

Recovery of Social Security Overpayments

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Since the Administrative Appeals Tribunal acquired jurisdiction in social security matters in 1980 many of the cases considered have concerned recovery of overpayments of social security pensions and benefits. This article considers the recovery by the Department of Social Security of such overpayments, both under the provisions of the Social Security Act 1947 (Cth) and common law principles, as well as discussing issues which arise in the cases involving recovery of overpayments by governments.

I. INTRODUCTION

Under section 140(2) of the Social Security Act an overpayment of pension, benefit or allowance may be recovered from a pension, benefit or allowance (other than family allowance) which the person is receiving or entitled to receive or becomes entitled to receive, such as when a person becomes eligible for an age pension. Recovery from pensions under section 140(2) is not subject to the Statute of Limitations.¹

Where a person is due for payment of arrears of pension or benefit and the unrecovered overpayment exceeds the amount of the arrears, the whole of the arrears are usually withheld in adjustment of the overpayment. If this would cause great hardship then part of the arrears may be paid.²

When a person is no longer entitled to a pension or benefit the Department seeks a total cash refund or refund by instalments, depending on the person's means.

The Department also considers it important to obtain an acknowledgement of debt from the pensioner or beneficiary to

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1. Department of Social Security, *Unemployment and Sickness Benefit Manual* (hereinafter *U & SB Manual*) para. 22.503. The rate of recovery begins at 10% of the basic pension or benefit when the person has no other income but a lower rate can be arranged in cases of hardship and if the overpayment was not caused by misrepresentation: *U & SB Manual* para. 22.200.
2. Department of Social Security (D.S.S.), *Pensions Manual* para. 21.722; *U & SB Manual* para. 22.210.

extend the limitation period for recovery of the overpayment by civil proceedings under section 140(l). There is no authority in the Social Security Act to obtain acknowledgements of debt. The form used by the Department to request an acknowledgement advises the debtor that he/she is under no legal obligation to acknowledge the debt but that the Commonwealth may institute civil recovery proceedings when no acknowledgement is given.³

When an overpayment is being recovered by deductions from current benefit or pension and the entitlement to that benefit or pension ceases before the overpayment is fully recovered, civil proceedings may be taken to obtain the balance of the debt.⁴

The Department may waive or write off overpayments in certain circumstances. Under the provisions of the Audit Act 1901 (Cth), overpayments of income tested pensions and benefits involving both administrative error and receipt in good faith may be waived by a delegated officer. A delegated officer is the Director-General or a Deputy Director-General for amounts up to \$5000 and a relevant officer in the Department of Finance for larger amounts.⁵

It seems that the Director-General cannot delegate this power to waive to officers lower in the Department of Social Security because section 70A of the Audit Act provides that the Minister for Finance cannot delegate his power to delegate the power to waive.

Under the provisions of the Audit Act overpayments may be written off in circumstances where the debt is not legally recoverable, the amount of the overpayment does not justify the cost of recovery or the debt cannot be recovered because the debtor cannot be found or has died and left no estate.

Overpayments of less than \$10 may be written off under section 70C(l) of the Audit Act, unless they can be recovered from a continuing benefit.⁶ When an overpayment is written off recovery action is not taken but the debt is not expunged.⁷

Overpayments arising from administrative error are recoverable at law, but the Minister for Finance and delegates in the Department of Finance and Department of Social Security have authority to waive recovery under section 70C(2) of the Audit Act,

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3. D.S.S. Memo 80/2506, *Overpayment of Pensions and Benefits — Acknowledgements of Debt* 23 September 1982.
 4. *U & SB Manual* para. 22.502.
 5. D.S.S. Memo 80/2506, *Overpayments due to Administrative Error*, 25 January 1983.
 6. *U & SB Manual* para. 22.600-601; D.S.S., *Family Allowance Manual* para. 10.600-10.601.
 7. *U & SB Manual* para. 22.004.

provided the overpayment was received in good faith by the pensioner.⁸

Administrative error includes machine error, omissions and mistakes by Commonwealth officers, employees and agents, but not where the error is caused or contributed to by the pensioner or beneficiary.⁹ Receipt in good faith means that there was no fault on the part of the recipient and he did not know or could not have known that the payment should not have been made.¹⁰

II. ADMINISTRATIVE APPEALS TRIBUNAL DECISIONS

1. *Jurisdiction of the Administrative Appeals Tribunal*

Review of social security matters by the Administrative Appeals Tribunal (A.A.T.) is provided for in section 15A of the Social Security Act 1947 (Cth), which states that where the Director-General has, in pursuance of sections 14 or 15 of the Act, "...made a decision affirming, varying or annulling a determination, direction, decision or approval of an officer, being a determination, direction, decision or approval that has been reviewed by a Social Security Appeals Tribunal", an application may be made to the A.A.T. for review of the decision.

A question arose in the early cases about the A.A.T.'s jurisdiction in overpayment cases involving section 140(1). The issue was raised in *Re Matteo*¹¹ whether, since section 140(1) provides that overpaid moneys that may be recovered are recoverable in a court, the A.A.T. had any function in relation to the "decisions" made antecedent to the institution of proceedings in a court. The A.A.T. said that there were certain administrative procedures, reviewable by the A.A.T., which must precede any move to seek recovery in a court in pursuance of section 140(1):

First an officer has to form an opinion or reach a conclusion that there has been a false statement or representation, or a failure or omission to comply with a provision of the Act; next, he must satisfy himself that some amount of pension or other benefit has been paid in consequence of that false statement, omission, etc. that would not have been paid but for the false statement, omission, etc. then he must make some calculation of the amount that has been so paid; and, finally, he or another officer must decide to seek recovery and (usually, if not invariably) to make a demand for the overpaid amount from the person from whom it is considered to be recoverable. We think that at least the determination of that amount

8. *Id.*, para. 22.810; *Family Allowance Manual* para. 10.141.

