended that the overpayments be recovered in a way that did not cause financial hardship to Jazazievska. The AAT said that the installments should not initially exceed \$10 a fortnight.

[H.B.]

## **Can Centrelink back pay family tax payment?**

**STEVENS and SECRETARY TO THE DFaCS**  
(No. 19990270)

**Decided:** 28 April 1999 by W.G. McLean.

The AAT found that s.900 of the *Social Security Act 1991* (the Act) precluded backpayment.

#### **The facts**

Ms Stevens had elected to receive family tax payment (FTP) for the 1997/98 tax year via lodgment of her income tax assessment with the Australian Taxation Office (ATO) by the tax concession known as family tax assistance (FTA). Whilst she was eligible for the support having two small children on a low income (gross taxable income for 1997/98 being \$17,702) due to the circumstances of her taxation for that year she would not receive the payment through the tax system. A Senior Officer of the ATO gave evidence that even if Ms Stevens requested an amended assessment, because total tax and other credits could not exceed tax payable, then Ms Steven's total amended tax refund would only increase by \$85.40, that is, she would be refunded all the tax she had paid, but could not be refunded more. This was substantially less than the \$400 FTP which she could have received if she had elected to claim from Centrelink.

Because of the stress of her marital breakdown she did not realise the negative impact of the additional health insurance rebate which she was required to claim in her 1997/98 tax return on her ability to receive the full FTA entitlement via the ATO. She contended that in such circumstances Centrelink should make the payment. Ms Stevens conceded in her appeal that the law had been correctly applied by the SSAT. In a written statement before the SSAT she requested that commonsense apply and that she be paid her entitlement.

The AAT found that s.900 of the Act precluded payment of FTP before a claim was lodged and there could be no backpayment of FTP in Ms Steven's circumstances.

Stevens wrote to Centrelink seeking an 'Act of Grace' payment. The AAT did not comment, as such, on this request.

#### **Formal decision**

The decision under review was affirmed.

[Ca.H.]

## **Recipient notification notices: 'event or change in circumstances'**

**ELLIOT and SECRETARY TO THE DFaCS**  
(No. 19990261)

**Decided:** 23 April 1999 by J.A. Kiosoglous.

#### **Background**

Elliot applied for age pension on 16 November 1995. On 7 December 1995 she was notified that she would be paid pension based on income of \$19,627, and that she was required to notify the Department if her and her husband's combined income exceeded \$377.44 a week. On 6 January 1996 Mr Elliot advised he would be returning to work. His sickness allowance was cancelled but his wife's age pension continued. Mrs Elliot said that on 6 January 1996 and April 1996 she had asked and been advised by a departmental officer that she continued to be eligible for the pension.

Two further notices were sent to Elliot on 18 July 1996 and 2 July 1997 stating that her pension was based on income of \$20,353 and \$29,702 respectively. The letters required her to tell the Department if the income as shown on the letters was incorrect. The income recorded was Elliot's superannuation income and did not include her husband's wages. Elliot did not respond to those notices and a debt was raised. The SSAT determined that there was a recoverable debt owed by Elliot for the period 25 July 1996 to 4 September 1997. There was no debt before this period as Elliot had complied with the first notice sent on 7 December 1995 when she and her husband notified of his return to work on 6 January 1996.

The SSAT stated that the authority for the sending of the notice was to be found in s.68 and s.69 of the *Social Security Act 1991* (the Act). As Elliot did not fail to notify of an event or change of circumstance she had not failed to meet her obligations under s.68 of the Act. However, the SSAT considered that her failure to advise that the income figure maintained was incorrect amounted to a breach of s.69 of the Act, giving rise to a debt under s.1224(1). It was agreed by both parties, and the AAT concurred, that the SSAT had erred in considering the applicant's failure to comply with a provision or requirement in relation to s.69 of the Act, because that section relates only to the

issue of specific forms the Department sends to its customers. Thus the issue before the AAT was whether Elliot had failed to comply with s.68 of the Act which provides:

'68.(1) The Secretary may give a person to whom an age pension is being paid a notice that requires the person to inform the Department if:

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

68.(5) A person must not, without reasonable excuse, refuse or fail to comply with a notice under subsection (1) to the extent that the person is capable of complying with the notice.

Penalty: Imprisonment for 6 months.'

The consequence of the failure to comply with a provision of the Act is that a debt can then be raised under s.1224(1).

