that each child did require substantially more care and attention than a child of the same age without disability, and that this need for care and attention would continue for an extended period.

Formal decision

The AAT affirmed the SSAT decision that CDA was to be paid for both children.

[B.M.]

Child disability allowance: provisional commencement day

DOWD and SECRETARY TO DSS

(No. 9236)

Decided: 7 January 1994 by B.G. Gibbs, R.C. Gillham and E.A. Shanahan.

Dowd claimed that she was entitled to back payments of child disability allowance in respect of her son. Her claim was that she should have received the payment from 26 February 1986.

Previous claims rejected

Handicapped child's allowance had first been claimed by Dowd on 26 February 1987. This claim was rejected on the basis that her son was not a handicapped child. Subsequent claims for child disability allowance on 2 February 1989 and 23 May 1991 were also rejected on the ground that her son did not need substantially more care and attention because of his disability than that required by a young person of the same age who does not have a disability.

Dowd claimed the allowance once again on 6 October 1992. This claim was also rejected, so she appealed to the SSAT. On 15 April 1993 the SSAT decided that she was eligible for child disability allowance and had been qualified to receive the payment since 1986. The SSAT therefore backdated the payment 12 months prior to the most recent claim, viz. 6 October 1992. This meant that Dowd would receive the payment from 6 October 1991.

What was the correct commencement date?

As the SSAT had decided that she was qualified from 1986 Dowd asked the AAT to review the SSAT decision that she was only entitled to payment from October 1991. Her submission was that s.960 of the *Social Security Act 1991* provided that payment is to occur from the provisional commencement day. Section 958(1) states that the date on which the person made the claim for the allowance is their provisional commencement day. But where a previous claim has been made for a similar payment then the date is determined under s.958(2)(a)(ii) of the Act. This section states:

> 'If
>
> (a) a person makes a claim (in this subsection called the "initial claim") for:
>
> . . .
>
> (ii) a pension, allowance, benefit or other payment under another Act, or under a program administered by the Commonwealth, that is similar in character to child disability allowance;
>
> the person's provisional commencement day is the day on which the person made the initial claim.'

Section 960 of the Act further provides that where a person is qualified for child disability allowance and the provisional commencement day is more than 12 months after the person became qualified to receive the payment then the allowance can be backdated by 12 months.

Dowd claimed that the object of these provisions was to provide for arrears where the person had been unsuccessful in seeking to obtain the payment even though she was qualified.

But the Tribunal could not agree with her claim for back payment to 1986. The Tribunal said:

> 'While we agree that statutes should be construed in a manner to carry out the intention of the legislature, the paramount rule remains that every statute is to be interpreted according to its manifest and expressed intention . . .Accordingly, we find that while pursuant to subsection 958(1) a person's provisional commencement day will be the day on which the claim for CDA is made, the manifest and expressed intention of subsection 958(2) is to be of ameliorative effect. That is to say, where a person makes a claim of the type provided for in that subsection (called the initial claim) rather than for CDA then, subject to certain criteria being met, the person's provisional commencement day for CDA is the day on which the person made the initial claim.'

(Reasons, pp.5-6)

The criteria are: that the person was qualified for the allowance on the date of the initial claim; that a subsequent claim for CDA is made; and that the Secretary is satisfied that it is reasonable for s.958(2) to apply to the person.

The AAT pointed out that Dowd's claim on 26 February for handicapped child's allowance was rejected. As a result she could not satisfy the first of the above criteria which required her to be qualified for CDA on the date of the initial claim. Thus she could not claim the back payment under s.958(2).

The Tribunal also concluded that the later claims for CDA in February 1989 and 1991 were not claims of the type provided for under s.958(2). This was a further reason why she could not avail herself of the ameliorating provisions under that subsection.

Formal decision

The AAT affirmed the decision under review and affirmed the applicant's provisional commencement date as 6 October 1992 and that payment was to be backdated by 12 months to 6 October 1991.

[B.S.]

Overpayment: prepayment of benefit

SECRETARY TO DSS and AKHNOUKH

(No. 9319)

Decided: 23 February 1994 by J.R. Dwyer.

The DSS sought review of a decision of the SSAT made on 24 November 1992 that set aside a decision of the DSS to raise and recover an overpayment of job search allowance paid to Akhnoukh for the period 16 December 1991 to 26 December 1991. The SSAT had decided that there was no debt owing.

It was not disputed that Anhoukh was receiving job search allowance (JSA) when, on 16 December 1991, he commenced full-time temporary employment. He was due to complete his next fortnightly application for continuation of benefits on 26 December, but as that date was a public holiday, his next payment of JSA was prepaid under s.569 of the *Social Security Act 1991* on 23 December. On 7 January 1992 Anhoukh lodged his form, disclosing that he had commenced employment.

The late lodgment over the Christmas period was not regarded as a breach of the Act. Anhoukh's JSA was cancelled from 27 December 1991 and the DSS wrote to him on 3 March 1992 advising that he had been overpaid $275.41 due to the prepayment for the period 13 to 26 December 1991.

