earn. That construction reflects the use of the word 'payment' and avoids the anomalies to which I have referred.

(Reasons, para. 21)

**Error of law**

The Court then found that the award of interest in this case related in some way to past economic loss. There was no evidence before either the SSAT or the AAT of the basis for calculating the award of interest except that it related to past economic loss. Whether any part of the interest payment was in respect of lost earnings or lost capacity to earn is a question of fact. The AAT found as a fact that the interest awarded was not in respect of lost earnings or lost capacity to earn and so there was no error of law.

**Formal decision**

The Federal Court dismissed the appeal.

**[C.H.]**

# *Debt due to failure to advise of marriage-like relationship: aspects of decision requiring consideration*

**HAZIM v SECRETARY TO THE DFaCS**
**(Federal Court of Australia)**

**Decided: 14 March 2002 by Gray J.**

Hazim appealed against the decision of the AAT that she owed a debt because she failed to advise the Department of Social Security and later Centrelink that she was living in a marriage-like relationship and thus was paid sole parent pension, parenting payment single, family payment and family allowance she was not entitled to receive.

**The facts**

Hazim had three children in 1993 and received sole parent pension and then parenting payment single. Centrelink claimed that between 24 April 1993 and 12 November 1998 Hazim was living as a member of a couple with Abdul Karim and had been overpaid $74,677.85. Hazim had three more children by Karim; two of those children were born within the above period. Hazim also received family payment and then family allowance for the children during the relevant period.

The SSAT decided that Hazim had lived in a marriage-like relationship since 12 January 1994 and that the debts must be recalculated and recovered. The AAT decided Hazim was a member of a couple and therefore not qualified to receive payments from 12 January 1994 to 4 September 1996 and from 13 October 1997 to 16 February 1998.

**The law**

According to s.249(1) of the Social Security Act 1991 (the Act) a person is only qualified for sole parent pension (and parenting payment single) if they are not a member of a couple. The definition of member of a couple is found in subsections 4(1),(2) and (3) of the Act. Subsection 4(2) states:

> **(2)** Subject to subsection (3), a person is a **member of a couple** for the purposes of this Act if:
>
> ...
>
> (b) all of the following conditions are met:
>
> (i) the person has a relationship with a person of the opposite sex (in this paragraph called the **'partner'**);
>
> (ii) the person is not legally married to the partner;
>
> (iii) the relationship between the person and the partner is, in the Secretary's opinion (formed as mentioned in subsections (3)), a marriage-like relationship;
>
> (iv) both the person and the partner are over the age of consent applicable in the State or Territory in which they live;
>
> (v) the person and the partner are not within a prohibited relationship for the purposes of section 23B of the *Marriage Act 1961*.

Subsection 4(3) sets out the criteria the Secretary must take into account when forming an opinion that the person is living in a marriage-like relationship. Subsection 4(4) provides that if a person has been living together with a person of the opposite sex in a residence for at least eight weeks, and they have a child, then the Secretary must not form the opinion the person is not living in a marriage-like relationship unless the weight of evidence supports this opinion.

The rates of payment of family allowance and family payment are calculated according to the person's income, which includes the income of their spouse. If Hazim was a member of a couple her spouse's income should have been taken into account when calculating the rate of family payment paid to her.

When Hazim received the sole parent pension, the Act provided in ss.282 and 284 for the person to be given notices requiring them to give information or a statement to Centrelink if there was a change of circumstances or an event occurred that affected their payments. Sections 288, 289 and 290 permitted the pension to be suspended or cancelled if the person did not provide the information or statement. Section 295 stated that the pension was to be cancelled or suspended if it was not payable under the Act. Similar provisions applied to payment of parenting payment single, family payment and family allowance.

