and the whole of each school vacation with Rollins and her husband.

Apart from the period between 1 July 1990 and 27 August 1990, Yalambee was an approved institution for family allowance purposes under the *Social Security Act 1947*.

Family allowance

The AAT said that, apart from the period 1 July 1990 to 27 August 1990 and the periods covered by school vacations, L was an inmate of an institution, Yalambee, within s.82(2) of the *Social Security Act 1947*. Adopting the approach laid down in *Piggott* (1986) 11 ALD 9; 35 *SSR* 443, the AAT said that L was a person admitted to, and residing in, the institution for protracted periods even though those periods might be interspersed with time spent away from the institution.

During the periods when L was an inmate of the institution, Rollins was not eligible for family allowance. She could not be paid family allowance for those fractions of a week which L spent with her while he was an inmate of Yalambee. The decision in *Matthews* (1988) 14 ALD 735, which had allowed a parent to receive part family allowance for the days (mostly weekends) which her child spent at home could no longer be followed because the section on which the AAT had relied in that case, s.103A, had since been repealed.

However, Rollins was qualified to receive family allowance on each pay day which fell during school vacations — her son was not an inmate of Yalambee during those periods. And she was also qualified to receive family allowance on each pay day which fell during the period 1 July 1990 to 27 August 1990. In that period, Yalambee had been awaiting re-approval as an institution, following a change in its management.

Child disability allowance

The AAT decided that Rollins' home was L's residence and the respondent provided L with care and attention on a daily basis in her home.

L was absent from Rollins' home for part of each week during school terms and these absences amounted to more than 28 days in any calendar year; but the absences were temporary within s.103(2)(c) of the 1947 Act. It was appropriate, the AAT said, to exercise the discretion conferred by s.103(2) of the 1947 Act so as to ensure that child disability allowance was paid to Rollins for each day of L's school vacations and each day of the period 1 July 1990 to 27 August 1990.

The 1991 Act

The AAT noted that the 1947 Act was repealed from 1 July 1991 and that the *Social Security Act 1991* contained a number of provisions dealing with the problem currently before the Tribunal. It appeared that these provisions might have produced some changes to the law. The AAT said it was sure that any such changes were inadvertent, because the 1991 Act was not intended to change the law but to rewrite the legislation in plain English.

The AAT said that the decision of the SSAT, as varied by the AAT, was an 'instrument' that was in force under the 1947 Act immediately before 1 July 1991. According to cl. 4(1) of Schedule 1A to the 1991 Act, that instrument now has effect from 1 July 1991 as if it were an instrument made under the 1991 Act.

The result was Rollins' eligibility for family allowance and child disability allowance after 1 July 1991 would be the same as before that date.

Formal decision

The AAT varied the decision under review by determining that, as from 13 June 1989, family allowance was payable to her for L for each family allowance pay day during school vacations and between 1 July and 27 August 1990; and child disability allowance was payable to Rollins for L on each family allowance pay day during school vacations or within 2 weeks after a vacation, and between 1 July and 27 August 1990.

[P.H.]

[**Editors' note:** Child disability allowance is paid to parents in 2-week portions; and, to receive a 2-weekly payment , a parent must be qualified on the pay day for that payment. In order to achieve the result which the AAT thought was desirable (that Rollins be paid for each day during L's school vacations), the AAT decided to treat Rollins as qualified, not only during the school vacations, but during the periods of 2 weeks after each vacation. The power to do this was conferred by s. 103(02) of the 1947 Act, if L's absences from Rollins' home were temporary. However, the AAT's decision to treat Rollins as qualified for an extra pay day after each school vacation could have the effect of paying her for more than the number of days in each school vacation.]

Child disability allowance

JONES and SECRETARY TO DSS (Nos 7693 and 7695)

Decided: 24 January 1992 by B. G. Gibbs.

Raffaela Jones had 4 children. Two of these, M and A, suffered from constant asthma.

Jones was granted handicapped child's allowance for of M, who was born in 1981, in 1983. This was converted to child disability allowance in 1987. Jones was granted child disability allowance for A, who was born in 1984, in 1988.

In June 1991, the DSS cancelled each allowance. On appeal, the SSAT affirmed the decision in respect of A but set aside the delegate's decision in respect of M.

Jones applied to the AAT for review of the first decision; and the DSS applied to the AAT for review of the second decision.

The legislation

At the time of the DSS decision, s.102 of the *Social Security Act* 1947 provided that a person who was qualified to receive family allowance for a disabled child was qualified to receive child disability allowance if the person or the person's spouse provided care and attention on a daily basis in their private home.

Section 101 of the Act defined a 'disabled child' as a child with a physical, intellectual or psychiatric disability who, because of that disability, needed (permanently or for an extended period) care and attention from another person on a daily basis that was substantially more than the care and attention needed by a child of the same age without such a disability.

(Similar provisions, ss.952 and 954, appear in the *Social Security Act* 1991, which came into operation on 1 July 1991.)