The AAT found that Anhoukh had not made a false statement or representation nor had he failed or omitted to comply with the Act.

The legislation

The issue concerned interpretation of s.1223AA(1) of the Act. Subsection 1223AA(2) at the relevant date provided that 'prepayment means a payment under section 569, 652, 722 or 755 (prepayment because of public holiday etc)'. Subsection 1223AA(1) provided as follows:

> 'If:
>
> (a) a person has received a prepayment of social security benefit for a period; and
>
> (b) the amount of the prepayment is more than the amount (if any) (in this subsection called the "right amount") of social security benefit that would have been payable to the person for the period if:
>
> (i) the prepayment had not been made; and
>
> (ii) the person had not made a false statement or representation in relation to matters that affect payment for the period; and
>
> (iii) the person had not failed or omitted to comply with a provision of this Act in relation to matters that affect payment for the period;
>
> the difference between the prepayment and the right amount is a debt due to the Commonwealth and recoverable by the Commonwealth . . .'

The SSAT had interpreted the subsection to mean that no calculation of the 'right amount' could be made unless all three elements mentioned in subparas (i) to (iii) were present, viz a prepayment, a false statement or representation and a failure or omission to comply with the Act. If there was no 'right amount' the debt was nil.

Deputy President Forrest in *Secretary, DSS and Williamson* (1993) 76 *SSR* 1102 took a different view of the subsection. He thought that the language of the subsection did not admit of an interpretation that required any fault or contravention of the Act by the recipient as a precondition of a debt. The Deputy President saw no ambiguity in the legislation and therefore found it unnecessary to examine the second reading speech for assistance in construing the statute.

In the present case, Senior Member Mrs Dwyer disagreed with the view of the SSAT, which she said amounted to reading s.1223AA(1)(a) as if it incorporated sub-paras (ii) and (iii) of para. (2)(b). If the conditions in sub-paras (ii) and (iii) were alternative and not cumulative, the prepayment would have been recoverable under s.1224(1) and there would have been no need to insert s.1223AA(1). Also, if prepayment was an independently sufficient precondition for a debt under the subsection, there would have been no need to add the other fault-based conditions in subparas (ii) and (iii).

The Senior Member found the legislation ambiguous and resorted to the second reading speech to assist in interpretation, as permitted by s.15AB of the *Acts Interpretation Act 1901* (Cth). She found that the speech suggested that the legislation was intended to have the effect of rendering a prepayment of benefit to a person who was later found not to have been entitled to the payment, a 'recoverable overpayment'. The interpretation in *Williamson* was consistent with the intention indicated by the Minister's speech, and was the preferable interpretation.

The AAT pointed out that s.1223AA had been amended by Act No. 36 of 1993, but the amended provision retained the obscure wording of its predecessor.

Formal decision

The AAT set aside the decision and substituted a decision that the prepayment was a debt due to and recoverable by the Commonwealth.

[P.O'C.]

Overpayment: recipient notification notice

SECRETARY TO DSS and PRIOR (No. 9384)

Decided: 25 March 1994 by D.W.Muller.

The SSAT had determined that although Prior was overpaid family allowance for the period 9 January 1992 to 12 November 1992, there was no debt owing by her to the Commonwealth.

Prior was receiving family allowance payments in respect of her children. In November 1989 she notified the DSS that the combined taxable income of her and her partner was $50,500 in 1989-90.

On 21 December 1991 the DSS wrote to her (a letter which the DSS conceded she did not receive) requiring her to notify within 14 days if combined taxable income for 1990-91 was more than $64,167. The DSS continued to pay family allowance to Prior in 1992.

In November 1992 the DSS learned that Prior's combined taxable income for 1991-92 was $69,245.

The DSS cancelled her family payments and on 12 November 1992 wrote to Prior informing her that she had been overpaid $1127.20 for the period 9 January 1992 to 12 November 1992 because the taxable income for 1990-91 was in excess of the limit for the 1992 calendar year of $67,377.

The legislation

The legislation identified by the AAT as relevant to the decision was in Part 2.17 of the *Social Security Act 1991* before the Part was repealed and replaced with new provisions from 26 June 1992. Section 838 states that a person is qualified for family allowance if, inter alia, the person satisfies the FA taxable income test. Section 840A sets out the method for calculating whether a person satisfies that test. Under s.840A(7), a person's taxable income for a tax year is taken to include that of the person's partner if the person is a member of a couple.

The AAT found that Prior was not qualified to receive family allowance for the relevant period, and had been overpaid $1127.20. That amount was recoverable as a debt due to the Commonwealth pursuant to s.1222A and 1223.

Was a valid notice a precondition to cancellation?

The AAT rejected Prior's submission that family payment can only be cancelled retrospectively (so as to create an overpayment) where a valid 'recipient notification notice' has first been given. [It appears that this was a reference to the fact that the letter of 21 December 1991 was not received.] The AAT said that the DSS may become aware of matters relating to qualification by a variety of means, not necessarily involving the sending of a notice, and