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