not need to retain the whole of the property. Two 50 acre lots had already been put up for sale. The Tribunal could not see how it was unreasonable to expect Mr and Mrs Henry to proceed with that sale.

The AAT also thought that it would be possible for Mr and Mrs Henry to borrow further money on the security of the property, particularly if steps were taken to sell the two 50 acre lots.

Accordingly, the AAT concluded that s.6AD did not apply to Mr and Mrs Henry and that, accordingly, the value of their property had to be taken into account in fixing the rate of their pension.

Formal decision

The AAT affirmed the decision under review.

REYNOLDS and SECRETARY TO DSS
(No.N85/386)

Decided: 2 May 1986 by R.C. Jennings.

Mr and Mrs Reynolds were age pensioners whose age pensions had been cancelled by the DSS following the introduction of the assets test in March 1985. They asked the AAT to review that decision.

The legislation

This case focussed on s.6AD of the *Social Security Act* which provided that property of a pensioner should not be included in the assets test where the property could not be sold, realised or used as security for borrowing money or where that property could not reasonably be expected to be sold, realised or used as security for borrowing money; and where the Secretary to the DSS was satisfied that the pensioner would suffer severe financial hardship if the value of the property were taken into account.

'Property that . . . the person . . . cannot sell'

The property involved in this case consisted of shares in a family company which was the registered proprietor of a farming property. Mr and Mrs Reynolds held 90% of the shares in the company and it was clear that they had the capacity to sell the farm. Accordingly, the AAT said, the farm should be treated as 'the property' under consideration for the purposes of s.6AD.

Mr and Mrs Reynolds had been attempting to sell the farm for about 18 months. No bid had been made for it at an auction and they were now attempting to sell it for its valuation. The DSS conceded that Mr and Mrs Reynolds had made reasonable efforts to sell the property but argued that the expression 'cannot sell or realise' in s.6AD referred to some legal prohibition rather than to an inability to sell for the lack of a buyer.

The AAT rejected this argument, saying that 'cannot sell' did include the lack of legal capacity to sell but also included 'the alternative meaning "is unable to sell" for whatever reason': Reasons p.6. The AAT said that, in the light of the evidence and the concession made by the DSS, it had no difficulty in deciding that Mr and Mrs Reynolds could not sell the farm.

'Severe financial hardship'

However, the AAT said, Mr and Mrs Reynolds were not able to show that they would suffer 'severe financial hardship' if the value of the property in question were taken into account. The AAT noted that Mr and Mrs Reynolds had income (from a war disability pension and from investments) which totalled $10 500 a year:

> 'The level of pension or benefit payable to different persons in different circumstances is a recognition by Parliament of the amount which is considered to be appropriate for that purpose from time to time.
>
> The decision to introduce the assets test was the implementation of a policy not to subsidise the income of some persons who had sufficient resources of their own if those resources in fact produce an income in excess of the maximum pension payable to an aged person. It will be difficult for such a person to demonstrate "severe financial hardship". . . .
>
> The facts of this case demonstrate a joint income of at least $2000 per annum more than the maximum pension and accordingly I cannot describe the present circumstances of the applicants as involving them in severe financial hardship.'

(Reasons, pp.7-8).

Formal decision

The AAT affirmed the decision under review.

FARROW and SECRETARY TO DSS
(No.T86/8)

Decided: 13 June 1986 by R.C. Jennings, QC.

Eric Farrow had qualified for an invalid pension because he was permanently incapacitated for work in March 1985, when he was 39 years of age. However, the DSS took account of a farming property (totalling 72 hectares) on which Farrow lived, some plant and stock, and decided that Farrow was not entitled to payment of invalid pension. In 1986, the DSS reviewed this decision and decided that the value of Farrow's property entitled him to a pension of $3292 a year (rather than $11 352 a year - the full rate payable to a person with Farrow's family commitments).

Farrow asked the AAT to review these decisions.

The legislation

It was agreed that the value of Farrow's property totalled $134 700. The central question in this review was whether Farrow was entitled to take advantage of s.6AD of the *Social Security Act*, the terms of which are described in the cases of *Reynolds* and *Henry*, noted in this issue of the Reporter.

'Security for borrowing'?

The AAT noted that the land in question was not mortgaged but accepted that, because Farrow had only meagre income and because he had been refused a loan by the Commonwealth Bank, Farrow could not reasonably be expected to use any of his assets as security for borrowing.

'Reasonably be expected to sell or realise'?

The basic question, the AAT said, was whether it was reasonable to expect Farrow to retain his farming property: the question whether it was reasonable to expect him to sell any of the plant or stock would depend on the answer to that question.

In order to decide whether it was reasonable to expect Farrow to retain or sell the farm, it was important to look at his circumstances. He was 40 years of age, had been married for 9 years and had 3 young children. In February 1985 he had been severely injured in an accident for which he had received no compensation. As a result of that accident he would never be able to return to strenuous physical activity.

Nevertheless, he had been able to maintain his property which produced little income but on which he had planted fruit trees. It was his intention to expand the area devoted to fruit trees, which should begin to produce an income within 4 years.

The DSS referred to its internal guidelines on the administration of s.6AD and in particular to para. 6.1232 of those guidelines which said, in part:

> 'A desire to continue a particular lifestyle . . . would not constitute an adequate reason as to why the person should not sell or borrow against his assets . . . [P]ersons should make adequate use of their own financial resources before calling on the community for income support.'

The AAT said that it was not necessary for Farrow to show that his case fell inside or outside the guidelines and said that the word 'lifestyle' was ambiguous and tended to be misleading. If it referred to 'a comparatively indulgent lifestyle' which allowed a wealthy landowner to engage in hobbies or sporting activities, it could 'be easily understood as an example of a situation where social welfare payments are not expected to support': Reasons, p.12.

