Regan was also able to sub-franchise part of the business to someone else, and he agreed to make a series of progressive payments to the proprietors amounting to approximately $25 000 over the 5 years of the agreement.

Regan told the Tribunal that he was originally able to keep up with demand but, as the weather improved, he had organised for a friend to be responsible for the delivery and collection of the equipment, while he carried out the maintenance and repairs. This latter activity took no more than 2 days a week and he was available for full-time work on the other days, stating that he had no problems with working a 7-day week. According to the profit and loss statement for the period September 1991 to January 1992, the profit was $916.02.

During the relevant period, Regan had other interests which he hoped would generate income in the future, including a hobby farm where he had planted native flowers, and the making of limestone products for use in landscape gardening. He also had an interest in a limestone block-cutting machine. In a statement made to the Department in February 1992 he said that these projects took up 'the majority of [his] time' and that he was prepared to forego any of the projects, except 'Dial-A-Mower', to take up full time employment.

Regan had always described himself as 'self-employed' on his job search forms, but not on his Newstart allowance forms. He had submitted profit and loss forms for the mower business to the DSS in September and October 1991.

'Unemployed'

The AAT noted that the term 'unemployed' is not defined in the 1991 Act and then reviewed a series of Federal Court and AAT decisions which have considered the meaning of the term under the 1947 Act (where it was similarly undefined).

For example, in *McKenna* (1981) 3 ALD 219; 2 *SSR* 13, the Tribunal decided that unemployed meant 'not being engaged in work of a remunerative nature'. This definition needed some modification, the AAT said in the present matter, in the light of the fact that beneficiaries were allowed to earn some income, and the situation where, although someone was not earning income, they were committed to some other activities, e.g. study or domestic work which 'demonstrates a preference for that activity rather than employment'.

The AAT also referred to a series of cases dealing with self-employed people which 'established that lack of profit or remuneration earned by a person from an enterprise or work is not determinative of the question whether that person is "unemployed"' and that 'to be under-employed is not the equivalent to being unemployed': Reasons, para. 17.

The AAT concluded that, given Regan's description of himself as a self-employed sub-contractor, the amount of money required to be paid under the franchise agreement, and the obligations he undertook under that agreement, he could not be considered to be 'unemployed' during the period under review.

The fact that Regan had organised someone else to do some of the work, thereby making himself available for work on 5 days, did not mean that he was 'unemployed' for the purposes of the *Social Security Act*. The AAT also noted the extent of Regan's obligations under the franchise agreement which, whilst they could be delegated, he retained ultimate responsibility which made them doubt whether he was available to do other work.

Given this conclusion, the AAT said that it did not need to decide whether Regan fulfilled the activity test, but given the extent of his other activities, the Tribunal doubted that this was the case.

An overpayment?

The AAT then considered whether there had been an overpayment under s.1223.

Section 1223(1)(b) provides that, where an amount has been paid to a person and the recipient was not qualified and the amount was not payable, then the amount so paid is a debt due to the Commonwealth.

The AAT said:

> 'On a literal interpretation of s.1223(1), however, it appears that the amount paid to the recipient by way of job search allowance and Newstart allowance during the period under review is a debt due to the Commonwealth and is recoverable by the Commonwealth because, as the Tribunal has already decided in this case, the respondent was not qualified for job search allowance or Newstart allowance and the relevant amount was not payable to him . . .'

(Reasons, para. 26)

Although the DSS had, when the decision was reviewed by an ARO, relied on s.1224 of the Act, it emphasised s.1223 in the AAT proceedings.

The Tribunal said it was unnecessary to decide the question but expressed its opinion that an overpayment had not arisen under s.1224(1) of the Act. This section provides that, where an amount has be paid because the recipient made a false statement or representation or failed to comply with a provision of the Act, there is a debt due to the Commonwealth. Although Regan made no specific reference to 'Dial-A-Mower' on his fortnightly review forms, he had provided the DSS with a profit and loss statement which was enough to make the DSS aware of the general nature of the respondent's business, or to allow them to seek further information if required.

Although the issue of waiver had not been addressed in argument, the AAT decided that there were no 'extremely unusual, uncommon or exceptional circumstances' in this case which, according to the 5 May 1992 determination of the Minister, were necessary before a debt could be waived.

Formal decision

The Tribunal set aside the decision under review and substituted for it a decision that Regan was not qualified for job search allowance or Newstart allowance during the period from 19 August 1991 to 5 February 1992 and that the amount of $3559.24 paid to Regan during that period was a debt due to the Commonwealth and recoverable by it.

[J.M.]

Job search allowance: engaged in course on full-time basis

SECRETARY TO DSS and CHEARY

(No. 8490)

Decided: 23 January 1993 by I.R. Thompson.

The DSS appealed against an SSAT decision that job search allowance (JSA) was payable to Andrew Cheary. The issue in dispute was whether Cheary was precluded by s.531(1). This

provides that JSA is not payable to a person 'who is enrolled in a full-time course of education or vocational training'.

