complex and formalistic'.[8] A further overhaul was recommended by the UK Leggatt Report in 2001, which supported the administrative amalgamation of all tribunals to a single administration under a unified Tribunals Service.[9]

Parallel considerations are apparent in both Australia and Britain, and as the current decade passes the extent to which Australian developments mirror the British counterparts will be critical to follow. There are significant on-going debates which need to be actively pursued — these include whether and which tribunals ought appropriately to be amalgamated; the size and constitution of tribunal panels; the role of non-legal members; applicant representation and their participation in hearing processes; and the impact of (perceptions of) legalisation of administrative review processes. In any redevelopment of tribunal processes, the essential hallmarks of external review need to be affirmed. But it is not (or ought not to be) sufficient to ensure that such hallmarks are apparent to government, policy makers or tribunal members — the views of users must also be considered, but in this jurisdiction are often not sought or are ignored. Protection of the rights of applicants in social security matters, and the significance of their perceptions of accessibility and fairness in the appeals processes established to ensure those rights, is vital. As the 2002 Leggatt Report in Britain cautioned, '[it] should never be forgotten that tribunals exist for users, and not the other way round ... they do not fulfil their function unless they are accessible by the people who want to use them, and unless the users receive the help they need to prepare and present their cases'.[10]

In this, it is key to appreciate that in this jurisdiction applicants are often inexperienced in, and ill-equipped to deal with, complex and daunting legal processes. This makes it especially critical to have an accessible mechanism to challenge a decision regarding income support entitlements or to have it adequately explained. An adverse decision in this jurisdiction may mean not simply denial of access to income support, but can have significant implications for family or individual lifestyles, and for participation in community life. Notwithstanding occasional political and media comment to the contrary, the assumption that those with 'genuine problems' or 'real grievances' will somehow find their way through the 'gateways' to the appropriate forum for administrative review, remains open to challenge.[11] The risk with any development in social security administrative review, if the appeal process is perceived by potential applicants as becoming more complex and legalistic, is that those applicants may assume that their claims have no merit, or that they will be the worse off for appealing, or will lose faith in a review process they perceive as remote and incomprehensible. In sum, continued access to a review system that is — and is perceived to be — fair, comprehensible, and accessible[12] — must remain central for all tiers of administrative review.

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Administrative Appeals Tribunal

Waiver of debt: good faith

SECRETARY TO THE DFaCS and DUNCAN
(No. 2003/1251)

Decided: 12 December 2003 by B.J. McCabe.

Background

Duncan was receiving parenting payment single and family tax benefit when his daughter turned 16 on 12 February 2002. Centrelink mistakenly continued to pay parenting payment single until 27 July 2002. The Department acknowledged that the overpayment was entirely attributable to its own administrative error. The SSAT waived the right to recover the debt, and the Department appealed that decision.

The issue

The issue was whether the overpaid money had been received in 'good faith'.

The evidence

There was no dispute about the material facts. Duncan was paid parenting payment single from 12 February 2002 to 27 July 2002 when he was not entitled to it. He was also paid family tax benefit, in error from 12 February 2002 until 25 November 2002. During the relevant time Duncan did not believe himself to be entitled to parenting payment. He believed the payments he received were a payment of unknown identity for himself and youth allowance for his daughter.

The law

Section 1237A of the *Social Security Act 1991* ('the Act') provides:

> **Waiver of debt arising from error**
>
> *Administrative error*
>
> **1237A.(1)** Subject to subsection (1A), the Secretary must waive the right to recover the proportion of a debt that is attributable solely to an administrative error made by the Commonwealth if the debtor received in good faith the payment or payments that gave rise to that proportion of the debt.

Discussion

The AAT discussed four decisions of the Federal Court which considered the meaning of the expression 'received in good faith'.

In *Secretary, Department of Education, Employment, Training and Youth Affairs v Prince* (1997) 152 ALR 127 Finn J referred (at 130) to a person's state of mind concerning receipt of the payment:

> [I]f that person knows or has reason to know that he or she is not entitled to a payment received ... that person does not receive the payment in good faith.

The Department submitted that it was not reasonable for Duncan to assume he was entitled to the money he received, when he had not specifically applied for a benefit, and his daughter had received a notice saying her claim for youth allowance had been rejected. Duncan said he was not used to dealing with Centrelink; he had spoken with a Centrelink officer and understood the defects in his daughter's claim were being corrected; and he thought payments could be made in the interim.