9. *U & SB Manual* para. 22.811.

10. *Id.*, para. 22.812; *Family Allowance Manual* para. 10.141.

11. (1981) 4 A.L.D. 398.

and the decision to seek recovery of it are determinations or decisions of officers under the Social Security Act that are reviewable under s.14 and appealable under s.15 of that Act and, consequently, prima facie reviewable by this Tribunal under s.15A of that Act if they have been reviewed by a Social Security Appeals Tribunal and, as in the present case, affirmed by the director-general or his delegate.¹²

The A.A.T. said that the determinations and decisions they referred to were clearly determinations and decisions under the Act. They said the words in section 140(l) "shall be recoverable in a court" meant no more than "is recoverable in a court" and decided that section 140(1), in providing for recovery in a court, did not impliedly exclude the Tribunal from having jurisdiction in relation to the decisions that necessarily precede the institution of court proceedings.¹³

Similarly in the cases of *Director-General of Social Services v. Hangan*¹⁴ and *Director-General of Social Services v. Hales*¹⁵ the Federal Court rejected the Director-General's arguments that recovery under section 140(1) did not involve a decision by the Director-General. They decided in similar terms to the *Matteo* decision that the decision by the Director-General to recover the overpayment could be reviewed by the A.A.T.

2. Section 140(1) — "effective cause"

Where, in consequence of a false statement or representation, or in consequence of a failure or omission to comply with any provision of this Act, an amount has been paid by way of pension, allowance, endowment or benefit which would not have been paid but for the false statement or representation, failure or omission, the amount so paid shall be recoverable in a court of competent jurisdiction from the person to whom, or on whose account, the amount was paid, or from the estate of that person, as a debt due to the Commonwealth.¹⁶

The A.A.T., beginning in *Matteo's* case,¹⁷ formed the view that an overpayment was recoverable under section 140(l) only if the pensioner's failure or omission to comply with the Act was the "effective cause" of the overpayment and not merely a contributory cause. The A.A.T. applied this concept of "effective cause"¹⁸ until the Federal Court in *Hangan* held that section 140(1) did not support the doctrine of "effective cause" and that,

12. *Id.*, 404.

13. *Id.*, 405.

14. (1982) 45 A.L.R. 23.

15. (1983) 47 A.L.R. 281.

16. Social Security Act 1947 (Cth) s.140(1).

17. Note 11 *supra*.

18. *Re Gee (No.2)* (1981) 4 A.L.D. 376; *Re Woodward* (1981) 5 S.S.R. 49; *Re Forbes* (1981) 5 S.S.R. 50; *Re Babler* (1982) 7 S.S.R. 71.

for the overpayment to be recoverable under section 140(1), a pensioner's failure or omission to comply with the Act need only be a contributory cause of the overpayment, not the effective or dominant cause.

In *Matteo* the A.A.T. considered the meaning of the words "in consequence of" in section 140(1) and decided that they did not have any special technical meaning. Rather the section contemplated more than a causal relationship between the failure or omission and the payment since the section referred to the amount not being paid "but for" the failure or omission.¹⁹

In *Matteo* the Tribunal found that the pensioner's failure or omission to comply with section 45(2) of the Social Security Act, requiring notification of increases in her husband's income, was the effective cause of the overpayment. However, the Tribunal said that the overpayment should not be recovered because Mrs Matteo had health problems, spoke little English, had not engaged in deception and had little income of her own. The Tribunal also thought that the Department of Social Security should take some share of the blame for the overpayment because of their failure to conduct annual pension reviews, which contributed to the overpayment.

In *Re Babler*²⁰ the A.A.T. said that the obligation to comply with section 45 and report increases in income was absolute, though they recognised that many pensioners do not speak English well and do not understand their obligations under the Social Security Act. The Tribunal said:

Whilst there may be circumstances in which the assumption on which the sub-section is built may be open to question (namely, that a pensioner will always be in a position to know what is the income of his or her spouse... and will always have the mental or physical capacity to comply), Parliament has nevertheless seen fit to impose the obligation on the pensioner and to do so in unqualified terms.²¹

The A.A.T. concluded that Mrs Babler's failure to notify increases in her husband's income was the effective cause of the overpayment.

Throughout these cases the Tribunal was strongly critical of the Department of Social Security for abandoning its practice of annual pension reviews between 1974 and 1978. The Tribunal

19. See *Reseck v. Federal Commissioner of Taxation* (1975) 133 C.L.R. 45 and *McIntosh v. Federal Commissioner of Taxation* (1979) 25 A.L.R. 557 where the meaning of "in consequence of" was considered in the context of taxation legislation.

20. Note 18 *supra*.

21. *Id.*, 71.

considered that in many cases²² the Department's failure to review was a contributory cause of the overpayment and in *Gee (No.2)* and *Forbes*²³ the effective cause.

In the cases of *Hangan*²⁴ and *Hales*²⁵ the A.A.T. found that the effective cause of the overpayments was the Department's failure to act on information from the pensioner and review the files, but these decisions and the concept of "effective cause" were overturned by the Federal Court.

In *Hangan*, a case of overpayment of child endowment (family allowance), the court held that the failure or omission to comply with a provision of the Social Security Act need only be a contributory cause, not the dominant or effective cause, of an overpayment for it to be recoverable under section 140(1).

Toohy J. considered the interpretation of the phrase "in consequence of" in section 26(a) of the Income Tax Assessment Act (1936) (Cth) in the cases of *Reseck v. Federal Commissioner of Taxation* and *McIntosh v. Federal Commissioner of Taxation*.²⁶ He said that in those cases the High Court and the Full Court of the Federal Court respectively had held that the words did not require that the relevant event be the dominant cause of the payment, merely that there be a "following on" or temporal sequence. Toohy J. said that those judgments were a guide to the proper interpretation of section 140(1).

Although the Court held that section 140(1) did not require the pensioner's failure or omission to be the effective cause of an overpayment for it to be recoverable, they also said that the Director-General has a discretion to consider whether he should recover the debt.²⁷ They said that in this case it would be inappropriate for the Director-General to take further action to recover the money because the case had lasted for four years and Mrs Hangan had been "sufficiently harrassed" due to the "crude and inefficient" handling of her case by the Department.²⁸

In *Hales* the Federal Court held that the A.A.T. had erred in law in construing section 140(1) as requiring the respondent's failure to inform the Department of her income to be the effective cause of the overpayment for it to be recoverable. However, they

22. *Re Matteo*, note 11 *supra*; *Re Babler*, note 18 *supra*; *Re Parr* (1982) 9 S.S.R. 90; *Re Costello* (1982) 11 S.S.R. 108.

23. Note 18 *supra*.

24. Note 14 *supra*.

25. Note 15 *supra*.

26. Note 19 *supra*.

27. Note 14 *supra*, 36 *per* Toohy J., 44 *per* Fitzgerald J.

28. *Id.*, 36, 51.

upheld the Tribunal's decision that because of hardship and the small chance of recovering the overpayment, recovery of the overpayment should not be sought as a matter of discretion.

3. *Discretion to recover under section 140(1)*

In relation to recovery of overpayments under section 140(1) the A.A.T. developed the view that the Director-General has a discretion to consider whether or not to recover the overpayment, and this view was approved by the Federal Court in the *Hangan* and *Hales* cases.

In *Matteo* the Tribunal said:

we do not read section 140(1) as in any event requiring the Director-General in all cases and in all circumstances to proceed in the courts against a former pensioner even where seemingly a favourable decision could be obtained as a matter of law. . . . The words "shall be recoverable in a court" mean no more than "is recoverable in a court" and do not lend any support to the view that section 140(1) requires the Director-General to institute court proceedings in all cases where that sub-section appears to be applicable. The sub-section does not say and it does not mean "shall be recovered in a court of law."²⁹

In recommending that the Director-General, in his discretion, not take action to recover overpayments, the A.A.T. has considered the effect of recovery on the pensioner, taking into account the person's circumstances and possible hardship, and whether in practical terms the overpayment would be recovered. The A.A.T. also took the view in some cases that the Department's suspension of periodic pension reviews contributed to the overpayments and should be a factor against recovery.³⁰

The Federal Court in *Hangan* agreed that the Director-General has a discretion under section 140(1) and recommended its exercise against recovery action. The judges in *Hales* made lengthy observations about the discretion to recover. Lockhart J. said the Director-General has the capacity to decide against recovery in view of a pensioner's indigent circumstances.³¹ McGregor J. thought that the discretion was not as broad as the A.A.T. proposed. He said that while hardship might preclude recovery at present, he did not think that the discretion should be exercised so as to preclude "forever and in all circumstances recovery which

29. Note 11 *supra*, 405; see also *Re Gee*, *Re Woodward*, *Re Forbes*, note 18 *supra*; *Re Riley* (1983) 13 S.S.R. 131; *Re Karabasis* (1983) 13 S.S.R. 131 and *Re Houghton* (1983) 14 S.S.R. 143 where the A.A.T. recommended that the Director-General exercise his discretion against recovery.

30. *Re Forbes*, note 18 *supra*; *Re Riley*, note 29 *supra*; *Re Karabasis*, note 29 *supra*.

31. Note 15 *supra*, 307.

might in the future be well within the financial competence of the respondent” especially since this was an illegal payment of public money to a person who apparently knew of her duty to advise of increases in income.³² Sheppard J. strongly supported the discretion against recovery. He noted that since social security recipients are more often than not “impecunious” it may not be feasible to pursue recovery action, and agreed with the A.A.T. that the Director-General should take account of all the circumstances of the case when deciding whether or not to institute recovery proceedings.³³

By recommending against recovery under section 140(1) in cases of hardship, even where the pensioner’s non-compliance with the Act was the “effective cause” of the overpayment, the A.A.T. and Federal Court have recognised the poverty and hardship experienced by many social security recipients.

4. *Recovery under section 140(2)*

[W]here, for any reason, an amount has been paid by way of a pension, allowance, endowment or benefit which should not have been paid, and the person to whom that amount was paid is receiving, or entitled to receive, a pension, allowance or benefit under this Act (other than a funeral benefit . . .) that amount may, if the Director-General in his discretion so determines, be deducted from that pension, allowance or benefit.³⁴

Sub-section (2) has been construed widely. In *Re Buhagiar*³⁵ the A.A.T. held that for section 140(2) to operate, considerations of fault or recoverability at law are not relevant, only that for some reason an amount has been paid which should not have been paid if the Act had been properly administered. The Tribunal said that the width of the words “for any reason” in the sub-section precluded

any limitation of sub-s.(2) to circumstances of fault on the part of the pensioner such as those envisaged by sub-s.(1) of s.140 . . . Sub-section (2) is capable of applying whether the fault for the overpayment rests with the pensioner, with the department, whether the fault is shared or, indeed, whether there is no fault on the part of anyone. It is capable of applying whether or not the overpayment would be recoverable at law.³⁶

However, despite the width of sub-section (2), the A.A.T. interpreted widely the discretion in the sub-section regarding the recovery of overpayment by deductions, so as to restrict recovery

32. *Id.*, 302.

