1914 of knowingly being concerned in the commission of offences by Roberts.

In November 1996 Edwards applied for and was granted newstart allowance. The DSS withheld part of his payment to recover the debt owed jointly by Roberts and Edwards.

The law

The debt was raised under s.1224 of the *Social Security Act 1991* (the Act), and according to the DSS s.1224AB made Edwards jointly liable to repay the debt. That section provides:

> **1224AB.(1) If**
>
> (a) a recipient is liable to pay a debt under s.1224 because the recipient contravened this Act; and
>
> (b) another person is convicted of an offence under ss.5, 7A or 86 of the Crimes Act 1914 in relation to that contravention;
>
> the recipient and the other person are jointly and severally liable to pay the debt.
>
> Note 1: Subsection (1) does not create a new debt. It extends liability for a debt that has already arisen under s.1224 to a person who is convicted of certain offences.
>
> Note 2: In recovering a debt, the Department may have regard to any view expressed by a court as to the responsibility of a person to pay the debt.

At the date Edwards was convicted of his offence, s.1237 of the Act dealt with waiver. In particular, s.1237(3) provided that the Secretary must waive the debt if a person is convicted of an offence and in sentencing the court indicated that it imposed a longer custodial sentence. From 1 January 1996 the waiver provisions were repealed and replaced with the present provisions. In particular, s.1237AA(1) provides:

> Waiver of debt relating to an offence
>
> **1237AA.(1) If:**
>
> (a) a debtor has been convicted of an offence that gave rise to a proportion of a debt; and
>
> (b) the court has indicated in sentencing the debtor that it imposed a longer custodial sentence on the debtor because he or she was unable or unwilling to pay the debt;
>
> the Secretary must waive the right to recover the debt.

The debt

Spender J had no hesitation in finding that Roberts owed a debt to the Commonwealth pursuant to s.1224. Edwards had been convicted pursuant to s.5 of the *Crimes Act* and, according to s.1224AB of the Act, Edwards became jointly and severally liable.

> In my opinion, the joint and several liability created by s.1224AB has the effect that Dr Edwards is also liable for the debt which, until his conviction, Ms Roberts was solely liable.

(Reasons, para. 31)

Spender J found that Edwards was the 'other person' referred to in s.1224AB(1)(b) and Edwards had an obligation to pay the money owed to the Commonwealth on his conviction for offences under s.5 of the *Crimes Act*, because that conviction was in relation to contraventions of s.1347 of the Act by Roberts.

Waiver

The Court first considered which of the waiver provisions applied. It was Spender J's opinion that because of the operation of s.8 of the *Acts Interpretation Act 1901*, the previous version of the waiver provisions applied. However, because of the similarity in the provisions, the result would be no different.

The relevant issue is whether the Court indicated on sentencing Edwards that it had imposed a longer custodial sentence on him because he was unable to pay the debt. Spender J referred to the findings of both the SSAT and the AAT with respect to the statements of the magistrate at the time of sentencing. The DSS had argued that pursuant to s.17 of the *Crimes Act* the magistrate had been required to give reasons why he had imposed a custodial sentence. Therefore, the remarks made at the time of sentencing were in relation to this requirement rather than referring to the fact that a longer custodial sentence had been imposed because Edwards could not pay the debt.

Spender J rejected this argument noting that the remarks made by the magistrate did not give reasons why the magistrate had imposed a custodial sentence rather than a non-custodial sentence. In fact, the magistrate had not complied with the requirement of the *Crimes Act*.

> In my opinion, the conclusion that the Magistrates Court indicated that it imposed a longer custodial sentence because Dr Edwards was unable to pay the debt, was a conclusion well open to the SSAT and to the AAT. Where a court says that a factor in imposing a sentence of twelve months' imprisonment was the inability of the person to pay the debt, the court is indicating that, if the circumstances were not present, the term of imprisonment (if indeed there be any at all) would be shorter than twelve months.

(Reasons, para. 39)

Formal decision

The DSS appeal was dismissed.

[C.H.]

Rent assistance: arrears of payment

SHIEL v SECRETARY TO THE DSS
(Federal Court of Australia)

Decided: 13 September 1999 by Katz J.

Shiel appealed to the Federal Court from the decision of the AAT that he was not entitled to arrears of rent assistance for three periods from July 1996 to November 1996.

The facts

Between 11 July 1996 and 18 July 1996 Shiel was living in a caravan park. Between 16 August 1996 and 15 November 1996 he was living in Cantrell Street and then from 15 November 1996 to 18 November 1996 he was again living in the caravan park. He lodged a claim for rent assistance for the two periods in the caravan park on 31 December 1996, and for the period at Cantrell Street on 12 December 1996. During part of the period Shiel was receiving newstart allowance. Shiel was living in Henry Lawson Drive when he claimed rent assistance on 20 June 1997. This claim for rent assistance was granted from the date of claim but not before. Shiel told the AAT that the reason why he had not lodged claims for rent assistance earlier, was that he was under a great deal of stress and needed time to 'put my head back'.

The law

The *Social Security Act 1991* (the Act) provides that in certain circumstances the payment of newstart allowance can include an additional component for rent assistance (s.643). The Rate Calculator is set out in s.1068, and in particular paragraph 1068(1)(aa) provides for the payment of rent assistance as an additional payment. Section 660(2) states that the rate of newstart allowance continues in effect until a further determination in relation to that allowance under s.660G takes effect. According to s.660G, if the Secretary is satisfied that the rate at which newstart allowance is being paid is less than provided for in the Act, then the Secretary is to determine that the rate is to be increased to a rate specified in the determination. The date of effect of such determination is ascertained by reference to s.660K, which provides in s.660K(5):

> **660K.(5)** Subject to s.(6), if the favourable determination is made following a person having advised the Department of a change in circumstances, the determination takes effect on the day on which the advice was received or on the day on which the change occurred, whichever is the later.

