Maintenance 'received'?

In the AAT, Cassels argued that the use of the word 'received' in the definition of maintenance income contained in s.3 of the *Social Security Act* meant that only those amounts actually received as maintenance could be taken into account. Similarly, s.4A refers to capitalised maintenance as being 'received'. On this basis, she argued that, since the proper value of the benefit received in relation to the block of land was no more than $1000, the amount apportioned under s.4A(2) should be reduced by the relevant amount.

Cassels sought a ruling from the AAT that, in calculating the maintenance income and capitalised maintenance income in relation to her and the children, only those payments and the actual value of those benefits actually received by her should be taken into account.

The interim decision

The AAT accepted Cassels' proposed method of assessing the amount of capitalised maintenance income, noting that although it might lead to some administrative difficulties, it was a just result which would accord with the plain, natural and intended meaning of the statute.

> 'The basic starting point for the assessment is the total of the payments and value of the benefits *received*. Nothing could be clearer in my opinion. There is of course a great difference between the value of payments and benefits agreed upon or awarded on the one hand and those received, on the other hand.'

(Reasons, para.31)

The AAT accordingly set aside the decision under review and remitted the matter to the Secretary for reconsideration in accordance with the reasons for decision. Further hearing of the application was adjourned and a directions hearing ordered.

[R.G.]

HOPE and SECRETARY TO DSS (No. 5842)
Decided: 8 March 1990 by C.J. Bannon.

Hope, aged 60, was in receipt of age pension. She and her husband were divorced in December 1988. The Family Court made an order that, in lieu of $126 per week maintenance for 3 years, the liability for that maintenance was to be satisfied by a transfer to the wife of the husband's interest in the former matrimonial home.

In addition, Hope was ordered to pay her ex husband $10 600. The DSS had made a decision, after commuting the amount of the husband's maintenance to approximately $20 000, to treat the transfer as capitalised maintenance income over three years which had the effect of reducing her pension from $133 per week to approximately $78 per week. Hope asked the AAT to review the decision.

The legislation

Section 3(1) of the *Social Security Act* defines capitalised maintenance income as maintenance income exceeding $1500 which is not provided on a periodic basis. Maintenance income, in-kind maintenance income and special maintenance income are separately defined in s.3(1).

Section 4A deals with the apportionment of capitalised maintenance income and provides for it to be apportioned over the period specified in any order of the court. However, s.4A(5) gives the Secretary a discretion to set a different period if the period is considered to be inappropriate.

The AAT decision

The AAT rejected an argument by Hope's counsel that the sum was in-kind maintenance income and decided that it fell within the definition of capitalised maintenance income. After outlining evidence of the financial hardship which Hope was experiencing as a result of having her pension substantially reduced, the AAT set aside the decision under review and directed the Secretary to exercise the discretion under s.4A(5) by extending the 3-year period to 6 years.

[R.G.]

Income test: rural adjustment payment and farm losses

SECRETARY TO DSS and ADAMS (No. 6489)
Decided: 13 December 1990 by H.E. Hallowes.

In 1985 and 1986, Alexandra Adams and her husband were working a farming property (which they owned, subject to mortgage). Adams qualified for and was paid unemployment benefit.

Between August 1985 and July 1986, Adams also received payments, amounting to $11 329, from the Victorian Rural Finance Corporation (RFC). She did not disclose these payments to the DSS.

The DSS then decided that Adams had been overpaid unemployment benefits amounting to $9140. On review, the SSAT set aside that decision. The DSS then appealed to the AAT.

The legislation

The issues in the present review were, first, whether the payments received by Adams were "income" and, second, whether the farm losses could be offset against those payments, if they were "income".

At the time of the decision under review, s.3(1) of the *Social Security Act* defined "income" as meaning –

> 'personal earnings, moneys, valuable consideration or profits, whether of a capital nature or not, earned derived or received by [the] 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 but does not include
>
> ...
>
> (ca) the value of emergency relief or like assistance ...'

The rural adjustment payments

The payments to Adams were described as "Rural Adjustment Scheme - Household Support" payments, and made pursuant to money granted to the State by the Commonwealth under the *States and Northern Territory Grants (Rural Adjustment) Act*. The payments were intended to help people suffering personal hardship while they were attempting to move out of unprofitable farming activities.

These payments were initially designated as a loan, repayable to the RFC; but, at the end of 12 months, the payments were reclassified as a grant, in accordance with the standard practice of the RFC.

The AAT decided that these payments did not fall within the first part of the s.3(1) definition of 'income' – they were not personal earnings, valuable consideration or profits earned, as those terms had been explained in *Read* (1988) 43 *SSR* 555 and *Hungerford* (noted in this issue of the *Reporter*). That is, the payments 'were not the result of personal exertion, or profits earned, nor gain under a contract for the sale of assets, goods or services': Reasons, para. 21.

However, the AAT said, the payments received by Adams fell within the second part of the s.3(1) definition

of 'income'– they were a periodical payment, a benefit by way of allowance, or a periodical payment by way of allowance. Although they had been designated as a loan at first, they were later classified as a grant and then had to be treated as 'income' of Adams: they were amounts available for Adams' maintenance.