33. *Id.*, 319, 323.

34. Social Security Act 1947 (Cth) s.140(2).

35. (1981) 4 A.L.D. 113.

36. *Id.*, 120.

under section 140(2) in practical terms. In *Buhagiar* the A.A.T. said:

Despite the breadth of s.140(2) it cannot, we think, have been intended that, as a matter of course and without regard to the individual circumstances in each case, a pensioner who has an ongoing entitlement to a pension should be exposed to greater liability for recovery of pension overpaid than a person who has ceased to be a pensioner and against whom the only remedy is an action at law.³⁷

They said the discretion whether to recover by deductions or not was wide and the Director-General must be guided in deciding by "principles of consistency, fairness and administrative justice."³⁸ Matters of fault and recoverability, as well as hardship, were appropriate considerations at this stage.

It seems that in *Buhagiar* the A.A.T. was attempting to use the discretion in section 140(2) to limit the operation of the subsection so that it had the same practical operation as section 140(1), where recoverability depends on non-compliance with the Social Security Act by the pensioner. The Tribunal appeared to take a similar approach in *Re Livesey*,³⁹ that as a matter of discretion no more should be recovered under section 140(2) than would be recoverable under section 140(1) if that section were applicable. Other cases take a narrower view of the discretion, but recommend that the discretion be exercised against recovery in cases of hardship.⁴⁰

III. RECOVERY UNDER COMMON LAW PRINCIPLES OF MONEY PAID WITHOUT LAWFUL AUTHORITY OR BY MISTAKE

Some of the overpayment cases⁴¹ in the A.A.T. have referred to or discussed the recovery of overpayments under the principles of *Auckland Harbour Board v. The King*⁴² or recovery of money

37. *Id.*, 123.

38. *Id.*, 121.

39. (1982) 6 S.S.R. 62.

40. In relation to recovery under s.140(2) and the discretion under s.140(2), see also: *Re Pfeiffer* (1981) 5 S.S.R. 48, *Re Wright* (1982) 11 S.S.R. 107, *Re Gee* (1981) 5 S.S.R. 49, *Re Peake* (1982) 6 S.S.R. 63, *Re Holt* (1983) 12 S.S.R. 121, *Re Emery* (1983) 13 S.S.R. 130, *Re Roe* (1983) 14 S.S.R. 143, *Re "H"* (1983) 14 S.S.R. 142. For consideration of calculation of overpayments and deductions under s.140(2) see *Re Harris* (1981) 3 S.S.R. 22 and (1983) 44 A.L.R. 645 (Federal Court). This case is being taken to the High Court but at the date of writing has not been heard.

41. *Re Gee*, note 40 *supra*; *Re Buhagiar*, note 35 *supra*; *Director-General of Social Services v. Hales*, note 15 *supra*.

42. [1924] A.C. 318.

paid by mistake of fact. To date, these principles have not been the basis of decisions allowing recovery of social security overpayments, nor does the Department of Social Security often argue these principles in cases. However the *Auckland Harbour Board* principle is implicit in the Department's approach to overpayments, that a person has been paid money to which he/she is not legally entitled and he/she should repay the money, unless there are very good reasons against repayment. It is likely that in the future the Department will seek to rely more on these principles.

The principle of the *Auckland Harbour Board* case is that

no money can be taken out of the consolidated fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself... Any payment out of the consolidated fund made without Parliamentary authority is simply illegal and ultra vires, and may be recovered by the Government if it can... be traced.⁴³

In that case the Minister for Railways in New Zealand entered an agreement to pay the Auckland Harbour Board a sum of money as consideration for the Board granting a lease of land to a company. The land was reclaimed by the Government, so the Board was unable to grant the lease. It was held that since the authority given by Parliament to pay the money to the Board was conditional on the lease being granted, and the condition was not fulfilled, the payment was illegal and recoverable. Hosking J. in the Supreme Court of New Zealand (affirmed on appeal by the Privy Council) said that public money could not be paid without Parliamentary authority, which is mostly found in statutes or statutory regulations.⁴⁴

The *Auckland Harbour Board* principle has been approved and applied in many cases and contexts.⁴⁵ It was followed in *Commonwealth of Australia v. Burns*⁴⁶ where it was held that amounts paid to the defendant by the Repatriation Department were recoverable by the Commonwealth as moneys paid out of Consolidated Revenue without statutory or other lawful authority. Newton J. also said that the payments were made by reason of mistake on the part of officers of the Repatriation

43. *Id.*, 326 per Viscount Haldane.

44. (1919) 38 N.Z.L.R. 419.

45. *E.g. R v. The Toronto Terminals Railway Co.* [1948] Ex. C.R. 563; *Commonwealth of Australia v. Thomson* (1962) 1 C.C.R. (Vic.) 37; *Attorney-General v. Gray* [1977] 1 N.S.W.L.R. 406.

46. [1971] V.R. 825.

Department, though he did not have to decide whether the money would be recoverable on that basis.⁴⁷

Recovery of money paid under a mistake of fact was considered in *Commonwealth of Australia v. Kerr*.⁴⁸ Gordon J. approved a statement from *Halsbury's* that:

The mistake must not only be as to some fact affecting the liability to pay, but it must also be a mistake between the party paying and the party receiving the money. If the fact about which the mistake exists has nothing to do with the payee, the rule does not apply. Furthermore, the mistake must be that of the person who paid the money, and not of another person on whose mistake he thought fit to act.⁴⁹

In a leading case on money paid by mistake, *Kelly v. Solari*,⁵⁰ Parke B. said that where money is paid

under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the facts. . . . If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it.⁵¹

Farwell J. in *In Re The Bodega Co. Ltd*⁵² stated that:

The mistake upon which you can recover must . . . be a mistake as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money. That, I apprehend, means this. If you are claiming to have money repaid on the ground of mistake, you must shew the mistake is one which led you to suppose you were legally liable to pay.⁵³

Goff⁵⁴ has said that to succeed in a recovery action the plaintiff must be able to point to a specific fact about which he is mistaken and show that he would not have made the payment but for the mistaken assumption of fact.⁵⁵ He rebuts the suggestion that before action can be taken to recover money paid under a mistake of fact a demand for the money is necessary:

47. *Id.*, 827, 830.

48. [1919] S.A.L.R. 201.

49. *Id.*, 216.

50. (1841) 9 M. & W. 54.

51. *Id.*, 59. *Kelly v. Solari* was a case where an insurance company paid money on an insurance policy, forgetting that the policy had lapsed because of non-payment of premiums.

52. [1904] 1 Ch. 276.

53. *Id.*, 286, quoting from Bramwell B. in *Aiken v. Short* (1856) 1 H. & M. 210, 215.

54. R. Goff, *The Law of Restitution* (2nd ed.1978).

55. *Id.*, 72, 79, citing *Home and Colonial Insurance Co. Ltd v. London Guarantee & Accident Co. Ltd* (1928) 45 T.L.R. 134; *Bernard & Shaw Ltd v. Shaw (Viron Third Party)* [1951] 2 All E.R. 267.

The duty to repay does not arise because the defendant has refused to return the money. It arises from the date of the receipt of the money, because the defendant has received money he never ought to have received.⁵⁶

However, as he admits, if both parties were mistaken, it is only fair that the payee should have the chance to make amends before legal proceedings are commenced.⁵⁷

In relation to an action to recover money paid by mistake, Goff is in favour of a defence that the defendant had so changed his position in good faith that it had become inequitable to require him to repay the money. No such defence has been generally recognised in English or Australian law, though it is recognised in the United States,⁵⁸ Canada⁵⁹ and New Zealand.⁶⁰

According to Goff, the defence of change of position is difficult to establish:

The mere spending of the money is not, in itself, sufficient to establish the defence.⁶¹ So, where the recipient has spent the money simply on ordinary living expenses,⁶² or in payment of previous debts, the payer can recover. The recipient must, therefore, show a detrimental change of position *as a result* of the particular payment.⁶³

IV. ESTOPPEL

The issue of estoppel as a defence to recovery of money paid illegally or by mistake has also been considered in these cases. In *Commonwealth v. Burns*⁶⁴ the defendant argued that the Commonwealth was estopped from alleging that the payments had been made to her without lawful authority. The basis of this argument was firstly that the officer of the Repatriation Department had represented to her that she was entitled to the payments, secondly that this representation was confirmed by the continuation of the payments, and finally that she had spent the money in reliance on the representation so requiring her to repay the money would operate unjustly to her detriment. Newton J. rejected this argument on the basis of the "well-established rule

56. *Id.*, 82.

57. *Ibid.*, citing *Sharkey v. Mansfield* 90 N.Y. 227, 229 (1982).

58. American Law Institute, *Restatement of the Law of Restitution* para. 142.

59. *Rural Municipality of Storthoaks v. Mobil Oil Canada Ltd* (1975) 55 D.L.R. (3d) 1, 13.

60. Judicature Act 1908 (N.Z.) s.94B.

61. Note 59 *supra*, 57.

62. *Old Colony Trust Co. v. Wood* 321 Mass. 519; 74 N.E. 2d 144 (1947).

63. Note 54 *supra*, 546.

64. Note 46 *supra*.

that a party cannot be assumed by the doctrine of estoppel to have lawfully done that which the law says he shall not do.’⁶⁵

In *Attorney-General v. Gray*⁶⁶ the New South Wales Court of Appeal held that estoppel was not available because its effect would be to prevent the Attorney-General from asserting the statutory illegality of the payments. The Court of Appeal referred to the House of Lords decision in *Howell v. Falmouth Boat Construction Co. Ltd*⁶⁷. There Lord Simonds (with whom Lords Oaksey, Radcliffe and Tucker agreed) referred to Lord Denning’s statement in the Court of Appeal that:

Whenever government officers, in their dealings with a subject, take on themselves to assume authority in a matter with which he is concerned, the subject is entitled to rely on their having the authority which they assume. He does not know and cannot be expected to know the limits of their authority, and he ought not to suffer if they exceed it. . . I know of no such principle in our law nor was any authority for it cited. The illegality of an act is the same whether or not the actor has been misled by an assumption of authority on the part of a government officer however high or low in the hierarchy.⁶⁸

