the Clare property and Yon received $76,000. The AAT found that Day had various other difficulties including serious injuries from falling from a horse, physical and psychological abuse from her former husband, custody and child support disputes, and her son's behavioural problems. Day applied for parenting payment single in April 2000, disclosing her interest in the company, which was no longer operating.

Day and Yon had each been 50% shareholders of Azure Graphics. Their interests in the Clare property, and liability for the associated loan of $96,700 were transferred to the company when it was established. Their move to live on the Clare property gave rise to taxation implications, as did their later decision to sell that property. Tax implications also arose from private use, and later acquisition by Yon, of a company-owned vehicle.

The AAT reported that Day and Yon's accountant decided to account for the benefits, received by Day and Yon in 1996/97, 1997/98 and 1998/99, by calling the amounts franked dividends, directors' fees and loans in the tax years 1999/2000, 2000/01 and 2001/02. Azure Graphics had ceased trading by the time these amounts were brought to account.

Day received a tax bill for the tax years 1999/2000, 2000/01 and 2001/02.

The issue

The issue in this case was whether, for the purposes of the *Social Security Act 1991* (the Act), 'dividends', 'directors' fees' and 'loans' associated with Azure Graphics Pty Ltd in Day's tax returns for 1999/2000, 2000/01 and 2001/02 were income or assets.

The legislation

The AAT referred to income test definitions contained in s.8(1) of the Act, and financial assets definitions in s.9(1) as follows:

> **8(1) 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;
>
> ...
>
> **9(1) financial asset** means:
>
> (a) a financial investment;
>
> (b) a deprived asset.
>
> **financial investment** means:
>
> (a) available money; or
>
> (b) deposit money; or
>
> (c) a managed investment; or
>
> (d) a listed security; or
>
> (e) a loan that has not been repaid in full; or
>
> (f) an unlisted public security; or
>
> (g) gold, silver or platinum bullion; or
>
> (h) an asset-tested income stream (short term).

Discussion

The AAT noted that Day's accountant considered that the only benefit Day ever received from setting up the company and purchasing and selling the Clare property was the possible short lived benefit of an interest free loan in 1995.

The AAT stated:

> It is well settled that income for the purposes of the *Social Security Act 1991* is not necessarily the same as taxable income for the purposes of the *Income Tax Assessment Act 1997*. See *Secretary, Department of Family and Community Services v Garvey* 91 ALR 245. In the social security context '*income*' relates to an amount earned, derived or received by the person for the person's own use or benefit. It relates to the resources which are available to the person, upon which the person should draw before being eligible for government support. If a person receives no money or benefits for their own use during a specific period, then they receive no income for that period. They may need the safety net provided by the social security legislation to survive.
>
> The Tribunal finds that in the case of Ms. Day, the dividends', 'directors fees' and 'loans' which went towards inflating her taxable income for the tax years 1999/2000, 2000/2001 and 2001/2002 were not earned, derived or received by her for her own use or benefit in those years. It was not income within the meaning of that term in the *Social Security Act 1991*. They were not assets either. There was no way they could be realised.

(Reasons, paras 39-40)

The AAT went on to find that even if the amounts were to be considered income or assets, Day did not knowingly make any false statements to the Department about her income or assets 'because the amounts were included in her taxation returns by her accountant for purely technical legal reasons to comply with the taxation legislation', and that the circumstances were sufficiently special to 'justify the conclusion that it would be inappropriate, unfair and unjust to recover any overpayment arising out of them'.

Formal decision

- Any amounts designated 'dividends', 'directors' fees', or 'loans' associated with Azure Graphics Pty Ltd in Day's tax returns for 1999/2000, 2000/01 and 2001/02 did not constitute 'income' or 'assets' for the purposes of the Act.
- If there was any right to recover any overpayment arising in relation to the above dividends, directors' fees or loans, the circumstances are sufficiently special that the right is to be waived pursuant to s.1237AAD of the Act.

[H.M.]

Arrears: notice of decision; requirements

SECRETARY TO THE DFaCS and TANGNEY
(No. 2003/1172)

Decided: 21 November 2003 by N. Isenberg.

Background

On 25 June 2000 Rafter advised Centrelink that he paid $100 per week rent to Tangney. Centrelink linked this information to Tangney's record, and wrote to her on 9 August 2000 advising that an annual income of $5204.20 would be used to calculate her rate of parenting payment. Similar letters were sent to her on 30 November 2000, 3 May 2001 and 15 August 2001.

On 16 July 2002 Tangney queried her rate of payment, and asserted that Rafter did not pay rent to her. The decision to reduce her payment was reviewed, and Tangney was paid a higher rate from the date of her query.

The issue

Did the letters sent to Tangney outlining the income used to calculate her rate of parenting payment constitute 'notices' for the purposes of the social security law and, as such, operate to preclude payment of arrears to the date her rate was originally reduced?

The findings

The Tribunal considered s.109 of the *Social Security (Administration) Act 1999* ('the Act'), which provides:

> **109(2)** If:
>
> (a) a decision (the original decision) is made in relation to a person's social security payment; and
>
> (b) a notice is given to the person informing the person of the original decision; and
>
> (c) more than 13 weeks after the notice is given, the person applies to the Secretary, under section 129, for review of the original decision; and

(d) the favourable determination is made as a result of the application for review;

the favourable determination takes effect on the day on which the application for review was made.

