'The Tribunal has taken the view that her reporting of her specific earnings at 4 to 6 week intervals had no direct effect on the creation of a situation where ultimately, after some considerable time, an overpayment was sought to be recovered. The problem the respondent faces is that its own acquiescence virtually constituted an adoption of that process such that it effectively reduced to zero, that is totally subsumed, any contributory force her failure to report her earnings within 14 days might have had.'

Would the overpayment have occurred 'but for' the breach?

There was a further question whether the amount sought to be recovered would not have been paid 'but for' the failure or omission. In *Hangan*, Toohey J said that the predecessor of s.246(1) did not have two components but was rather a composite provision in which the words 'but for' were a corollary of the words 'in consequence of', rather than a separate test. The Tribunal posed the question whether the overpayment would not have occurred 'but for' the breach. The question was answered in the negative because the Department's inaction was a superseding cause or *novus actus interveniens* breaking the chain of causation which would otherwise have resulted from Greenwood's breach.

The AAT found, therefore, that the overpayment in the second period did not occur 'in consequence of' Greenwood's breach of her reporting obligations; and, in any event, it was not a situation where the overpayment would not have occurred 'but for' that breach.

In respect of the first period of overpayment, the Tribunal was not satisfied that the conversation with the departmental officer known as Joan occurred prior to 27 April 1989. Therefore the causal difficulties under s.246(1) that applied in respect of the second period were not operative in the first period. The Tribunal concluded that the overpayment should be maintained in respect of the first period.

Formal decision

The Tribunal affirmed the SSAT's decision to recover the amount overpaid in the first period. It set aside the SSAT's decision with respect to the second period and directed that the amount recovered from the applicant should be refunded to her.

[P.O'C.]

Assets test: land adjacent to home

EARLAM and SECRETARY TO DSS

(No. 7335)

Decided: 6 September 1991 by R.N.J. Purvis J.

Dorothy Earlam, who was 86 years of age, was the owner of 2 pieces of land in suburban Sydney. Earlam lived on one of the pieces of land (113 B Street), which shared a common boundary with the other piece, 111 B Street. Their total area was about 1.8 hectares.

Although the 2 pieces of land were on separate titles, 113 B Street had been regarded by Earlam as part of her home for many years, and it provided vehicular access to 111 B Street. Earlam maintained that her retention of 113 B Street was necessary to ensure the effective and practicable use of 111 B Street.

The DSS decided that the value of 113 B Street should be taken into account in applying the assets test to Earlam. The SSAT rejected Earlam's appeal and she appealed to the AAT.

The legislation

At the time of the DSS decision, s.4(1) of the *Social Security Act* 1947 provided that the value of a person's 'principal home' was to be disregarded when applying the assets test.

According to s.4(4), a reference to a person's principal home included —

'the private land adjacent to the [person's] dwelling house to the extent that that private land, together with the area of the ground floor of the dwelling house, does not exceed 2 hectares'.

Land 'adjacent to' a principal home

There was no question, the AAT said, that 113 B Street was private property. The crucial question was whether it was 'adjacent to' Earlam's home, 111 B Street.

The DSS pointed to the Explanatory Memorandum on the Bill which introduced the predecessor to s.4 of the 1947 Act. The Minister had said that, where a person owned 2 connecting blocks of land, one of which contained the person's home, it was not intended that the other block 'be treated as part of the curtilage of the home'.

The AAT said that, taking into account the purpose of the social security legislation ('to provide for necessitous persons'), that legislation should not be construed narrowly. The reference to adjacent land should be read as including —

'the place in which the applicant was or is living, and the area of land that the applicant regarded or regards as part of her (or his) home'.

(Reasons, p.9)

The statement in Explanatory Memorandum, the AAT said, 'could not . . . have been intended not [*sic*] to refer to private land adjacent to a dwelling house where such private land was and is regarded as part of such dwelling house': Reasons, p.9.

The evidence established that 113 B Street was regarded by Earlam as part of her home and had always been so regarded. That land, together with 111 B Street, did not exceed 2 hectares. It was, accordingly, part of Earlam's principal home. Accordingly, the value of her interest in the property should be disregarded in applying the assets test.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with the direction that the land at 111 and 113 Street should be disregarded for the purposes of the social security legislation.

[P.H.]

Income test: accruing return investment

CREEK and REPATRIATION COMMISSION

(No. 7156)

Decided: 9 July 1991 by I.R. Thompson, A.R. Argent and P.J. Burns.

This case concerned an application to review the decision of a delegate of the Repatriation Commission to the effect that Norman Creek's income was to take account of certain withdrawals of investments made by Creek and his wife from accruing return investments.

The facts

Mr and Mrs Creek had been receiving service pensions since 1981. The basic facts were succinctly stated by the AAT as follows:

'In 1981 each of them invested in a single premium life insurance policy with The Over 50's Friendly Society: bonuses were

credited annually. There is no doubt that each of the investments was an "accruing return investment" in terms of the definition of that phrase in section 35(1) of the Act. It was possible for either the applicant or his wife to withdraw all or part of the amount of the investment at any time. On 11 August 1986 each of them withdrew $2500; on 11 August 1987 the applicant withdrew $5000; on 14 April 1988 his wife withdrew $5000; on 17 October 1988 he withdrew $5000; on 29 March 1989 his wife withdrew $5000; and on 19 October 1989 he withdrew $5000.'

