The legislation

Recovery of overpayments is governed by the old s.140 of the *Social Security Act* [which was renumbered s.181 in July 1987 and is now s.246].

Under sub-section (1), where an amount has been paid 'in consequence of a false statement or representation or . . . a failure or omission to comply with any provision of' the Act and would not have otherwise been paid, 'the amount so paid is a debt due to the Commonwealth'.

Under sub-section (2), where 'an amount has been paid . . . that should not have been paid . . . and the person to whom the amount was paid is receiving . . . a pension', the amount overpaid can be deducted from the pension.

Sub-section 145(1) [later 186(1) and now s.246(1)] permitted write off of debts or waiver of recovery.

Sub-section 130(1) [now s.132(1)] required a beneficiary immediately to notify the receipt of income at a rate higher than that last specified in a claim, statement or notification.

The facts

The applicant's husband incurred losses from his farming business in the 1984/85 and 1985/86 financial years. However, he also derived interest from a $70 000 term deposit of $8024 and $9440 in those years. The deposit was the proceeds of the sale of two parcels of his farm land in 1981 and 1982. The interest on the term deposit was used to service a bank overdraft from his farm account and pay day-to-day expenses for the farm. The farm losses were deducted from the term deposit for income tax purposes.

When the applicant originally claimed unemployment benefit she disclosed her own bank term deposit but not her husband's. Questions on the claim form asking whether her husband had bank or other accounts or any other income were ticked 'no'.

However, the applicant did lodge with her claim a copy of her husband's profit and loss statement for the financial year 1984/85, which included a one line reference to the term deposit income but showed an overall loss. In September 1986 she produced to the DSS a copy of her husband's tax return for 1985/86, which showed 'net income business other than primary production' of $9440 but a very small amount of overall taxable income.

The applicant also did not disclose her husband's term deposit or the interest therefrom in her "First Income Statement" or in any of her applications for continuation of unemployment benefit. However, she did notify the DSS of her husband's term deposit when she applied for an age pension on 10 September 1987.

Deduction of farm loss from investment income

It was argued for the applicant that she had not been overpaid because the farming losses were deductible from the term deposit interest.

Relying on the Full Federal Court decision in *Haldane-Stevenson* (1985) 26 *SSR* 323 and a number of AAT decisions, the AAT decided that

> 'in the context of the *[Social Security] Act* I do not think it is open to the applicant to deduct losses incurred in a farming business from income received from the term deposit notwithstanding that income was derived from the investment of the proceeds of sale of a portion of the land formerly used in his farming enterprise.'

(Reasons, p.6.)

Overpayment as a consequence of failure to disclose

The AAT cited the Full Federal Court decision in *Hangan* (1982) 11 *SSR* 115 as authority for the proposition that

> 'it is not necessary that a failure or omission to comply with a provision of the Act be the dominant or effective cause of the overpayment, it is sufficient that the failure or omission be a contributory cause before the overpayment is recoverable'.

(Reasons, p.12)

The AAT did not accept that disclosure of the applicant's husband's term deposit had been made by production of his profit and loss statement. It said that —

> 'Departmental officers should not be obliged to go behind the claim form and scour other documents in an endeavour to ascertain details of assets not disclosed on the claim form'.

(Reasons, p.13)

As there had been a failure to disclose the existence of the term deposit and consequent income, there had been a s.181(1) overpayment of unemployment benefit to the applicant.

Benefit that should not have been paid

In the alternative, the AAT found that 'unemployment benefit was paid to the applicant "that should not have been paid" within the meaning of sub-section 181(2)': Reasons, p.14. In so finding, the AAT said that 'the scope of s.181(2) is such that questions of fault or contributing factors required by sub-section (1) do not apply': Reasons, p.14.

Waiver

The AAT did not consider that the facts of the case warranted waiving any of the debt. The applicant had $1000 in the bank. Her husband owned a 240 acre farm, livestock, plant and equipment which was a marginal but recently financially improving enterprise. He had a $16 000 overdraft but still retained $50 000 of the term deposit at the heart of this review. In making its decision the AAT commented that 'with any person on a pension a deduction therefrom is likely to cause financial hardship': Reasons, p.16.

Discretion

The AAT found that there had been administrative error or oversight in September 1986 when the applicant produced a copy of her husband's 1985/86 tax return to an officer of the DSS, who failed to note the item showing $9440 as net income from business other than primary production.

The AAT said this was relevant to 'the exercise of discretion', without clearly stating which discretion it had in mind (Reasons, p.14). It then made no specific conclusion in relation to what consequences should flow from this finding other than affirming the decision under review.

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Income test: foreign pension only payable in foreign country

ROSE and SECRETARY TO DSS
(No. N89/160)
Decided: 11 May 1989
by R.N. Purvis J.

Rose applied for an age pension. In his claim he stated he was in receipt of a superannuation benefit from the German Democratic Republic of some $A18 045 a year. However, this benefit could not be transferred out of the GDR. The DSS rejected his claim in February 1987, treating his superannuation benefit as income.

