(whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.'

The AAT said that the purpose or object underlying the amendments to s.153 had been described by the Tribunal in *Jovanovic*: its purpose was to 'clarify that [s.153(1)] may apply whether compensation was received before or after the date on which the person became qualified to receive a pension'.

Discretion to ignore part of award

The AAT then turned to the question whether there were special circumstances in this case which would justify the exercise of the discretion in s.156. Hajar was separated from his wife and children (who were receiving supporting parent's benefit). Although he had spent most of the compensation payment he was the joint owner (with his wife) of a house with the value of $175 000. It was, the AAT said, 'inequitable for the applicant to claim financial hardship when he owns such a valuable asset and does nothing to realise on it'. The Tribunal pointed out that although it might be impractical for Hajar to borrow money on the house there was no reason why he should not take proceedings in the Family Court for a property settlement, which would lead to the house being sold and the proceedings divided between himself and his wife.

Hajar claimed that he had been poorly advised by his solicitors when he accepted the compensation settlement. He said that his solicitor had told him, at the time of the settlement, that he would remain eligible for social security payments. The AAT said that if Hajar had been misled by poor legal advice and had suffered a loss as a result, it was up to Hajar to take legal action against his solicitors, for damages for breach of contract or negligence:

'Hardship that can be resolved by actions of the complainant is not hardship at all.'

(Reasons, para 46)

In any event, the AAT said, it was clear that Hajar had continued to worsen his financial position after it became clear to him that the DSS would not pay him unemployment benefit:

'He cannot have been in doubt at that stage that he was disbursing what the Act regarded as the proper source of his support for a long time to come.'

(Reasons, para 47)

The AAT was not able to identify any other circumstances which could be regarded as special.

Formal decision

The AAT varied the decision under review by substituting for the original preclusion period the preclusion period as based on the calculations agreed between the parties.

[P.H.]

Federal Court decisions

Unemployment benefit: full-time student

HARRADINE v SECRETARY TO DSS

(Federal Court of Australia)

Decided: 14 October 1988

by Davies J.

This was an appeal against an AAT decision, which had affirmed a DSS decision that Brendan Harradine was not eligible for unemployment benefits for a period from October to November 1987.

At the time, Harradine was enrolled as a full-time student for a university law degree. During most of the academic year, Harradine had been employed on a half-time basis as a school teacher while pursuing his university studies. It was only after he had ceased his part-time work that he applied for unemployment benefits.

The legislation

The DSS had rejected Harradine's claim because of s.136(1) of the Social Security Act which provided that benefit was 'not payable to a person ... in respect of any period during which ... the person is engaged in a course of education on a fulltime basis'.

The evidence

The evidence before the AAT was that Harradine had been enrolled in his law course since the beginning of 1985 and, by 1987, he had completed all the requirements expected of a full-time student in the first three years of a law course.

'Full-time' studies

The AAT had decided that Harradine was precluded from receiving unemployment benefit because 'he was enrolled as a full-time student' and because he was 'engaged in a full-time course of study'.

The Federal Court said that s.136(1) referred to engagement in a course of education:

'Thus, I do not read s.136(1)(a) as requiring a consideration of the hours each day which a student spends in attendance at lectures and tutorials and in study. The provision does not refer to the hours spent on study and says nothing as to engagement in part or fulltime employment or in other absence from study. The provision turns its attention to the character of the study.'

(Judgment, p.6)

The Court said that enrolment in a full-time course of education did not necessarily exclude a person from receiving a benefit:

'The question as to whether a claimant is engaged in a course of education on a full-time basis must be, I think, primarily a question of fact. The provision does not use the word "enrolled" or the term "a full-time course of education".'

(Judgment, p.7)

An error of law?

The Federal Court pointed out that, in the present case, the AAT had expressed itself rather ambiguously: but the evidence before the Tribunal had been sufficient to support a finding that Harradine had been engaged in his course of education on a fulltime basis:

'Mr Harradine had been enrolled as a full-time student in what was classified by the University as a fulltime course of study. He maintained normal progress. It accords with ordinary parlance to describe him as engaged in study on a fulltime basis. It would not seem to accord with ordinary parlance to describe him as engaged in study on a part-time basis. This was not a case where a student, because of the exigencies of his employment, proceeded through his course in a manner similar to that of a part-time student and it was not a case where the student's course was interrupted from time to time by his employment ...

