in 1994-95 was likely to exceed $27,467.50. There were no special circumstances in relation to the period after 14 March 1995 which would justify waiver of the debt under s.1237AAD.

The third debt

The DSS argued that Stuart had been overpaid during this period because she had not notified that her income for 1994-95 exceeded $21,000 within 14 days of the DSS's letter to her dated 4 December 1995. The AAT found that the notice in that letter complied with the requirements of s.873 and that Stuart did not respond to this notice, as a result of which she was paid family payment on the basis of her having received income of $21,000 for 1994-95 when her assessed income was $31,786. Under s.1224, the difference between what she was paid and what she would have been paid had she complied with the notice was a debt which was recoverable from her. In the circumstances, neither waiver for administrative error pursuant to s.1237A(1), nor waiver in the special circumstances of the case pursuant to s.1237AAD, was appropriate.

Formal decision

The AAT set aside the decision of the SSAT and substituted a decision that:

(a) there was no overpayment of family payment, and no debt in relation to the period 13 October 1994 to 22 December 1994;

(b) there was an overpayment of family payment in relation to the period 5 January 1995 to 21 December 1995, but the amount for the period 5 January 1995 to 14 March 1995 inclusive is waived.

(c) the overpayment for the period 1 January 1996 to 29 February 1996 is affirmed.

[S.L.]

Family payment: request to be paid on estimate; form authorised by Secretary

SECRETARY TO THE DSS and JONES
(No. 12646)

Decided: 24 February 1998 by D.W. Muller.

Jones was receiving the higher level of payment for children (additional family payment, formerly family allowance supplement (FAS)). The DSS said that during 1993 and 1994 Jones had incurred a debt, after her combined taxable income in the period proved to be higher than was used by the DSS to calculate the rate of payment.

The SSAT, when it reviewed the matter, took the view that Jones did not incur a debt because she had never made a written request that the family payment be based on a current estimate provided by her. In the SSAT's view, the *Social Security Act 1991* (the Act) required that the Department provide a specific form for such a request, and without the use of a form authorised for the purpose, payment on an estimate should not have been made.

Calculating the payment

Jones had been in receipt of family payment and had given estimates about changes in family income from time to time. In December 1992 she filled out the standard application form and on it estimated that there would be a reduction in her income. In January 1993 another estimate was made, which was a higher amount but still allowed payment. In July 1993 a further estimate was given for 1993-94 and Jones continued to be paid. The next significant triggering event occurred at the end of 1993. Jones supplied her verified figures for combined taxable income for 1992-93, but, significantly, made no further estimate for 1993-94. Subsequently a notice was issued to Jones advising the rate of payment to her, and that the rate was based on an estimate provided by her for 1993-94. This estimate was the one previously provided in July 1993.

The issue

The issue before the AAT was whether there was a debt, the SSAT having decided that there was not because the DSS had no legal authority to base payment on an estimate where there was no 'request.' An additional issue was whether, if there was a debt, it should be waived.

The legislation

The legislation that pertains to family payment provides for family payment to be paid on the basis of the combined taxable income for the family. The combined taxable income is taken from the tax year that ended in June of the previous calendar year (s.1069-H12, at the time of the decision under review). This is known as the base year. Where income has fallen, the Act provides that an estimate of the current income can be used, instead of the base year (s.1069-H18). Section 1069-H19 referred to the person asking the Secretary to change the tax year. Section 1069-H20 (see now s.1069-H22) stated that:

> 'A request under point 1069-H19 must be made in writing in accordance with a form approved by the Secretary.'

The Act at the time relevant to the AAT's review provided that where the estimate turns out to be an underestimate by 25% or more, a recalculation of family payment was to be made using the taxable income as assessed by the Commissioner of Taxation.

Request to be paid on estimate

The SSAT in setting aside the DSS decision that there was a debt, said that s.1069-H20 required that the DSS provide a specific form authorised for the purpose before family payment could be paid on the basis of an estimate. Without that form, the SSAT said, no payments should be made on a current year estimate, and no overpayment could be raised based on an estimate found to be incorrect.

Before the AAT, Jones gave evidence that she never sought to be paid on an estimate, and had made it clear that she did not want to run the risk of incurring an overpayment. However, the AAT found that Jones was sufficiently conversant with the system to know that, by completing the forms, she would be paid on the basis of her estimate.

The AAT pointed out that if the DSS had not used amounts provided as estimates by Jones, she would have been paid no or negligible amounts of additional family payment. The AAT found that the forms used by the DSS and filled out by Jones from time to time were sufficient to satisfy the description of 'a form approved by the Secretary' for this purpose (s.1069-H20). It further found that the filling out of the form by Jones constituted a valid request within the meaning of s.1069-H19 and s.1069-H20.

This dealt with the debt until the end of 1993.

For payments that were made in 1994, the AAT decided that although Jones had made no estimate in the form lodged in October, she had made a false statement, namely that combined taxable income would be below the limit that would allow payment of maximum family payment. Further, when advised by the DSS that family payment in 1994 would be based on an estimate (i.e. the estimate given in July 1993) she did nothing to correct that error.

