old. He owned 22 out of 32 shares in Fly Yourself Pty Ltd; the estate of his late mother and the estate of his late grandfather each owned five shares. The company's principal asset was Hanrick's home on the Gold Coast.

Hanrick was also a member of a partnership trading as W H Hanrick and Sons, which had been engaged in primary production prior to 2001. Notwithstanding that the other partners were Hanrick's late mother and his late grandfather, Hanrick maintained the partnership still existed. The partnership assets consisted of a bank deposit of $66,000 and a loan to Fly Yourself Pty Ltd of $200,220. The loan to the company had been intended to fund the purchase of Hanrick's home.

Centrelink decided that Hanrick's share of the partnership was 35/66, and the net assets needed to be attributed on that basis. It followed that $106,177 of the loan and $35,000 of the bank deposit were attributed to Hanrick as 'financial assets', which in turn attracted deemed income to Hanrick. Centrelink rejected Hanrick's claim on the grounds that his combined income precluded entitlement.

The issues

The Tribunal's principal task was to determine whether the loan by the partnership to the company was a 'financial asset'. If that question was answered in the affirmative, it would follow that deemed income thereon, in addition to Hanrick's other income, would put his combined income over the allowable threshold.

The law

Section 1077 of the *Social Security Act 1991* (the Act) requires deemed income from 'financial assets' to be assessed. The expression 'financial assets' is defined in s.9 to include 'financial investments', which includes money on deposit and the value of a loan that has not been repaid in full.

Discussion

Hanrick argued he should be treated as a home-owner. The loan moneys owed to the company should not have been taken into account because they related to the purchase of his home, which was exempted from the calculation.

The Tribunal turned its mind to the *Partnership Act* and concluded that the estates of Hanrick's mother and grandfather were not legal persons capable of entering into a partnership. The Tribunal observed that one effect of the *Succession Act 1981* was that the legal representatives of the estates could enter a partnership, but given Hanrick was sole executor of both estates, it was a legal impossibility for him to be in partnership with two other people, both of whom were himself. The Tribunal concluded he was really a sole trader and that the partnership property had vested in him. The Tribunal therefore considered that the shares attributed by Centrelink to Hanrick, being 35/66ths of the partnership property and 22/32nds of the company, understated his true entitlement to the financial assets of those entities.

The Tribunal observed that even if it was wrong in that respect, Hanrick's application would necessarily fail unless he could establish the loan moneys ought be disregarded because they were used to fund his principal home. The Tribunal stated:

> In *Repatriation Commission v Harrison* (1997) 46 ALD 193, the applicants controlled two companies. The sole assets of the companies were debts owed to them by the applicants ... The Tribunal held the value of the loans by the companies should be disregarded in assessing the value of the applicants' assets because in substance the applicants owed the money to themselves. Tamberlin J disagreed. The logic of the separate entity doctrine underlying corporate law prevented the decision-maker from having regard to the 'reality' of the situation. If the applicants were indebted to the companies, it was not open to the applicants to forgive the debt or ignore it. His Honour held that the value of the debt could be attributed to the applicants.
>
> I think the same logic applies here. The unpaid loan is a financial asset in the hands of the person or persons to whom it is owed. If the partnership has ceased to exist as I have found, the whole amount (less any amount that might be held for the benefit of others) is to be counted as part of the assets of the applicant. If the partnership remains on foot, the value of the loan is attributable to the partners according to the size of their shares ... The company's presence cannot be ignored, whatever the 'reality' of the situation. If one is to make use of complicated structures in the course of managing one's affairs in order to take advantage of the legal consequences of those structures, one cannot ignore the structure and its consequences when it suits one to do so.

(Reasons, paras 19, 20)

Formal decision

The Tribunal affirmed the decision under review.

[S.L.]

Disability support pension debt: special circumstances

SECRETARY TO THE DFaCS and BOYD
(No. 2003/541)

Decided: 11 June 2003 by S. Forgie.

The issue

The issue in this case was whether Boyd owed a debt of disability support pension (DSP) totalling $12,250 for the period July 1997 to January 2001, and whether any or all of the debt should be recovered. The SSAT had determined in July 2001 that no overpayment had occurred.

Background

There was no dispute that Boyd was during the period in question qualified to receive DSP, nor that on recalculation and taking into account her combined income her DSP payments should have been reduced to nil or a reduced amount in some fortnights during the period in question.

On 26 March 1997 a computer letter was generated from Centrelink to be sent to Boyd, which set out her combined annual income and required her to notify if her combined income was more than $82 per week, or if she or her husband commenced work. Although Boyd stated she did not receive this letter, she did in any case advise Centrelink on 26 March 1997 that her husband had begun work. There was no evidence that the letter had in fact been posted, and given this, the Tribunal concluded that Boyd was not given this notice (*Acts Interpretation Act 1901*, s.29). Boyd did not contact Centrelink again, nor was she contacted by Centrelink, until February 2001 when she was advised of the DSP debt. There was no dispute that after July 1997 Mr Boyd's employment income had increased above the amount noted in the Centrelink letter dated 26 March 1997.

