investments totalling more than $40 000 which produced income of about $6000 per annum and was granted a part pension.

**Home interest not deductible**

The AAT said:

> 'No question arises in this case like those which arose in [*Haldane-Stevenson* (1985) 26 *SSR* 323 and *Garvey* (1989) 53 *SSR* 711], there is no basis for arguing that the interest paid on the mortgage on [the applicant's home] should be deducted from the income received from any part of the applicant's investments. She cannot claim the proposed deduction is associated with the income merely because it was or would be possible to repay the loan with some of the moneys invested . . .
>
> The interest on the mortgage . . . is no more than a living expense incurred by the applicant, like rent . . . That interest is entirely unrelated to any investment which returns income. It is not a cost of achieving that income.'

(Reasons, p.4)

**SSAT's reasons**

The AAT noted in passing that the SSAT in its reasons -

> does not expressly distinguish its findings on material facts and evidence or material on which the findings were based from the reasons for its decisions as required by paragraph [204(1)(a) of the *Social Security Act*] . . . [but it] complies substantially with those requirements and is adequate to determine this application.

**Formal decision**

The AAT affirmed the decision under review.

**[D.M.]**

# Investment income: spreading of capital gains

**SPENCE and REPATRIATION COMMISSION**
**(No. V88/883)**
**Decided:** 25 January 1990 by H.E. Hallowes.

Spence asked the AAT to review a decision of the Commission to maintain as income for 12 months capital profit earned on redeeming an investment.

**The legislation**

Under s.35A(4) of the *Veterans' Entitlements Act* 1986, where a person becomes entitled to receive an amount of income, not being income from remunerative work or a return from an accruing return investment, the person is taken to have received one 52nd of that amount as income during each week in the period of 12 months from the date when he becomes entitled to the income.

To be an 'accruing return investment' the value of the investment must be unlikely to decrease from time to time as a result of market changes; s.35A(1).

[These provisions were replaced and substantially replicated by ss.37B and 37J from 1 December 1988. These provisions are identical to *Social Security Act* 1947 s.3A(1) and (4) prior to 1 December 1988 and ss.12B and 12L since then.]

**The facts**

Spence invested $5000 with a BSL property trust in 1982 and withdrew $8283 on 5 February 1988 when the trust was terminated. The trust documents provided that neither repayment of the investment nor the performance of the trust were guaranteed. Indeed, in September 1986, the capital value of Spence's investment had dropped to $3906.

**Not an 'accruing return investment'**

The AAT decided that Spence's investment was not an 'accruing return investment' because its value was not guaranteed and affirmed the decision to apply s.35A(4) and maintain the $3283 profit component as income at the rate of $126.23 per fortnight until 5 February 1989 .

**Definition of income**

Spence argued that the decision was contrary to the definition of income in the dictionary and that applied by the Tax Commissioner; but the AAT stated that it must apply the *Veteran's Entitlements Act* definition rather than those other definitions.

**Retrospectivity**

In response to the argument that the decision operated retrospectively, the AAT said:

> 'The legislation affects a veteran's rate of income from the day the veteran becomes entitled to receive the income. To that extent, the Act does not operate retrospectively, although Mr Spence did not perceive that the legislation may be amended when he made his original investment.'

(Reasons, p.8)

**'Double dipping' by the Commission & unconstitutional deprivation of property**

The AAT rejected an argument that redefining an asset as income represented 'double dipping'. Spence also raised a rather ingenious argument that the Commission had acquired his property on unjust terms in contravention of s.51(31) of the Constitution by reducing his rate of service pension. This was also rejected by the Tribunal.

**Formal decision**

The AAT affirmed the decision under review.

**[D.M.]**

# Supporting parent's benefit: which parent?

**MINASSIAN and SECRETARY TO DSS**
**(No. N89/80)**
**Decided:** 2 March 1990 by J.R. Gibson, J. Kalowski and M.T. Lewis.

Gerry Minassian had applied for supporting parent's benefit in respect of his son Luke on 3 June 1988. His claim was rejected on the basis that Luke was deemed to be in the custody, care and control of his mother, Donna Beales, who was receiving family allowance for him.

After appealing unsuccessfully to the Social Security Appeals Tribunal, Minassian applied to the AAT for review.

**The facts**

Luke was born on 31 October 1986. His parents separated on 26 April 1988. Ms Beales had sought orders of custody and guardianship in the Local Court and on 29 April 1988 the court had made an interim order giving the father access from 5 p.m. each Saturday to 1 p.m. Wednesday, and the mother access from 1 p.m. Wednesday to 6 p.m. Saturday.

Both parents had applied to the Family court for sole custody but, at the time of the AAT hearing, these applications were not finalised.

After Minassian's application for supporting parent's benefit was rejected, he applied for and was granted special benefit. In addition, family allowance payments were split between the two parents, as provided by s.86 of the *Social Security Act*.

**The law**

At the time Minassian applied for supporting parent's benefit, s.58(1) of the *Social Security Act* provided: