of 'income'. The Tribunal disregarded these on various grounds:

- offering a generalisation without specific value to the Davies case *(Ross v Secretary, Department of Social Security* (1990) 19 ALD 601);
- generalised discussion and selective quoting *(Haldane-Stevenson v Director-General of Social Security* (1985) 7 ALD 467);
- stating the obvious *(Secretary, Department of Social Security v Dellis* (1990) 21 ALD 252); and
- having no factual connection with Davies' circumstances *(Secretary, Department of Social Security v Jensen,* unreported A91/114 and *Donath v Secretary, Department of Social Security* (1989) 19 ALD 124).

In *Jansen* the Tribunal noted reference to *Gregory v Secretary, Department of Social Security* (1988) 15 ALD 513 which considered the phrase 'for the person's own use or benefit', as appearing in the definition of 'income' in s.8(1). The Tribunal drew attention to the following quote from Gregory:

> 'Clearly the intention of these words is that the earnings or moneys should be for the person's own use or benefit as distinct from another person's use or benefit, for example if money was given in trust for someone else, such as a child, it could not be said that the person had received those moneys for his or her own use or benefit.'

The DSS case was that the UK rent aid payment was to Davies direct rather than to the landlord, so constituted income even if not by way of his own exertion.

After quoting from *Gregory* the Tribunal applied it to the Davies case and said:

> 'My extended opinion of this statement is that it is markedly similar in intent to the payment of a means tested housing benefit to a pensioner that must be on-paid to the landlord if the pensioner is to continue to receive the benefit and to be housed. It matters not which specific dollar/pound is used to pay what bill, obviously the Australian disability support pension alone (without the pharmaceutical and rental add-ons) is insufficient to exist on in the UK without a further rental allowance, as it is in Australia. The UK rental benefit is not paid to the pensioner for his own use or benefit but paid "in trust" for on-payment to the landlord. Subsequent to this application, any possible doubt was removed by the direct payment of the benefit to the landlord.'

(Reasons, para. 18)

The AAT next considered cases dealing with payments by way of gift or allowance and from *Kolodzeij v Secretary, Department of Social Security* (1985) 7 ALD 660, *Kelleners v Secretary, Department of Social Security* (1988) 16 ALD 543 and *Teller v Secretary, Department of Social Security* (1985) 7 ALN 269. The essence of these cases was that a gift was an ex-gratia payment given by the donor for no consideration by the donee so could not be for reward or a result of exertion or for services rendered. Similarly an allowance is distinguished by also being provided ex-gratia and irrespective of any ascribed status or feature of the donor: Reasons: paras 20 and 21.

Finally the Tribunal accepted the view as to the meaning of 'income' given in *Hungerford v Repatriation Commission* (1990) 21 ALD 568. It said:

> 'At page 575 of that decision, the Tribunal concluded, after a detailed consideration of the words "earned, derived or received" and the amended definition where payments fall within the description "personal earnings, money, valuable consideration and profits", that the meaning that should be ascribed to these words should relate to "gains derived by a person as a result of the provision by that person of consideration in the form of personal exertion or other services or the disposition of property.'

(Reasons, paras 19 and 22)

Taking the analysis in these cases and applying it to Davies, his rent allowance was neither a result of personal exertion or provision of services nor was it an ex-gratia payment, so it fell outside the definition of 'income' in s.8(1) of the Act.

Without analysing the issue the Tribunal also opined parts of s.8(8) of the Act, especially paras (za) and (zc) were supportive of Davies' case.

A suggested piece of law reform

The AAT noted the word 'periodical' in the definition of 'income' in s.8(1) and pointed out the dictionary definition of the word was that it was a newspaper or magazine published regularly, e.g. monthly or weekly.

As a result the use of the word in s.8(1), particularly in (b) and (c), 'made little sense and should be altered to be less ambiguous'. The AAT thought the intended word was 'period' and said: 'that is not what they say; intent is one thing, the law stated in plain English is another': Reasons, para. 26.

Has the definition been changed?

Formal decision

The AAT set aside both the DSS and SSAT decisions by directing that the UK Housing Benefit paid to Davies by Chesterfield Borough Council was not 'income' for the purposes of the Act. It sent the matter back to the DSS to recalculate Davies' DSP and any arrears he might be owed.

[P.W.]

Waiver: which legislative provisions apply? meaning of 'knowingly'

CALLAGHAN AND SECRETARY TO THE DSS (No. 11404)

Decided: 13 November 1996 by S.A. Forgie.

The Callaghans sought review of a decision to raise and recover an overpayment of sickness allowance of $589.38 from Mr Callaghan and an overpayment of partner allowance of $2979.55 from Mrs Callaghan.

The only issue considered by the AAT was whether 'the debt or part of it, should be waived'.

Background

Mr and Mrs Callaghan had been receiving sickness allowance and partner allowance respectively, when Mrs Callaghan applied to DEETYA for AUSTUDY on 1 September 1994 and then lodged an AUSTUDY continuing application form on 30 December 1994. On both forms she indicated that her husband was in receipt of sickness allowance.

While in receipt of sickness allowance, Mr Callaghan was required to complete and lodge review forms with the DSS. On two forms lodged on 7 November 1994 and 31 January 1995 he indicated that neither he nor his partner received money from any other government department.