The overpayment in 1994, the AAT said, arose out of a combination of administrative error (by the DSS changing the tax year without a request) plus a false statement by Jones. This suggests that the AAT considered that the 1994 part of the overpayment constituted a debt under s.1224 of the Act.

The AAT went on to find that in any event the money was not received in good faith, so waiver was not appropriate for any of the debt.

Formal decision

The AAT set aside the decision of the SSAT and decided that there was a debt for the whole period and it should not be waived.

[M.C.]

Income: lump sum payment

SECRETARY TO THE DSS and McLAUGHLIN (No. 12988)

Decided: 16 June 1998 by R.D. Fayle.

Mr and Mrs McLaughlin were milk vendors who were paid the sum of $121,950 by the Dairy Industry Authority of Western Australia (DIA) as part of the deregulation of the milk industry. The sum was paid in two almost equal instalments, one in July 1995 and the second in September 1995. In return, Mr and Mrs McLaughlin undertook to cease operating their milk vending business.

Mr McLaughlin was receiving disability support pension (DSP) and Mrs McLaughlin was receiving partner allowance at the time of the payment by the DIA. The DSS treated the payments as income, precluding both Mr and Mrs McLaughlin from any payments. The McLaughlins sought a review of that decision, and the SSAT held that the payments were not income (but the amount was an asset). That decision was appealed by the DSS to the AAT, which held, for different reasons, that the amount was not income. The Tribunal's decision was appealed to the Federal Court, which determined that the amount was income, hence Mr McLaughlin was precluded from receiving DSP. However, the Tribunal had not considered Mrs McLaughlin's situation, and the matter was remitted to the Tribunal to consider whether the moneys received by Mrs McLaughlin should be treated as income in the fortnight of receipt only.

It was apparently agreed by the parties that Mrs McLaughlin remained qualified for partner allowance, pursuant to s.771JA, despite the fact that Mr McLaughlin was not receiving DSP. The issue was whether the allowance was payable, and this was dependent on Mrs McLaughlin's income.

Income

The DSS argued that the amounts received by Mrs McLaughlin should be spread over a year, one fifty-second of the amount being taken as being received during each week of the relevant 12 months. The DSS relied on s.1074(1)(a) (as it then was; s.1073(b)(1) of the Act as amended is identical, except it has no heading). The full amount had been received in two instalments which did not relate to any particular period. The AAT accepted that the payments were not periodic payments in the sense required by the Act. They did not cover a specific period, but were to cover the entire period of 3 years. McLaughlin submitted that the relevant legislation was the *Benefit Rate Calculator B* at *Module G* (s.1068-G1). There is no dispute that this is the correct calculator for determining the rate of payment of partner allowance.

The Tribunal noted that there is a clear distinction between the wording of *Module E* (s.1064-E1, used for working out income for the pension rate calculator) and that of *Module G* (s.1068-G1, used for working out income for Benefit Calculator B). Section 1068-G1 states:

> 'Step 1 Work out the amount of the person's ordinary income *on a fortnightly basis.*' [emphasis in the Tribunal's decision]

It was accepted by the AAT that a specific statutory provision overrides a general provision, and that s.1074 is a general provision. The heading, which forms part of the Act, made that clear. The heading is no longer present, however the distinction between the general provisions of s.1073, as it now is, and the Benefit Rate Calculators, 'each of which address specific and limited circumstances' remains.

As a result, the amount of $121,950 is to be taken into account as income for Mrs McLaughlin in each of the two fortnights that the instalments were actually received. The Tribunal noted that:

> 'this is an odd result, having regard to the fact that the income in this case has the very same source for both Mr and Mrs McLaughlin but is treated quite differently for each in determining their respective claims under the *Social Security Act 1991*.'

Formal decision

The AAT set aside the decision under review and remitted the matter to the DSS with directions that Mrs McLaughlin's rate of payment of partner allowance be calculated on the basis that the sum of $121,950 is ordinary income to which s.1068-G7A applies, and is to be taken into account in each of the two fortnights that instalments were actually received.

[A.B.]

Assurance of support debt: DSS guidelines

EBRAHIMI and SECRETARY TO THE DSS (No. 12872)

Decided: 11 May 1998 by R.P. Handley.

Ebrahimi signed an Assurance of Support in respect of his parents who arrived in Australia from Pakistan on 4 April 1992. On 23 August Mr Ebrahimi (snr) was granted special benefit, with effect from 5 August 1993. On 1 September 1995 the DSS decided to raise and recover an Assurance of Support debt of $6804.20. This decision was affirmed by an authorised review officer and the SSAT.

Ebrahimi did not dispute the existence of the debt, but argued that the debt should not be recovered.

The legislation

The relevant sections of the *Social Security Act 1991* (the Act) as to 'waiver' are ss.1237A(1) and 1237AAD. The AAT accepted an earlier Tribunal decision (*Secretary to the DSS and Kratochvil* (1995) 37 ALD 515; 84 *SSR* 1230) that Assurance of Support debts cannot be waived under s.1237A(1) because receipt of the payments by the debtor is an essential criterion.