Wade⁶⁹ said that:

it would seem necessary to reject the whole notion of estoppel of a public authority by wrongful assumption of statutory authority. For it clearly conflicts with the basic rule that no estoppel can give the authority power which it does not possess.⁷⁰

In *Lever (Finance) Ltd v. Westminster Corporation*⁷¹ Lord Denning applied the notion of estoppel that he had developed in *Robertson v. Minister of Pensions*⁷² and applied in *Howell*, though it had been rejected there by the House of Lords. Lord Denning held that a local planning authority was bound by wrong statements about planning permission made by one of its officers who had no power to give planning permission. Lord Denning said that the practice of allowing planning officers to give advice gave them “ostensible authority” and that a public body may be bound by representations made by their officers within this ostensible authority if people act on them. Wade commented on this kind of estoppel:

If the force of law is given to a ruling from an official merely because it is wrong, the official who has no legal power is in effect substituted for

65. *Id.*, 830.

66. Note 45 *supra*.

67. [1951] A.C. 837.

68. *Id.*, 845.

69. H. Wade, *Administrative Law* (1982).

70. *Id.*, 343.

71. [1971] 1 Q.B. 222, 230.

72. [1949] 1 K.B. 227.

the proper authority, which is forced to accept what it considers a bad decision. To legitimate ultra vires acts in this way cannot be a sound policy⁷³

especially since it contradicts the principle that estoppel cannot make lawful an act which is unlawful. The weight of authority is against Lord Denning's application of estoppel.⁷⁴

Clearly if a public body has no legal power to delegate decision-making authority to an officer, a decision made by the officer will be ultra vires, irrespective of whether there has been a delegation of authority in fact.

The issue of estoppel in relation to misleading advice from the Department of Social Security was recently considered by the A.A.T. in *Vallance and the Director-General of Social Security*.⁷⁵ An officer of the Department gave Mrs Vallance the wrong advice about her entitlement to a Class A Widow's pension if the only child left in her care entered full-time employment. Mrs. Vallance acted on the advice and the Department cancelled her pension. Mrs Vallance argued that because of the bad advice given by the officer of the Department, on which she had acted to her detriment, the Director-General was estopped from saying that her entitlement to a widow's pension ceased. The A.A.T. rejected this argument and said:

In general terms, the powers of the Director-General are those given to him by statute, and although he ostensibly has a wide discretion to determine the rate of pension which is reasonable and sufficient, I am unable to find any power vested in him to grant a pension to a person who is not qualified to receive one.⁷⁶

This case illustrates the hardship which can result from the "no estoppel" rule in relation to representations by public officers.

In the *Thomson*⁷⁷ case it was argued on behalf of the Commonwealth that the payment of money did not amount to any representation as to entitlement on which to base estoppel.⁷⁸ Goff is also of the opinion that the mere payment of money under a mistake cannot constitute, in itself, a representation which will

73. Note 69 *supra*, 345.

74. See *Commonwealth v. Burns*, note 46 *supra*; *Attorney-General v. Gray*, note 45 *supra*; *Howell v. Falmouth Boat Construction Co. Ltd*, note 67 *supra*; *Attorney-General for Ceylon v. R.D. Silva* [1953] A.C. 461; *Peart v. Victorian Railways Commissioners* [1924] V.L.R. 425; *Attorney-General v. Municipal Council of Sydney* (1919) 20 S.R. (N.S.W.) 46; *Commonwealth of Australia v. Thomson*, note 45 *supra*.

75. (1983) 12 S.S.R. 123.

76. *Ibid.*

77. Note 45 *supra*.

78. *Id.*, 550.

estop the payer from recovering his money.⁷⁹ In considering the application of estoppel to recovery of social security overpayments, a point worth considering is whether the payment of a pension alone, leaving aside advice as to entitlement, would be a representation as to entitlement.

V. SECTION 64 JUDICIARY ACT 1903 (CTH)

In *Commonwealth v. Burns*, Newton J. said of the rule that estoppel cannot make legal an illegal action:

The rule is of wide application and can apply as between subject and subject, so that s.64 Judiciary Act has no application. It was not suggested that s.64 prevented the application of the principle in the *Auckland Harbour Board* case and in my view it does not do so: cf *South Australia v. Commonwealth* (1962) 108 CLR 130, at 140 per Dixon CJ.⁸⁰

Section 64 Judiciary Act, 1903 provides that: "In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject." In *South Australia v. Commonwealth* Dixon C.J. and Kitto J. expressed the view that the rights referred to in section 64 include the substantive law governing the liability in the suit.

The effect of section 64 on the application of the *Auckland Harbour Board* principle arose in *Maguire v. Simpson*,⁸¹ *Commonwealth of Australia v. Crothall Hospital Services (Aust.) Ltd*⁸² and *Buhagiar*.⁸³ In *Maguire v. Simpson* it was not decided whether section 64 would "assimilate the rights of the Commonwealth to those of a subject" in a case of recovery of payments made without lawful authority.⁸⁴ In *Crothall*, Ellicott J. said (obiter) that section 64 did not destroy the Commonwealth's cause of action in reliance on the *Auckland Harbour Board* principle in cases of recovery of unlawful payments. As Aronson and Whitmore have observed, the question is unresolved as to whether section 64 and its equivalents mean that one should disregard the government's public status in an action brought by it to recover overpayments from public funds.⁸⁵ It is notable that if section 64 does not disturb the

79. Note 54 *supra*, 550.

80. *Commonwealth v. Burns*, note 46 *supra*, 830.

81. (1977) 139 C.L.R. 362.

82. (1981) 36 A.L.R. 567.

83. Note 35 *supra*.

84. Note 81 *supra*.

85. M. Aronson & H. Whitmore, *Public Torts and Contracts* (1982) 11.

Crown's status in relation to the *Auckland Harbour Board* principle, it gives the Crown an advantage in relation to estoppel, which can be argued against an ordinary citizen but not the Crown.

In *Commonwealth v. Burns* Newton J. said that the application of the *Auckland Harbour Board* principle in overpayments cases was confirmed by those sections of the Commonwealth Constitution dealing with the Consolidated Revenue Fund and appropriation laws.⁸⁶ It might follow from this that any attempt by a court, tribunal or legislation to qualify the application of the principle to overpayment cases could be unconstitutional.

In the *Hales*⁸⁷ case in the Federal Court, the Director-General argued that the *Auckland Harbour Board* principle compelled the conclusion that the Director-General had no discretion not to proceed to recover an overpayment, as a consequence of there being no Parliamentary authority for the payments. The argument was rejected. Sheppard J. said the principle was not relevant to the question of the Director-General's discretion to decide whether or not to take recovery proceedings. He emphasised that section 140 (l) of the Social Security Act provides only that an overpayment shall be recoverable, and does not say that the Director-General must take action to recover it. He said:

In my opinion the *Auckland Harbour Board* case is authority for no more than that a payment made without parliamentary authority *may* be recovered. I have emphasised the word "may" because it is the word used by Viscount Haldane in the judgment which he delivered on behalf of the Board. Thus in no sense can the case be said to be one which decides that action *must* be taken to recover moneys paid without parliamentary authority. All it and the later cases decide is that an action for recovery lies and estoppel will not assist the defendant. In my opinion the provisions of section 140(l) are but a legislative statement of the principle.⁸⁸

This interpretation qualifies the usual absolute view taken of the case.

VI. NEGLIGENCE AND NEGLIGENT MISSTATEMENTS BY PUBLIC BODIES

In view of the problems discussed above in attempting to apply estoppel to wrong or misleading advice from government officials, it has been suggested that it would be more appropriate to award damages to the person who suffers loss by relying on the wrong advice, on the basis of negligence by government or public

86. See ss 53, 54, 56, 81, 82, 83.

87. *Director-General of Social Services v. Hales*, note 15 *supra*.

88. *Id.*, 320.

authorities or their employees.⁸⁹ However, in attempting to prove negligence, it may be difficult to show that the government body or official owed a duty of care.

In *Carpenter's Investment Trading Co. v. Commonwealth of Australia*⁹⁰ Kinsella J. held that there was no duty owed by the Commonwealth to individual members of the public to appoint specially qualified persons to assist the Commissioner of Taxation in the administration of the Taxation Acts. The only duty of servants of the Commissioner was held to be to the Commissioner. There was held to be no relationship of duty between servants of the Commissioner and members of the public. This decision has been criticised as taking "an indefensibly restrictive view of the relationships between public servants and the public. It would be grossly unjust to say that no government employee other than those at the very top owes the public any duty of care."⁹¹

In *Green v. Daniels*⁹² the High Court rejected a claim in negligence against an officer of the Department of Social Security on the basis that the plaintiff could not prove that she had acted to her detriment in reliance on the defendant's advice, nor could she prove damage. Stephen J. did not decide whether there was a duty of care owed to the plaintiff by the official.

A possible avenue of redress lies in the tort of negligent misstatement, which has been developed in a line of cases based on the decision of *Hedley Byrne & Co. Ltd v. Heller & Partners*.⁹³ Government bodies are now held liable in damages for financial loss which occurs as a result of wrong advice from them. Most of the cases to date involve local government functions.⁹⁴

In *Hull v. Canterbury Municipal Council*,⁹⁵ *Hedley Byrne v. Heller* was applied to hold the Council liable for carelessly giving invalid consent to development plans, on the basis that:

the law will imply a duty of care when a party seeking information from a party possessed of special skill trusts him to exercise due care, and the

89. J.M. Evans, "Delegation and Estoppel in Administrative Law" (1971) 34 *Mod. L. Rev.* 335; H. Wade, note 69 *supra*, 346; M. Aronson & H. Whitmore, note 85 *supra*; H. Whitmore, *Principles of Australian Administrative Law* (1980) 246.

90. (1952) 69 W.N. (N.S.W.) 175.

91. M. Aronson & H. Whitmore, note 85 *supra*, 79-80.

92. (1977) 13 A.L.R. 1.

93. [1964] A.C. 465.

94. *Ministry of Housing and Local Government v. Sharp* [1970] 2 Q.B. 223; *Hull v. Canterbury Municipal Council* [1974] 1 N.S.W.L.R. 300; *Knight Holdings Pty Ltd v. Warringah Shire Council* [1975] 2 N.S.W.L.R. 796.

95. *Ibid.*

second party knew, or ought to have known, that the first party was relying on the second party's skill and judgment.⁹⁶

Hull was followed in *Knight Holdings v. Warringah Shire Council*.⁹⁷ In the course of his judgment Yeldham J. said:

Mr Wilcox [for the Council] submitted that it was laying down too broad a principle of liability to say that a council which acts negligently in the course of administering a town planning scheme is liable in damages to someone injured thereby, and that such a principle goes well beyond what was dealt with in *Hedley Byrne*. However, I do not think that this is so. . . .⁹⁸

The High Court decision in *Shaddock (L.) & Associates Pty Ltd v. Parramatta City Council*⁹⁹ clarified and expanded the scope of the negligent misstatement action. In that case the appellants purchased land for the purpose of redevelopment in reliance on information from the Council that there was no road-widening proposal affecting the land. In response to a telephone enquiry and a subsequent written enquiry, the appellant's solicitors received answers that no road-widening scheme affected the land, but in fact a road-widening scheme did exist which required acquisition of more than a third of the land, so the land was unsuitable for development. On appeal, the High Court held that the Council owed a duty of care to the appellants, represented by their solicitors, to supply correct information about the road-widening proposals.

