Zhang, reported in this issue. The approach in *Gray* was to 'dissect the requirements' of the relevant legislation and then apply the facts. Employing that approach the AAT established the various requirements under consideration in this matter, concluding that the emphasis in s.541B is on enrolment:

> It is upon enrolment in the course. It then moves to the study period for which the person is enrolled and then to the normal amount of full-time study for the period for which he or she is enrolled for that study period. The study period for which a person is enrolled then becomes a question to be ascertained on the facts of the case.

(Reasons, para. 26)

The AAT concluded that ascertainment of the relevant 'study period' remains a question of fact to be decided in each case.

The reference to a semester in s.541B(1)(b)(i) was seen as an example only, consistent with s.15AD(a) of the *Acts Interpretation Act 1901* which provides that an example of the operation of an Act is not be taken as exhaustive.

Conclusions

Four factors were identified as pointing to the study period being a full academic year in this case. These included that enrolment on each occasion was for an academic year, and that the enrolment form is headed 'enrolment — 2001' suggesting a full-year rather than part-year enrolment. Also, Matheson was able to change subjects from one semester to another within the year's enrolment in the course. The Program Information for her course also supported this view. It was determined that in this case the 'study period' was an academic year.

The AAT determined that as Matheson's enrolment of 22.5 points in 2000 was less than 75% of the normal full-time student load, there was a debt from 20 October 2000 until the end of the 2000 academic year. However, with a workload of 27 points (75%) in the 2001 year no debt arose between the end of the 2000 academic year and 26 July 2001.

Formal decision

The AAT set aside part of the decision, determining that a debt was to be recovered from Matheson for the period from 20 October 2000 to the end of the 2000 academic year, and affirming that there was no debt for the remaining period.

[H.M.]

[**Contributor's note:** This decision was followed in *Secretary to the DFaCS and Ung* No 2003/748, decided 4 August 2003. The Department has lodged an appeal to the Federal Court in the matter of *Matheson.*]

Widow allowance: residential qualification

SECRETARY TO THE DFaCS and KAELLO
(No. 2003/490)

Decided: 30 May 2003 by R.G. Kenny.

Background

Kaello divorced her husband in Russia in January 1995, and came to Australia in March 1995, staying with her daughter until her return to Russia in June that year. After her mother's death in September 1996, Kaello travelled to Australia on a visitor's visa and applied for a permanent visa. She was granted a bridging visa in 1997, which allowed her to travel to Russia on 1 September 1997 to resolve matters relating to her mother's will.

Kaello's mother bequeathed to her one room in a two-room unit in Russia. Her step-brother inherited the other room. During this period in Russia, Kaello lived in another unit that she owned, while she sold some of her mother's possessions. Kaello returned to Australia on 23 July 1998, on which date she was also granted a permanent residence visa.

On 23 March 1999, Kaello returned to Russia to sell the unit she inherited from her mother. The sale of the unit was complicated by the fact that she was legally required to offer her step-brother an opportunity to purchase the property, and that opportunity was to be left open for 12 months. Her ownership of the property needed to be resolved before the courts. Even after an extension of the required 12 months, Kaello's brother was not in a position to purchase the unit, and it was put up for sale. A purchaser was found, but there was some dispute regarding payment that also required resolution. As a result of these difficulties, Kaello did not return to Australia until 18 July 2002.

During this period, Kaello lived in the unit she owned independently of her step-brother, and lived off her Russian pension and earnings from part-time employment.

On 2 August 2002 Kaello lodged a claim for widow allowance, which was rejected by the delegate on 5 August 2002 on the basis that she was not residentially qualified for that payment. The decision was affirmed by the Authorised Review Officer, but overturned by the SSAT.

Legislation

The only area of dispute regarding Kaello's qualification for widow allowance, related to subparagraph 408BA(2)(d)(ia) of the *Social Security Act 1991* (the Act), which provides that:

> the woman entered Australia on or after 1 April 1996 and before the commencement day — the woman has been an Australian resident for a period of, or periods totalling, 104 weeks before the day she lodged the claim for the allowance.

An Australian resident is defined in s.7(2) of the Act as a person who:

> (a) resides in Australia; and
>
> (b) is one of the following:
>
> (i) an Australian citizen;
>
> (ii) the holder of a permanent visa;
>
> (iii) a special category visa holders who is a protected SCV holder.

Subsection 7(3) of the Act provides guidance for determining whether or not a person can be considered to be residing in Australia:

> In deciding for the purposes of this Act whether or not a person is residing in Australia, regard must be had to:
>
> (a) the nature of the accommodation used by the person in Australia; and
>
> (b) the nature and extent of the family relationships the person has in Australia; and
>
> (c) the nature and extent of the person's employment, business or financial ties with Australia; and
>
> (d) the nature and extent of the person's assets located in Australia; and
>
> (e) the frequency and duration of the person's travel outside Australia; and
>
> (f) any other matter relevant to determining whether the person intends to remain permanently in Australia.

Australian residence

The AAT considered the categories outlined in s.7(3) of the Act but noted that this was not an exhaustive list of considerations, and that the intention of the respondent will also be relevant: *Hafza v Director-General of Social Security* (1985) 6 FCR 444. The AAT calculated that Kaello had spent only 35 weeks in Australia between the date she was granted a permanent visa and the date she lodged a claim for widow allowance. However, the AAT

contrasted the wording of subparagraphs 408BA(2)(c)(ib) and 408BA(2)(c)(ia) and concluded that a person can be considered to be an Australian resident during periods of absence.

