by assigning the debt of redemption moneys to the trustees of the APSF in consideration for the issue of units to APF5 unit holders in APF. The Van Geests' investments were affected as follows:

- 2106 APF units were derived from 9739 APF5 units (one unit remained in the original fund);
- 10178 APF units were derived from 20,355 ASPF units.

The further purchase of 1228 APF units in June 1993 took their total to 13512 APF units.

On 28 July 1993 DSS assessed the income value of the investment at a rate of return of 34.61% and the Van Geest's age pension rates were considerably reduced. The DSS calculated the income from the units on the basis of capital growth from $1.05 on 29 May 1992 to $1.30 on 28 May 1993 and a current value of $1.31.

Both parties agreed that the investments were managed investments. The point of contention was whether the 2016 units derived from the APF5 were purchased prior to 9 September 1988, and therefore excluded under s.1074A(b) from being assessed under Subdivision AA of the *Social Security Act 1991*.

The Tribunal found that the investment in APF5 was realised, within the meaning of s.9(10), upon restructuring of the investment in April 1992, referring to a letter to the applicants from Advance Asset Management which stated that all but one of their units in APF5 were redeemed and the proceeds applied to acquiring units in APF. Although no positive action by the applicants led to the realisation of the investment through restructuring, the restructure was accepted by a majority of unit holders at a meeting of which the Van Geests' were aware but did not attend.

As the original units were realised, the subsequent acquisition of the 2016 units in APF must be considered a new investment and, as they were not acquired before 9 September 1988, they must be assessed under Subdivision AA of the Act.

The AAT then considered the calculation of the income from the investments under ss.1074B and 1074E of the Act. These sections provided that the calculation of non-exempt managed investment returns are based on the investment's performance over the preceding 12 months and that a person's ordinary income on a yearly basis is taken to be increased by the value of the investment multiplied by the annualised rate of return (expressed as a % per year) on the investment product, based on performance over the previous 12 months. The AAT noted that the DSS had erred in assessing the Van Geests' income by calculating the growth of the investment (per unit) on a current unit value of $1.30 while calculating their yearly income on the basis of a current unit value of $1.31, thus overstating their annual income by $46.76. The DSS conceded that the unit value of $1.31 should have been applied in both instances.

The Van Geests then submitted that the 1228 units which were purchased after the first review period in May 1993 should not have been considered in the calculation of their income. The Tribunal accepted that submission and found that the 1228 units should not have been included in the May 1993 review to determine prospective earnings over the next 3 months, but should have been considered in the following review some 3 months later.

The Van Geest's final submission was that the method of calculation under s.1074B, applying the value of the investment at the end of the review period rather than at the commencement, was inequitable. The AAT noted their concern but considered that the method logically required that the value of the investment be taken at the date of the assessment as the assessment was 'not one to calculate actual growth or loss over the preceding twelve month period but is intended to determine income for a projected period'. The Tribunal further said that the most accurate gauge of the unit value was not the listing price, but the price at the close of the day's trading as that price reflects its real value in the market place.

Formal decision

The AAT varied the decision under review and remitted the matter to the respondent with directions:

- that in the assessment under review, the current unit value at 28 May 1993 of $1.31 be used to calculate the annualised rate of return on the investment product; and
- that the 1228 units purchased on 3 June 1993 not participate in the assessment of 29 May 1993 but instead be considered in the following three monthly review.

[B.W.]

Job search allowance: gift of assets

DE RYK and SECRETARY TO DSS (No. 9516)

Decided: 2 June 1994 by S.A. Forgie, L.Rodopoulos and I.L. Campbell.

De Ryk was appealing a decision to pay him jobsearch allowance at a reduced rate.

The issues

The DSS decided to pay De Ryk at a reduced rate because he was deemed to receive income amounting to $4560 a year from gifted and loaned assets. The issue to be decided was whether or not these amounts should reduce the amount of job search allowance payable to De Ryk.

Background

In 1991 De Ryk had given amounts of money to his children. Three of his four children had received $25,000 each. This money was used by his children to offset existing debts that they had. De Ryk lent an additional $11,000 to one of his daughters.

Which law applied?

The AAT recognised that if the gifted amounts had to be taken into account when assessing allowance then it was first necessary to determine which law applied in this case. After Ryk lodged his claim, the provisions relating to disposition of assets were amended with affect from 1 January 1993. Section 1125A, inserted by the amendment, requires the secretary when assessing the amount of allowance payable, to take into account the value of some assets which have been disposed of in the past.

The AAT decided that De Ryk had an accrued right to have his claim considered under the law in force at the date of his claim. The AAT had regard to many authorities including *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934, *Re Circovski and Secretary, DSS* (1992) 15 AAR 55 and *Esber v Commonwealth of Australia and Another* (1992) 106 ALR 577. On consideration, the AAT chose to adopt the reasoning in *Re Jin and Secretary, DSS* (unreported, Decision No. 9463, 11 May 1994). The AAT concluded that s.1125A did not apply to De Ryk's claim, which had been lodged and determined, and the determination appealed, before the section came into operation.

How should the relevant law be applied to the gifted amounts?

The AAT considered the eligibility criteria for job search allowance under s.513 of the Act. The rate at which the allowance is paid must be determined by reference to the assets test and the income test provisions of the act.