However, the AAT indicated that it was not appropriate to apply this term to the 'efforts of an aged or invalid person to turn a smallholding to its best economic advantage for the bene-

fit of those whom he has a responsibility to support': Reasons, p.12. The AAT continued:

> 'I do not accept that the applicant should be denied the opportunity of continuing his present plans. They are reasonable aspirations having regard to the handicap he suffers and the relatively modest assets he has acquired. They represent at least 20 years hard effort. He has a young family for whom he has obvious responsibilities. He should be permitted to discharge them in accordance with his ability.
>
> If he succeeds the extent to which he will need to rely on the State will progressively diminish. If he is denied this opportunity and forced to realise his assets he will eventually, but almost certainly, become a greater burden on the State.'

(Reasons, pp.12-3).

The AAT noted that the total value of the property (including plant and stock) was $134 700 and that, under the *Social Security Act*, Farrow and his wife were permitted to hold $108 000 worth of property before the assets test applied to them:

> 'The value of that excess is by no means substantial and it is not for want of effort on their part that it is presently producing only a very small income. The discretion to disregard assets must surely be more readily available in such cases.'

(Reasons, p.13).

Financial hardship

The AAT pointed out that, if the assets test applied to Farrow, his annual income from the pension would be $3292. It appeared that Farrow had little if any income from other sources. Accordingly, he would continue to suffer severe financial hardship if he could not take advantage of s.6AD.

Formal decision

The AAT set aside the decision under review and remitted the matter to the respondent to decide the rate of pension which should be paid to Farrow, taking account of the level of his income.

Handicapped child's allowance

PHILLIPS and SECRETARY TO DSS (No.W84/185)

Decided: 7 May 1986 by R.K. Todd, J.G. Billings and N. Marinevitch.

Gloria Phillips was granted a handicapped child's allowance for her daughter, N, in June 1982. This application to the AAT raised three matters in relation to that allowance: Phillips' eligibility for back-payment from August 1981 to May 1982, her daughter's classification as a handicapped child rather than a severely handicapped child, and a reduction in the allowance in July 1983 from $73 to $20 per month.

The evidence

N was born on 10 May 1975. Although Phillips had thought her daughter was 'slow', she had not noticed anything unusual, until 1980, when a baby health sister had referred her to the children's hospital in Perth. There Phillips was told that her daughter had 'a problem'. She was referred to a child development centre, where N was diagnosed in July 1981 as having a mild to moderate intellectual handicap. Phillips and C then attended a clinic for weekly check-ups over a period of 6 months. N then attended 2 special schools.

It appeared that the baby health sister had told Phillips that she might be eligible for handicapped child's allowance in 1980; but that none of the other medical agencies which she consulted over the next year had mentioned this possibility. Early in 1982 (within 6 months of the diagnosis of N), a welfare worker asked the children's hospital to prepare a claim for the allowance; but the hospital had delayed for several months, so that the claim was not lodged until 9 months after the diagnosis.

Phillips described N's behaviour and the type of care required. N broke toys given to her and was generally unable to get on with other children, but had recently begun playing with a younger child. N needed regular prompting to do everyday tasks but could dress and feed herself. N had communication problems: her younger siblings could not understand her and she needed to be given simpler explanations than her younger siblings. Phillips had also been involved in extra expenditure for N: she had bought some special educational toys (and would use any back-payment to buy more) and had to replace N's shoes frequently. She had spent approximately $20 a month while her daughter attended the clinic, but this had decreased once N started at special school. A welfare worker gave evidence that Phillips suffered considerable financial hardship from 1981 to 1984.

A State medical officer described N as having a 'mild to moderate intellectual handicap' without any other physical disabilities. He said that N would require constant care and attention from her mother for several years.

The legislation

Section 105J of the *Social Security Act* provides that a person who provides 'constant care and attention' to a dependent severely handicapped child in their home is eligible for handicapped child's allowance.

Section 105JA gives the Secretary power to grant an allowance to a person who provides 'only marginally less than the care and attention' needed by a severely handicapped child to a dependent handicapped child in their home (para.(a)), if the person 'is, by reason of the provision of that care and attention, subjected to severe financial hardship' (para.(b)).

According to s.105H(1), a 'severely handicapped child' is defined as a child with a physical or mental disability needing constant care and attention; and a 'handicapped child' is defined as a child with a physical or mental disability needing only marginally less care and attention.

Section 105L provides that the rate of handicapped child's allowance to be paid for a 'severely handicapped child' is $85 a month; and, for a 'handicapped child' - 'such rate as the Secretary, in his discretion, from time to time, determines, but not exceeding [$85 a month]'.

Section 102(1), read with s.105R, provides that a handicapped child's allowance is payable from the date of eligibility *if* the claim is lodged within 6 months or, where the claim is lodged later than that, *if* there are 'special circumstances'. Otherwise, the allowance is payable from the date when the claim is lodged.

Severely Handicapped Child?

The Tribunal relied on the decision in *Seager* (1984) 21 *SSR* 230, where the AAT had said that it was necessary for a parent to provide 'continually recurring' care and attention; but that periods of inattention within each 24-hour cycle did not prevent the care and attention being 'constant'. It concluded that -

> 'we are not satisfied that N, by reason of her disability, requires care and attention of the required constancy. . . . While N suffers no physical disability, her mental disability is such that, if her potential is to be realized and the effects of her disability minimized, she requires considerably more care and attention than would be required for a child without that disability. It follows that in our opinion N is a handicapped, but not a severely handicapped, child within the meaning of the Act.'

(Reasons, para.13)

Eligibility from August 1981?

Phillips argued that she was eligible