connection with convictions. The AAT stated:

> ... If the view expressed by Einfeld J in *Bulsey's* case is correct, most prisoners who spend time outside the prison walls whilst serving their sentences would not be in gaol within the meaning of the term in the Act, whilst outside prison, because the reason for their removal from prison would not be 'in connection with' their convictions. Such an interpretation would render s.23(5)(b) pointless.

(Reasons, para. 16)

The AAT concluded that Jozwiak was being lawfully detained in connection with his convictions for offences, and was being detained at a place other than a prison. He was in gaol within the meaning of that term in s.23(5)(b) of the Act.

Formal decision

The AAT affirmed the decision under review.

[S.L.]

Debt recovery: bankruptcy and fraud

WEISS and SECRETARY TO THE DFaCS
(No. 2004/744)

Decided: 20 July 2004 by M.J. Carstairs.

Background

Weiss received newstart allowance between 29 January 1996 and 17 March 1998. During this period he was operating a construction business. He was prosecuted and found guilty in relation to his improper receipt of newstart allowance.

He was declared bankrupt on 11 November 1998 and discharged from bankruptcy on 3 May 2003.

Centrelink raised a debt totalling $25,794.38 on 13 May 2003. Weiss refused to pay this amount on the grounds that he had been discharged from bankruptcy. The amount of $6788.52 was then garnisheed from Weiss' tax refund on 1 August 2003.

Weiss requested a review of the decision. The debt was reduced to $15,212.31 by the Social Security Appeals Tribunal as it was satisfied that after 1 September 1997, his business had collapsed and he was taking sufficient steps to qualify for newstart allowance.

The issue

The issues in this appeal were:

- whether Weiss was entitled to newstart allowance during any period of the debt;
- the impact of bankruptcy on the debt; and
- whether Centrelink took appropriate action by way of garnisheeing Weiss' tax refund.

The legislation

Sections 1230C and 1233 deal with garnishee action.

> **1230C.(1)** Subject to subsection (2), a debt due to the Commonwealth under this Act is recoverable by the Commonwealth by means of one or more of the following methods:
>
> (a) if the person who owes the debt is receiving a social security payment — deductions from that person's social security payment ...
>
> (c) repayment by instalments under an arrangement entered into under section 1234;
>
> (d) legal proceedings;
>
> (e) garnishee notice.
>
> **1230C.(2)** Subject to subsection (3), a debt due to the Commonwealth under this Act is recoverable by means of a method mentioned in paragraph (1)(d) or (e) only if the Commonwealth:
>
> (a) has first sought to recover the debt by means of a method mentioned in paragraph (1)(a), (b) or (c); and
>
> (b) can establish that the person who owes the debt:
>
> (i) has failed to enter into a reasonable arrangement to repay the debt; or
>
> (ii) after having entered into such an arrangement, has failed to make a particular payment in accordance with the arrangement.
>
> ...
>
> **1233.(1)** If a debt is recoverable from a person (in this section called the debtor) by the Commonwealth under section 1227A or 1230C of this Act ... the Secretary may by written notice given to another person:
>
> (a) by whom any money is due or accruing, or may become due, to the debtor; or
>
> (b) who holds or may subsequently hold money for or on account of the debtor; or
>
> (c) who holds or may subsequently hold money on account of some other person for payment to the debtor; or
>
> (d) who has authority from some other person to pay money to the debtor;
>
> require the person to whom the notice is given to pay the Commonwealth:
>
> (e) an amount specified in the notice, not exceeding the amount of the debt or the amount of the money referred to in the preceding paragraph that is applicable ...

Section 153 of the *Bankruptcy Act 1966* deals with recovery of debts.

> (1) Subject to this section, where a bankrupt is discharged from a bankruptcy, the discharge operates to release him or her from all debts (including secured debts) provable in the bankruptcy, whether or not, in the case of a secured debt, the secured creditor has surrendered his or her security for the benefit of creditors generally ...
>
> (2) The discharge of a bankrupt from a bankruptcy does not:
>
> ...
>
> (b) release the bankrupt from a debt incurred by means of fraud or a fraudulent breach of trust to which he or she was a party or a debt of which he or she has obtained forbearance by fraud ...

Entitlement to newstart allowance

The Tribunal considered evidence in relation to whether Weiss was qualified for newstart allowance at any stage during the period of the debt.

The Tribunal noted that Weiss' business ceased from 1 September 1997 and accepted that he was looking for work after this time. However, evidence before the Tribunal showed that between September 1997 and March 1998 Weiss received a number of large sums into his bank account which precluded him from receiving newstart allowance when treated as a lump sum under s.1073 of the *Social Security Act 1991*. This information was not provided to Centrelink and the Tribunal was satisfied that if Centrelink had been aware of the information then Weiss would not been entitled to newstart allowance.

Bankruptcy

The Tribunal then considered the effect of bankruptcy in relation to the debt. The Tribunal referred to the case of *Civitareale and Secretary, Department of Family and Community Services* (1999) 57 ALD 451 which found that the test of fraud was a subjective test and not an objective one. The Tribunal considered the transcript from the criminal prosecution case. It also noted that Weiss pleaded guilty and a finding from the sentencing judge that the amount of the debt up until 1 September 1997 arose as a result of fraud.

