> I take the view that 'received in good faith' in the context of section 1237A(1) of the Act refers to receipt of the payment by the debtor in circumstances without notice of any irregularity which is contrary to the Act.

The issue arose in *Haggerty and Secretary to the DETYA* (1999) decided 5 November 1999. The AAT held in that case that a student had not received AUSTUDY in good faith because his sister, who was living with him in a family home, had applied for AUSTUDY at the same time and was rejected on the basis of actual means. The Tribunal was satisfied that 'there was reason for the applicant to know that he was not eligible for AUSTUDY payments as well as reason for him to make further inquiries'. The want of good faith was drawn from the findings that:

- there was concern and puzzlement within the family about entitlement;
- the situation was so unusual that Mr Haggerty snr had contacted the Department seeking to know why one child's application had been rejected and another accepted;
- the circumstances were such that the applicant had reason for concern;
- Haggerty had theories about the possible reasons for the decision to grant AUSTUDY to him and not his sister and had put his mind to the discrepancy;
- there was sufficient reason for Haggerty to have made an enquiry to clarify the situation.

Haggerty's evidence had been that he believed the different outcome for his own AUSTUDY application and that of his sister had been due to their age difference and differences in the courses of study they were undertaking.

It was argued in the Federal Court appeal that the AAT's finding, that Haggerty had sufficient reason or concern to make further enquiry to clarify the situation, was not sufficient in law to amount to a lack of good faith. The AAT had failed to make sufficient findings about Haggerty's actual state of mind regarding the receipt of the payments and had instead placed undue weight on the view of his family members.

The Federal Court accepted these submissions. French J looked to the words used in *Prince* and stated:

> I do not take what his Honour said in that case as supporting the proposition that a person can be found to be receiving payments other than in good faith simply by reason of the fact that there are facts in existence which are known to the recipient to negative the recipient's entitlement. In my opinion that is not a sufficient criterion. Knowledge of relevant facts is not enough to generate reason to know of the lack of entitlement.
>
> The criterion of receipt in good faith may be characterised as a positive one as counsel for the respondent submitted. That is not to say that a recipient of a mistaken payment must prove that he or she has considered the entitlement to the money and positively concluded that there is an entitlement. There is no question of an onus here to be met by the recipient who claims benefit of the mandatory waiver. Nor is there some twilight zone between good faith and want of good faith. A waiver can only, in my opinion, be declined where there has been a receipt, without good faith, of moneys mistakenly paid ...
>
> Consistently with what his Honour said in the *Prince* case, want of good faith will arise where there is a suspicion held by the recipient that he or she may not be entitled to the payment made or a doubt as to the entitlement coupled with some objective basis for such suspicion or doubt. The provision does not, however, authorise the imputation of want of good faith in any of the senses above described simply because there are in existence objective facts which would raise a belief or a doubt or a suspicion of non-entitlement in the mind of some imaginary recipient. That proposition is quite consistent with the view that the existence of such facts may support an inference that the recipient disbelieved or doubted or was suspicious about his or her entitlement. 'Reason to know' as Finn J used that term in *Prince* does not necessarily import a criterion of imputed as distinct from actual want of good faith as I have described it.

Thus, the decision affirms that the good faith criterion is a subjective test, which requires a positive finding as to the state of mind of the recipient of the overpayment. Objective evidence may be looked to as supporting evidence for a finding on that issue, but such objective evidence cannot be used to conclude there is a want of good faith on the basis of what a reasonable person might have done or believed in response to such information. Further 'concern, puzzlement, upset and a perception of unusual circumstances, coupled with an absence of further enquiry', are not enough in themselves to constitute want of good faith. However, it is clear that a more positive finding, that there has been 'a degree of wilful blindness' (*see Mallows and Secretary to the DSS* decided 12 September 1997), for example, will support a conclusion that there has been a want of good faith.

[A.T.]

Administrative Appeals Tribunal Decisions

Notice of decision: formal requirements

SECRETARY TO THE DFaCS and PLUG
(No. 2000/744)

Decided: 25 August 2000 by O'Connor J, R.D. Fayle and S. McKnight.

Background

Plug was receiving family allowance of $299.45 a fortnight when she separated from her husband in January 1996. She advised the DSS that she was receiving private maintenance of $100 a fortnight. On 23 January 1996 she was notified by letter that the rate of family allowance would reduce to $277.95 a fortnight from 1 February 1996 because her maintenance had changed, and that she must advise if the amount of maintenance she received changed.

On 6 March 1996 Plug notified the DSS that she and her husband had reconciled. She also applied for a parenting allowance and later provided full details about her husband. On 26 March 1996 a letter was sent to Plug advising that family allowance would be paid at $246.45 a fortnight from 11 April 1996, and the amount was lower because she was no longer eligible for guardian allowance. It did not explain that maintenance of $100 a fortnight was still taken into account in calculating the rate.

On 7 July 1997 the DSS wrote to Plug stating that the Child Support Agency had worked out that she should get at least $124.33 a month as child support, but 'as you are getting at least this amount you do not have to do anything further'. Plug did not contact the DSS to query that letter.

Centrelink advised Plug on 16 March 1998 that her family allowance would be paid at $264 a fortnight (effective from 12 March 1998) 'because you are now getting more Rent Assistance'.

On or about 28 May 1998, Plug became aware that she had been underpaid family allowance since she and her husband had reconciled, and she requested arrears from the date of reconciliation. Centrelink paid arrears from 12 March 1998.

The legislation

Section 887 of the *Social Security Act 1991* (the Act) provides:

> **887.(1)** The day on which a determination under s.878 or 883 (the 'favourable determination') takes effect is worked out in accordance with this section.
>
> . . .
>
> **887.(3)** If:
>
> (a) a decision (the 'previous decision') is made in relation to a family allowance; and
>
> (b) a notice is given to the recipient advising the recipient of the making of the previous decision; and
>
> (c) the recipient applies to the Secretary under s.1240, more than 13 weeks after the notice is given, for review of the previous decision; and
>
> (d) a favourable determination is made as a result of the application for review; and
>
> (e) subsections (6), (7) and (8) do not apply to the determination;
>
> the determination takes effect on the day on which the recipient sought the review.
>
> . . .
>
> **887.(4)** If:
>
> (a) a decision (the 'previous decision') is made in relation to a family allowance; and
>
> (b) no notice is given to the recipient advising the recipient of the making of the previous decision; and
>
> (c) the recipient applies to the Secretary under s.1240 for review of the previous decision; and
>
> (d) a favourable determination is made as a result of the application for review; and
>
> (e) subsections (6), (7) and (8) do not apply to the determination;
>
> the determination takes effect on the day on which the previous decision took effect.
>
> . . .

Centrelink had decided that arrears could be paid from 12 March 1998 pursuant to s.887(3) because Plug had requested a review of the decision less than 13 weeks after a notice was given. Arrears could not be paid from an earlier date because the request was made more than 13 weeks after the letter of 26 March 1996.

On review the SSAT had varied that decision to make the increased rate payable from 6 March 1996 to 7 July 1997. It followed *McAllan and Secretary, DSS* (1998) 3(5) *SSR* 62:

> ... no mention was made in the notices of the fact that the department was taking into account maintenance income. There was no way Mrs Plug could have known this, and the [SSAT] took the view that Mrs Plug was not notified of the decision to take maintenance income into account within the meaning of subsection (4) of s.887. The [SSAT] took the view that a notice must not only inform the recipient of what the decision is, but it must also include sufficient information for the recipient to know what the main reasons for the decisions are.

The AAT's decision

In *Austin v Secretary, DFaCS* (1999) 3(10) *SSR* 159, Drummond J had considered other provisions in the Act that were the same for relevant purposes as s.887, and had stated:

> ... it is not necessary for any reasons for a decision to be notified to a benefit recipient before there can be 'notice' given of that decision within the meaning of that term in s.660K. *Re McAllan* was not correctly decided.

For Plug it had been argued that s.887(4) was a beneficial provision and should not be construed narrowly. Its purpose was for recipients to be given sufficient information about the decision to decide whether or not to seek review of the decision, and this required the notice to include sufficient information for the recipient to know the main reasons for the decision. As the rate of family allowance was based on the assumption that she was still receiving maintenance income, that fact had to be communicated to Plug for the notice to serve any meaningful purpose.

It had also been argued that the word 'decision' is widely defined. In *ABT v Bond* (1990) 170 CLR 321 the High Court had said that it may signify a determination of any question of substance. In this case a matter of substance was that Plug was believed to be receiving maintenance income, but the DSS had not informed her of this 'decision'.

However, the AAT considered it was bound by the *Austin* decision, and even if not bound it would require strong argument to depart from the reasoning which had been endorsed by its own decision in *Secretary, DSS and Sting* 2 *SSR* 3.

The AAT did not accept that because the DSS had previously written letters to Plug that contained more than the bare decision, it was estopped from relying on an argument that the legislation required *only* such information to be communicated. This was because the doctrine of estoppel would require the applicant to take action otherwise not required by the law, and there was no general power for parties affected to require reasons for decisions in such a case.

It also did not accept that because the applicant had in the past informed Plug of the essential parts of its decisions on matters of substance, then Plug had a legitimate expectation that she would be informed of the essential parts of the applicant's decisions at all times. The difficulty was that the principle relates to the process of making a decision, whereas this case was related to the manner of notifying a decision to the party affected. The principle does not create substantial rights over and above those provided in the statute concerned.

Formal decision

The AAT set aside the SSAT's decision and in substitution decided that the rate of family allowance was properly increased from 12 March 1998.

[K.deH.]

Family allowance: fringe benefits, employee contribution

SECRETARY TO THE DFaCS and NEMER
(No. 2000/559)

Decided: 7 July 2000 by D.J. Trouse.

Background

Nemer and her partner were employed by a trading company under their control. Family allowance for three dependent children had previously been cancelled because combined taxable income had exceeded the relevant income ceiling. On 29 May 1998, Nemer requested the payments be reinstated. She estimated her and her partner's taxable income for 1997/98 to be $69,992, and stated that they did not receive employer-provided benefits. Payments were resumed from 23 April 1998 on the basis of that information.

On an annual review form of 7 October 1998, Nemer advised her actual taxable income for 1997/98 was $34,996, her partner's was $34,946, and their employer had provided car fringe benefits throughout the year. The value of the car benefit was determined to be $5312 which, when added to the individual amounts, gave a combined taxable