possible anomalous results that this provision could cause. For example, take a situation where an applicant for a pension had made deposits with an institution which had since been put into liquidation and the best estimate of the liquidator was that no dividend would be paid to the depositors. In this event, even though the deposit had no commercial value, it would be shown at its face value for s.4 purposes because it had not yet been extinguished and remains as a right, albeit worthless. It is doubtful that the legislature intended that result, but the words are plain, whilst their literal meaning is clear and whilst they may produce an unfair result they do not give rise to any ambiguity.'

Formal decision

The AAT determined that the appropriate amounts to be taken into account as an asset in the applicant's hands prior to 27 October 1986 should be based on the net worth of the HFT whereas, after that date, the value of the asset in the applicant's hands was the full face value of the debt remaining outstanding at that date.

[A.A.]

Assets test: disposition

McGUIRK and SECRETARY TO DSS

(No. 7929)

Decided: 1 May 1992 by H.E. Hallowes

Michael and Gwen McGuirk appealed against an SSAT decision affirming a decision of the Department to include an amount of $31 000, given by Gwen McGuirk to Pope John Paul II, as property of the applicants for the purposes of calculating the rate of age pension.

In October 1990, Mrs McGuirk told the Department she had received a cheque for $41 983.36 from the Public Trustee, being her brother's deceased estate. She had immediately withdrawn $35 000 and paid this amount to her parish priest to give to Pope John Paul II.

The AAT accepted Mrs McGuirk's account that she was fulfilling an undertaking given to her brother while he was alive that she would carry out his wishes to give his money to the poor. He had been unable to do this in his lifetime as his affairs were managed by the Public Trustee.

The legislation

The DSS had treated this gift as a disposal of property under 6 of the *Social Security Act* 1947. This provided that, where property of more than $4000 was disposed of, that property had to be included in the value of the property of the person. And property was disposed if no or inadequate consideration was received for it.

Property disposed of?

Mr McGuirk argued that it was unfair that the DSS had a discretion to protect investors in the Pyramid Building Society but could not or would not take into account the charitable motives of his wife in disposing of the money.

The AAT decided that Mrs McGuirk had not received valuable consideration for the disposal of the money as 'consideration' in the Act had been used in a technical legal sense. It also rejected an argument, without further comment, that Mrs McGuirk had no discretion and was obliged to carry out her brother's 'trust'.

Formal decision

The AAT affirmed the decision under review.

[J.M.]

Assets test: superannuation relinquished

POOLE and SECRETARY TO DSS

(No. 7859)

Decided: on 30 March 1992 by M.D. Allen.

Mr Poole had been receiving a pension pursuant to the *Superannuation Act* 1922 of $719.64 a fortnight. He chose to relinquish his pension, to which he had a continuing entitlement, because he wanted it 'under the heading of entitlement'. He applied for age pension and sought payment on the basis that he had no income.

Legislation

Section 8(1) of the *Social Security Act* 1991 defines 'income' to mean an income amount earned, derived or received by a person for the person's own benefit or use. An 'income amount' means valuable consideration or personal earnings or moneys or profits, whether of a capital nature or not.

Section 9(5) provides that for the purposes of the Act a superannuation pension is taken to be presently payable at all times after the commencement of the first period in respect of which it is payable.

Was the superannuation pension income?

The issue was whether the superannuation pension, which was payable to Poole but which he declined to receive, was income under the Act.

The AAT referred to *Rose v Secretary to DSS* (1990) 92 ALR 521; 54 *SSR* 727, where the Federal Court had held that a pension payable to Mr Rose in East Germany, but which he could not access from Australia, was income under the Act.

The AAT said that, if a pension that a person could not access was taken to be income, 'how much more so in the case of Mr Poole who by his own voluntary act has deprived himself of the income'.

The AAT concluded that the superannuation pension was income to be taken into account in assessing his entitlement to age pension.

Formal decision

The AAT affirmed the decision under review.

[P.O'C.]

Newstart training allowance

SECRETARY TO DSS and DIEPENBROECK

(No. 7970)

Decided: 19 May 1992 by O'Connor J.

David Diepenbroeck was granted newstart allowance on 19 August 1991, when he was 19 years of age.

On 26 August 1991, Diepenbroeck started a vocational training course approved by the CES. He applied for a newstart training supplement under s.644 of the *Social Security Act* 1991. An officer in the Department of Employment, Education and Training (DEET) rejected Diepenbroeck's application.

On review, the SSAT decided that Diepenbroeck was eligible for the supplement. The Secretary to the DSS applied to the AAT for review of that decision.

The legislation

Section 644(1) of the *Social Security Act* 1991 declares that person who is receiving a newstart allowance and undertaking a CES-approved course of vocational training is to have her or his rate of allowance increased by a newstart training supplement, to be paid at the rate considered appropriate by the Secretary.

According to s.644(2), the Secretary is to calculate the amount of the supplement by having regard to a person's expenses while undergoing the training. Section 644(3) fixes the maximum amount of the supplement as $87.50.

