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

of the parties, and hence eliminate situations whereby the spouse and/or children receive nominal maintenance payments over a long time period, resulting in payments of social security benefit which are not justified.'

In the present case, the AAT said, Smith had mistakenly understood, when agreeing to the consent order, that the child maintenance payment would be 'once and for all'. She had since lost contact with her former husband.

However, the AAT said that, in view of the income of Smith's husband at the time of the consent order ($300-400 a week), child maintenance of $40 a week for each child had been reasonable.

Although Smith was in a difficult financial situation (because her sole parent pension had been reduced on the assumption that she was receiving $80 a week child maintenance income), the AAT said that it was open to Smith to attempt to locate her former husband and have the consent order altered.

The AAT concluded by observing that the DSS had failed to inform Smith of the full implications of the maintenance income test at the time of its introduction; however, Smith had been advised by the DSS when first granted supporting parent's benefit in 1987 that maintenance payments were treated as income; and said that, in view of that advice,

> 'it was the responsibility of the respondent to make her own inquiries of the Department . . . to satisfy herself that the receipt of a payment of lump sum child maintenance would not affect her pension'.

(Reasons, para. 30)

Formal decision

The AAT set aside the decision of the SSAT and decided that the capitalisation period for the child maintenance received by Smith was the period specified in the consent order, 5 years.

[P.H.]

Income test: market-linked and accruing return investments

SECRETARY TO DSS and EGAN

(No. 8239)

Decided: 10 September 1992 by D.W. Muller.

Armyne Egan received a profit of $6519 from a superannuation scheme in August 1991 when she redeemed her lump sum payment from the fund on turning 70. This profit had accumulated since 30 June 1983.

In October 1991, the DSS decided that the profit should be treated as income for the 12 months following receipt when calculating her rate of age pension.

The SSAT subsequently decided that only the profit accrued after 8 January 1991 should be taken into account in assessing her income. The DSS asked the AAT to review the SSAT's decision.

The legislation

Section 1075(1) of the *Social Security Act* 1991 provides:

> 'If—
>
> (a) a person has made or acquired, at any time before 1 January 1988, an accruing return investment; and
>
> (b) the investment is:
>
> (i) an investment with a friendly society; or
>
> (ii) an investment of a kind where a return is not available:
>
> (A) until the end of a period of at least 12 months after that investment was made or acquired; or
>
> (B) until full realisation of that investment; and
>
> (c) the person realises the investment and receives an amount by way of return on that investment;
>
> the person is, for the purposes of this Act, to be taken to receive one fifty-second of that amount as ordinary income of the person during each week in the period of 12 months starting on the day on which the person realises the investment and receives an amount by way of a return on the investment.'

Section 1081(1) provides that, where an original investment is converted into an accruing return investment, then the accruing return investment is deemed to have been made on the date the original investment was converted and the original investment is deemed to have been realised on that date.

Section 1082(1) states:

> 'if a person realises a market-linked investment that was made or acquired before 9 September 1988 and receives an amount by way of return, the person is, for the purposes of this Act, taken to receive one fifty-second of that amount as ordinary income of the person during each week in the 12 months commencing on the day on which the person realises the investment.'

Section 9 defines an 'accruing return investment' as

> 'an arrangement by a person that consists of or includes an investment of money, being an investment:
>
> (a) that produces:
>
> (i) a fixed rate of return, whether or not that rate varies from time to time; or
>
> (ii) a rate of return that may be reasonably approximated; and
>
> (b) the value of which from time to time is unlikely to decrease as a result of market changes.'

A 'market linked investment' is defined to include 'a superannuation benefit vested in a person and held in a superannuation fund (unless a superannuation pension funded by that benefit is presently payable to the person)'.

Application of the legislation to the investments

The Tribunal applied the legislation to Egan's investments.

The superannuation fund in which she had invested her money changed its name (and practices) a number of times. The original investment from June 1983 to December 1987 was with the Westpac Superannuation Fund. This was a market-linked investment as this fund invested mostly in shares, real estate and some fixed interest deposits. From December 1987 to 5 August 1991 the fund became known as the Westpac Superannuation Savings Fund. This was an accruing return investment as this fund invested in highly secure short term securities and a small amount of property.

Based on this analysis of the investments, the AAT simply determined the profit from the market-linked investment which was realised on 30 December 1987 when it was converted to an accruing return investment according to s.1081. This profit was $3217 and, by applying s.1082(1), Egan's income for the following 12 months must be increased by 1/52 of $3217 per week. This meant that she had probably received an overpayment of age pension in 1988.