problems, he did not expect Dobson to function properly in work-related matters.

Submissions

The DFaCS submitted that s.153(2)(b) of the *Bankruptcy Act 1966* did not allow Dobson to avoid the debt as the false representations of income in the fortnightly declarations amounted to fraud. Hence the debt was said to have survived the bankruptcy.

Dobson argued there were special circumstances at times of the allegedly fraudulent statements. His mother died on 31 October 1996. His relationship of 20 years broke down in 1996 and he had serious health and psychological problems. Dobson gave evidence to the AAT that, as he had great difficulty in coping with everyday living at the time, many official and administrative tasks were beyond him. He told the AAT that payments from his acting work arrived sporadically, some being royalties or residuals for work completed years ago.

Consideration of the issues

The AAT found that, in breach of the *Social Security Act 1991,* Dobson failed to notify Centrelink of some income received. Whilst the amount of the debt was unclear, the AAT was satisfied that there was a debt of approximately $2500.

The AAT referred to the case of *Secretary, Department of Social Security v Southcott* 2(9) *SSR* 126 where North J found that the right of the Commonwealth to recover a debt is limited in the case of bankruptcy. The means of debt recovery provided in the *Social Security Act 1991* are replaced by the right of the Commonwealth to prove a debt in bankruptcy. Because the Commonwealth did not prove the debt, then, unless there was a fraud, the right to recover a debt ceased when Dobson became bankrupt.

Fraud?

Did Dobson's failure to fully declare all income, as required by the *Social Security Act 1991* amount to fraud? The AAT cited *Civitareale and Secretary, Department of Family and Community Services* [1999] AATA 486. This case applied the definition in Osborn's Concise Law Dictionary, stating that fraud entails 'moral obliquity'.

The definition also stated

> fraud is proved when it is shown that a false representation has been made
>
> (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false...

The AAT also considered the case of *R v Sinclair* [1968] 3 All ER 241 at 146 which stated that 'to cheat and to defraud is to act with deliberate dishonesty to the prejudice of another's propriety right'.

Having considered Dobson's medical and emotional condition at the time of the alleged fraud, the AAT was not able to find any deliberate dishonesty or any false representation made knowingly or recklessly. Hence the AAT said a failure to notify in these circumstances was not fraud under the *Bankruptcy Act 1966.* As there was no fraud, the debt owed to the Commonwealth ceased when Dobson became bankrupt. Hence, withdrawals of repayments from Dobson's DSP were not authorised and should be repaid.

Although it did not need to consider the issue of waiver, the AAT commented that it would consider a waiver favourably had the debt remained.

Formal decision

The SSAT decision was set aside. The debt owed to the Commonwealth ceased on Dobson's bankruptcy. All withdrawals from his pension since that date were not legal and should be repaid.

[H.B.]

Family allowance overpayment: special circumstances

GIBBONS and SECRETARY TO THE DFaCS (No. 2000/464)

Decided: 9 June 2000 by J.A. Kiosoglous.

Background

The applicant received family allowance after providing an estimate on 24 June 1997 of $60,000 for 1997/98 income. Actual income was more than 10% of the estimate and a debt was raised for the period 3 July to 18 December 1997.

The issue

The issues in this appeal were:

- is there a debt?
- should the debt be waived?

The evidence

Gibbons represented his wife. His evidence was that he had advice from Centrelink that there was a 25% leeway, rather than 10%. He submitted, therefore, that the debt arose due to administrative error.

Evidence was also given of their current family situation, including:

- failure of a business and subsequent bankruptcy;
- their 13-year-old son had suffered from ADD for seven years;
- their 6-year-old son suffered from cerebral palsy and micro cephalic epilepsy. This son had a life expectancy of five years and there were 'enormous' care and financial obligations;
- the decision to give their children education in Adelaide and consequently incurring $135 month in bus passes;
- general financial difficulties.

The Department argued that, while sympathetic to the applicant's situation, there was a demonstrated capacity to repay without compromising the children's care.

The law

There was no dispute that a debt existed under ss.885 and 1223. The Tribunal considered the application of the administrative error provision of the Act but found that if there was an error it did not cause the debt.

The main issue was the application of special circumstances waiver which is covered by s.1227AAD.

The AAT accepted that the debt could not be written off and that the applicant did not 'knowingly' make false statements or breach the Act.

The AAT found that the 'striking feature' was the 'enormity of the burden' faced by the applicant and her husband. The Tribunal discussed the issue of distinguishing sympathy and special circumstances. The Tribunal noted that it should consider the overall effect of the debt recovery against the impact that recovery would have on the family. It also noted that it should consider the best interests of the children and their quality of life.

The Tribunal found the expenses associated with the children's care were unusual and exceptional, as compared with other disabled children. This together with other financial issues and the burden of caring for the children, especially the six-year-old constituted special circumstances — and warranted waiver of the debt.

Formal decision

The AAT set aside the decision under review, and substituted a decision that the debt of the period 3 July to 18 December 1997 be waived.

[R.P.]

Family payment debt; request to pay on an estimate; administrative error; special circumstances

SECRETARY TO THE DFaCS and AGRESTI
(No. 2000/383)

Decided: 19 May 2000 by R.P. Handley.

The Department sought review of a decision of the SSAT which had affirmed the raising of family payment debts of $1216.80 for the period 2 January 1997 to 18 December 1997 and $517 for the period 1 January 1998 to 21 May 1998, and waived recovery of the debt of $1216.80.

The issue

The issue in dispute before Tribunal was the recovery of the debts.

The facts

On 18 December 1996, Agresti lodged a claim for family payment in respect of her four-year-old son and her second son who was born on 12 December 1996. She estimated that her combined taxable income in 1996/97 would be $56,543, which was less than her combined taxable income of $84,135 in 1995/96, because she had commenced maternity leave and her husband had become self-employed in November 1996. By letter dated 1 May 1997, the Department advised her that the income used to work out her rate of family payment was her estimate of $56,543. By letter dated 1 December 1997, the Department advised her that she must notify the Department if her combined income for 1996/97 exceeded the applicable income limit for two children of $69,239. Agresti did not reply to this letter and family payment continued to be paid to her on the basis of her estimate of $56,543 for 1996/97. A data matching exercise subsequently revealed that her combined taxable income for 1996/97 was $70,930. On 21 May 1998, the Department cancelled her family allowance, as family payment was renamed. On 28 July 1998, the Department raised debts against Agresti of $1216.80 for the period 2 January 1997 to 18 December 1997 and $517 for the period 1 January 1998 to 21 May 1998.

The evidence

Agresti said 1996/97 was a difficult year for her. Her mother died, she and her husband had been evicted from their rental accommodation in November 1996, and her husband resigned from his job to care for her and their children because she suffered ongoing pain as a result of spinal injuries received in a motor vehicle accident in 1994. Her husband had hoped to obtain contract work but none had eventuated. Their new baby born in December 1996 had health complications.

Her estimate of $56,543 was based on the rental income she expected to receive from a property she inherited from her mother, income she received from the investment of a lump sum compensation settlement arising from the motor vehicle accident, and her income and her husband's income from 1 July to November 1996. She said actual combined income for 1996/97 exceeded her estimate because she received more rental income than she had expected as a result of a proposed sale of the property falling through. Her ATO assessment for 1996/97 was not issued until November 1997 because the inheritance of the rental property had complicated preparation of her return.

Agresti said she generally reads forms she signs but had no understanding of the consequences of under-estimating her income on the family payment claim form and did not realise she had a choice as to whether to provide an estimate. Her main objective in lodging the claim in December 1996 had been to obtain the maternity allowance. She had no specific recollection of the Department's letters of 1 May 1997 and 1 December 1997. In December 1997, they had moved into a new house and their records were in some disarray.

At the time of hearing in February 2000, her husband remained full time carer of the children and she worked full-time as an office worker. The family's income consisted of her wages and income from a rental property.

The Department's submissions

The Department noted that Agresti's combined taxable income in 1995/96 exceeded the applicable threshold for payment of family payment. Regard was had to her estimate for 1996/97 and it was considered to be a request to assess her entitlement to family payment on the basis of the estimate. It was noted that the claim form did warn of the risk of providing an estimate which was not within 10% of actual income.

The Department submitted that it was empowered by s.885 to recalculate the family payment to which Agresti was entitled. As she had not replied to the Department's letter of 1 December 1997 by providing details of actual income in 1996/97, the Department had no choice but to continue family payment in 1998 on the basis of her estimate for 1996/97 and had the power to do so under s.1069-H18. Agresti had the responsibility, having been notified of her obligations, to notify of events or circumstances which might affect her payments, an obligation accepted by the Tribunal in *Secretary, DFaCS and Delia* [1999] AATA 799. The Department relied on the reasoning in *Delia*.

Agresti's submissions

Agresti's representative referred to the analysis of the relevant legislation in *Stuart* (1998) 3(4) *SSR* 42 and argued that Agresti had not made a request in accordance with s.1069-H21 as there was no provision to make a request on the claim form which she had lodged. Agresti's primary intention in lodging her claim in December 1996 was to obtain maternity allowance. Unfortunately, the form provided for that allowance was a composite form which also included family payment and childcare assistance. Section 885 permits the Department to recalculate the family payment payable but does not empower it to make a determination.

As there had been no request to be paid on the basis of an estimate on the claim form lodged by Agresti, the decision to do so was an administrative error and was the sole cause of the overpayment for the period 2 January 1997 to 18 December 1997 and, accordingly, that debt must be waived under s.1237A(1).

In relation to the second debt of $517 for the period 1 January 1998 to 21 May 1998, s.1069-H15 did not apply and the Department did not have the power to continue paying Agresti in 1998 on the basis of her 1996/97 estimate. The Department's letter to her dated 1 December 1997 did not ask her to provide