### Submissions

It was argued on behalf of Elliot that she did not fail to comply with the notice of 18 July 1996 because no 'event' or 'change in circumstances' occurred. The fact that the Department put an incorrect income figure on the letter could not of itself constitute an event, which involves something 'happening'. It was also submitted that the requirement in the notice to advise if the income maintained was incorrect was ultra vires the power contained in s.68 of the Act.

The Department submitted that the event which occurred was that Elliot was required to notify the Department if her combined income as shown in the letter was incorrect. What 'happened' was that Elliot's income as shown was incorrect and she was therefore required to notify of that event.

### Meaning of 'event' or 'change in circumstances'

The AAT considered that the notice of 18 July 1996 was a valid notice under s.68(1) of the Act. The Tribunal went on to say:

'In the present matter, the Tribunal, whilst sympathetic to the position of the applicant, considers that to construe the section so as to mean that notification by a client to the Department was not necessary where a notice was sent and contained a figure which did not in fact represent the combined income would fly contrary to what needs to be reasonably considered of clients of the Department, and contrary to the express purpose of a notice such as the one sent to the applicant. In effect, the notice asks the applicant to inform the Department if the combined income figure is not the actual combined income of the applicant and her partner. In this case, it clearly does not represent the correct figure.

It does not matter therefore as to why the figure is incorrect at that stage. It could be due to administrative error on behalf of the Department, or it could not. The only concern at that stage, is whether or not the figure in the notice is wrong. If it is wrong, then there is an obligation on the part of the applicant to notify the Department.

The Tribunal notes that there are clear similarities between this present case and *Re Donald*. In *Re Donald*, the Tribunal was concerned with a notice, which was to all intents and purposes the same as in the present application. In *Re Donald*, the Tribunal held that the inclusion of a figure in a notification notice which does not represent the actual combined income is an "event" "which required a response" (paragraph 53).

The Tribunal notes that in the present case, there is a question as to whether the applicant read the notification notice or not. The Tribunal must consider however, that if the applicant did not read the notice, or did not read it fully, she did so at her own peril. The Tribunal notes that this is consistent with *Re Donald*, where the Tribunal considered that there was an obligation to at least read the notification notices.'

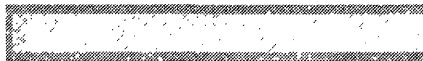
(Reasons, paras 38-40)

The AAT concluded that the combined income as shown on the notification notice dated 18 July 1996 was incorrect, and this constituted an 'event' pursuant to s.68(1) of the Act which required Elliot to notify the Department. In failing to respond to the 'event', Elliot failed to comply with a provision of the Act and the overpayment became a debt due to the Commonwealth under s.1224(1) of the Act. The Tribunal was satisfied that there was no reasonable excuse as to why Elliot could not comply with the notification requirements. The debt could not be waived on the basis of administrative error because the failure to comply was a contributing cause to the debt.

### Formal decision

The decision of the SSAT was affirmed.

[A.T.]



## Age pension: assets test; hardship provisions

**HOWLETT and SECRETARY TO THE DFaCS**  
(No. 19990317)

**Decided:** 13 May 1999 by J. Dwyer.

### Background

The Howletts were on age pension from 1988, being paid under the 'financial hardship' provisions of the *Social Security Act* (the Act). These provisions allow for payment of pension to people whose assets would otherwise preclude payment to them. The Act allows this where it can be established that a person has unrealisable assets and would suffer severe financial hardship if the hardship provisions were not applied to them. The age pension that was being paid to the Howletts was 'stopped' (in the words of the decision informing them of the event) on 5 September 1996, at about the time when they sold a parcel of land, one of several that had been subdivided the previous year on a parcel of farming land held by the wife. The Howletts each owned a farming property which was farmed in partnership with their son who owned a third property also farmed within the partnership. The main property had been in the family for generations. The Howletts' own house on that property was the one they moved into when they married some 60 years previously. The property in the wife's name had been bought in 1962.

After the subdivision of the wife's block into six blocks in 1995, the blocks were placed on the market. Only one of the six was sold. The settlement date for that sale was 16 September 1996, shortly after the decision to 'stop' their pensions was made. At the time of the decision, the value of the whole of the Howletts' property exceeded \$377,500 which was the assets limit for social security pension payment at the time of the decision to 'stop' the pension. Whilst the Department accepted that some of the property was an 'unrealisable asset', the subdivided blocks were not regarded as unrealisable by the Department.

### The legislation

The Act defines an 'unrealisable asset' as follows:

'11.(12) An asset of a person is an **unrealisable asset** if: