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.

Centrelink was deducting $220 per fortnight from their social security payments to repay the debts, which caused them financial hardship. The father had told them to vacate his house and the relationship between the applicants and Mr D'Angelo's parents had completely broken down. Mr D'Angelo said that he had little prospect of obtaining work because of the severity of his back condition and the effects of his medication.

The applicants submitted that they should not have to repay the debt at present as they were making genuine attempts to establish entitlement to the funds in the loan account. They submitted that they were in difficult circumstances, and their future was uncertain.

Centrelink's submissions

Centrelink stated that the distribution of $74,718 in 1999 was treated as income for 52 weeks, following the date of the distribution, under s.1073 of *Social Security Act 1991* (the Act). The balance of the loan account was maintained as a financial asset and interest was deemed on the amount under s.1077 of the Act.

It was conceded that at all times the applicants were unaware of the existence of the trust or the loan account. However, referring to the Tribunal decisions in *Duckworth and Secretary, Department of Social Security* (1995) 39 ALD 674, *Christensen and Secretary, Department of Social Security* (1995) 37 ALD 795, *Department of Social Security and Papamihail* (AAT 12205, 12 September 1997), and *Hawkins and Secretary, Department of Family and Community Services* [1999] AATA 34 it was said that crediting an amount to a beneficiary loan account was sufficient for the distribution to be *received*, within the meaning of s.1073(1) of the Act, from the date of distribution. This was on the basis that Mr D'Angelo, as beneficiary of the loan account, had an entitlement to the funds for his own use or benefit.

It was submitted that there was no reason to assume that Mr D'Angelo's legal action would not be successful, but the appropriate course of action was to write off recovery of the overpayment for a period of 12 months in order to establish the result of the legal action.

The issues

Although a number of matters fell for consideration in this case, a pertinent issue was whether the distribution of $74,718 fell within s.1073 of the Act.

The AAT also considered whether the applicant could meet the requirements of section 1236 in order to write off the debt, or whether any other legislative provisions relating to the recovery of the debt were applicable.

Distribution of trust income — when is it received for the purposes of s.1073 of the Act?

Section 1073 provides:

> **1073(1)** Subject to points 1067G-H5 to 1067G-H20 (inclusive), 1067L-D4 to 1067L-D16 (inclusive), 1068-G7AA to 1068-G7AR (inclusive), 1068A-E2 to 1068A-E12 (inclusive) and 1068B-D7 to 1068B-D18 (inclusive), if a person receives, whether before or after the commencement of this section, an amount that:
>
> (a) is not income within the meaning of Division 1B or 1C of this Part; and
>
> (b) is not:
>
> (i) income in the form of periodic payments; or
>
> (ii) ordinary income from remunerative work undertaken by the person; or
>
> (iii) an exempt lump sum.
>
> the person is, for the purposes of this Act, taken to receive one fifty-second of that amount as ordinary income of the person during each week in the 12 months commencing on the day on which the person becomes entitled to receive that amount.

Section 8 of the Act defines *income* for the purposes of the Act, and states:

> **'income'**, in relation to a person, means:
>
> (a) an income amount earned, derived or received by the person for the person's own use or benefit; or
>
> (b) a periodical payment by way of gift or allowance; or
>
> (c) a periodical benefit by way of gift or allowance;
>
> but does not include an amount that is excluded under subsection (4), (5) or (8) ...

The Tribunal was satisfied, following *Gregory* and *Duckworth* that the distribution of $74,718.00 was *income* within the meaning of s.8 of the Act as it was *derived* at the date of the trust distribution. However, the Tribunal did not agree with the Tribunal decisions (*Harris*, *Duckworth* and *Christensen*) which decided that such amounts necessarily attract the operation of s1073 of the Act.

> Section 1073 of the Act uses the phrase *if a person receives*. In the context of this Act, that in s8 defines *income* as covering all amounts *earned derived or received*, the use of the term *receives* in s1073 suggests that the section is distinguishing amounts *received* from those earned or derived. Some confirmation of this appears also by the use of two expressions in s1073: *receives* and *becomes entitled to receive*.
>
> Cases interpreting the meaning of *receive* conclude that the word should be given its ordinary and natural meaning within the context in which it is used ...

(Reasons, paras 34, 35)

The AAT referred to the cases of *Rose v Secretary, Department of Social Security* (1990) 21 FCR 241 and *Archer v Comcare* (2000) 101 FCR 30 in support of this view, and went on to say:

> Looked at in the context of the Act, it seems that a similar distinction is being drawn by the use of the term *receives* on its own in s1073. Both s8 and s1073 address questions of *income*. However, s1073 deals only with *received* income, whereas s8 deals with *income* more broadly, as all amounts *earned, derived or received*. The distinction being made in s1073 is that it is only those lump sums that a person actually *takes into possession* (*Jessop*; *Archer*) which will attract the operation of s1073, subject to its stated exceptions. This interpretation is supported by the use of two expressions in s1073. As the opening words refer to *if a person receives ... an amount*, and then the section later refers to when the person *becomes entitled to receive the amount* the legislation contemplates the possibility that these can be two separate times. *Receipt* and an *entitlement to receipt* are two different concepts. The Tribunal therefore rejects the respondent's submission that entitlement to receive an amount is interchangeable with receipt of the amount. Section 1073 does not apply to an amount of income that is not in fact *received* and over which there is only a legal entitlement.

(Reasons, para. 37)

However, this did not mean that the 1999 trust distribution was not taken into account as income under the Act at the time of the distribution. This was because the relevant rate calculators provided in part for the way that income was to be taken into account in the operation of the Act. Having found that the distribution made by the trust was *derived income*, this income was taken into account under the pension rate calculator and the parenting payment rate calculator. Applying the provisions of the rate calculators, the income of one member of a couple was treated as the income of both (s.1063, point 1064-A2, point 1064-E2 and point 1068-D2). In Module E of point 1064-E1, the ordinary income test required that Mr D'Angelo's ordinary income be calculated on a yearly basis. The same apportionment occurred with the parenting payment, even though worked out as a fortnightly rate, not an annual rate. Under point 1068B-D19, the Tribunal found that there was no reason to treat the $78,714 as falling in a shorter time than 52 weeks, for the purposes of calculating the rate of Mrs D'Angelo's parenting payment. In support of this approach, the AAT noted that there was no provision in either of the rate calculators that required

the income be held in one fortnight only. Therefore, the amount of $74,714 was apportioned over the year following the distribution, which was from 1 July 1999.

With respect to the treatment of the $200,000 in the loan account, from 1 July 2000 until 23 March 2003, the Tribunal accepted that the loan was a *financial asset* and that s.1077 of the Act applied to deem income on the loan balance.

As a result Mr and Mrs D'Angelo had been overpaid and these amounts were recoverable debts under s.1223(1) and s.1223(5) of the Act as it stood at the relevant time.

Recovery of the debts

With respect to recovery of the amounts, s.1236 provides:

> **1236(1)** Subject to subsection (1A), the Secretary may, on behalf of the Commonwealth, decide to write off a debt, for a stated period or otherwise.
>
> **1236(1A)** The Secretary may decide to write off a debt under subsection (1) if, and only if:
>
> (a) the debt is irrecoverable at law; or
>
> (b) the debtor has no capacity to repay the debt; or
>
> (c) the debtor's whereabouts are unknown after all reasonable efforts have been made to locate the debtor; or
>
> (d) it is not cost effective for the Commonwealth to take action to recover the debt.
>
> **1236(1B)** For the purposes of paragraph (1A)(a), a debt is taken to be irrecoverable at law if, and only if:
>
> (a) the debt cannot be recovered by means of deductions, or legal proceedings, or garnishee notice, because the relevant 6 year period mentioned in section 1231, 1232 or 1233 has elapsed; or
>
> (aa) the debt cannot be recovered by means of deductions or setting off because the relevant 6 year period mentioned in section 86 of the A New Tax System (Family Assistance) (Administration) Act 1999 has elapsed; or
>
> (b) there is no proof of the debt capable of sustaining legal proceedings for its recovery; or ...
>
> **1236(1C)** For the purposes of paragraph (1A)(b), if a debt is recoverable by means of:
>
> (a) deductions from the debtor's social security payment; or
>
> (b) deductions under section 84 of the A New Tax System (Family Assistance) (Administration) Act 1999; or
>
> (c) setting off under section 84A of that Act;
>
> the debtor is taken to have a capacity to repay the debt unless recovery by those means would result in the debtor being in severe financial hardship.

Despite the concession by Centrelink that recovery of the debt should be written off under s.1236, the Tribunal was not satisfied that all the conditions for the exercise of that discretion were met. This was because it could not be said that the debt was irrecoverable. Both applicants were in receipt of payments and their evidence indicated that, while circumstances were difficult they were not in severe financial hardship.

The Tribunal, however, noted s.1234(1) of the Act, which provides:

> The Secretary may, on behalf of the Commonwealth, enter into an arrangement with a person under which the person is to pay a debt, owed by the person to the Commonwealth, or the outstanding amount of such a debt, in a way set out in the arrangement.

The AAT went on to say:

> Any recovery action under the legislation should take account of the applicants' circumstances. It is to enable people's circumstances to be taken into account, that provisions in the Act in Parts 5.3 and 5.4 allow for non-recovery of debts or delaying recovery until a person can repay ... In the present case the respondent concedes that the applicants had no knowledge of the trust and were unaware of the distribution in 1999. The applicants have commenced legal action and are incurring large legal costs, although their advisers appear to remain confident about the prospects of the Supreme Court action. The action and the family circumstances surrounding the debt have placed considerable pressure on the applicants' home life and they are facing eviction. The Tribunal believes that it is proper to await an outcome in the legal action, after which decisions can be made about recovery. Section 1234 of the Act allows for this to occur and should be applied. Depending on the outcome in the Supreme Court and taking into account the legal costs incurred, there may be issues that need to be considered by the respondent under the discretion for *special circumstances*. However these are matters for the future.

(Reasons, para. 45)

Formal decision

The Tribunal set aside the decision under review and substituted a decision that the debts to the Commonwealth be recovered by instalment commencing twelve months from the date of the decision, or on the finalisation of the applicants' application to the Supreme Court of Victoria, whichever occurred earlier.

[A.T.]

Newstart allowance: liquid asset test waiting period

SECRETARY TO THE DFaCS and SCHUMACHER
(No. 2003/554)

Decided: 13 June 2003 by N. Isenberg.

Background

Schumacher ceased employment on 31 March 2002 and on 9 April 2002, lodged a claim for newstart allowance (NSA). In April 2001, he invested a sum of $80,000 with Stoneham Investments Pty Ltd ('the company') following a compensation payment. The company produced chemicals and Schumacher's funds were put into consolidated funds. Stoneham was a life-long friend of Schumacher's mother and Schumacher thought such an investment would be more secure and yield a better return than a bank. The arrangement occurred by 'handshake' and Schumacher did not regard himself as an 'investor'. The money could be withdrawn with two month's notice except in an 'emergency', although conflicting evidence existed concerning the required notice.

Schumacher notified Centrelink of his investment and a 13-week liquid asset test waiting period (LATWP) was imposed. The SSAT set aside the decision and held that the investment did not fall within the definition of cash and readily realisable assets and was not, therefore, a liquid asset.

The issue

The issue for the AAT was whether the investment in the company was a 'liquid asset' for the purposes of the *Social Security Act 1991* (the Act). If that was so, a 13-week LATWP would apply.

The law

Section 598 of the Act provides that a person is subject to a LATWP where a person's 'liquid assets' exceed the person's 'maximum reserve' (in this matter, $2500) on the date they become unemployed or the date on which they claim NSA. Section 14A defines liquid assets as:

> **'liquid assets'**, in relation to a person, means the person's cash and readily realisable assets, and includes:
>
> (a) the person's shares and debentures in a public company within the meaning of the Corporations Law; and
>
> (b) amounts deposited with, or lent to, a bank or other financial institution by the