

## Legislation

Section 3 of *A New Tax System (Family Assistance) Act 1999* (the Act) provides:

**maintenance income**, in relation to an individual, means:

- (a) child maintenance — that is, the amount of a payment or the value of a benefit that is received by the individual for the maintenance of an FTB child of the individual and is received from:
  - (i) a parent of the child; or
  - (ii) the partner or former partner of a parent of the child; or
- (b) partner maintenance — that is, the amount of a payment or the value of a benefit that is received by the individual for the individual's own maintenance and is received from the individual's partner or former partner; or
- (c) direct child maintenance — that is, the amount of a payment or the value of a benefit that is received by an FTB child of the individual for the child's own maintenance and is received from:
  - (i) a parent of the child; or
  - (ii) the partner or former partner of a parent of the child;

but does not include disability expenses maintenance.

## Whether payment 'direct child maintenance'?

The Department submitted that the mother's payment of \$7200 fell within the definition of direct child maintenance under s.3(c) because the daughter received the value of the benefit of the payment by the mother for the program. The Tribunal should use the ordinary meaning of 'own' to refer to a particular benefit for the daughter's maintenance and for no other child's maintenance. The Department referred to *Secretary, Department of Social Security and Rosendorf* (1990) 20 ALD 270 in which the Tribunal stated:

One has to distinguish a benefit from an advantage ... and The Macquarie Dictionary defines the word 'benefit' to mean 'anything that is for the good of a person or thing'. It is in this sense that the word is used in the Social Security Act.

The Department also submitted that the decision to credit the mother's Child Support Agency account with a non-agency payment of \$7200 was correct because both parents had signed the agreement, which specified that the payment was to count for child support. She stated that the calculation of family tax benefit by Centrelink was correct and took into account all relevant factors.

Iorio submitted that his daughter and mother pressured him late at night into signing the agreement the day before the deadline for payment. He maintained

that he was unaware of the details of the program. He disagreed strongly that the \$7200 was for travel, school expenses and other expenses, and stated that the mother's contribution covered only airfares and supervision of the daughter during the program. It was not for her own maintenance as specified in the legislation, because it was not provided for her personal maintenance.

Iorio stated he was misled about the nature of the program, and discovered after his daughter's departure that there was no school component, and that she proposed to spend the year staying with relatives and travelling in Europe. He then organised distance education for her, and incurred the cost (between \$9000 to \$10,000) of providing books, internet access, telephone and other materials that enabled her to study a Victorian Year 11 course while she was overseas.

In relation to the crediting of the \$7200 to the mother's account with the Child Support Agency, Iorio submitted that at no time did he receive the mother's payment, so he should not have incurred a family tax benefit debt as a result. He stated further that the amount was actually a debt incurred by him because he was required to waive child maintenance from 30 January 2001 to 31 December 2001.

The Tribunal accepted Iorio's evidence that pressure had been exerted on him to sign the agreement shortly before the deadline for payment. However, it noted as the custodial parent, he should have been aware of details of the proposed trip and discussed the issues with his daughter before committing himself to the expenditure and before consenting to her participation. The agreement signed by Iorio and the mother states clearly that the mother's payment is to be counted as child support during the program.

The Tribunal was satisfied that the statement in the agreement that the mother was to pay for the daughter's travel, school expenses and other expenses to the value of \$7200 was correct, even though Iorio also contributed a considerable sum towards her education and other expenses.

The Tribunal found that the daughter received the value of the benefit of the payment by the mother of \$7200, and that this benefit was received for her own maintenance and for no other person's, from a parent. The payment fell within paragraph (c) of the definition of maintenance income received by Iorio and had to be taken into account in the calculation of family tax benefit.

In determining whether Iorio incurred a debt the Tribunal was satisfied that Centrelink took into account the correct factors when calculating family tax benefit payable to him based on the amount of child maintenance received during the period 1 July 2000 to 23 February 2001. The Tribunal found that, under s.71(2) of the Act, Iorio incurred a debt of \$1785.65 to the Commonwealth.

The Tribunal noted that under s.95 of *A New Tax System (Family Assistance (Administration)) Act 1999* (the FAA Act) the Secretary may decide to write off the debt in certain circumstances. The Tribunal found there were no grounds to write off the debt. Section 97 of the FAA Act provides for waiver of a debt arising from administrative error made by the Commonwealth. The Tribunal found that there was no administrative error by Centrelink. Section 101 of the FAA Act provides for waiver of recovery of a debt where there are special circumstances (other than financial hardship alone). In this case the Tribunal found that Iorio's circumstances did not constitute special circumstances (other than financial circumstances alone), and waiver of the debt under s.101 of the FAA Act was not appropriate.

## Formal decision

The Tribunal affirmed the decision under review.

[M.A.N.]