Acting on their decision that the amended s.1125A could not be retrospectively applied, the AAT turned to the original s.1126 and related provisions. Section 1126 provides that the value of an asset disposed of by a person during a pension year is taken into account in assessing the rate of allowance payable to the person and partner for 5 years from the date of disposal. The gifts of $25,000 to each of De Ryk's three daughters fell within the definition of disposal of an asset in s.1123.

But the loan of $11,000 could not be considered a disposal of income because s.11(11) of the Act specifically stated 'that lending of money after 27 October, 1986 is not a disposition of an asset for the purposes of s.1123': Reasons, para. 13.

Definition of pension year

Section 1126 referred to assets disposed of in the pension year. The AAT looked at two possible interpretations of pension year. First, the pension year may be the year commencing on the date when pension was first payable. Applying s.11(10)(8), this would mean that because De Ryk disposed of assets in August 1991 the disposal did not occur within the pension year commencing 31 August 1992, when allowance was first payable.

The second possible interpretation was that pension year refers to the calendar year in which a person received the pension or allowance. This would make the actual date of disposal irrelevant as long as it occurred in the same year as commencement of claim.

The AAT preferred the first interpretation, that the pension year commenced upon receipt of pension. This interpretation also accorded with the subsequent inclusion of s.1125A in the Act. Although the AAT stressed that s.1125A did not apply in this case, the Tribunal acknowledged that it 'is relevant in understanding what section 1126 means': Reasons, para. 21.

The AAT concluded that s.1126 is only to be applied in those cases where disposal of assets occurred while the person was in receipt of benefit or allowance.

Application of s.1126 to De Ryk's circumstances

The AAT found that because 'De Ryk disposed of $75,000 of assets before he claimed job search allowance, he had not disposed of any assets during a pension year within the meaning of s.1126': Reasons, para. 24. Thus the AAT found that the $75,000 should not be taken into account when assessing how much allowance was payable to De Ryk. In view of its decision on this point it was necessary to consider under s.1127, whether at the time De Ryk made the gifts he could reasonably have expected that he or his wife would become qualified for a payment under the Act.

Formal decision

The decision was set aside and the matter was sent back to the DSS for recalculation of job search allowance on the basis that the gifts were not relevant to assessment of rate payable.

[B.M]

Child disability allowance: care and attention

KRZNARIC-GRAHAM and SECRETARY TO DSS
(No. 9526)
Decided: 6 June 1994 by S.A. Forgie.

Krznaric applied for a child disability allowance (CDA) for her two daughters Aamie and Teagan. The application was refused by the DSS and this decision was affirmed by the SSAT. Krznaric appealed to the AAT.

The legislation

Section 954 of the Social Security Act 1991 provides that a person may receive CDA if the young person in respect of whom the allowance is paid is a 'CDA child of the person'.

The child must be a disabled child as provided by s.952 of the Act:

> 'Subject to section 953, a person is a disabled child if:
> (a) the young person has a physical, intellectual or psychiatric disability; and
> (b) because of that disability, the young person:
> (i) needs care and attention from another person on a daily basis; and
> (ii) the care and attention needed by the young person is substantially more than that needed by a young person of the same age who does not have a physical, intellectual or psychiatric disability; and
> (c) the young person is likely to need that care and attention permanently for for an extended period.'

The facts

Krznaric had two children aged 4 and 2. Both children had asthma and Krznaric applied CDA in respect of both children. The elder child, Aamie, was diagnosed by Dr Grigoleit as having moderately severe asthma. Her attacks were monthly, lasting 7 to 10 days. Krznaric had to supervise Aamie's activities and diet constantly. She had to administer medication daily and place her daughter on a ventalair machine 3 times a day for 30 minutes each session. Aamie had been admitted to hospital for her asthma on 3 or 4 occasions.

The younger child, Teagan had been diagnosed by Dr Grigoleit with mild-moderate asthma. He described the attacks as 'three-four monthly' and stated that they last for two weeks.

Medical evidence

Dr Ian Skelton, General Surgeon, had treated Aamie for her asthma condition since February 1993, when she was referred to him by Dr Grigoleit. His reports indicated that Aamie was prone to vomiting and had a poor appetite. When he examined her on 22 March 1993, she had a respiratory tract infection.

A Commonwealth Medical Officer, who saw Aamie on 23 February 1993 reported that she did not require substantially more care and attention on a daily basis than is usually required at that age.

Dr Grigoleit had treated Teagan since 24 September 1992 and reported that she had mild to moderate asthma and suffered attacks 'three-four monthly'. The AAT interpreted this statement to mean that Teagan had an attack each 3 to 4 months as he stated that the duration of each attack was 2 weeks. Dr Grigoliet did not indicate whether Teagan required substantially more care and attention than a child of her age without a disability.

Dr Skelton, who had also seen Teagan reported on 9 March 1993, that a chest X-ray showed extensive changes which were consistent with infection. He saw her again on 22 March 1993 and reported that despite antibiotics, X-rays showed persistent changes which had been present since July 1992. Due to her lack of response to treatment, he referred her to the thoracic unit at the Royal Children's Hospital. The AAT did not have access to the results of that referral.