The Tribunal then focused on the lump sums received by Weiss after 1 September 1997 noting that these payments were made into a bank account in a false name. The Tribunal concluded

that for both periods, including the period after 1 September 1997, the overpayments arose as a result of fraud.

The Tribunal therefore concluded that the debt survived Weiss' bankruptcy as the debt arose as a result of fraud.

Garnishee

The Tribunal went on to consider the debt recovery action by way of garnishee. The Tribunal found that all the necessary procedural steps were met and that the garnishee action was lawful.

Special circumstances

The final issue considered by the Tribunal was special circumstances waiver. The Tribunal found this was not available as Weiss had knowingly made a false statement or failed to comply with a provision of the Act.

Formal decision

The AAT varied the decision under review and decided that Weiss owed a debt to the Commonwealth of $20,361.37 for the period January 1996 to 17 March 1998.

[R.P.]

Age and wife pensions assets test: is money held by Public Trustee for investment an asset?

PERRONE and SECRETARY TO THE DFaCS
(No. 2004/775)

Decided: 22 July 2004 by M.J. Allen.

Background

On 10 October 2002 a Centrelink officer made a decision to cancel the Perrones' age pension (AP) and wife pension (WP) respectively because their combined assets exceeded the allowable maximum value of assets.

In 1996 Mr Perrone was receiving AP and Mrs Perrone was receiving WP. Mr Perrone, who was 64 at the time, was involved in an accident and suffered serious head injuries. In August 2002 proceedings instituted on Mr Perrone's behalf were settled by consent judgment, and a sum of $500,000 was paid to the Public Trustee for Western Australia.

On becoming aware of the terms of settlement Centrelink reviewed the Perrones' eligibility for benefits they had been receiving and calculated the value of their combined assets as approximately $550,000 ($500,000 held on behalf of Mr Perrone by the Public Trustee and $50,000 of other financial assets). That amount exceeded the then allowable value of assets for a homeowner couple, which was $447,500. Accordingly, a decision was made to cancel both AP and WP payments.

There was no dispute that the amount of damages awarded to Mr Perrone did not include any component for past or future economic loss for the purposes of s.17 of the *Social Security Act 1999* ('the Act') and therefore no preclusion period for the payment of benefits applied.

The issue

The issue was whether the decisions to cancel the payments were correct having regard to the assets and income tests.

The decision

An 'asset' is defined in s.11 of the Act as meaning 'property or money (including property or money outside Australia)'. The word 'property' is not defined in the Act but the Perrones' conceded that the amount held by the Public Trustee on behalf of Mr Perrone was property, and therefore an asset, for the purposes of the Act unless it was an asset that could be disregarded under s.1118.

The Tribunal was satisfied on the basis of the decision in *Melbourne v Secretary, Department of Social Security* (1998) 85 ALR 291, that this was an appropriate concession.

Section 1118 of the Act sets out a substantial number of asset types that can be disregarded when calculating the value of a person's assets. The only asset category the Perrones' identified as possibly applicable in this case was in s.1118(1)(n), which provides that the value of a person's asset is to be disregarded if it is 'personal property ... [that] is designed for use by a disabled person; and the person ... is disabled'.

The Perrones' contended that the $500,000 held by the Public Trustee is personal property of Mr Perrone and that he is disabled. It was also acknowledged that it required a 'strained construction' of paragraph (n), to say that the amount of money was 'designed for use by a disabled person'.

Centrelink contended that paragraph (n) should not be interpreted broadly in a way that would include the $500,000 and that it should be restricted to items of physical personal property — such as a wheelchair, motor vehicle or other apparatus or appliance — designed specifically for physical use by a disabled person.

On the assumption that the money held by the Public Trustee was personal property of Mr Perrone and that he was disabled for the purposes of the Act, it was the Tribunal's opinion that the construction of paragraph (n) advanced by the Perrones placed far too much strain on the words of the paragraph. Section 1118 deals with a number of different types of assets, including interests in real property; certain types of interests in other arrangements affecting homes; investments; proceeds of an insurance policy claim or compensation payments received for the loss of buildings, plant and personal effects; and items such as a motor vehicle in certain circumstances. Paragraphs (n) and (p) deal with personal property that is 'designed for use by a disabled person' or is 'modified so that it can be used by a disabled person' respectively.

The Tribunal considered that in the context in which those paragraphs appear they refer to items such as wheelchairs, motor vehicles, or other type of appliances that are either specifically designed for physical use by a disabled person or are modified so that they can be used by such a person. The Tribunal considered that the paragraphs referred to items of physical personal property of that kind and could not be interpreted to include such things as a financial asset of the type in question.

The Tribunal found that the sum held by the Public Trustee was an asset of the Perrones and its value could not be disregarded pursuant to s.1118 of the Act. Accordingly, its value had to be taken into account when calculating the combined asset values for asset testing purposes.

Formal decision

The Tribunal affirmed the decision under review that the rate of AP and WP payable to the Perrones, having regard to their combined assets, was nil and therefore AP and WP were not payable to them.

[S.P.]