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.

The legislation

Section 35(1) of the *Veterans' Entitlements Act* 1986 defined 'income' in the same terms as s.3(1) of the *Social Security Act* 1947, as including profits of a capital nature received by a person.

Section 37J(1) provided that, where a person became entitled to receive a capital amount (excluding certain payments not relevant here), the person should be taken as receiving 1/52nd of the amount in each week in the 12 months following the person becoming entitled to receive the amount.

The issue

The issue raised in this case was a simple one:

- given that the increased investment value prior to 1988 had already been included in Mr Williams' assets for the purpose of the assets test; and
- given that the 11% notional income after 1988 had been calculated on the basis of the increased value of the investment due to dividend payments;

did the Commission's action of treating the difference between the redemption value and the original investment as a capital gain, and hence income, amount to double counting of the investment increase due to dividend payments.

The decision

The AAT held that a literal application of the act would justify the conclusion that the difference between the redemption value and the initial investment was a capital gain and hence income for the purposes of s.37J of the *Veterans' Entitlements Act*. The Tribunal said that such a reading did not accord with parliamentary intent and amounted to a double counting of the capital gain in dividend payments, insofar as the increased value of the investment had either already been included as an asset prior to 9 September 1988 or had been used to calculate the 11% notional income after that date. The Tribunal held that the $1509 was not income for the purposes of the Act.

Formal decision

The Tribunal set aside the decision under review and determined that no portion of the $6509 redemption amounted to income.

Law reform

The Tribunal noted the artificiality of treating all increases in investment growth as an asset without allowance for inflationary effects. Small increases in investments, which are treated as income for the purposes of the Act, may in fact amount to losses after correction for inflation. The Tribunal urged the Minister to consider this issue in future legislative amendments.

[A.A.]

Child disability allowance

KNIGHT and SECRETARY TO DSS (No. 7289)

Decided: 5 September 1991 by B.H. Burns, J.T.B. Linn and D.J. Trowse.

The DSS cancelled Mary Knight's child disability allowance and she requested review of that decision by the SSAT. The SSAT affirmed that decision and Knight requested that the AAT review the SSAT decision. In the AAT's opinion, it was in the interests of the parties that a prompt decision be given so *ex tempore* Reasons were handed down.

The facts

Based on the evidence given to it, the AAT made the following findings:

(1) Knight's child Gary suffered from the disabilities of asthma and epilepsy.

(2) Gary required care and attention on a daily basis because of his disabilities, and this care was substantially more than that provided to a child of the same age who did not have these disabilities.

(3) Gary was likely to need care and attention for an extended period.

The law

The relevant legislation is set out in ss.101 and 102 of the *Social Security Act* 1947. The AAT interpreted 'substantially' by adopting the meaning set out in the AAT decision of *Bosworth* (1989) 51 *SSR* 678. This was that 'substantially more than', meant '"considerably" or "significantly" more than'. The test for deciding the need of the child for care and attention was an objective one: (see *Sachs* (1984) 21 *SSR* 232 and *Monaghan* (1990) 55 *SSR* 736).

The decision

The AAT decided that the only relevant issue before it was whether Gary needed care and attention on a daily basis which was substantially more than the care and attention needed by a child of the same age. This was found on the facts and therefore Gary was classified as a disabled child and Knight was qualified to receive child disability allowance.

Formal decision

The AAT set aside the decision under review and substituted a decision that Knight was qualified to receive child disability allowance.

[C.H.]

MILAS and SECRETARY TO DSS (No. T90/35)

Decided: 23 September 1991 by P.W. Johnston.

Helen Milas sought review of a decision of the SSAT made on 20 December 1990. The SSAT affirmed a decision of the DSS made on 31 July 1990 to reject a claim for Child Disability Allowance.

The facts

Milas' daughter, Sonya, was born on 22 February 1982. She was receiving treatment for asthma, recurrent ear infections, sinusitis, hay fever and allergies. Her treating doctor reported that the asthma was static and moderately severe, requiring daily prophylactic measures, and Sonya was likely to require care and attention for an extended period.

The legislation

At the time Milas made the original application for Child Disability Allowance it was necessary to establish that the child was a 'disabled child' within the meaning of s.101 of the *Social Security Act* 1947. The child had to have a physical disability and, because of that disability, require care and attention provided by another person on a daily basis that was substantially more than the care and attention needed by a child of the same age who did not have such a disability. It was also necessary to show that the care and attention was likely to be needed permanently or for an extended period. The situation is now governed by s.952 of the *Social Security Act* 1991, which is virtually the same except that the words 'young person' now appears in the place of 'child'.

The issues

It was conceded that Sonya had a physical disability but the DSS contended that the disability was not so severe as to require care and attention on a daily basis that was substantially more than the care and attention needed