Shiel's argument

Shiel argued that s.1296 of the Act obliged the Secretary to the DSS when administering the Act to make available to the public, advice and information services on income support, and the delivery of services in a fair, courteous, prompt and cost efficient manner. Section 1304 of the Act allowed the Secretary to gather information from people if the Secretary considered that information relevant to the rate of a social security payment. Shiel argued that the Secretary had a continuing duty to obtain information from a person about any change in that person's circumstances which could lead to an increase in the rate of payment. According to Shiel, if the Secretary had complied with his obligation he would become aware in July 1996 that Shiel was renting premises. Shiel argued that the Secretary had breached a duty to him by not collecting that information.

Date of effect of an increased rate

Katz J stated that any decision under s.660G would increase a rate of payment prospectively. In certain circumstances the rate may be increased retrospectively, but only if it was also to operate prospectively. For example if a person advised the Secretary of a change in circumstances but the determination to increase the rate did not take place at that time but at a later date. The date of effect would be from the date of the advice and retrospective to the date of the determination.

In relation to Shiel's three claims for retrospective grants of rent assistance, only the third claim in June 1997 involved the prospective increase in the rate of newstart allowance. So it was only in relation to the third claim that there could be any possibility of getting a retrospective payment. The Court found that s.660K(5) applied in this case, and Shiel had first advised the DSS of a change in his circumstances in June 1997, the day when he made his claim. This was also the day when his claim was granted. Therefore, there was no retrospective payment and no legal error in the AAT's decision.

With respect to the first and second claims, the AAT had decided that under s.660G, there should be a notional increase in the rate of Shiel's newstart allowance to include rent assistance. It then considered whether this notional increase should take effect retrospectively. The AAT applied s.660K(5) and decided that there should be no retrospective grant of rent assistance. The Federal Court found this approach to be in error. Because there was no prospective grant of rent assistance arising from the first two claims there could be no retrospective payment.

Katz J rejected Shiel's argument regarding ss.1296 and 1304, stating that s.1296 only imposed a duty on the Secretary to administer the Act in such a way that it was desirable to achieve the results set out in the section. This did not impose any new or substantive duty, and it was not owed to any member of the public. The Court followed the High Court in *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454 where the High Court found that a similar provision was not just a 'pious admonition' because a breach of such a provision could lead to disciplinary proceedings. Katz J found that this reasoning would also apply to s.1296.

In relation to s.1304, Katz J noted that for Shiel to succeed, he would have to show that the section imposed an implied duty on the Secretary to obtain the information from him. The Court found two difficulties with that construction of the section.

> Parliament's purpose in including the provision was to confer a power capable of being used in aid of the prevention or the recovery of unjustified payments ... It was not included in order to confer a power capable of being used in aid of ensuring persons who were not receiving or had not received social security benefits to which they were or had been entitled to receive those benefits.

(Reasons, para. 39)

The Court also noted that a person could be imprisoned if they did not provide the information sought.

Even if s.1304 were to be construed without taking into account its purpose, it would then impose upon the DSS an administrative burden that would plainly be impossible to fulfil. It would apply to every benefit paid under the Act. If the power had been given to the Secretary to be used for the benefit of certain people, then those people must be specifically identified and the conditions under which the power is to be exercised must be specifically stated (See *Julius v Bishop of Oxford* (1880) 5 App Cas 214). The Court rejected both Shiel's arguments, noting that if there had been a duty, the AAT had no power to make an award as a result of the Secretary breaching such a duty.

Formal decision

The appeal of Shiel was dismissed.

[C.H.]

Newstart and parenting allowance: disposal of assets

ANSTIS v SECRETARY TO THE DSS
(Federal Court of Australia)

Decided: 27 August 1999 by Weinberg J.

Anstis and his wife appealed the decisions of the AAT that they had disposed of assets which should be taken into account when calculating the rate of newstart allowance payable to him, and the rate of parenting allowance payable to his wife.

The facts

On 22 December 1997 Anstis made enquiries about the payment of newstart allowance for himself and parenting allowance for his wife. They lodged claims and as Anstis would not be available for work until 2 January 1998 the allowances were payable from that date. On 22 December Anstis established the Anstis Discretionary Trust to which he transferred a part interest in a joint tenancy with his wife. The value of the asset was $30,000. Centrelink took into account the value of that asset when calculating the rate of payment of the allowances.

The law

After noting comments in *Blunn* v *Cleaver* (1993) 47 FCR 111 on the complexity of the *Social Security Act 1991* (the Act), the Court considered the structure of the Act as a whole.

> The scheme of the Act is to make provision for 'income', whether earned, derived or received, to be taken into account in determining whether a pension, benefit or allowance is payable, and if so at what rate.

(Reasons, para.17)

A person's financial assets will also determine the rate of allowance paid. The definition of financial assets in s.9(1) includes deprived assets. Deprived assets are deemed to earn ordinary income at a statutory rate. The Act is structured so that members of a couple are treated as a single economic unit for the purposes of determining whether they are entitled to a benefit and at what rate.

With regard to the disposal of assets s.11(10) defines 'pension year' as:

> **11.(10)** A reference in sections 1123 to 1128 (disposal of assets) to a **pension year**, in relation to a person who is receiving:
>
> (a) a social security or service pension; or
>
> (b) a social security benefit; or