The evidence

M required the administration of sprays and the testing of airways flow each morning, under Jones' supervision. M used a Ventolin puffer 3 times a day and nebuliser therapy for 30 minutes each evening, the latter under Jones' supervision. Once or twice a week, the nebuliser therapy was repeated during the night. In addition, Jones had to provide more extended care on the occasions when M suffered a more severe

asthma attack — some 3 or 4 times each year.

M also suffered from atopic eczema, for which Jones applied cream each evening, a process which occupied a few minutes. Jones accompanied M on visits to a general practitioner every 2-3 months and to a paediatrician every 3 months, and attended the local pharmacist 2 or 3 times a week for medication.

A also required the testing of airways flow each morning, under Jones' supervision. Nebuliser therapy and a 'puffer' were administered each morning and evening. Additional and more frequent sessions of nebuliser therapy were required every 5-6 weeks. Jones accompanied A on visits to a paediatrician every 3 months, and attended the local pharmacist once or twice a week for medication.

The AAT's decision

The AAT decided that, although both children had a physical disability and required care and attention from another person on a daily basis, that care and attention was not substantially more than that needed by a young person of the same age who did not have those disabilities.

The question of 'need' for care and attention had to be made on the basis of objective judgment; and the evidence did not support a finding of need for substantially more care and attention.

Formal decision

The AAT affirmed the SSAT's decision in relation to A; and set aside the SSAT's decision in relation to M.

[P.H.]

TRAINER and SECRETARY TO DSS

(No. 7801)

Decided: 5 March 1992 by P.W. Johnston, J.G. Billings and R.A. Joske.

Nancy Trainer gave birth to her son, R, in 1980. Trainer claimed child disability allowance for R in 1990. When her claim was rejected by the DSS, she appealed to the SSAT, which affirmed the DSS decision.

Trainer then applied to the AAT for review of the SSAT's decision.

The legislation

At the time of the DSS decision, s.102 of the *Social Security Act* 1947 provided that a person who was qualified to receive family allowance for a disabled child was qualified to receive child disability allowance if the person or the person's spouse provided care and attention on a daily basis in their private home.

Section 101 of the Act defined a 'disabled child' as a child with a physical, intellectual or psychiatric disability who, because of that disability, needed (permanently or for an extended period) care and attention from another person on a daily basis that was substantially more than the care and attention needed by a child of the same age without such a disability.

(Similar provisions, ss.952 and 954, appear in the *Social Security Act* 1991, which came into operation on 1 July 1991.)

The evidence

R was of average intelligence but had specific learning difficulties which affected his reading and writing skills and his numeracy. He suffered from poor concentration and memory retention.

Trainer told the AAT that she spent 2-3 hours each day in reviewing R's school work and giving him additional tuition. She also ensured that R attended daily to his personal hygiene and grooming.

The AAT's decision

The AAT said that R had an intellectual disability; and that the assistance provided by Trainer met the description of 'care and attention'.

R's disability did require some care and attention, the AAT said. The assistance provided by Trainer was directed to preventing him suffering possible anguish and loss of self-esteem (in relation to his school work) with permanent anti-social consequences.

But the care and attention needed by R was not 'substantially more than' the care and attention needed by a child of the same age who did not have the disability. The test of need was objective; although some extra care was required to prevent R slipping behind in his schooling, R's situation was not so critical as to require the devotion of the large amount of supplementary tuition which he received: Reasons, para. 29.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

FAS special assessment: procedural requirements

COLLARD and SECRETARY TO DSS

(No. 8041)

Decided: 24 June 1992 by T.E.Barnett.

The applicant sought review of a DSS decision which rejected her claim for special assessment of her entitlement to Family Allowance Supplement (FAS) under s.74B(3) of the *Social Security Act* 1947 which was the applicable legislation for this matter.

The legislative scheme

FAS payments depend on the number of eligible children in the family and the income of the applicant including the income of any spouse. Section 74B(1) sets down a formula for calculation of FAS which refers to the 'base year of income', that is, the financial year which ended in the calendar year preceding the date of application.

As an alternative to this method of calculation, the Act allows an applicant to apply for a special assessment based on the current year of income. This is available where it is estimated that the current year of income will be 25% lower than the base year of income.

The facts

The applicant was aged 31 and had 5 children under the age of 11. She lived in a *de facto* relationship. On 12 April 1991 she applied for FAS but did not provide sufficient details of the combined income of herself or her *de facto* spouse for the years 1989-90 and 1990-91. This information was subsequently requested by the DSS. However, it was not mentioned by the DSS that this information had to be written on a prescribed form.

Collard's *de facto* spouse sent to the DSS office a Notice of Assessment from the Tax Office which showed his income for the year 1989-90 as $20 669. Later he telephoned the DSS office to complain about the delay in processing the FAS payment. At that time a DSS officer noted that his income was $20 669 and that Collard's pension payments during 1989-90 ($6935) brought the combined income to $27 604.20. This meant payment of FAS at a reduced rate.

The DSS officer then advised Collard's spouse that a special assessment could be requested. An estimate