While in Australia, Kaello originally lived with her daughter and her husband, but after their separation, she shared a room in a three-room apartment with her daughter. Kaello was not included in the lease for this property, but was a permitted occupant. At all material times, Kaello owned a partially furnished unit in Russia, in which she lived while in that country. Further, Kaello owned part of a unit that she inherited from her mother, but which was eventually sold.

Kaello had some family in both Russia and Australia. In Russia, Kaello had a step-brother and a cousin and their respective families. She had a daughter in Australia.

Kaello had not worked in Australia, but had purchased some shares here and had opened a bank account. Kaello worked in Russia while finalising the sale of her mother's unit and received a Russian pension.

Kaello had spent a significant period of time outside Australia since she obtained a permanent visa. The AAT considered the decisions in *Re Secretary, Department of Social Security and Mosca* [1998] AATA 586 and *Re Issa and Secretary, Department of Social Security* (1985) 8 ALN 177, and the Department's argument that in both these matters the claimants had clearly established residential status in Australia before leaving the country. However, the AAT concluded that, although it may be 'less difficult to show an intention to return to Australia where there has been a previous lengthy period of residence in the country', the absence of a lengthy period of residence is not, of itself, a 'persuasive factor' (Reasons, para. 38).

In addition to the above, the AAT considered Kaello's intention to reside in Australia and the reasons for her prolonged absence, as well as her commitment to English lessons both in Australia and in Russia.

The AAT concluded that Kaello did satisfy the residence requirements for widow allowance at the date of claim.

Formal decision

The Administrative Appeals Tribunal affirmed the decision of the SSAT.

[E.H.]

Notice requesting information: validity

THEO and SECRETARY TO THE DFaCS
(No. 2003/489)

Decided: 30 May 2002 by R.G. Kenny.

Background

Theo and his wife were receiving age pension and blind pension on 1 January 2002 when the social security treatment of private trusts and companies changed. Centrelink had evidence that Mr and Mrs Theo, along with their children, were involved in the Solon Theo Family Trust (the trust) at that time. Centrelink required details of Mr and Mrs Theo's involvement in this trust in order to correctly assess their ongoing qualification for social security payments.

Centrelink wrote to Mrs Theo on 5 February 2002, requesting that information about her involvement in the trust be returned to Centrelink by 18 February 2002. Theo responded to that correspondence on 18 February 2002, informing Centrelink that he was the trustee of the trust, but that he did not believe that the trust was affected by the changed rules.

A letter was sent to Theo on 25 February 2002, again requesting further details regarding the trust. The letter did not specify a date for the supply of this information. Theo attended an interview at Centrelink on 28 February where he was recorded as having advised that he was the trustee of the trust.

On 7 March 2002, another letter was sent to Theo, requiring the return of information regarding the trust by 14 March 2002. Theo did not respond to that request.

On 8 April 2002, a decision was made to suspend Theo's payments. A letter to that effect was sent informing him of that decision on the same day. On 12 June 2002, Theo's payments were cancelled.

The issue

Whether the notices sent to Mr and Mrs Theo requesting information about their involvement in the trust were valid notices under the *Social Security (Administration) Act 1999* (the Act), and consequently, whether Centrelink validly suspended and cancelled Theo's pension as a result of his non-compliance with those notices.

The legislation

The notices in question were found to be issued under s.192 and s.196 of the Act. The relevant parts of s.196 provide:

> **196(1)** A requirement under this Division must be made by written notice given to the person of whom the requirement is made.
>
> **196(2)** The notice:
>
> (a) may be given personally or by post or in any other manner approved by the Secretary; and
>
> (b) must specify:
>
> (i) how the person is to give the information or produce the document to which the requirement relates; and
>
> (ii) the period within which the person is to give the information or produce the document to the Department; and
>
> (iii) the officer (if any) to whom the information is to be given or the document is to be produced; and
>
> (iv) that the notice is given under this section.
>
> **196(3)** The period specified under subparagraph (2)(b)(ii) must not end earlier than 14 days after the notice is given ...

Subsection 29(1) of the Acts *Interpretation Act 1901* provides:

> Where an Act authorises or requires any document to be served by post, whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used, then unless the contrary intention appears the service shall be deemed to be effected by properly addressing prepaying and posting the document as a letter, and unless the contrary is proved to have been effected as the time at which the letter would be delivered in the ordinary course of post.

Were the notices valid?

The AAT noted that notice provisions must be strictly construed, particularly where the consequence of non-compliance includes a penalty such as cancellation of a social security benefit. The AAT then considered the time periods that were allowed for compliance in the notices of 5 February, 25 February, 7 March, 24 June and 29 July 2002. In the absence of evidence to the contrary, the AAT presumed that these letters were received the day following the day they were sent. However, in none of the letters was the time period for compliance specified as at least 14 days after the day of receipt, and accordingly, the AAT found these notices to be invalid.

The AAT rejected the Department's arguments that the letters could be considered to be notices issued under s.68 of the Act, which allows seven days for compliance. The AAT found that the notices issued referred specifically to either s.192 or s.196 of the Act. The AAT