The debts were raised pursuant to s.1224 of the Act, which provided:

> **1224.(1)** If:
>
> (a) an amount has been paid to a recipient by way of social security payment; and
>
> (b) the amount was paid because the recipient or another person:
>
> (i) made a false statement or a false representation; or
>
> (ii) failed or omitted to comply with a provision of the social security law or this Act as in force immediately before 20 March 2000 or the 1947 Act;
>
> the amount so paid is a debt due by the recipient to the Commonwealth.

Further relevant sections are s.24(2) and s.1237AAD. Subsection 24(2) states that if a person is a member of a couple the Secretary may decide for a *special reason in the particular case* that the person be treated as not being a member of a couple. Section 1237AAD provides that a debt may be waived in the special circumstances of the case if the debtor did not knowingly make a false statement or representation that caused the debt.

**The AAT's findings of fact**

Gray J noted that there were discrepancies between the AAT's observations in its reasons, its findings of fact and its decision. It was argued by Hazim that this was an error of law. One of the functions of the AAT is to identify the facts. The discrepancies between some of the AAT's findings and its decision were errors of fact. Section 43AA of the Administrative Appeals Tribunal Act 1975 which sets out the 'slip rule' in statutory form, was the perfect remedy for this error. It allowed the AAT to correct the discrepancies by ordering the Registrar of the AAT to amend the decision and reasons according to its directions. It was also argued by Hazim that the fact that the AAT had not of its own motion corrected the discrepancies in its decision was an error of law. This argument was rejected by the Court because the AAT

had not yet been asked to correct the discrepancies.

**The decision under review**

The AAT had stated in its reasons that it was not certain what decision it was reviewing because there was no decision to raise a debt included in Centrelink's documents. Gray J found it hard to identify the difficulty the AAT had with the decision under review and concluded that the AAT probably only wished to vary the dates Hazim was found to be in a marriage-like relationship. However the Court did conclude that the AAT had not correctly identified the decision under review and thus had misdirected itself as to the substantial issue to be addressed.

The nature of the decision under review is derived from the legislation. However s.1224 does not empower a person to make a decision. 'If the facts referred to in the section have occurred, the section operates to create a debt due to the Commonwealth' (Reasons, para. 32). In court proceedings to recover any debt it would simply be necessary to prove the facts in s.1224. It would not be necessary to show that an officer had made a decision to raise and recover the debt. According to Gray J the issue was whether the raising of a debt or seeking to recover a debt was a reviewable decision.

The review sections provide that the ARO, SSAT and the AAT can review a decision under the Act. *Decision* is defined in the AAT Act as including *making a declaration, demand or requirement.* This would seem to cover the situation where a demand for repayment of a debt is made. In this case a decision was made and correctly reviewed by the ARO and the SSAT.

**Section 1224**

For there to be a debt under s.1224 there must be a causal relationship between the false statement/misrepresentation or failure/omission by the person (or another) and the payment of a social security benefit to that person. If when making a claim for a benefit a false statement etc is made and as a result the benefit is paid, there is a debt under s.1224:

> The test for causation is not intended to be a difficult one. If the information provided in the false statement or representation is a contributing factor in the favourable determination, the relationship will be established. Similarly, if the absence of the information that should have been provided, but was not as a result of the failure or omission, contributed to the favourable determination, the causal relationship will exist. In either case, the amounts paid to the recipient as a result of the determination of the claim will be paid 'because' of the false statement or representation or the failure or omission.

(Reasons, para. 38)

If the payment was not made because of a false statement etc at the time of the claim the situation is more difficult. The decision to pay the benefit continues until a further decision is made to terminate payment. If it can be shown that subsequent events have occurred that would have justified a decision to terminate the payment, then consideration must be given to whether the person made a false statement etc. which caused the payments to continue:

> The false statement or representation, or the failure or omission, must have been a contributing factor to the absence of a decision to terminate payments.

