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

Boele's first notification to the DSS of the changed circumstances.

The facts

The Tribunal's Reasons were given *ex tempore* and the written record of the decisions is quite brief, containing few of the material facts. [The discussion of the second issue was too brief to justify a note in this *Reporter*.]

In relation to the first issue, it seems that Boele deposited funds in an account with a financial institution with which she had a housing mortgage. The terms of the investment were apparently that the deposited funds did not attract interest; rather the balance of the deposited funds and the notional interest payments on those deposited funds were notionally credited to the mortgage account on a monthly basis, thus reducing Boele's indebtedness on the mortgage loan. This in turn reduced the interest accruing on the mortgage loan.

The issue for the AAT was whether the savings to Boele by reason of the lower amount of interest accruing on the mortgage loan amounted to income in her hands for the purposes of the *Social Security Act*.

The legislation

This case was decided prior to the enactment of s.4C in the *Social Security and Veterans' Affairs Amendment Act (No. 2)* 1990.

Section 3(1) of the *Social Security Act* defines income as, *inter alia*,

> 'personal earnings, money, valuable considerational profits . . . earned, derived or received . . . '

Decision

The AAT said it was 'our considered view' that the savings to Boele on the interest accruing on a mortgage loan, by reason of foregoing the interest payments on her deposits, was valuable consideration within the meaning of 'income' in s.3(1). No further reasons were given by the Tribunal.

Formal decision

The decision of the SSAT was affirmed.

[Note: The leading decision on 'valuable consideration' is the High Court decision in *Read* (1988) 43 *SSR* 555. The AAT decision in *Hungerford* (noted in this issue of the *Reporter*) is also relevant. The decision of the AAT in the present case appears consistent with those decisions.]

[A.A.]

Income test: return of capital investment

HUNGERFORD and REPATRIATION COMMISSION (No. 6190)

Decided: 14 September 1990 by S.A. Forgie, I.R.W. Brumfield and E. Keane.

The application to the AAT concerned a decision of a delegate on 10 May 1988 to treat the sum of $103.16 per month, received by the applicant by way of annuity, as income for the purposes of the income test under s.47 of the *Veterans' Entitlements Act* 1986.

The facts

On 18 July 1987, Mr Hungerford was the recipient of a service pension under the *Veterans' Entitlements Act*. On this day he entered into an annuity policy with Suncorp. The terms of this policy included that in consideration of Mr Hungerford paying the capital sum of $8000 to Suncorp, Suncorp would pay a monthly annuity to Mr Hungerford of $103.16. The Tribunal found that this sum was composed of $55.79 undeducted purchase price and $47.37 interest. The undeducted purchase price represented a return of the investment capital for which no taxation advantage was received.

The legislation

Section 47(4) *Veterans' Entitlements Act* provides for an income test on service pensions in substantially the same terms as s.33(12) of the *Social Security Act* (in relation to age pension). For the purposes of this income test, 'income' is defined in s.35(1) of the *Veterans' Entitlements Act* in substantially the same terms as s.3(1) of the *Social Security Act*.

At the time the original decision was taken by the delegate in Mr Hungerford's case, there were no provisions in the *Veterans' Entitlements Act* specifically dealing with the treatment of annuities as income and so the case fell to be determined by reference to the definition of income in s.35(1):

> '"income" in relation to any person, means any personal earnings, money, valuable consideration or profits, whether of a capital nature or not, earned, derived or received . . . '

[Note: There were no specific provisions relating to the treatment of annuities as income in the *Veterans' Entitlements Act* until Act No. 164 of 1989.]

The issues

There were two issues canvassed by the Tribunal:

(1) whether the words 'whether of a capital nature or not' qualify only the word 'profits' or whether they qualify the whole of 'personal earnings, moneys, valuable consideration or profits'; and

(2) whether the undeducted purchase price component of the annuity falls within the definition of 'income' by reason of the phrase, 'whether of a capital nature or not', in that definition.

[Note: The *Veterans' Entitlements Act* as it stood on 10 May 1988 contained no provisions expressly dealing with the assessment of capital as income. Such a provision in the form of s.37J was not introduced until Act No. 135 of 1988 on 8 December 1988.]

It was common ground that the interest component of the annuity was income.

The decision

In relation to the first issue, the AAT had no difficulty in holding that the words 'whether of a capital nature or not' qualified the whole of the preceding phrase and not just the word 'profits'.

The Tribunal then proceeded to reason that the phrase 'whether of a capital nature or not' does not operate in its own right to catch all capital receipts; rather its effect is limited to catching capital receipts in the form of 'personal earnings, moneys, valuable consideration or profits'.

The Tribunal then examined the meaning of each of these terms. The meaning of 'valuable consideration or profits' had previously been considered by the High Court in *Read* (1988) 43 *SSR* 555.

The Tribunal noted the views expressed in *Read*, that 'valuable consideration' connotes receipts other than in the form of money. It is implicit in the Tribunal's decision that, given that Mr Hungerford's receipts were specifically in monetary form, the concept of 'valuable consideration' was not applicable in his case.

In relation to 'profits', the Tribunal noted the views expressed in *Read* that a profit connotes 'a financial gain'. In Mr Hungerford's case the return of his capital was not found to answer this description.

In relation to 'personal earnings', the Tribunal expressed the view that some reward for personal exertion was required, and that a mere return of capital also did not answer this description.