On these facts, it was open to the Tribunal to find that Mr Harradine was engaged in his course of education on a fulltime basis. In brief, as Mr Harradine's progress in his course was consistent with his enrollment, it was unnecessary for the Tribunal to do more in the concluding passages of its reasons than to refer to the nature of the enrollment. No error of law was expressed in or should be implied from those reasons.'

(Judgment, P.10)

Formal decision

The Federal Court dismissed the appeal.

[P.H.]

Income test: war restitution payment

KELLENERS v SECRETARY TO DSS

(Federal Court of Australia)

Decided: 15 November 1988

by Ryan J.

This was an appeal against the decision of the AAT in Kelleners (1987) 38 *SSR* 479. The AAT had decided that a pension paid to Kelleners under Netherlands legislation as compensation for war-time persecution at the hands of Japanese military forces was 'income' within s.6(1) of the *Social Security Act*; and that the amount of that pension should be taken into account in calculating the rate of widow's pension payable to Kelleners.

The legislation

At the time of the decision under review, s.6(1) of the *Social Security Act* defined 'income' as meaning -

'personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for the person's own use or benefit by any means from any source whatsoever within or outside Australia, and includes a periodical payment or benefit by way of gift or allowance. . . . '

The definition went on to exempt several specific types of payment including the following:

'(h) insurance or compensation payments made by reason of the loss of, or damage to, buildings, plant or personal effects;

(u) a periodical payment or benefit by way of gift or allowance from the father, mother, son, daughter, brother or sister of the person;'

The Netherlands legislation provided for the payment of a pension to a person who was unable to earn an income through work, as a result of war-time persecution.

'Payment or benefit by way of . . . allowance'

The Federal Court referred to several previous decisions of the AAT: *Kelleners* (above), *Zolotenki* (1987) 38 *SSR* 479 and *Teller* (1985) 25 *SSR* 298 - in which payments of this type had been held to amount to 'income'; and *Artwinska* (1985) 24 *SSR* 287 and *Kolodziej* (1985) 26 *SSR* 315 - in which payments of this type had been held to fall outside the definition of 'income'.

The Federal Court noted that the payments being made to Kelleners under the Netherlands legislation were paid to her because of her status as a 'persecuted person' unable to earn an average income as a consequence of an illness or disability caused or aggravated by persecution. The Court pointed out that the payments were periodical and went on to conclude that they were 'by way of . . . allowance'.

The Court said that the phrase 'payment or benefit by way of gift or allowance' covered receipts of money or other benefits 'advanced ex gratia'. The Court pointed to the specific exemption from the definition of 'income' in paragraph (u) of that definition:

'Paragraph (u), in particular, by repeating precisely from the body of the definition the words "a periodical payment or benefit by way of gift or allowance" is a cogent indication that the legislature regarded periodical payments or benefits received ex gratia from any source as being within the definition, and was concerned to exclude only payments or benefits received from a donor within the specified degrees of family relationship to the recipient.'

(Reasons, pp.15-16.)

The Court noted that there was no suggestion that the payments received by Kelleners were made by reason of any loss of or damage to property, so that paragraph (h) of the definition of 'income' did not exempt the payments from that definition.

Discretion to recover overpayment

Another issue raised in this appeal was whether the AAT had properly exercised the discretion conferred by the former s.146 of the *Social Security Act* by recommending that the overpayment which had been made to Kelleners would be recovered from her at the rate of $20 per week.

The Federal Court said that it had a limited function in reviewing the AAT's exercise of its discretion. Only if the Tribunal had made some error in exercising the discretion (for example, by taking into account irrelevant matters or ignoring some material consideration) that the Court could interfere with the AAT's exercise of its discretion.

In the present case, the Court said, it appeared that the AAT had taken account of all the relevant information, including Kelleners' inability to earn an income. It did not appear that the AAT's decision that the overpayment paid to Kelleners should be recovered at the rate of $20 a week until Kelleners reached the age of 65 was unreasonable or plainly unjust.

Formal decision

The Federal Court dismissed the appeal.

[P.H.]