It was accepted by the parties that Rose's GDR pension (payable on his

retirement as a Professor of Anthropology) was paid on a monthly basis when Rose was in the GDR but was not transferable or payable outside the GDR and that Rose's only other income was $10–$15 a week, from book royalties paid in Australia.

It appeared that Rose visited the GDR for some months every year, for work and health reasons, and that when he was living in Australia he relied on relatives and friends to support him. He was a resident of Australia for the purposes of the *Social Security Act*.

The issue before the AAT was whether the GDR pension fell within the definition of 'income' in the Act:

> 'personal earnings, moneys, valuable consideration or profits, whether of a capital nature or not, 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 . . .'

A general beneficial interpretation?

Rose argued that his GDR superannuation was not for his use or benefit in Australia and an adverse decision in this case would force him 'to leave his homeland to survive'. He argued that this was not the aim of the Act and, as the *Social Security Act* was beneficial legislation, it should be interpreted favourably to him.

The Tribunal said that it was only if there was an ambiguity in the legislation that a beneficial interpretation could be given and it perceived no ambiguity.

'Earned, derived or received'

The definition of 'income' in the Act refers to income 'earned, derived or received by that person for the person's own use or benefit' and, Rose argued, this meant realized, that is, available for him to use in Australia.

Rose relied on the High Court decision in *Read* (1988) 43 *SSR* 555 to support his argument. However, the AAT distinguished *Read* and concluded that, as the superannuation entitlement was paid into Read's bank account in the GDR, the entitlement had been derived by him and as far as possible realized.

'Use or benefit . . . within or outside Australia'

Did the words 'within or outside Australia' only qualify the words 'from any source whatsoever', as Rose argued, or did they also apply to the whole definition, in particular, 'for the person's use or benefit' as the DSS argued?

The AAT considered the earlier decision in *Hoogewerf* (1988) 45 *SSR* 577, where the AAT had decided that money paid by the Indian government in India to applicants for an Australian pension, but where access to the money in India was impractical, was not to be treated as income under the *Social Security Act*.

The AAT in Rose's case said that *Hoogewerf* turned on its facts: the cost of travel to India and the age of the applicants in that case had been crucial factors. The AAT further noted that *Hoogewerf* followed the Federal Court decision in *Inguanti* (1988) 44 *SSR* 568, where the court stated that in deciding whether income was earned derived or received:

> 'The question is one of fact and degree... [I]t will be open to a Tribunal of fact to determine the matter in accordance with the facts and circumstances of the case as it sees them. If the prospect of the moneys ever being received is remote, or, if receipt of them, although certain, is likely to be so far in the future as to make e ititlement to them of no relevant benefit at the time the matter is considered, it will be correct to say that the moneys are not being "derived".'

The AAT noted that, as the dispute in *Inguanti* concerned an Italian pension payable in Italy, the Court had been dealing with moneys '"derived" outside of Australia and for a "use or benefit" both "outside" of and "inside" Australia': Reasons, p.12. Thus the AAT concluded that the words 'within or outside Australia' qualified both the phrase 'use and benefit' and their derivation.

The AAT found that Rose spent a large proportion of his time in the GDR, and was domiciled there, and that he had the use and benefit of the superannuation payment whilst there. It concluded that it was income for the purposes of the Act, noting in passing that '[i]f he resided in Australia and was not able to use the entitlement or benefit from it, then a different situation might well arise': Reasons, p.13.

Formal decision

The AAT affirmed the decision under review.

[J.M.]

Assets test: orally declared trust

JAMES and SECRETARY TO DSS (No. 5041)

Decided: 21 April 1989 by G.L. McDonald.

James applied for an age pension in December 1987, which was granted at a reduced rate because of the operation of the assets test. She sought review of the DSS decision to include as an asset a unit registered in her name which she said was held in trust for her daughter and grand-daughter.

The legislation

The only issue was whether the unit was properly included in the value of James' property pursuant to ss.4(1) and 8 of the *Social Security Act* 1947.

The facts

James purchased the unit, which was adjacent to the unit in which she lived, in June 1983. The AAT accepted her evidence that the unit was purchased to provide accommodation for her daughter and grand-daughter, who exclusively occupied it. Her daughter suffered from brain damage and epileptic fits and required constant medication. Prior to the purchase of the unit they lived with James.

James told the AAT that the unit was purchased to give her daughter and grand-daughter some degree of independence and yet be close enough for James to supervise her daughter's medication. She said she felt a need to protect her daughter from 'gentlemen with less than honourable intentions', and did not register the unit in her daughter's name to safeguard her daughter.

James also said in evidence that it was always her intention, if her daughter and grand-daughter moved from the unit, to sell it and place the proceeds in a fund for their benefit.

James' daughter paid her $40 a fortnight which was to cover rates, taxes and insurance costs of the unit and therefore was not rent.

Separation of legal and beneficial interests

The DSS had not disputed that, 'in assessing the value of property for the purposes of the Act, the legal and beneficial interests can be separated': Reasons, p.2.