## Parenting payment debt: administrative error; special circumstances; waiver

SECRETARY TO THE DFaCS and  
MCKENZIE  
(No. 2003/267)

**Decided:** 21 March 2003 by S. Bullock.

## Material facts

McKenzie had been paid parenting payment in 1999 based on a declared figure of \$349.20 per week for her husband's casual earnings. During May 2000, McKenzie had completed a family assistance office form and had declared her husband's annual income to be \$24,876. About a month after McKenzie had completed the form there was a change in her husband's employment. She gave evidence at the hearing

that she had attended Centrelink in June 2000 to notify of the change in her husband's circumstances and had completed a one-page form providing amounts her husband would be receiving from employment. Centrelink had no record of this form being completed and had continued to calculate her rate of parenting payment based on the figure of \$349.20. Notices were sent to McKenzie advising her that this figure was being used to calculate her rate of parenting payment. McKenzie gave evidence at the hearing that she had not received the mail and had previously made complaints to the post office. A neighbour also gave evidence of experiencing similar problems with his mail. The overpayment was detected by Centrelink when McKenzie completed a parenting payment review at the end of December 2000 resulting in her payment being cancelled and a debt being raised.

McKenzie at the hearing provided evidence from her treating doctor and counsellor that she had suffered from a history of depression and anxiety as well as physical health problems.

On appeal, the SSAT decided to set aside the decision and send the matter back for reconsideration in accordance with directions that the debt be waived because of sole administrative error by the Commonwealth.

### The issue

The only issue for the AAT to decide was whether the debt could be waived. The relevant provisions of the *Social Security Act 1991* (the Act) are:

**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.

Note: Subsection (1) does not allow waiver of a part of a debt that was caused partly by administrative error and partly by one or more other factors (such as error by the debtor).

**1237AAD.** 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 false 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.

### Discussion

The Tribunal found that McKenzie was an honest and truthful witness and accepted her evidence that she had attended Centrelink in June 2000 and had completed a form in relation to her husband's change in employment. The Tribunal commented that the CRAM report relied on by the DFACS was only useful to the extent that it showed McKenzie's attendance was not recorded by Centrelink and found that it was not sufficient, given the force of other evidence, to contradict McKenzie's account. The Tribunal also accepted her evidence that she had been advised by a departmental officer that she would receive written advice within one week if there was to be a change to her parenting payment. The Tribunal noted that no such advice had been received, and accepted McKenzie's evidence of her belief that her husband's increased earnings were modest and that there might not necessarily be any change as the increase in income probably fell within her understanding of the income limit. Having accepted McKenzie's evidence, the Tribunal found that the administrative error made by Centrelink, in failing to record the information provided by McKenzie about her husband's income, was relevant to waiver on the ground of special circumstances. The Tribunal opined that this error was crucial as McKenzie's belief was that from that point Centrelink was taking into account the correct earnings information to assess her parenting payment.

In relation to the notices issued to McKenzie during the relevant period, the Tribunal accepted McKenzie's submissions that s.29 of the *Acts Interpretations Act 1901*, which is similar to s.237 of the *Social Security (Administration) Act 1999*, in relation to notices of decision, prescribes a presumption of service which can be rebutted by evidence to the contrary. On the evidence, the Tribunal found that the notices had not been received, noting that this amounted to a special circumstance. The Tribunal accepted McKenzie's evidence about her mail problems and that she had taken reasonable steps to rectify the mail problem. The Tribunal also accepted that it was a reasonable decision for McKenzie not to obtain a post office box based on financial constraints.

Having regard to the Department's failure to act on information provided to it by McKenzie notifying of her husband's changed circumstances, the administrative error of crucial Centrelink

letters not being served on her, her psychological and physical health and her limited financial means, the Tribunal found that McKenzie's circumstances are 'precisely those envisaged by the legislators when framing the discretionary provision of s.1237AAD of the Act' (Reasons, para. 84).

Having found that there were special circumstances pursuant to s.1237AAD of the Act to warrant waiver of the entire debt, the Tribunal did not make any findings in relation to whether the debt could be waived pursuant to s.1237A of the Act.

### Formal decision

The AAT set aside the decision under review and substituted a decision that the debt of \$3063 owed by McKenzie to the Commonwealth should be waived pursuant to s.1237AAD of the Act due to her special circumstances.

[G.B.]

## Sole parent pension: substantial delay in raising debt; special circumstances waiver

**MCLEAN and SECRETARY TO THE DFACS**  
(No. 2003/321)

**Decided:** 7 April 2003 by N. Bell.

### The issue

The issue before the Tribunal was whether the debt owed by McLean should be waived in whole or in part due to special circumstances.

### Material facts

Whilst in receipt of sole parent pension, McLean was employed at Blacktown Hospital for the period April 1995 to 2 January 1997. Throughout the relevant period, she had submitted review forms advising of her earnings over the preceding 12 weeks. In October 2000, a data matching exercise with the Australian Taxation Office yielded information about McLean's earnings in the relevant period and this resulted in her payments being reviewed. On 20 April 2001, an overpayment was raised. By the time of the hearing, the debt had been fully repaid.