(Reasons, para. 39)

Section 1224 does not operate to create a debt immediately after a change in circumstances. Before s.1224 would operate to create a debt it must be shown that a decision would have been made by Centrelink to cancel that payment because of the change in circumstances, and that the decision was not made because of the false statement etc. The date the decision would have been made to cancel payments if there had been no false statement etc, must be ascertained before there can be a debt. Unless there is a finding as to the date of cancellation of the payment, it cannot be said that the payments were made as a result of the false statement etc.

Gray J then noted that neither the ARO nor the SSAT had made the necessary connection between any false statements etc. made by Hazim and the continuing payment of social security benefits to her. The AAT made no specific findings on whether Hazim made a false statement etc that caused the sole parent and the other payments to continue to be paid to her. Both the SSAT and the AAT had assumed that it was simply necessary to find that a marriage-like relationship existed for there to be a debt.

**Subsection 4(4)**

Subsection 4(4) sets out a statutory presumption that if specific circumstances exist the Secretary is obliged to find that there is a marriage-like relationship unless the weight of evidence is to the contrary. According to Gray J, the existence of a false statement etc. must be decided without reference to s.4(4). The failure or omission relates to whether the person complies with a notice — not whether the person is living in a marriage-like relationship. If a finding has been made that there was a false statement etc, the decision can be made on whether there was a marriage-like relationship and whether payments continued because of the false statement. The AAT applied s.4(4) incorrectly because its function was:

> not to form an opinion as to whether, during some particular period or periods, the relationship between the applicant and Abdul Karim had been a marriage-like relationship. Rather, its function was to determine whether there had been any false statement or representation, or any failure or omission, of the kind contemplated by s.1224 and to decide whether a causal relationship existed between any such statement, representation, failure or omission and the making of any payment received by the applicant. Section 4(4) could have been relevant only to the question of causation, and only on the basis that it may have been necessary to determine whether a notional decision-maker would have applied the presumption and would have made a decision to cancel or suspend payments.

(Reasons, para. 68)

Two further issues were raised by the appeal. The first was whether s.4(4) applied from the commencement of the period the person began living with the other person, or after eight weeks. The Court decided that s.4(4) only applied after the eight-week period. The second issue was whether s.4(4) applied to the payments of family allowance and family payment. The Court found that s.4(4) was not limited to sole parent pension and parenting payment single even though the subsection referred to 'if a person claims, or is receiving, sole parent pension'.

**Waiver/special circumstances**

The AAT had dealt with waiver by referring to s.24(2) and considering whether special circumstances could be found. This was clearly an error of law. Subsection 24(2) does not deal with special circumstances but rather if a specific reason exists in the particular case. If a specific reason exists the Secretary can treat the person as not being a member of a couple. Subsection 24(2) deals with the present state of affairs and its only relevance is to consider whether it can be taken into account when considering causation under s.1224. That is, if the Secretary had known all the facts would a decision have been made to continue payments because of s.24(2), even though the person has made a false statement etc and was a member of a couple. The AAT should have addressed the question of waiver under s.1237AAD.

**Summary**

- Did Hazim (or another) make a false statement or representation, or did Hazim (or another) fail to comply with a provision of the Act. If so, the AAT must determine whether the false statement etc. caused (that is, contributed to) no decision being made to cancel the social security payments. The AAT must also decide the date any such decision would have been made. Then the AAT must consider whether s.4(4) and/or 24(2) applied. If the AAT does decide that a decision would have been made to cancel payment of the benefits from a certain date, it is then obliged to calculate the amount of the debt.
- The AAT must decide if a false statement etc. was made knowingly. If not, the AAT can then consider if there were special circumstances that would justify waiving all or part of the debt.

**Formal decision**

The Federal Court set aside the decision under review and remitted the matter back to the AAT to be reheard by a differently constituted panel.