Applying *Hedley Byrne v. Heller* Mason J. (Aickin J. concurring) stated:

whenever a person gives information or advice to another upon a serious matter in circumstances where the speaker realizes or ought to realize, that he is being trusted to give the best of his information or advice, as a basis for action on the part of the other party and it is reasonable in the circumstances for the one party to act on that information or advice, the speaker comes under a duty to exercise reasonable care in the provision of the information or advice he chooses to give.¹⁰⁰

Gibbs C.J. stated the rule in similar terms.

The Court decided that it would not have been reasonable for the appellants to rely on an unconfirmed answer given by an unidentified person on the telephone, and the Council therefore owed no duty of care in responding to the telephone enquiry. But the written enquiry on the usual form made clear the seriousness

96. *Id.*, 301.

97. Note 94 *supra*.

98. *Id.*, 805.

99. (1981) 36 A.L.R. 385.

100. *Id.*, 404.

of the enquiry and the importance attached to the answer. The Council therefore owed a duty of care in answering it.

The Court considered the decisions of the Privy Council and High Court in *Mutual Life and Citizens Assurance Co. Ltd v. Evatt*¹⁰¹ and decided that for the purpose of the *Hedley Byrne* rule there was no distinction between giving advice and supplying information. The Court disagreed with the majority decision of the Privy Council in *M.L.C. v. Evatt* that the duty to exercise reasonable care is limited to persons whose business or profession includes giving the sort of information sought or persons who claim to have the same skill and competence as those carrying on such a business. Gibbs C.J. said the duty applies just as well to public bodies which follow the practice of supplying information which is available more readily to it than to other persons, and the rest of the Court gave similar opinions.

Compensation for negligent misstatement could be useful for social security recipients in the *Vallance*¹⁰² situation, who act in reliance on information from Department of Social Security officials that their action will not affect their pension entitlement and subsequently have their pensions cancelled. In an overpayment situation, recovery of the overpayment might not be regarded as financial loss to ground a negligent misstatement action, although in practical terms it could cause financial hardship.

VII. CONCLUSION

The government administration has significant power to affect people's lives by administrative decisions, and review of such decisions is often necessary to ensure that people are not affected detrimentally or unjustly by them. This is particularly important since, as Jowell points out, the rules by which governments operate "are not primarily tailored to individual circumstances; they view the individual to whom the rule is applied as one of a class or category."¹⁰³

The object of review procedures is to provide an opportunity to scrutinise decisions made and the reasons for them and to provide

101. (1968) 122 C.L.R. 556 (H.C.); (1970) 122 C.L.R. 628 (P.C.); [1971] A.C. 793 (P.C).

102. Note 75 *supra*.

103. J. Jowell, "The Legal Control of Administrative Discretion" [1973] *Public Law* 178, 202.

correct decisions. Ideally the effect of review procedures should be to encourage more care in making initial decisions.¹⁰⁴

Correct decisions at the initial stage are especially important to social security recipients, many of whom depend on social security payments as their sole source of income¹⁰⁵ and do not have the resources to wait for administrative review procedures to remedy adverse decisions.

As Taylor notes,¹⁰⁶ administrative review tends to provide “one-off” corrections, because of its focus on individual disputes between a citizen and government. Administrative review could have a greater impact on primary decision-making by provision of information about review decisions to decision-makers, revision of decision-making procedures and manuals, and, where appropriate, review of the legislation relevant to the decisions.¹⁰⁷ As Taylor suggests, when a review decision changes the principle of general application or the accepted understanding of a legislative provision, there should be a reassessment of all cases where the principle has been applied with continuing effect, rather than relying on individual applications for review to correct the decisions.¹⁰⁸

A government department may respond to the A.A.T. by changing its decision-making procedures, or maintaining its existing procedure and accepting that the Tribunal will overturn a number of its decisions. While the former option may involve more work and a longer time to make decisions, the latter disadvantages people who do not have the resources to seek reviews of decisions.

In social security appeals the A.A.T. is often required to consider discretionary powers under the Social Security Act. Hopefully the identification by the Tribunal of criteria to be applied in the exercise of discretionary powers will lead to greater awareness in the Department of the circumstances involved in social security decisions.

104. M.J. Mossman & R. Sackville, “Issues in Law and Social Security” in *Essays on Law and Poverty: Bail and Social Security* (1977) 70; Australian Government Commission of Inquiry into Poverty, *Law and Poverty in Australia Second Main Report* (1975) 179.

105. *Law and Poverty in Australia, id.*, 163; Administrative Review Council, *Social Security Appeals* (1981) 15.

106. G.D.S. Taylor “Access to Administrative Justice” in *Access To Law* (1980) J. Goldring, N. Cunningham, R. Hamilton, D. Partlett (eds) 19.

107. *Id.*, 38.

108. *Id.*, 40.

The effectiveness of the A.A.T. in improving administrative decisions ultimately depends on the degree to which government departments acknowledge and implement the spirit of A.A.T. decisions throughout their administrative processes.