(i) immediately before the period of absence commenced, the person was receiving the age pension; or

(ii) during the period of absence, the person's claim for the age pension is granted under the *Social Security (Administration) Act 1999*.

Clause 128(1) of Schedule 1A of the Act provides as follows:

> Saving provision-portability rules relating to rates of pension
>
> **128.(1)** Despite the amendments of sections 1213A, 1215, 1216, 1220A, 1220B and 1221 of this Act made by the *Social Security and Veterans' Entitlements Legislation Amendment (Miscellaneous Matters) Act 2000*, if:
>
> (a) a person was absent from Australia immediately before 20 September 2000; and
>
> (b) at a time (the *post-start time*) after 20 September 2000, the person had not returned to Australia for a continuous period of 26 weeks or more since 20 September 2000;
>
> those provisions continue to apply to the person at the post-start time as if those amendments had not been made.

The issue

The AAT needed to determine whether the amendments which took effect on 20 September 2000 in relation to portability of pensions applied to Dagher. If so, Dagher would be entitled to the full pension if in Australia, but a lower rate once continuously absent for a period exceeding 26 weeks.

Discussion

The AAT was satisfied that Dagher satisfied clause 128(1)(a) in that he was absent from Australia immediately before 20 September 2002.

Dagher argued the meaning of clause 128(1)(b). He submitted that the 26 weeks referred to the period 20 September 2000 to 20 March 2001. In other words, if a person returned to Australia within that period, the saving provision would apply. Dagher referred to s.1214 of the Act which applies where a person's maximum portability period is an unlimited period, and s.8 of the *Acts Interpretation Act 1901* which protects specified rights when an Act repeals or amends an Act unless contrary intention appears. Dagher submitted he had a right to a pension and the amendments of 2000 had adversely affected that right.

The AAT concluded:

> As Mr Bartley submitted, Mr Dagher had an entitlement to an age pension. That is not in dispute. The dispute relates to the rate of the pension he is entitled to receive. In my opinion, the legislative scheme is clear. Mr Dagher's entitlement was not affected, but the rate at which the pension is payable when he is overseas was. I agree with Mr Larcombe that Mr Dagher, having returned to Australia after 20 September 2000, and having remained continuously for more than 26 weeks, is not entitled to the protection of the saving provision clause 128 of schedule 1A of the principal Act.

(Reasons, para. 17)

Formal decision

The AAT affirmed the decision under review.

[S.L.]

Recovery of debt: investment property disclosure; administrative error waiver

SECRETARY TO THE DFaCS and RUSSELL
(No. 2004/953)

Decided: 14 September 2004 by M. Thorpe.

The issue

In this matter the issue was whether debts of age pension (AP) and partner allowance (PA) should be recovered from Mr and Mrs Russell.

Background

Mr Russell was granted AP and Mrs Russell PA from July 2000. Mrs Russell was transferred to AP from November 2000. Their rates of payment did not take account of the value of an investment property which Mr Russell owned, a matter noted during a data match exercise in July 2001, as a result of which their rates of payment were reassessed. In May 2002 Centrelink determined that overpayments for the period July 2000 to April 2002 had occurred, but after further review the period of the overpayment was shortened to July 2000 to October 2001, and the debts reduced to $5016 and $5839 for Mr and Mrs Russell respectively.

At the time of applying for their respective payments, Mr and Mrs Russell had — they argued — visited Centrelink and had supplied the necessary documentation about their property investment, including the Certificate of Title, although the details of the investment were not coded by Centrelink. Though the Russells acknowledged receiving in May 2002 a letter from Centrelink (and earlier letters) requiring them to notify should their circumstances have changed, they did not respond as they believed that none of their circumstances had changed from when they applied.

The law

There was no dispute in this matter that an overpayment had occurred and debts were owed by both Mr and Mrs Russell. The sole issue was whether those debts should be recovered. Section 1237A of the Act requires that a debt must be waived — that is, not recovered at all — in certain circumstances:

> **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 Tribunal concluded that it was not unreasonable for the Russells to not respond to Centrelink letters, given that they had in good faith provided details of all their assets, and that as Centrelink had not coded those details the debts had arisen solely because of Centrelink's administrative error. In this the Tribunal relied on the decision in *Sekhon v Secretary, Department of Family and Community Services* [2003] FCAFC 190 that:

> ... a debt attributable solely to an administrative error can be paraphrased as meaning that the only cause that objectively can be ascribed to the relevant debt is an administrative error ...

There was no reason for the Russells to believe that they were not fully entitled to their payments, given the details they had supplied at application. The Tribunal noted the decision in *Secretary, Department of Education, Employment, Training and Youth Affairs v Prince* (1997) 26 AAR 387 at 388 that:

> ... if a person knows or has reason to know that he or she is not entitled to a payment received – that person should not receive the payment in good faith. Absent such knowledge or reason to know, the receipt would be in good faith.

Given that they had provided Centrelink with all the relevant information, and that their circumstances had not changed subsequently, it was reasonable that they did not respond to letters subsequently sent by Centrelink, and their payments were received in good faith.

Formal decision

The Tribunal affirmed the decision that the debts be set aside and that any

amounts recovered to date be reimbursed to Mr and Mrs Russell.

