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.

The real issue for the Tribunal was whether the return of capital in these circumstances could be described as the receipt of 'money' in the form of capital. The Tribunal canvassed a number of authorities from different jurisdictions on the meaning of 'money' before deciding that, in its present context, the word 'money' must also connote a reward 'from personal exertion or as consideration for some services rendered' (*Flanigan* (1984) 22 *SSR* 256).

In summary, the Tribunal said that the words 'personal earnings, moneys, valuable consideration and profits' carry the basic meaning of 'gains derived by a person as a result of the provision by that person of consideration in the form of personal exertion or other services or the disposition of property'.

Formal decision

The Tribunal held that the part of Mr Hungerford's annuity which represented the return of capital was not income for the purposes of the *Veterans' Entitlements Act*.

[A.A.]

Income test: farm 'profit'

MILLER and SECRETARY DSS
(No. S89/263)
Decided: 7 September 1990 by J.A. Kiousoglous, J.T.B. Linn and D.B. Williams.

The DSS raised an overpayment of unemployment benefits recoverable from Valerie Miller. On review, the SSAT agreed with the calculation of the overpayment but waived recovery of half the debt because of administrative error by the DSS. The DSS accepted this decision but Miller applied to the AAT for it to be reviewed.

The facts

Miller, in partnership with her husband and son, ran a farm that received its income from the sale of wheat and wool in December or January each year.

She was paid unemployment benefit from May 1987 until September 1988. Initially she provided the DSS with a copy of her 1985/86 tax return which showed a loss for the partnership. Her 1986/87 tax return showed a profit but this was not declared to the DSS. She continued to lodge fortnightly forms in which she stated that no income had been derived during the (2 week) period.

On 7 June 1988, the DSS reviewed Miller's position and decided to review again upon lodgment of her next tax return. Miller's 1987/88 tax information, which showed a profit, was made available to the DSS in September 1988.

The DSS subsequently raised an overpayment of $4647.68 for the period 10 October 1987 to 17 June 1988. Unfortunately the AAT did not fully explain the reasons why the DSS chose these dates other than that Miller 'could only have been expected to be aware of the 1986/87 financial year statement and of the profit which it showed, in October 1987': Reasons, para. 10.

The SSAT agreed with the overpayment sum but waived half because of the Department's failure to seek details regarding Miller's financial position.

Shortly prior to the AAT hearing, the DSS discovered that the overpayment had been wrongly calculated but agreed to waive the additional amount.

The legislation

'Income' is defined in s.3(1) of the *Social Security Act* to include 'profits'.

The applicant's argument

Miller argued that capital repayments and family expenditure (including insurance, medical expenses and accommodation costs for her daughter in Adelaide) should be allowed as deductions in determining her income. As far as she was concerned she had not made a profit because she was in debt.

Deductions not allowed

Reference was made to the cases of *Haldane-Stevenson* (1985) 26 *SSR* 323, *Paula* (1985) 24 *SSR* 288, *Hales* 47 ALR 281 and *Ward* (1985) 7 ALN N66. In particular, *Paula* was relied upon for the principle that –

> 'Private expenses such as medical expenses and living costs are not deductible.'

(Reasons, para. 15)

The AAT did not specifically comment on the deductibility of capital repayments. However, as it affirmed the decision under review, it is presumably to be taken as deciding that capital repayments cannot be deducted.

Waiver

The AAT agreed with the Department's decision to waive the additional amount due to the recent recalculation and agreed with the SSAT's decision in relation to waiver.

Difficulties with fluctuating farm income

Comments were made about difficulties caused by severe fluctuations in farm income and the AAT suggested that –

> 'Careful continuing review of these fluctuations in income should become part of the normal screening by the Department in cases such as this where Unemployment Benefit and other pensions depend on income earned.'

(Reasons, para. 21)

Unfortunately, the AAT itself avoided discussion of the difficult issues surrounding notification of variations in income of farms and other small businesses.

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Unemployment benefit: income test

FERGUSON and SECRETARY TO DSS
(No. 6483)
Decided: 6 November 1990 by K.L. Beddoe.

Maxwell Ferguson had been granted unemployment benefit. He held an investment of some $40 000 in a managed investment trust (AFT), which made quarterly distributions of profits. In calculating the rate of Ferguson's benefit, the DSS decided to treat the fortnightly average of the amount distributed in the previous four quarters as Ferguson's income for each fortnight in the current quarter.

The result of this decision was that Ferguson's income was assessed at a fortnightly figure $36 higher than it would have been if it had been based on the most recent quarterly distribution.

This decision, according to the DSS, was based on 'Government policy expressed by our Special Policy Unit'.

Ferguson applied to the AAT for review of that decision.

The legislation

Section 122(1) of the *Social Security Act* provides that the rate of unemployment benefit payable to a person is to be reduced by reference to the person's income, where that income exceeds $60 a fortnight.