**[C. H.]**

[**Contributor's Note**: Sections 288 and 289 of the Act set out the date of effect of any decision to cancel payment of sole parent pension if a person complies with a notice (s.288) or fails to comply with a notice (s.289). The Court refers to the difficulty the AAT would have deciding the date of a decision to cancel payment of the pension if a person made a false statement or representation that resulted in the pension continuing to be paid. Sections 288 and 289 set out the dates of effect of any decision to cancel the pension.

The Court did not address the issue raised in the SSAT decision that where a person loses qualification for the sole person pension that qualification can only be restored if the person claims the pension again. So if a person were to lose qualification for the pension by becoming a member of a couple, the person would only qualify for the pension again if they claimed it again. In Hazim's case if she became a member of a couple in 1994 she could not have been qualified for the pension after that date unless she reclaimed it.]

# SSAT Decisions

## *Family tax benefit: reasonable action to obtain maintenance*

**HM**

**Decided:** 22 November 2001

HM had four children for whom she received family tax benefit at above the minimum rate. A fifth child was born on 28 May 2001, and HM lodged a claim for family tax benefit in respect of this child on 4 June 2001. The claim was accepted and she was paid family tax benefit from the date of the child's birth, but only at the minimum rate, on the grounds that she had not taken reasonable action to obtain maintenance from the father of the child. HM subsequently lodged an application for a Child Support Assessment on 2 August 2001, and was paid the higher rate of family tax benefit. The issue to be determined was whether HM was entitled to be paid the higher rate of family tax benefit from 28 May 2001 until 1 August 2001.

**The law**

The rate of family tax benefit payable is determined in accordance with the provisions set out in Schedule 1 of the *Family Assistance Act 1999*. In particular clause 10 provides:

> **10.** The FTB child rate for an FTB child of an individual is the base FTB child rate (see clause 8) if:
>
> (a) the individual or the individual's partner is entitled to claim or apply for maintenance for the child; and
>
> (b) the Secretary considers that it is reasonable for the individual or partner to take action to obtain maintenance; and
>
> (c) the individual or partner does not take action that the Secretary considers reasonable to obtain maintenance.

**The policy**

In reaching its decision, Centrelink relied on the departmental policy guidelines which specified that reasonable action to obtain maintenance required that a claimant apply for a Child Support Assessment within 28 days of their claim for family tax benefit.

**What constitutes 'reasonable action'?**

The Tribunal noted that the Departmental guidelines were inconsistent with the legislation to the extent that they fettered the discretion contained in clause 10. While lodgement of a Child Support Assessment within a reasonable time frame was considered to be a legitimate criteria on which 'reasonable action' could be considered, it was not legitimate to limit consideration solely to that factor.

The Tribunal stated that whether HM had taken reasonable action to obtain maintenance depended on her behaviour and circumstances at the relevant time. The Tribunal took into account that HM was suffering ill health after the birth, and that the child needed to remain in hospital for some weeks. This impacted on her ability to fully read and understand documentation which notified her of the need to lodge a claim for Child Support Assessment within 28 days of her claim. As soon as she became aware of the requirement in August 2002 to lodge such an application, she did so.

It was also noted that the application for Child Support in respect of the fifth child made no practical difference, as HM was already in receipt of child support at the minimum rate of $5 a week for her other four children, her ex-partner being unemployed. That assessment did not change.

The Tribunal determined that HM had not failed to take reasonable action to obtain maintenance and that she was entitled to family tax benefit at above the minimum rate for her fifth child from 28 May 2001 until 1 August 2001.

**[A.T.]**

## *Family tax benefit and maternity allowance: child's residence; whether in adult's care*

**YL**

**Decided: 5 November 2001**

YL lodged a claim on 15 August 2001 for family tax benefit and maternity allowance in respect of his daughter, J, born on 7 March 2001. The claims were rejected on the basis that J was born in China, was not an Australian resident and was not in YL's care.

**The law**

Section 21 of the *Family Assistance Act 1999* (the FA Act) requires that a claimant have an FTB child in their care to be eligible for family tax benefit. An FTB child is defined in s.22 to mean: