that Sureshan was not interviewed and assessed, or made aware of his obligations under the AOS. The DSS was not properly notified of the AOS and accordingly, it took no follow-up action.

On 4 November 1992, Sureshan's parents were granted permanent residency. On 28 January 1993, Sureshan accompanied his parents to help them apply for special benefits. He again asked whether the AOS would apply. The officer he spoke to telephoned the DIMA and was advised that 'his parents were not under an AOS'. Special benefits were granted. There was no follow-up with Sureshan and no statements sent to him showing the amount to be repaid as required by the departmental guidelines. It was not until 14 April 1997 that Sureshan was notified of a debt allegedly owed under the AOS. The debt claimed was $15,819.76, which was later raised to $22,792.96 for the period 28 January 1993 to 6 November 1994.

Sureshan sought internal review then review by the SSAT, which affirmed the decision that there was a debt owed under the AOS. Sureshan appealed to the AAT, claiming there was no debt owed under the AOS, as he financially supported them for two years dating from their arrival in Australia. He also claimed that, if there was a debt, it should be waived as it was caused solely by an administrative error by the Commonwealth.

The legislation

The DFaCS submitted that the AOS was governed by reg. 163B(2)(b) of the *Migration Regulations 1991* which provided that an AOS ceased to have effect two years after arrival in Australia or after a grant of permanent residence, whichever occurred later. The DFaCS argued that as permanent residence was granted on 4 November 1992, the AOS expired two years subsequently.

Section 1227 of the *Social Security Act 1991* provided that an AOS debt (as defined by s.23(1) of the Act) is a debt due to the Commonwealth. Section 1237A(1) provided that the Secretary must waive the right to recover the proportion of a debt that is due solely to an administrative error of the Commonwealth if the debtor received the money in good faith.

Section 1237AAD provided that the Secretary may waive the right to recover all or part of the debt if satisfied it did not wholly or partially result from the debtor knowingly making a false representation or failing to comply with a provision of the Act. There must exist special circumstances making it desirable to waive the debt. The section also required that the Secretary be satisfied that a waiver was more appropriate than writing off the debt.

Regulation 163A of the *Migration Regulations 1991* required that an AOS must be in the form approved by the Minister. Regulation 163B provided that an AOS given on or after 20 December 1991ceased to have effect at the end of two years after the applicant entered Australia or the grant of an entry permit, whichever occurred later.

The reasoning of the AAT

The AOS signed by Sureshan did not comply with reg. 163B(2)(b), as it did not include the words 'whichever happens later'. In the signed AOS, Sureshan promised to repay any benefits received by his parents within two years of their entry into Australia. The AAT found that the signed form was clearly defective as it did not fulfil the intent of reg.163B. The Minister was empowered to approve only a form that was consistent with the legislative intent of reg. 163B. Accordingly, the AAT found that the approval of the defective AOS form was not a valid exercise of statutory power. The form signed by Sureshan was not a valid AOS within the meaning of s.23(1) of the *Social Security Act 1991*. The AAT found that there was no assurance of support debt to be recovered.

In the alternative, the AAT found that if there was an enforceable AOS, it ceased to have effect two years after his parents entered Australia.

The AAT then considered the applicable law should there exist a recoverable debt under the AOS. It found that the debt was solely due to administrative errors of the Commonwealth and the money was received in good faith. The AAT said there were several Commonwealth errors including the misplacing of his parents' application for permanent residence for two years, the false advice that the AOS would not effect their right to receive social security benefits, the false and misleading AOS form and the failure to adhere to departmental guidelines. However, despite the Commonwealth errors, the applicability of s.1237A(1) was in doubt as the money had not been received by the 'debtor', but by his parents.

The AAT decided that if a debt existed, it should be waived pursuant to s.1237AAD as the Commonwealth errors amounted to special circumstances. Sureshan was misled by erroneous oral advice, and a misleading and defective form, despite his diligent attempts to obtain accurate information. He had fully fulfilled his obligations to the Commonwealth as he had supported his parents for more than two years after their entry into Australia. The additional period of two years obligation to support his parents was due to the long delay in processing his parents' application for permanent residence. The AAT decided that if any debt existed, it should be waived.

Formal decision

The decision under review was set aside. There was no debt owed by Sureshan.

[H.B.]

Federal Court Decisions

Recovery of debt: joint liability; waiver

SECRETARY TO THE DSS and EDWARDS
(Federal Court of Australia)

Decided: 8 October 1999 by Spender J.

The DSS appealed against a decision of the AAT that although Edwards owes a debt to the Commonwealth, the DSS is obliged to waive that debt.

The facts

Between September 1992 and May 1995 Edwards' partner Roberts was paid job search allowance, sickness allowance and disability support pension. During the same period Roberts worked for Edwards, and Edwards supplied her with medical certificates to enable her to obtain benefits.

On 14 September 1995 Roberts pleaded guilty in the Magistrates Court to 71 charges of obtaining a benefit which was not payable to her. She was convicted and sentenced and ordered to pay restitution of over $25,000. On 9 November 1995 Edwards was convicted of three charges under s.5 of the *Crimes Act*

1914 of knowingly being concerned in the commission of offences by Roberts.

In November 1996 Edwards applied for and was granted newstart allowance. The DSS withheld part of his payment to recover the debt owed jointly by Roberts and Edwards.

The law

The debt was raised under s.1224 of the *Social Security Act 1991* (the Act), and according to the DSS s.1224AB made Edwards jointly liable to repay the debt. That section provides:

> **1224AB.(1) If**
>
> (a) a recipient is liable to pay a debt under s.1224 because the recipient contravened this Act; and
>
> (b) another person is convicted of an offence under ss.5, 7A or 86 of the Crimes Act 1914 in relation to that contravention;
>
> the recipient and the other person are jointly and severally liable to pay the debt.
>
> Note 1: Subsection (1) does not create a new debt. It extends liability for a debt that has already arisen under s.1224 to a person who is convicted of certain offences.
>
> Note 2: In recovering a debt, the Department may have regard to any view expressed by a court as to the responsibility of a person to pay the debt.

At the date Edwards was convicted of his offence, s.1237 of the Act dealt with waiver. In particular, s.1237(3) provided that the Secretary must waive the debt if a person is convicted of an offence and in sentencing the court indicated that it imposed a longer custodial sentence. From 1 January 1996 the waiver provisions were repealed and replaced with the present provisions. In particular, s.1237AA(1) provides:

> Waiver of debt relating to an offence
>
> **1237AA.(1) If:**
>
> (a) a debtor has been convicted of an offence that gave rise to a proportion of a debt; and
>
> (b) the court has indicated in sentencing the debtor that it imposed a longer custodial sentence on the debtor because he or she was unable or unwilling to pay the debt;
>
> the Secretary must waive the right to recover the debt.

The debt

Spender J had no hesitation in finding that Roberts owed a debt to the Commonwealth pursuant to s.1224. Edwards had been convicted pursuant to s.5 of the *Crimes Act* and, according to s.1224AB of the Act, Edwards became jointly and severally liable.

> In my opinion, the joint and several liability created by s.1224AB has the effect that Dr Edwards is also liable for the debt which, until his conviction, Ms Roberts was solely liable.

(Reasons, para. 31)

Spender J found that Edwards was the 'other person' referred to in s.1224AB(1)(b) and Edwards had an obligation to pay the money owed to the Commonwealth on his conviction for offences under s.5 of the *Crimes Act*, because that conviction was in relation to contraventions of s.1347 of the Act by Roberts.

Waiver

The Court first considered which of the waiver provisions applied. It was Spender J's opinion that because of the operation of s.8 of the *Acts Interpretation Act 1901*, the previous version of the waiver provisions applied. However, because of the similarity in the provisions, the result would be no different.

The relevant issue is whether the Court indicated on sentencing Edwards that it had imposed a longer custodial sentence on him because he was unable to pay the debt. Spender J referred to the findings of both the SSAT and the AAT with respect to the statements of the magistrate at the time of sentencing. The DSS had argued that pursuant to s.17 of the *Crimes Act* the magistrate had been required to give reasons why he had imposed a custodial sentence. Therefore, the remarks made at the time of sentencing were in relation to this requirement rather than referring to the fact that a longer custodial sentence had been imposed because Edwards could not pay the debt.

Spender J rejected this argument noting that the remarks made by the magistrate did not give reasons why the magistrate had imposed a custodial sentence rather than a non-custodial sentence. In fact, the magistrate had not complied with the requirement of the *Crimes Act*.

> In my opinion, the conclusion that the Magistrates Court indicated that it imposed a longer custodial sentence because Dr Edwards was unable to pay the debt, was a conclusion well open to the SSAT and to the AAT. Where a court says that a factor in imposing a sentence of twelve months' imprisonment was the inability of the person to pay the debt, the court is indicating that, if the circumstances were not present, the term of imprisonment (if indeed there be any at all) would be shorter than twelve months.

(Reasons, para. 39)

Formal decision

The DSS appeal was dismissed.

[C.H.]

Rent assistance: arrears of payment

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

Decided: 13 September 1999 by Katz J.

Shiel appealed to the Federal Court from the decision of the AAT that he was not entitled to arrears of rent assistance for three periods from July 1996 to November 1996.

The facts

Between 11 July 1996 and 18 July 1996 Shiel was living in a caravan park. Between 16 August 1996 and 15 November 1996 he was living in Cantrell Street and then from 15 November 1996 to 18 November 1996 he was again living in the caravan park. He lodged a claim for rent assistance for the two periods in the caravan park on 31 December 1996, and for the period at Cantrell Street on 12 December 1996. During part of the period Shiel was receiving newstart allowance. Shiel was living in Henry Lawson Drive when he claimed rent assistance on 20 June 1997. This claim for rent assistance was granted from the date of claim but not before. Shiel told the AAT that the reason why he had not lodged claims for rent assistance earlier, was that he was under a great deal of stress and needed time to 'put my head back'.

The law

The *Social Security Act 1991* (the Act) provides that in certain circumstances the payment of newstart allowance can include an additional component for rent assistance (s.643). The Rate Calculator is set out in s.1068, and in particular paragraph 1068(1)(aa) provides for the payment of rent assistance as an additional payment. Section 660(2) states that the rate of newstart allowance continues in effect until a further determination in relation to that allowance under s.660G takes effect. According to s.660G, if the Secretary is satisfied that the rate at which newstart allowance is being paid is less than provided for in the Act, then the Secretary is to determine that the rate is to be increased to a rate specified in the determination. The date of effect of such determination is ascertained by reference to s.660K, which provides in s.660K(5):

> **660K.(5)** Subject to s.(6), if the favourable determination is made following a person having advised the Department of a change in circumstances, the determination takes effect on the day on which the advice was received or on the day on which the change occurred, whichever is the later.