The law

The *Social Security Act 1991* (the Act) at that time provided by s.1224 that an amount overpaid may be recovered where the amount was paid because of 'a false statement or false representation' or where a recipient 'failed or omitted to comply with a provision of this Act ...' (s.1224). Section 1223 then further provided that a debt was owed where '... the recipient was not qualified for the

social security payment and the amount was not payable to the recipient ...' (s.1223(1)). This latter section was amended with effect from 1 October 1997 to provide that a debt exists where '... the recipient was not qualified for the social security payment when it was granted; *or* ... the amount was not payable to the recipient ...' (emphasis added). The Act further provided by s.1223(5) that a debt exists where the amount received by a person is greater than the correct amount which should have been paid.

Where a debt exists recovery may be waived where s.1237AAD of the Act applies, which provides:

> 1237AAD. The Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that:
>
> (a) the debt did not result wholly or partly from the debtor or another person knowingly:
>
> (i) making a false statement or false representation; or
>
> (ii) failing or omitting to comply with a provision of this Act or the 1947 Act; and
>
> (b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and
>
> (c) it is more appropriate to waive than to write off the debt or part of the debt.

Did a debt exist?

The Tribunal first considered whether a debt existed in respect of the DSP payments received by Mrs Boyd.

The Tribunal concluded that no false statement or representation was made by Mrs Boyd as to her husband's employment or earnings and, as she had not received the letter supposed to be sent to her in March 1997, she had not failed to comply with a provision of the Act. As such, no debt arose under s.1224 of the Act. Similarly, although in some fortnights no DSP was payable to Mrs Boyd, she had remained qualified for DSP, and hence no debt arose under s.1223 of the Act during the period in question to 1 October 1997.

However, from 1 October 1997 the amendment to s.1223 came into effect, which provided that a debt could exist if either the person was not qualified for the payment when granted or the amount in question was not payable. Applying this amended provision, the Tribunal concluded that a debt did exist in respect of those payment periods after that date when, because of her husband's earnings, no DSP was payable to Boyd.

The Tribunal considered also s.1223(5) of the Act and determined that a debt existed in respect of the DSP overpayments received by her prior to 1 October 1997 (because those payments were made on the basis of incorrect combined income figures); and likewise in respect of DSP overpayments made after that date (because she received amounts other that the 'correct' amount of her entitlement in those fortnights where she was entitled to a nil payment and in other periods where she was entitled to a reduced payment).

In summary, therefore, the Tribunal concluded that a debt existed in respect of the whole of the overpayments of DSP for the period July 1997 to January 2001.

Should any part of the debt be waived?

The Tribunal considered the requirements of s.1237AAD of the Act, and concluded that the debt had not arisen from any false statement or representation by Boyd. However, for s.1237AAD 'special circumstances' must be able to be said to exist, for which it was necessary to show that '... something unfair, unjust or unintended had occurred or that there [was] some feature out of the ordinary ...' (*Groth v Secretary, Department of Social Security* (1995) 40 ALD 541 at 545).

In this matter, the Tribunal concluded that the intention of the legislation was to '... characterise as debt ... amounts paid to a person who was not entitled to receive them regardless of whether that person received them in good faith or not' and to recover these other than where special circumstances exist (Reasons, para. 27). Boyd was of the belief that the income figures advised via her taxation returns would have been made known to Centrelink through data matching. Further, as no letters were sent to Boyd informing her of her obligations, she was unaware of the need to advise of her husband's earnings. The Tribunal noted that the system of administration used by Centrelink allowed incorrect payments to be made to Boyd for an extended period. However, the Tribunal concluded that '... [this] system of administration potentially led to injustice for many if not all social security recipients but it did not lead to any injustice or unfairness to Mrs Boyd that was not visited, or potentially visited, upon all other recipients of payments under the Act ...' (Reasons para. 29).

On this basis, the Tribunal found that there were no special circumstances sufficient to warrant waiver of the debt.

The decision

The Tribunal set aside the decision under review and determined that a debt of $12,250 existed for the period July 1997 to January 2001.

[P.A.S.]

Disability support pension overpayment: good faith; failure to notify

GOUBRAN and SECRETARY TO THE DFaCS (No. 2003/558)

Decided: 16 June 2003 by N. Isenberg.

The issue

In this matter the issue was whether Goubran owed a debt of disability support pension (DSP) totalling $1862 for the period March 2001 to October 2001, and whether any or all of the alleged debt should be recovered.

Background

Goubran was in receipt of DSP for some years after a heart attack in 1994, following which he eventually resigned from his previous employment as a teacher. His wife also worked casually or part-time as a teacher and her income affected the rate of DSP paid to Goubran. She negotiated his Centrelink application and managed any issues which arose regarding his claim.

From late 1998 Mrs Goubran worked casually but irregularly, being called when work was available, though for the latter three terms of 2000 this became more regular part-time (2 or 3 days per week) work. In 2001 her work again became casual and less predictable.

From 1998, after commencing employment, Mrs Goubran would each fortnight advise Centrelink by telephone of her earnings, though these were unpredictable. In late 2000, after she ceased working for the year and when her carer's allowance ceased, she applied for newstart allowance (NSA). From then she notified Centrelink of her irregular earnings via fortnightly NSA forms, having been advised by Centrelink that telephone advice regarding her earnings was no longer required. Only one such fortnightly form was able