The DEETYA granted AUSTUDY to Mrs Callaghan. For the same period of time the DSS paid sickness allowance to Mr Callaghan and partner allowance to Mrs Callaghan.

The issue and the evidence

Mr and Mrs Callaghan did not dispute they had received an overpayment in the amount calculated by the DSS, but they wanted the debt waived because they said they did not realise that the DSS and the DEETYA were different government departments. They were not aware that Mrs Callaghan could not receive partner allowance and AUSTUDY at the same time.

The AAT examined the evidence, including notices sent by the DSS to Mr Callaghan, and concluded that Mr Callaghan knew that he had an obliga-

tion to advise of a change in Mrs Callaghan's income but had omitted to do so.

The law

The AAT considered whether it should apply the waiver provisions current at 28 September 1995, the date on which waiver had been considered by the DSS, or whether it should apply the new waiver provisions introduced by the *Social Security Amendment (Carer Pension and Other Measures) Act 1995*, on 1 January 1996.

The AAT considered the case of *Patti-Mae Lee v Secretary DSS* (1996) 139 ALR 57 (pp.10-12) and the case of *Esber v Commonwealth* (1992) 106 ALR 577 and said that according to the principles stated in those decisions, a debtor had the right to have waiver considered on review according to the law in force at the date that waiver was first considered. The AAT said it was 'bound to apply the waiver provisions in force at that date unless the 1995 Amendment Act intended that its provisions should apply and that any accrued rights should be altered': Reasons, para. 8.

The AAT decided that because of the specific directions contained in the new s.1236A, the new waiver provisions applied to that part of the debt which arose before 1 January 1996 and which was neither waived nor paid before that date, that is, to that part which was still outstanding at 1 January 1996.

As to a debt or part of a debt which was paid before 1 January 1996 and in respect of which waiver was refused before that date the pre-1 January provisions applied.

The AAT, in considering the application of the law to the facts before it, said that no part of the debts paid before 1 January 1996 should be waived because s.1237(2), the only provision that might have been applicable, did not authorise waiver as the Tribunal was not satisfied that the Commonwealth had made an administrative error. If it had, the debt did not arise solely from it, as Mr and Mrs Callaghan had failed to notify the DSS of Mrs Callaghan's AUSTUDY payments.

The AAT also said that the debts outstanding on and after 1 January 1996 could not be waived under s.1237AAD, which was the only provision which might be applicable. Section 1237AAD states:

> '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 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.'

The AAT said that the word 'knowingly' is understood, from case law, to mean actual knowledge, unless the legislation specifies otherwise. It found that there is nothing in s.1237AAD to suggest that it should be given any meaning other than that the person has actual knowledge that he or she is making a false statement or representation or is failing or omitting to comply with a provision of the Act.

The AAT found that Mr Callaghan knew he had an obligation to advise of a change in Mrs Callaghan's income and he knowingly omitted to comply with a provision of the Act when he failed to advise of the change. The AAT was also satisfied that Mr and Mrs Callaghan knowingly omitted to notify the DSS, in the sickness allowance forms, of Mrs Callaghan's AUSTUDY payment. The AAT said it drew a distinction between 'knowingly omitting' and 'fraudulently omitting' and applied the distinction in favour of Mr and Mrs Callaghan.

However, it concluded that as Mr and Mrs Callaghan had known that they had omitted to include the AUSTUDY benefit in the sickness allowance forms, they had knowingly omitted to comply with a provision of the Act.

It followed that the debt could not be waived in accordance with s.1237AAD for each of its three paragraphs must be satisfied for waver to apply.

Formal decision

The AAT affirmed the decision of the SSAT.

[G.H.]

Overpayment of job search allowance: recoverable from undischarged bankrupt?

SECRETARY TO DSS and SOUTHCOTT (No. 11741)

Decided: 2 April 1997 by J. Dwyer.

The DSS sought review of a decision of the SSAT that although a recoverable debt existed in this case, the debt should be waived by the DSS pursuant to s.1237AD of the *Social Security Act 1991* (the Act).

The facts

Southcott received unemployment benefit/newstart/job search allowance between May 1991 and June 1994. However, during that time he and his estranged wife had owned a truck, and had been in partnership as a trucking subcontractor for Boral. Monthly cheques in payment for his driving were sent to the matrimonial hom,e and banked by his wife. Southcott ceased driving the truck at some point, and his wife hired a driver to continue to drive it.

The DSS, in a data check under the *Data-Matching Act* between the DSS and tax records, found an inconsistency between statements which Southcott had made when applying for benefits, and his declared tax income. The AAT accepted that Southcott was confused and not trying to deceive officers of the DSS, and that he was half owner of the trucking business, and entitled to half the income, although his wife received 100% of the profit. However, it found that he knew he was entitled to half the income, and was in fact allowing his wife to use his income.

The DSS sought to recover the overpaid benefits as a debt at a time when Southcott had been declared bankrupt, but was working for a salary and was not in receipt of any social security benefits.

Recoverable debt

The AAT found that there was a recoverable debt in respect of overpaid benefits under s.1224(1) of the Act because Southcott had made false statements when applying for the benefits when he stated that he was not a part owner of the