[P.A.S.]

Austudy debt: distribution from family trust; waiver

SECRETARY TO THE DFaCS v SANGSTER
(No. 2004/991)

Decided: 21 September 2004 by J. Allen.

The issue

This matter concerned Austudy payments totalling $5404 for the period February to November 1999. The issues for consideration were whether a debt for this amount existed and, if so, whether that debt should be recovered.

Background

Sansgter was a beneficiary under a Family Trust established by her father. In November 1998 the Trust resolved to distribute $50,000 to her. Prior to this distribution, the accountant for the Trust had enquired by telephone to Centrelink, and had been incorrectly advised that anything that occurred prior to Austudy being granted would be of no relevance to that payment. Sangster lodged a claim for Austudy in December 1998, but did not advise of the Trust distribution. She was paid from February 1999. The distribution from the Family Trust was noted after a Data Matching exercise in 2002, and the debt subsequently was raised.

The law

The *Social Security Act 1991* ('the Act') provides by s.581 that the rate of Austudy paid to a person is determined by reference to the relevant rate calculator, which in turn directs attention to the person's ordinary income. The term 'income' is defined in ss.8(1) and 1073(1) of the Act as set out in the decision of *Benton* on p.67 in this issue.

The Act by s.1237A provides that waiver of a debt must occur where the debt is '... attributable solely to an administrative error made by the Commonwealth if the debtor received in good faith the payment or payments ...'. Waiver is also possible under s.1237AAD if, inter alia, 'special circumstances' can be said to exist.

Discussion

Is there a debt?

The Tribunal noted that it was not disputed that the distribution had taken place, and that following this Sangster had a legal entitlement to demand payment of the amount. She had in fact drawn on the amount to meet her tuition fees and income tax liabilities. The Tribunal determined that the distribution was 'income' and, applying s.1073(1), that she was to be taken to have received one fifty-second of the total amount distributed in each week for 12 months after the distribution occurred. The effect of this additional income was to reduce her rate of Austudy to nil, and therefore Sangster was not entitled to receive the amounts paid to her during the period in question. The total of those payments was a debt to the Commonwealth.

Should that debt be recovered?

The Tribunal noted the decision in *Secretary, Department of Social Security v Hales* (1998) 51 ALD 695 that:

> The taxpayer is entitled to expect that in the ordinary course money paid to people which they are not entitled to receive will be recovered, albeit in a way appropriate to the circumstances which led to the overpayment and the circumstances of the persons concerned.

In considering whether the debt had arisen 'solely' through administrative error, the Tribunal referred to the decision in *Dranichnikov v Centrelink* [2003] FCAFC 133 that '... [w]hether the debt was due to an administrative error depends upon the circumstances, including the information supplied in association with the claim, and whether any administrative processes which were in place in relation to the processing of such claims were followed'. In this matter, the Tribunal accepted that incorrect advice was given by Centrelink, and that this caused Sangster to believe that the Trust distribution would have no effect on Austudy payments. However, whilst accepting that Sangster did not set out to mislead Centrelink, the information she supplied in her claim form was incomplete. This, in turn, contributed to the granting of Austudy to her, and so Centrelink's administrative error could not be said to be the *sole* cause of the debt arising. As a result, although noting that Sansgter did receive the payments in good faith, the Tribunal concluded that waiver could not occur under s.1237A of the Act.

The Tribunal then considered whether discretionary waiver was permissible under s.1237AAD of the Act. The Tribunal noted the requirement under *Beadle and Director General of Social Security* (1984) 6 ALD 1 that to be 'special' circumstances must be 'unusual, uncommon or exceptional', and that those circumstances must also make waiver 'desirable'. The Tribunal affirmed and followed the decision in *Commissioner for Superannuation v Boardman* (1994) 33 ALD 669 that 'desirable' should be interpreted to mean '... being fair in order to do justice ...' having regard to the overall administration of the Act, and further the expectation that recipients of benefits will be in 'impecunious and straitened circumstances' (*Director General of Social Services v Hales* (1983) 47 ALR 281). Having regard to Sangster's situation, the Tribunal concluded that she could not be said to be in 'impecunious and straitened circumstances', and therefore special circumstances sufficient to make it desirable to waive the debt could not be said to exist.

Formal decision

The Tribunal determined that the debt was correctly raised and that it should not be waived.

[P.A.S.]

Data matching: failure to follow required process

FRUGTNIET and SECRETARY TO THE DFaCS
(No. 2004/996)

Decided: 24 September 2004 by E. Fice.

Background

A data match review was conducted by Centrelink in July 1998 and following information received from Frugtniet's employer, a debt was raised on 9 September 1998 in the sum of $3191.40 for the period 17 April 1998 to 20 August 1998. Frugtniet continued to lodge fortnightly forms and continued to receive newstart allowance. A further data match review was received on 27 March 2001 which disclosed that Frugniet's 1999/2000 taxable income differed from the income reported to Centrelink. By letter dated 8 August 2001, Centrelink informed Frugtniet that Australian Taxation Office (ATO) records revealed income of $12,258 whereas Centrelink records revealed no income was declared. As a re-