

'Considerations of policy and convenience', Heerey J. said, 'lead to the same result': Reasons, p. 7. The logical place for a power to waive recovery of AUSTUDY overpayments was with those who were responsible for administering the AUSTUDY scheme. In fact, s.31C(1) of the *Student Assistance Act* authorised the Minister to waive recovery of an overpayment under that Act. But no power was conferred on the Secretary to the DSS or the AAT to exercise that power.

**Formal decision**

The Federal Court allowed the appeal and set aside the decision of the AAT.

[P.H.]



# Discretion to disregard compensation payment

**SECRETARY TO DSS v SMITH**  
(Federal Court of Australia)

**Decided:** 26 June 1991 by von Doussa J.

This was an appeal, under s.44 of the *AAT Act*, from the AAT's decision in *Smith* (1991) 60 SSR 832.

The AAT had decided that a payment of compensation made to Smith in respect of an industrial injury should be treated as not having been made, so as to avoid recovery (under ss.152 and 153 of the *Social Security Act*) of sickness benefit paid to Smith for an unrelated temporary incapacity for work. According to the AAT, the 'unusual fact situation' justified a decision that there were 'special circumstances' within s.156 of the Act.

**The scope of the s.156 discretion**

The DSS first argued that s.156 could not be used to alleviate a result which flowed from the terms of ss.152 and 153 of the *Social Security Act*, or to override an apparently unjust result which was the product of the legislation.

Von Doussa J. rejected this argument:

'The fallacy of the argument lies in its failure to read s.156 as part of the overall scheme enacted in Part XVII to provide for cases where a person becomes eligible to payments under the Act and from an independent source by way of compensation that is in whole or in part in respect of an incapacity for work.'

(Reasons, p. 9)

That scheme involved the arbitrary 50% formula in s.152(2)(c)(i), the application of which could be alleviated through the discretion in s.156, as O'Loughlin J had recognised in *Hulls* (1991) 60 SSR 834.

According to von Doussa J., there were other arbitrary elements in the scheme: the use of average weekly earnings in s.152(2)(e) and the commencement of the lump sum payment period in accordance with s.152(3) were other examples. These provisions were 'intended to operate together as a fair balance of the interests of the recipient of the payment with the interests of others in the community whose needs must be met as far as possible from a

finite budget allocation for social security measures': Reasons, p. 10.

The scheme of Part XVII of the *Social Security Act* recognised that 'perfect matching of eligibilities ... for pension and for payments by way of compensation in respect of an incapacity for work is impracticable'. At the same time, the legislation 'recognised that from time to time a case may arise where the degree of unfairness to a recipient of a payment by way of compensation would bring about an unreasonable or unjust result which was outside that which could be justified by the practical expediency of the arbitrary provisions in ss.152 and 153': Reasons, pp. 10-11.

Von Doussa J also rejected the parallel argument advanced by the DSS that the 'circumstances' which could be considered under s.156 should be confined to matters which arose external to the operation of the scheme:

'The facts peculiar to a particular person cannot be considered in isolation from the operation of the provisions of ss.152 and 153. The operation of those sections in the light of the facts surrounding the person concerned is part of the circumstances of the case.'

(Reasons, p. 12)

In the present case, von Doussa J said, it had been open to the AAT to find 'special circumstances' and to exercise its discretion under s.156 in favour of Smith:

'Allowing that the object and purpose [of Part XVII] is one of practical expediency at the expense in some cases of perfect fairness it was open to find, as the Tribunal did, that the operation of Part XVII would otherwise be unjust in the circumstances of this case.'

(Reasons, pp. 14-15)

**Formal decision**

The Federal Court dismissed the appeal.

[P.H.]

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