would not have been created under s.1166 'but for' the preceding error made by Centrelink. A 'but for' test can be used to determine 'a' cause, but not the sole or only cause.

The primary judge considered that the debt was caused by a number of factors, including the fact that Sekhon had received a compensation amount and had also received Centrelink benefits in respect of the same period. Heerey J effectively saw these matters as merely pre-conditions to the issue of the notice. They were necessary factors to create a valid debt under the *Social Security Act 1991*, and s.1237A could only apply where a valid debt existed. As s.1237A presupposed the existence of a valid debt, they were not matters relevant to the causation test.

The Full Court, referring to the decision in *Dranichnikov*, affirmed that s.1237A is predicated on there being a valid debt. However, the majority of the Full Court also considered, as a causal factor, the exercise of policy considerations in the exercise of the discretion to issue a notice under s.1166 of the Act, and considered that there was no evidence of any error in the exercise of that discretion in Sekhon's case.

In *Dranichnikov,* the decision rested on the Court's conclusion that the decision maker had made no attempt to determine the chain of events which led to an overpayment occurring. In those circumstances the decision maker had failed to fulfil the task required under s.97 of the *Family Assistance (Administration) Act 1999*. However, by way of obiter, the Court went on to make some unusual remarks as to the nature of 'administrative error'. Hill J (Keiffel J agreeing) stated:

> Essentially ... the concept is one where the error or mistake arises as a result of the procedure that has been adopted. An obvious example would be payment of a benefit where the decimal point was wrongly located. An error made by Centrelink or the Australian Taxation Office acting on its behalf in its administration of the law will generally be an administrative error. On the other hand, a decision made, for example, on a question of legal entitlement to a benefit while no doubt made in the course of administration of the law would not be an administrative error.

(Reasons, para.62)

The Court makes it clear that payment of a social security benefit or pension to which a person is not entitled cannot be considered of itself to be an error. The fact that Dranichnikov was paid family tax benefit when he did not meet the residential requirements for that payment, did not mean, in itself, that he was paid the family tax benefit as a result of administrative error. However, it was not then permissible to say, as the original decision maker appeared to do, that if a claim for benefit was made to which a person had no entitlement, the debt could not then be said to arise solely through administrative error. A factual enquiry as to how money came to be paid as a result of that claim was necessary.

Hill J's reasoning, however, also suggests that there is a distinction between errors in the administrative process and errors regarding 'legal entitlement' or 'determinative' errors and appears to be stating that errors which are 'determinative' are not errors to which s.1237A has any application. This raises the difficult problem of deciding which errors can be regarded as merely matters of administration or process and which are 'determinative'. In what category should an erroneous determinative decision, occurring as a result of computer programming, fall? What should occur when a decision maker is given all relevant information but misunderstands those facts or misapplies the law? In reality the lines between purely administrative acts and legal entitlement issues are more often than not blurred and the suggested distinction is certainly problematic if not unworkable. Rather, as Hill J. also stated:

> It is neither possible nor appropriate to attempt a meaning of the words 'administrative error' which would accurately cover every case for much will turn upon the circumstances.

(Reasons, para.62)

[A.T.]

Administrative Appeals Tribunal

Waiver: special circumstances; knowingly failing or omitting to comply with a provision of 'this Act'

SECRETARY TO THE DFaCS and MORTLOCK
(No. 2003/918)

Decided: 18 September 2003 by M. D. Allen.

The issue

The issue was whether an amount of $2915 in parenting payment ('PP') should be recovered from Mortlock. Her former husband had told her that he had advised Centrelink of his work and his wages, and when she later asked him about this 'he went off the deep end'. There was no record of such notification to Centrelink.

Background

Mortlock was in receipt of PP during the period in dispute, and the existence of the debt was not denied. Mortlock's relationship with her former husband was characterised by violence and his obsessive control of her life, and she had taken out an Apprehended Violence Order against him. At the hearing, with Tribunal approval, Mortlock remained outside the hearing while her ex-husband gave evidence because of her fear of him, and the Tribunal concluded that she was genuine in her fear and that this corroborated her accounts of earlier domestic violence.

The applicant's ex-husband was repaying a Centrelink debt which had arisen from his failure to declare his income, and had not challenged his overpayment.

The law

The obligation on a recipient to notify Centrelink of certain information is set out in the *Social Security (Administration) Act* ('the SSA Act'), which by s.68(2) provides that:

> **68.(2)** The Secretary may give a person to whom this subsection applies a notice that

requires the person to do either or both of the following:

(a) inform the Department if:

(i) a specified event or change of circumstances occurs; or

(ii) the person becomes aware that a specified event or change of circumstances is likely to occur;

(b) give the Department a statement about a matter that might affect the payment to the person of the social security payment.

The waiver provisions are contained in s.1237 of the *Social Security Act 1991* ('the Act') 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.

Thus in this matter the key question was whether or not Mortlock or another person had knowingly failed to advise Centrelink of her ex-husband's earnings, and whether special circumstances sufficient to justify waiver of any debt amount, could be said to apply.

The decision

The Tribunal concluded that Mortlock's ex-husband had knowingly failed to comply with his notification obligations under the SSA Act. However, the Tribunal noted that s.1237AAD(a)(ii) of the Act referred to obligations imposed not under the SSA Act but only under the Act or its predecessor (the 1947 Act). The Tribunal stated:

> Whereas I am satisfied that the Respondent's former husband knowingly failed to comply with his notification obligation, that obligation had been imposed upon him pursuant to para 68(2)(a) of the *Social Security (Administration) Act 1999* (see para 5 of Exhibit A1). As was pointed out by Deputy President Wright, QC in *Re Secretary Department of Family & Community Services and Lind* (2003) 36 AAR 498 (in a decision with which I respectfully agree), a reference in the *Social Security Act 1991* to *'this Act'* does not include a reference to the *Social Security (Administration) Act 1999*. This is particularly so in s 1237AAD of the *Social Security Act 1991* as that section refers specifically to *'a provision of this Act or the 1947 Act'*.

The question then was whether Mortlock had herself 'knowingly' failed to comply with a provision of the Act. Referring to *Callaghan and Department of Social Security* (1996) 45 ALD 435 the Tribunal concluded that 'knowingly' required actual knowledge and a deliberate act or omission, or an act or omission indifferent to the consequences (Reasons, para 16). Having regard to the nature of the relationship between Mortlock and her ex-husband, the Tribunal found that Mortlock was entitled to rely on her ex-husband's advice (that he had advised Centrelink) and was dissuaded through fear from making other enquiries of him. As such she did not 'knowingly' fail or omit to comply with her notification obligations.

The Tribunal then considered whether 'special circumstances' applied in this situation. The Tribunal noted the views made in *Department of Social Security v Ellis* (1997) 46 ALD 1 that 'special circumstances' could not be defined by reference to 'precise limits or rules' but would depend of the precise circumstances of the particular case, and that 'something unfair, unintended or unjust' and, so, out of the ordinary would support a conclusion that special circumstances existed (*Groth v Department of Social Security* (1995) 40 ALD 541).

Here, the Tribunal concluded that it would be unfair and unjust to hold Mortlock liable for extra moneys paid into an account over which she had no effective control, given that her relationship with her ex-husband was marked by intimidation and violence. Thus special circumstances could be said to exist, and Mortlock had not knowingly failed or omitted to comply with her obligations under the Act.

Formal decision

The Tribunal affirmed the decision that the debt be waived.

[P.A.S.]

[**Editor's note:** There have been conflicting decisions in regard to whether failing or omitting to comply with a provision of 'this Act' incorporates a failure to comply with obligations imposed by notices issued under s.68 of the *Social Security (Administration) Act 1999*. For the alternative view see *Secretary to the DFaCS and Quinn* (2002) 5(2) *SSR* 15 and *Secretary to the DFaCS and Hosie* (2003) 5(7) *SSR* 79. These cases dealt with s.630AA of the Act. The legislation has now been amended to deal with this problem, in so far as it arose under s.630AA. The Family and Community Services Legislation Amendment Act No. 30 of 2003 (assent 15 April 2003) changes 'this Act' in s.630AA to 'the social security law'. However, s.1237AAD was *not* similarly amended.]

Debt due to family trust distributions: meaning of 'receives' in s.1073; hardship and recovery action

D'ANGELO and SECRETARY TO THE DFaCS (No. 2003/712)

Decided: 29 July 2003 by M.J. Carstairs

Background

During the period 7 July 1999 to 26 March 2002, Mr D'Angelo received disability support pension and Mrs D'Angelo received parenting payment. Mr D'Angelo's father operated an engineering company and the D'Angelo Family Trust.

In April 2002 the company's accountants advised Centrelink that Mr D'Angelo had a balance of $200,000 in the trust's beneficiary loan account and that $74,718 had been distributed to Mr D'Angelo by way of an increase in the beneficiary loan account following the sale of a property owned by the trust. The company accountants confirmed that Mr D'Angelo was not informed of the distribution. The accountant stated that the distribution of $74,718.00 to the loan account in 1999 was a non-taxable capital gain. This meant that it did not have to be declared in a tax return.

Centrelink raised debts of $7,629.11 for Mrs D'Angelo and $8,657.50 for Mr D'Angelo, for the period 7 July 1999 to 26 March 2002 following a recalculation of their social security entitlement, taking into account the deemed income from the beneficiary loan account and the distribution from the trust.

Evidence

Mr D'Angelo told the Tribunal that he was employed in his father's engineering company from 1985 to 1994, but was forced to cease work after sustaining a back injury. He no longer had contact with his father, although he and Mrs D'Angelo were living rent-free in a house owned by his father. Mr D'Angelo had sought legal advice and was taking action to recover the amount of $200,000 held in the beneficiary loan account, as both Centrelink and the SSAT suggested this. So far he had incurred over $30,000 in legal costs.