Government policy

The DSS argued that the newstart training supplement should not be paid to anyone under 21 years of age. It was said that the training supplement system had initially been paid outside the social security system, without any legislative base. The supplement had only been paid, as a matter of government policy, to persons aged at least 21 years.

Evidence was given to the AAT by a senior officer in the DEET, that the inclusion of the supplement in the *Social Security Act* 1991 had not been intended to disturb the existing policy.

The DSS argued that the AAT should apply the Government policy on a minimum age for the supplement, as recognised by the leading decision in *Re Drake and Minister for Immigration and Ethnic Affairs (No. 2)* (1979) 2 ALD 634. However, the AAT pointed out that in discussing whether the AAT should take account of government policy, as outlined in *Drake (No. 2)*, Brennan J (at 641) had distinguished between a lawful policy which guided the exercise of a discretion and 'an unlawful policy which creates a fetter to limit the range of discretion conferred by a statute'.

The discretion available to the Secretary and the AAT under s.644, the AAT said, was limited. It related only to the amount of the supplement, and the factors to be taken into account in exercising that discretion were set out in s.644(2).

This case, the AAT said, was more like the situation in the school leavers' case, *Green v Daniels* (1977) 13 ALR 1, than the cases applying policy statements to broad discretions. The AAT concluded:

> 'What has happened in this case is that the criteria contained in s.644(2) have had superimposed upon them an additional criterion relating to age. Under s.644(2)(a), (b) and (c) the Secretary is to have regard to 3 factors in determining the amount of increase in NSA. As stated above, no broad discretion is conferred on the Secretary. The Secretary must have regard to specific factors in considering the amount of increase which is appropriate. It is not open to the Secretary to import other criteria which limit the exercise of the discretion. Age is not a factor which may be taken into account when determining the amount of the increase in NSA.'

(Reasons, para. 22)

Reference to extrinsic materials

The AAT also rejected a DSS decision that the relevant second reading speech and explanatory memorandum showed that s.644 should be read as excluding persons under 21.

The AAT described these documents as introducing an element of ambiguity and conflict which was not found in s.644. The AAT said:

> 'The *Social Security Act* 1991 is intended to be the "plain English" version of the Act. It is intended to be accessible so that ordinary Australians can understand it. These considerations reinforce my view that the meaning of s.644 is clear on the face of the Act and that factors not expressly stated ought not to be included in its meaning.'

(Reasons, para. 18)

Formal decision

The AAT affirmed the decision of the SSAT.

[P.H.]

Unemployment benefit: liquid assets test

JACOBSEN and SECRETARY TO DSS

(No. 7846)

Decided: 20 March 1992 by W.J.F. Purcell, D.J. Trowse and J.Y. Hancock.

The DSS decided to impose a 4-week deferment period for payment of unemployment benefit to Jacobsen on the basis that on the day on which he lodged his claim, the value of his liquid assets exceeded $10 000, the maximum reserve applicable to him under s.116C of the *Social Security Act* 1947.

Jacobsen appealed unsuccessfully to the SSAT and then to the AAT.

The legislation

The 'liquid assets' test for unemployment benefit came into effect from 1 February 1991. Section 116C(2) of the 1947 Act provided that, where on the date of claim a person's liquid assets exceeded the person's maximum reserve ($10 000 in Jacobsen's case), the person was not qualified to receive a benefit during the 4 weeks commencing on the day on which the person became unemployed.

The Secretary had a discretion to waive the 4-week deferment period if satisfied that to apply it would cause undue long-term disadvantage or significant hardship to the person.

The assets

At the date of claim, 18 February 1991, Jacobsen disclosed liquid assets totalling $15 398. Between 19 and 21 February 1991 he received a further $2278 by way of lump sum severance pay.

Family financial commitment

After the application for review by AAT was lodged, the DSS acceded to Jacobsen's request to disregard, for the purpose of assessing his level of liquid assets, a sum of $4728 which he had set aside to buy a car for his son and to pay the insurance excess.

The AAT was troubled by this concession, stating the assessment of the level of liquid assets is not to be influenced by the possible existence of liabilities. The AAT concluded that Jacobsen's prior commitment, incurred before he became unemployed, could however be recognised as a 'one-time' payment under DSS guidelines (*Guide*, paras 10.270 to 10.271) for the purpose of the exercise of the waiver discretion in s.116C(4A).

Bank account

The AAT rejected a submission by Jacobsen that $11 994 in a Mortgage Interest Saver Account (MISA) should not be included in liquid assets because it was part of his mortgage. The AAT found that the MISA was simply a special savings account where the balance was off-set daily against the home loan balance. It was an amount deposited with a bank as defined by s.116C(9)(b).

The lump sum severance payment was found to be a 'qualifying eligible termination payment' and accordingly excluded from his liquid assets under s.116C(9).

Debt repayments

The applicant argued that lump sum payments of Bankcard totalling $2122 and mortgage instalments amounting to