(3) If:

(a) a decision (the original decision) is made in relation to a person's social security payment; and

(b) the person is not given notice of the original decision; and

(c) the person applies to the Secretary, under section 129, for review of the original decision; and

(d) the favourable determination is made as a result of the application for review;

the favourable determination takes effect on the day on which the determination embodying the original decision took effect.

The Tribunal concluded that the issue before it was whether the letters sent to Tangney constituted 'notices' for the purposes of this section.

The requirements of a valid notice are set out in s.72 of the Act:

72(1) A notice under this Subdivision:

(a) must be given in writing; and

(b) may be given personally or by post or in any other manner approved by the Secretary; and

(c) must specify how the person is to give the information or statement to the Department; and

(d) must specify:

(i) in the case of a notice under section 68 that requires the giving of more than one statement, each relating to the payment of the social security payment in respect of a period — the date by which the person is to give each statement to the Department; or

(ii) in any other case — the period within which the person is to give the information or statement to the Department; and

(e) must specify that the notice is an information notice given under the social security law.

Tangney argued that she was under considerable pressure at the time the letters were sent to her: she had been involuntarily hospitalised with bi-polar disorder for some of the relevant period and was subsequently trying to avoid being readmitted. She was also defending a custody claim in relation to her child. Tangney admitted that she normally gave Centrelink correspondence only a cursory examination, noting the amount payable.

The Tribunal considered *Secretary, Department of Social Security and Sting* (1995) 39 ALD 721, *Austin v Secretary, Department of Family and Community Services* (1999) 92 FCR 138, and *Department of Social Security and Plug* (2000) AATA744 before concluding that the letters did amount to 'notice' for the purpose of s.109 of the Act. Consequently, arrears were limited to the date that Tangney applied for a review of the decision to reduce her payment.

The Tribunal also suggested that Tangney should have been given an opportunity to address Rafter's statement that he paid rent to her, before that amount was included in her annual income by Centrelink.

Formal decision

The decision of the Social Security Appeals Tribunal was set aside and in substitution the Tribunal decided that Tangney did receive notice of a decision by Centrelink to reduce her Parenting Payment Single (PPS). There having been notice, the back-dating of the correct rate of PPS could only be to the date of the application for review of the decision, that is 16 July 2002.

[E.H.]

Arrears: notice of decision; requirements

PEURA and SECRETARY TO THE DFaCS (No. 2003/1123)

Decided: 7 November 2002 by D.G. Jarvis.

The facts

Mr and Mrs Peura operated accounting and fencing contracting businesses through a trust, with a private company, of which they were the sole shareholders and directors, acting as the trustee. From 1991, Mr Peura suffered from increasing ill health and required increasing care, such that both he and Mrs Peura were unable to continue to work. The trust consequently became inactive from June 2001. At that time, the trust owed Mrs Peura $24,965.

In August 2001, the company decided to cease acting as the trustee of the trust. Mrs Peura was appointed as trustee, and her shares in the company were transferred to her daughter, Anita. These shares had not been registered at the time of the hearing, as the stamp duty on transfer had not been paid.

Mrs Peura received a letter from Centrelink dated 6 September 2001, in which she was advised of her regular wife pension payment, and that a 'Combined Annual Income' of $4751.94 was used to determine her rate. On the same date, a similar letter was sent to Mr Peura, including the same amount as the 'Combined Annual Income'.

In November 2001 Mrs Peura was advised of the changes to the assessment of private trusts and companies that would commence from 2002. On 10 December 2001, Mr and Mrs Peura each received letters advising them of the payments they would receive from 17 January 2002. Those letters stated that Mr and Mrs Peura's 'Combined Annual Income' was $7647.94.

Mrs Peura told the Tribunal that she believed the amount listed as 'Combined Annual Income' was a summary of the payments made to her in that financial year. She argued that the letter did not advise that a decision had been made to attribute the income and assets from the trust to her and did not provide a reason for the reduction in the rate. She subsequently became aware of the attribution, and contacted Centrelink on 15 May 2002, advising that the trust had become inactive in June 2001. Centrelink ceased attribution from 15 May and Mr and Mrs Peura's rate increased.

The issue

The issue before the Tribunal was whether arrears were payable to Mr and Mrs Peura for the period from 1 January 2002 to 15 May 2002.

The Tribunal first considered the operation of s.109 of the *Social Security (Administration) Act 1999* ('the Act'). If the notice sent to Mr and Mrs Peura in December 2001 was adequate, then the date of effect of the decision to increase the rate of payment would take effect on the day the request for review was made. If it was deficient, the increase in payment could be backdated to 1 January 2002.

The Tribunal was referred to various decisions. The applicant relied on *Wills and Secretary, Department of Social Security* (1998) 54 ALD 271, in which the Tribunal noted that the failure to correctly code Mrs Wills as a non-homeowner resulted in the payment of a reduced rate of benefit for over 12 months. The Tribunal found that letters sent to Mrs Wills did not outline the actual decision made (that being to record Mrs Wills as a non-homeowner) and consequently did not amount to 'notice' of the decision. In the current case, the