

Jacqueline. In addition, when calculating Horsey's correct entitlement to FTB for Daniel, the authorised Review Officer took into account maintenance income of \$5010 received by Horsey during 2000/2001. The total overpayment amount in question was \$3904.15 less \$1000 waived under a Determination made in 2001 under s.102 of *A New Tax System (Family Assistance) (Administration) Act 1999* ('the Act').

The law

The Act provides in Schedule 1 for a maintenance income test, the effect of which is that the rate of FTB payable depends on the amount of maintenance income received by an applicant.

The Act in 3 defines 'maintenance income' as:

maintenance income, in relation to an individual, means:

(a) child maintenance — that is, the amount of a payment or the value of a benefit that is received by the individual for the maintenance of an FTB child of the individual and is received from:

- (i) a parent of the child; or
- (ii) the partner or former partner of a parent of the child ...

In s.22 of the Act the term 'FTB child' is defined to mean:

22 When an individual is an FTB child of another individual

(1) An individual is an *FTB child* of another individual (the *adult*) in any of the cases set out in this section.

Individual aged under 18

(2) The individual is an *FTB child* of the adult if:

- (a) the individual is aged under 18; and
- (b) the adult is legally responsible (whether alone or jointly with someone else) for the day to day care, welfare and development of the individual; and
- (c) the individual is in the adult's care; and
- (d) the individual is an Australian resident or is living with the adult.

In the year in question, neither Jacqueline nor Joshua were in the applicant's care, and hence the Tribunal concluded that neither could be considered to be an 'FTB child' in that year. The Tribunal noted that receipt of child support (maintenance) in relation to a non FTB child (in this case, Joshua and Jacqueline) would be unusual such as to fall within the concept of special circumstances as noted in *Beadle v Director-General of Social Security* (1984) 6 ALD 1. As neither Joshua nor Jacqueline were FTB children in the year in question, any maintenance payments received in respect of them should be excluded from the maintenance income

test and so from calculation of the rate of FTB to be paid.

The decision

The Tribunal set aside the decision under review and directed that the overpayment be recalculated on the basis that only maintenance income received in respect of Daniel be included in the calculation of the annual maintenance income.

[P.A.S.]

Member of a couple: jurisdiction; meaning of 'decision'

YORK and SECRETARY TO THE DFACS
(No. 2003/843)

Decided: 29 August 2003 by R. Kenny.

The issue

The issue in this directions hearing was whether the Tribunal could determine the question of a debt and its waiver when these had not been explicitly considered by the SSAT.

Background

In October 2002 Centrelink determined that York was a member of a couple for disability support pension purposes ('DSP') and that, as a result, an overpayment of DSP had occurred. This decision was affirmed by an Authorised Review Officer in January 2003, and by the SSAT in April 2003. In its decision the SSAT affirmed that York was a member of a couple, but made no mention of any overpayment, debt or waiver. The applicant appealed to the AAT, requesting that both her relationship status and the question of any debt be resolved.

The law

The *Social Security (Administration) Act 1999* ('the Act') provides by s.181 that '[the] AAT may only review a decision that has been reviewed by the SSAT'. The question which arises is whether the decision under review by the Tribunal is that made by the SSAT or the primary (operative) decision.

The Tribunal noted that various approaches to this question have been taken, but that in *Yolbir v Administrative Appeals Tribunal* (1994) 48 FCR 246 and again in *Lee v Secretary,*

Department of Social Security (1996) 69 FCR 491 the latter interpretation was applied — that is, it was the primary (operative) decision that was to be reviewed at the Tribunal.

The Tribunal concluded that:

... [once] the SSAT determined that the applicant was a member of a couple, the implication of that decision was that she was overpaid disability support pension in the period nominated and ... there is authority for the view that the waiver issue may be considered by the Tribunal on the basis that non-waiver is implied in the situation ...

(Reasons, para. 14).

The decision

The Tribunal concluded that the decision under review was the operative decision and all those matters that were included in that decision, including York's relationship status, whether a debt existed and whether any debt should be waived.

[P.A.S.]