Cheary was enrolled in an Associate Diploma of Business (Marketing) at the Homesglen College of TAFE. The course was taught on Friday evenings, Saturdays and Sundays, and for a brief period on Thursday evenings.

Cheary gave evidence that, of the 25 people in the class, 16 were in full-time employment. He said that early in the semester he had spent about 4 hours a week outside class studying but later on, when written work was due, approximately 9 hours a week. Cheary had also told the SSAT that he had done the work on 2 or 3 evenings a week.

The TAFE officer, who had developed the course Cheary was undertaking for the whole TAFE system, gave evidence that for a course of this nature 18-20 hours a week class contact time would be provided, though the particular TAFE college teaching it could decide to extend or decrease the hours. He said that it was also expected that students would spend a similar number of hours outside the classroom, but again this could vary depending on the capacity of the student. Homesglen TAFE in fact taught the course over 16 class contact hours a week.

Engaged in a course on a full-time basis?

The Tribunal noted that the 1947 Act had contained a similar provision to s.531(1) of the 1991 Act, precluding payment to students 'engaged . . . in a course of education on a full-time basis' (see the former s.136).

The AAT said that this provision had caused some difficulties of interpretation. For example, in *Harradine* (1989) 87 ALR 305; 50 *SSR* 663, the Full Federal Court decided that, because the Act used the term 'engaged', the deciding factor had to be the degree of the student's activity, not how the course was categorised by the institution.

The AAT referred to the legislation amending s.136 of the 1947 Act, which left that section in substantially similar terms to s.531 of the *Social Security Act* 1991. In the second reading speech on the amending legislation, the Minister had referred to the need to amend the legislation in the light of *Harradine* (and the AAT decision of *O'Brien* (1990) 20 ALD 539; 49 *SSR* 630) to ensure that it apply not only to persons *engaged* in a course of education on a full-time basis, but also to those *enrolled* in a full-time course of education.

The Tribunal noted that '[u]nfortunately the opportunity was not taken to define the meaning of "a full-time course of education"': Reasons, para. 18. The Tribunal therefore decided to approach the question of identifying such a course in the same way as the Federal Court had done in *Harradine*, that is, as dependent on the particular facts of the course.

The AAT expressed the view that, if a course had 18-20 class contact hours a week and involved a similar number of hours of study, it would be a full-time course of education. However, the hours spent by Cheary varied between 20 and 25 hours a week. There was no evidence that an average student undertaking the particular Homesglen course would have been expected to spend more hours in private study than Cheary had done.

The TAFE officer said that the number of additional hours required depended vary much on the ability of the teacher [*sic*]. The AAT noted that, since the course was taught on one evening a week and on Saturdays and Sundays, it seemed likely that it was designed to allow those in full-time jobs to undertake it, and it seemed likely that the amount of private study a student was expected to undertake was likely to be similar to that undertaken by Cheary. The Tribunal concluded that the course was not a full-time course of education.

Formal decision

The Tribunal affirmed the decision under review.

[J.M.]

Capitalised maintenance income

SECRETARY TO DSS and SMITH

(No. 8426)

Decided: 14 December 1992 by B.H. Burns.

In May 1989, the Family Court made a consent order, transferring $22 184.82 to Sharon Smith from her former husband as a lump sum payment of child maintenance. The order described this amount as maintenance of $40 a week for each of Smith's 2 children (aged 7 and 8) 'for the next 260 weeks (5 years)'.

The DSS treated the amount of $80 a week as child maintenance and reduced Smith's sole parent's pension accordingly.

On review, the SSAT decided that the lump sum payment should be spread over some 11 years (rather than the 5 years specified in the consent order), thereby reducing the amount per week of child maintenance and increasing the rate of Smith's sole parent's pension.

The DSS appealed to the AAT.

The legislation

It was agreed that Smith had received 'capitalised maintenance income' — maintenance income that was not a periodic amount or a benefit provided on a periodic basis: *Social Security Act* 1947, s.3(1).

According to s.4(1) of the 1947 Act, capitalised maintenance income was to be taken to be received over the course of the 'capitalisation period determined under subsections (2) to (5)'.

Section 4A(2) provided that, where capitalised maintenance income was received under a court order or a court-approved agreement, the capitalisation period was, subject to s.4A(5), the period specified in the order or agreement.

Section 4A(5) gave the Secretary a discretion to vary the period specified in an order or agreement where the specified period was 'not appropriate in the circumstances of the case'.

Varying the capitalisation period

The SSAT had accepted a submission from Smith that the capitalisation period should be extended until her younger child turned 18 — making the period some 11 years rather than 5 years.

The DSS argued that, where a period was prescribed in an order, the Secretary, the SSAT and the AAT could not go behind the order and change the period. After referring to *Walsh* (1989) 17 ALD 77; 48 *SSR* 623; *Siviero* (1986) 68 ALR 147; *Cocks* (1988) 18 ALD 160; 48 *SSR* 622; and *Littlejohn* (1989) 19 ALD 361; 53 *SSR* 712, the AAT rejected that argument. The AAT said:

> '[Section] 4A was designed to ensure that the consent orders in question accurately reflect the true financial situation