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

of 1990-91 combined income was made as being $22 030. This figure was calculated on the basis of salaries and unemployment benefits paid to Collard's spouse during the year. As this figure was not 25% less than the 1989-90 figure the DSS officer advised that the income was too high for a special assessment.

Subsequently, it was acknowledged by the DSS officer that she had failed to tell Collard's spouse that the additional benefit portion of his unemployment benefit was non-taxable. That is, in assessing his income for the current year, the DSS should have ignored that part of unemployment benefit which was paid for his children. If this had been done, it was conceded by the DSS, the current year of income would have been 25% less than the base year of income. A superior of the original DSS officer did not detect this error when Collard's spouse queried the matter and on 31 May 1991 the DSS decided to pay the applicant FAS at a reduced rate.

Was strict compliance with s.74B(3) required?

The DSS submitted that for a special assessment to be made Collard had to comply strictly with s.74B(3). One of the section's requirements was that Collard make a request in writing for a special assessment 'in accordance with a form approved by the Secretary'.

Collard claimed that she had substantially complied with the section. On 15 July 1991 she had gone to the DSS office and requested in writing a reassessment of her 1990-91 income after receiving advice that there had been an error. This had been done on an official 'Statement' form. Although it did not contain all her income details, these had been noted on the file when her spouse had telephoned the DSS office some weeks earlier. This file note was referred to in the statement.

The DSS countered with the argument that even if the statement made on 15 July 1991 did satisfy the requirement in s.74B(3) as to the approved form the final provision in that section would not then be satisfied. The provision refers to the situation where 'there has been an eligible reduction in the person's income for the year of income in which the request is made' as being a further requirement for a special assessment. The DSS submitted that, as the statement was made on 15 July 1991, the year of income in which the request was made would then be the 1991-92 financial year.

Assuming, as the parties had done, that the request was for her income to be assessed on her 1990-91 income the AAT made the following comments:

> 'It should be remembered that this is welfare legislation and that many applicants will, like this applicant, have difficulty in fully understanding the complex procedural requirements. It is understandable therefore that the legislature has included provisions in the Act which enable DSS officers in some circumstances to apply the spirit of the legislation when applicants who have an entitlement have not correctly made the application prescribed for that particular entitlement.'

The Tribunal then referred to s.159(5) which provided that where a claim for a particular payment is made and the DSS considers that it is reasonable for the claim to be treated as a claim for some other payment then the claim may be treated as a claim for that other payment.

The AAT then considered whether the request for a special assessment made on 15 July 1991 for the 1990-91 year could have been a request for an assessment for the 1991-92 year. The details for the 1991 calendar year were provided as the first half of the year related to the 1990-91 financial year. But the second half of 1991 also related to the first half of the 1991-92 financial year.

The AAT decided that s.159(5) should apply. In reaching its decision that the request should be treated as a request for assessment on the 1991-92 financial year the Tribunal took into account the fact that the DSS had sufficient information to make such an assessment, that there was a written request capable of being regarded as a request for the 1991-92 year, that Collard had chosen to appeal to the SSAT rather than fill in more forms when requested by the DSS, that it was desirable as being in the interests of DSS efficiency that the proper forms be used, that Collard relied on DSS assistance when the wrong form was used, that Collard had an entitlement to maximum FAS from at least 15 July 1991, and that Collard was an Aboriginal woman with 5 children who did not understand the procedural requirements.

Payment under s.34A Audit Act

The AAT also noted the relevance of the *Audit Act* 1901 in order that substantive justice is achieved in such cases. It commented:

> 'Had the Tribunal not been able to do substantial justice by applying the provisions of s.159 it would certainly have made a recommendation for the same financial result to have been achieved by making a payment under the provisions of s.34A of the Audit Act 1901. This course of action was actually recommended by the SSAT but was not accepted by the respondent for the reason that the respondent considered that Ms Macara had not assisted the applicant to calculate the estimated combined income of the applicant and her spouse and that the Department was therefore not negligent. This Tribunal has found that the officer did assist in calculating the estimated combined income and did contribute to the estimate being calculated as too high a level. Furthermore the findings indicate that there was also a degree of negligence on 15 July 1991 when an officer failed to ensure that the correct SR162 Form was used by the applicant when she came to the Midland Office to complain and to renew her request for a special assessment.'

Formal decision

The AAT set aside the decision under review and substituted a decision that:

- the decision to reject the applicant's request for special assessment for the 1990-91 income year is affirmed;
- that as from 15 July 1991 the applicant's FAS entitlement shall be assessed on her and her *de facto* spouse's combined income for the year of income 1991-92;
- that the matter is remitted to the DSS to recalculate the applicant's FAS payments from 15 July 1991 in the light of this decision;
- that each party is granted liberty to apply regarding the calculation of entitlements.

[B.S.]

Special benefit: residence requirement

SECRETARY TO DSS and MORAIS

(No. 2629)

Decided: 27 March 1992 by S.A.Forgie.

The DSS applied for review by the AAT of that part of an SSAT decision which substituted a new decision that Mrs Morais was residentially qualified for a special benefit.