The AAT concluded that the belief did not have to be reasonable, with reference to *Haggerty v Department of Education* (2000) 331 AAR 529. French J said (at 534 and 535) that a want of good faith arises where there is a positive belief that the payment is made by mistake, or where a person holds suspicion or doubts about their entitlement, and there is an objective basis for the suspicion or doubt.

> The provision does not, however, authorise the imputation of want of good faith in any of the senses above described simply because there are in existence objective facts which would raise a belief or a doubt or a suspicion of non-entitlement in the mind of some imaginary recipient.
>
> Concern, puzzlement, upset and a perception of unusual circumstances, coupled with absence of further inquiry, are not enough themselves to constitute want of good faith.

The AAT referred to *Pledger v Secretary Department of Family and Community Services* [2002] FCA 1576 in concluding that the test as to whether a recipient should have known or suspected they were not entitled was not an objective test. In *Pledger* Weinberg J said a 'careful consideration of the actual state of mind of the recipient' was required, and in that sense 'the test is entirely subjective, and not objective'. However, 'idiosyncratic views as to what might be regarded as acceptable behaviour, including the standards of a "Robin Hood", will not be regarded as amounting to "good faith"'.

The AAT considered the decision of Cooper J in *Jazazievska v Secretary Department of Family and Community Services* [2000] FCA 1484 was consistent on that point in the reference to turning a 'blind eye' as not amounting to receipt in good faith.

Turning to Duncan's actual state of mind the AAT said

> I am satisfied he actually believed he was receiving what he was entitled to receive. That belief was not necessarily reasonable ... He may well have wondered or be puzzled [sic] about his entitlements but that is why he spoke with Centrelink officers on a number of occasions ... Mr Duncan was unused to dealing with Centrelink and was almost certainly naïve ... But I do not accept his assumptions about the behaviour of Centrelink were so idiosyncratic as to prevent him relying on s.1237A.

(Reasons, para. 10)

Formal decision

The decision of the SSAT to waive the right to recover the debt was affirmed.

[H.M.]

Overpayment age pension: overseas pension income not declared; special circumstances waiver

VAN WEEREN and SECRETARY TO THE DFaCS (No. 2004/578)

Decided: 7 June 2004 by S. Webb.

Background

On 1 April 1992 the *Social Security Agreement between Australia and the Kingdom of the Netherlands* (the Agreement) came into effect. Van Weeren received Australian and Dutch age pensions since 1992 and in April of that year he attended an information seminar and received a letter from the Dutch authorities concerning the Agreement. He was advised that his Dutch pension was subject to bi-annual indexation adjustments and under the Agreement, Dutch authorities would inform Centrelink of general bi-annual indexation increases in Dutch age pension. Van Weeren received monthly statements advising him of the rate of his Dutch pension.

Van Weeren was notified of adjustments in the rate of his Australian age pension in notices dated 10 March 1995, 15 September 1995 and 23 August 2000. These notices specified his annual income and his obligation to inform Centrelink if his weekly income exceeded a specified amount. Letters dated 10 March 1995 and 15 September 1995 specified his overseas income as $7513 per annum or $144.48 weekly. The letters also required him to notify Centrelink within 14 days if his gross income went above $144.48 per week. His income did in fact exceed those specified amounts but he did not inform Centrelink.

Van Weeren was also sent letters about changes in the exchange rate used by Centrelink in converting his Dutch age pension; however, these letters did not inform him of the rate of his Dutch pension either in Guilders, Euros or Australian dollars.

On 31 May 2003 Van Weeren was sent a notice, informing him that the rate of his Australian pension was being recalculated on the basis of the rate of his Dutch pension as advised to Centrelink by the Dutch authorities. On the same day Van Weeren was informed that in the period from 1 April 1999 to 25 March 2003 his Australian pension had been overpaid in the amount of $4484.97 and a debt would be raised under s.1223(1) of the *Social Security Act 1991* ('the Act'). The amount of the debt was later varied to $4479.77 after reconsideration of the decision. That decision was affirmed by an authorised review officer on 27 June 2003 and again affirmed by the SSAT on 30 September 2003.

The issue

The sole issue for determination by the AAT was whether there were special circumstances that made it desirable to waive the debt in whole or in part under s.1237AAD of the Act.

The law

The AAT concluded that there was a debt and also concurred that the debt did not arise solely by error of the Commonwealth and therefore could not be