ever her 'average weekly rate of [private] income' over eight weeks was higher than $20 a week or higher than the average rate last notified. The section gave the pensioner 14 days in which to make this notification. Section 46 then allowed the DSS to vary the rate of pension, 'having regard to the income of a pensioner'.

Fox took the view that the calculation of private income and, consequently, of the rate of pension was to be based on (flexible) blocks of eight weeks:

> This means a retrospective adjustment, in the light of later knowledge. What she should have done [when her income increased] was to give notice under s.45. The period of eight weeks there referred to is in my opinion a 'rolling' one, in the sense that one is always looking back to the immediately preceding period of eight consecutive weeks. (p.5)

Northrop rejected the argument that 'a pension year should be used as a basis for determining amounts of ... pensions'. Rather, [t]he calculations [of pensions] are based on rolling periods of eight consecutive weeks plus fourteen days and are designed to protect the revenue from the payment of amounts of pension in excess of the amounts properly payable' (p.26). The amounts of pension which were payable had to be calculated each fortnight, 'by dividing the annual rate of pension by twenty-six' (p.27). He conceded that '[t]his may appear to be an extremely difficult exercise, but with the use of computers the mechanics are made simple' (p.26). [It is worth noting that these provisions date from the *Old Age Pension Act* 1908, some time before computers were available for calculating pension levels.]

The effect of these judgments appears to be that the level of pension payable to a pensioner is determined each fortnight, using the latest 'eight week average weekly income' as the critical information on which the income test is applied. That 'eight week average weekly income' must, of course, be multiplied by 52 (to give an annual rate of income), the income test in (s.28(2)) applied and the resulting annual rate of pension divided by 26 to give the fortnightly pension. The 'eight week average weekly income' may be replaced at any time (the eight week periods are both 'rolling' and 'overlapping', to adopt the language of Northrop).

In his dissent, Ellicott adopted the approach of the AAT, and said that the 'pensioner years' (beginning on the date when a pension was first granted and on each anniversary of that date) should be used as the basis for assessing the effect of private income on the pension payable to a pensioner. This assessment was to be done annually and retrospectively – and the DSS would then need to recover overpaid pension or pay out underpaid pension from the past year.

Letter

CALCULTING THE INCOME TEST – A COMMENT ON THE HARRIS DECISION

Dear Editor,

The Federal Court decision in the appeal by the Director-General of Social Security against the Administrative Appeals Tribunal decision in the case of HARRIS will no doubt be the subject of much examination and discussion. A point which interests me is whether an overpayment calculated in accordance with the Court's ruling will be higher or will be lower than that calculated under the Tribunal ruling.

While the result will no doubt generally depend on the particular circumstances of the individual case, it does seem that in many instances the method of calculating an overpayment as indicated by the Court's decision may well result in a lower amount than by the method favoured by the majority of the Tribunal. I think this may result from the pensioner being given the benefit of the fourteen days in which to notify of the variation in income which the Court referred to as being 'in the nature of a period of grace'.

Another point of particular interest is the 'rolling concept' in relation to the period of eight consecutive weeks referred to in s.45(1) of the Social Security Act, and just what it is the pensioner is required to notify. Where a person's income increases to a fixed rate it would seem that the average weekly rate of income in the previous period of eight weeks will increase for each of the suceeding eight weeks before it stabilises. Does this mean, one wonders, that the pensioner is obliged to notify eight times? Furthermore, s.45(1) does not require the pensioner to notify of his new rate of income but of the amount received in the period of eight weeks. Dividing this amount by eight will not, of course, show what the new rate of his income is.

One might think there is still a considerable area of uncertainty about the intended, and the actual, effect of the income test and the obligations imposed on pensioners.

D.E. Franklin,
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Legislation

Sickness benefit

As foreshadowed in the last issue of the *Reporter*, s.108 of the *Social Security Act* has been amended to remove a restriction on grant of sickenss benefit.

This restriction, the DSS had claimed, resulted from s.108(1)(c) which required a claimant for sickenss benefit to satisfy the Director-General that she had, because of incapacity, suffered a loss of income. According to the DSS a person who was unemployed or who was a student or out of the work-force, before falling sick (and becoming incapacitated) could not show a loss of income.

A new sub-paragraph and a new subsection, now extend the eligibility for sickness benefit to any person who, but for the incapacity would have qualified for unemployment benefit s.108(1)(c)(ii), and to any person who was receiving invalid pension, sheltered unemployment allowance or rehabilitation allowance became temporarily incapacitated and lost that pension or allowance s.108 (1AA).

These amendments have been introduced by the *Social Security Amendment Act* 1982.