Evidence was given by a Departmental officer of a policy of pro-rating of withdrawals made from accruing return investments between income and return of capital. Only the income portion was taken into account in the income test. This method of calculating income was essentially the issue under review by the Tribunal.

Legislation

This case involved consideration of the provisions in the *Veterans' Entitlement Act* 1986 for assessing income over the period 11 August 1986 to 19 October 1989, being the period over which the withdrawals were made.

(a) Between 19 May 1986 and 26 October 1986, when the withdrawal of 11 August 1986 was made, the relevant statutory provision was the definition of income in s.35(1):

> 'In relation to any person ... any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for his or her own use or benefit by any means from any source whatsoever, within or outside Australia ...'

(b) Between 27 October 1986 and 12 December 1987, the same definition applied except that the additional words: 'whether of a capital nature or not' were added after the words 'or profit'. This definition applied to the withdrawal of 11 August 1987.

(c) Between 13 December 1987 and 30 November 1988, specific statutory provisions were introduced into the Act to deal with accruing return investments in the form of s.35A(5):

> '(5) Where a person makes, at any time before 1 January 1988, an accruing return investment:
>
> (a) with a friendly society; or
>
> (b) of a kind where a return is not available until the end of a period of at least 12 months after that investment was made or until realisation of that investment;
>
> and the person becomes entitled to receive an amount by way of a return on that investment, the person shall, for the purposes of this Act, be taken to receive one fifty-second of that amount as income of the person during each week in the period of 12 months commencing on the day on which the person becomes entitled to receive that amount'.

These provisions applied to the withdrawals of 14 April 1988 and 30 October 1988.

(d) From 1 December 1988 until 7 January 1991, the relevant provisions governing the withdrawals of 19 March 1989 and 19 October 1989 were in s.37C(3), which was in identical terms to s.35A(5) quoted above.

Decision

The AAT rejected the Department's pro rata basis of calculating income from accruing return investments and said that each withdrawal had to be assessed in the light of the legislative provisions prevailing at the time of the withdrawal.

In relation to the period before 13 December 1987, i.e. the withdrawals of 11 August 1986 and 11 August 1987, the Tribunal held that the bonuses credited to the pensioners' account were income derived for their own use or benefit. (The Tribunal did not differentiate between the two withdrawals occurring either side of the amendment which introduced the words 'whether of a capital nature or not' into the definition of income.)

In relation to the period after 13 December 1977 when the specific accruing return investment provisions had been introduced into the Act, the Tribunal held that a pensioner became entitled to receive an amount by way of a 'return' when a bonus was credited to her or his account. In these circumstances, a bonus was a return within the meaning of s.35A(5) and is therefore income.

The Tribunal noted that its finding in respect of the periods before 13 December 1987 and after 13 December 1987 would produce a lower rate of pension for the pensioner because all returns were included within income rather than a pro rata. The Tribunal recommended that no action be taken to raise or recover an overpayment because Creek had acted in good faith and the legislative provisions were complex and obscure (as evidenced by the Department's confusion).

Law reform

The Tribunal strongly recommended that the Department desist from using unauthorised calculation techniques and that if the Department wished to adopt a pro rata method then the Act should be amended accordingly.

Formal decision

The AAT set aside the Repatriation Commission's decision and remitted the matter to the Commission with directions that the bonuses credited to Mr and Mrs Creek's investments were income, but that their service pensions should not be reduced prior to 2 November 1989.

[A.A.]

Income test: market-linked investment

WILLIAMS and REPATRIATION COMMISSION

(No. 7280)

Decided: 4 September 1991 by T.E. Barnett.

Mr Williams sought review of a decision of the Commission to treat as a capital gain and hence income the difference between the initial investment and the redemption value of a particular investment made prior to 9 September 1988.

The facts

Mr Williams made a $5000 investment in Growthlink Trust in 1983. Between 1983 and 9 September 1988, the value of his investment increased due to dividends credited to his account with the Trust. The value of the increase in the investment was treated as an asset in Mr Williams' hands for the purposes of the assets test prior to 9 September 1988. No issue was taken as to the correctness of this approach.

After 9 September 1988, when the 'market linked investment' provisions came into force, it was common ground that the investment came within these provisions and that Mr Williams was deemed to have received a notional 11% annual return on his investment. The 11% was calculated on the basis of the increased annual value of the investment at the end of each investment period.

Between 1983 and January 1990, the investment had increased from $5000 to $6702 from dividend growth. In January 1990, Mr Williams redeemed the investment for $6509. The Commission argued that the difference between the initial investment of $5000 and the redemption value of $6509 was a capital gain and hence income to be dealt with pursuant to s.37J of the Act.