Emergency relief

The AAT then decided that the payments did not fall into the exception established by para (ca) of the definition of 'income' because they were not payments of 'emergency relief'. An 'emergency', the AAT said, involved the 'near approach of danger'; but here the payments had not been made in response to such a threat but to alleviate financial hardship.

The farm losses

The AAT then turned to the question whether the substantial losses suffered by Adams and her husband on their farming business could be deducted from the RFC payments.

The AAT referred to the Full Federal Court decision in *Garvey* (1989) 53 *SSR* 711 as requiring that the losses be ignored when calculating Adams' income from the RFC payments. The AAT was unable to identify any distinction between *Garvey* (where the losses came from investment properties and the income came from employment) and the present case (where the losses came from an activity which led to Adams' eligibility for the payments).

Discretion to waive recovery

The AAT then considered the question whether the s.251(1) discretion, to waive recovery of the overpayment, should be exercised.

It noted that Adams had acted honestly, because she had genuinely believed that the RFC payments were not subject to the social security income test. She and her family were now in a desperate financial situation, having been forced off their farm; they were heavily in debt and had minimal income and substantial outgoings. There were sufficient grounds, the AAT said, to exercise the s.251(1) discretion.

Formal decision

The AAT set aside the SSAT decision; decided that the RFC payments had been 'income' of Adams; that there had been an overpayment to Adams; but that recovery of all of this overpayment, apart from any family allowance payable to Adams for the 12 months ending November 1989, should be waived.

[P.H.]

Income test: war restitution pension

WELS and SECRETARY TO DSS (No. Q90/42)
Decided: 6 December 1990 by D.W. Muller.

This case concerned the review of a decision of the SSAT, affirming a DSS decision to treat a restitution pension, received by Audrey Wels' husband from the Netherlands Government for wartime suffering, as 'income' within the meaning of s.3(1) of the *Social Security Act*.

The facts

Wels' husband was of Dutch origin and had been imprisoned by the Japanese in Indonesia during World War 2. He was in receipt of the pension from the Netherlands Government payable to persons who suffered lack of earning capacity by reason of persecution by the Japanese or Germans during World War 2.

The Tribunal found that a base part of the Netherlands pension was compensation generally for experiences suffered during the war and for loss of amenities of life. A second part of the Netherlands pension related to loss of earning capacity.

The legislation

Section 3(5) of the *Social Security Act* provides that a pensioner's income includes half the income of the pensioner's spouse.

Income is defined in s.3(1) as meaning –

> 'in relation to a person . . . personal earnings, money, valuable consideration or profits, whether of a capital nature or not, earned derived or received by that person . . . and includes a periodic payment or benefit by way of gift or allowance . . . but does not include
>
> . . .
>
> (ka) an amount paid by way of compensation by the Federal Republic of Germany or by a State of that republic under the laws of that republic or of that State relating to compensation of victims of national socialist persecution;
>
> (kb) an amount paid by way of compensation by the Republic of Austria under the laws of that republic relating to compensation of victims of national socialist persecution . . .'

The issues

The issues for the AAT were whether the Netherlands pension received by Mr Wels was 'income' within the meaning of the above definition and, of so, whether it was excluded from being income by reason of paragraphs (ka) or (kb).

The decision

The AAT reviewed many of the authorities on the point and decided as follows:

Paragraph (ka) and paragraph (kb) relate only to payments received from the German and Austrian Governments. As the present payments were received from the Netherlands Government, they were not excluded from the definition of income by reason of either of these two paragraphs.

The issue of whether the Netherlands pension was income pursuant to s.3(1) had already been determined by the Federal court in *Kelleners* (1988) 47 *SSR* 616, where it was held that the Netherlands pensions were 'a periodic payment . . . by way of . . . allowance' within the definition of income. The decisions of *Teller* (1985) 26 *SSR* 298, *Zolotenki* (1987) 38 *SSR* 479, and *Donath* (1989) 54 *SSR* 722, were also seen to support this conclusion.

Formal decision

The decision of the SSAT was affirmed.

[*Note:* The Tribunal questioned the fairness of exempting German and Austrian restitution pensions but not exempting the Netherlands restitution pensions. The Tribunal expressed the tentative view that the Netherlands pensions were of the same nature as the German and Austrian pensions and ought therefore to be likewise exempt from the definition of income.]

[A.A.]

Income test: mortgage off-set account

BOELE and SECRETARY TO DSS (No. S90/74)
Decided: 12 November 1990 by B.H. Burns, R.B. Rogers and D.J. Trowse.

Marlene Boele sought review of a decision of the SSAT which affirmed a DSS decision:

(1) That interest payable on a deposit which was automatically offset against other mortgage loan commitments of Boele with the same financial institution, was income of Boele for the purposes of sole parent's pension.

(2) That the earliest date of increase of a sole parent's pension by reason of changed circumstances was the date of