that applicants only received a rate of return of 12% during the period. It was also not disputed that the capital of the investment of Mrs Carter had diminished over a period of time, to $59,728 in 1994.

It was agreed that the investment was a 'managed investment' under s.9(1A) and (1B)(a) of the Act, being an investment in which the money or property is paid into a body corporate or trust fund, for example, a public unit trust, and the invested assets are not held in the names of investors. Therefore, the income of the applicants from the GIO investment would be calculated in accordance with ss.1074A to 1074E of the Act.

Under s.1074B the ordinary income of the applicants was taken to have increased by the value of the investment multiplied by the annualised rate of return, based on the performance of the GIO product over the previous 12 months. The AAT found that there was no 'declared rate' on the investment because the GIO was to decide what rate of return was appropriate from time to time based on expectations and perfomance. Therefore, the rate of return for the period from November 1992 to November 1993 was calculated under s.1074E(5), (6) and (7) utilising a DSS formula. Under s.1074E(7), in working out the rate of return or loss on an investment product for a period of 12 months, the DSS was required to take into account (in addition to the value of the product, bonus issues and any other rights):

> '(d) the amount of the distributions (however described) made to the holders of the product during the period.'

The formula applied by the DSS was as follows:

> 'Rate of return = 100 x [(current unit price – unit price 12 months ago) + last 12 months income distributions per unit], divided by the unit price 12 months ago.'

The DSS included the total distribution for the period November 1992 to November 1993 in the formula. The applicants submitted that amounts described as 'return of capital' in respect of the GIO investment comprised solely owner's original capital and that the DSS had incorrectly included the return of original owner capital in calculating the rate of return. They submitted that the expression 'distributions' in s.1074E(7) does not include return of owner capital.

The DSS argued that s.1074E(7)(d) required them to include distributions of capital of all kinds in calculating the income on the managed investments. Further, the DSS did not concede that all of the amounts described as 'return of capital' in respect of the applicants' GIO investments comprised owner capital.

The AAT accepted, citing *Clifford* (1995) 38 ALD 695 and a number of other AAT cases, that the formula utilised by the DSS was an appropriate interpretation of s.1074E(7), and that it was recognised by the finance industry as the correct way to determine the annualised rate of return. It also found that the distribution from the GIO investment included at least some return of original owners capital. However, it found that the return of original owners capital was taken into account in the assessment of the value of the investment and that s.1074E(7)(d) was intended to include any return of capital within 'distributions (however described)'.

The AAT noted that, although correct, the formula appeared to have operated unfairly in this case, as the applicants were assessed as having 17% income from the investment at a time when the in hand receipts were less than 12% including some return of their original capital.

Formal decision

The AAT affirmed the decision under review.

[M.S.]

Income: proceeds of sale of house placed on term deposit

ACONLEY and SECRETARY TO DSS
(No. 11040)

Decided: 27 June 1996 by P. Bayne.

Background

In December 1994 Aconley sold her interest in her home. She received $100,000 from the sale and invested it in a 6-month term deposit. At all relevant times, Aconley intended to use the proceeds of the sale to purchase another home. This she did in July 1995. The DSS did not regard the proceeds of the sale as an asset, but treated the interest generated from the term deposit as income. This affected Aconley's rate of pension.

The issues

Was the interest earned from the moneys placed on deposit 'income' as defined in s.8(1) of the *Social Security Act 1991*? If this were so, then the amount of income imputed to Aconley by reason of the investment was to be assessed in accordance with s.1099DA.

The legislation

Aconley sought to rely on s.1118(2) of the Act. The Tribunal considered the heading and some parts of s.1118(1) also relevant:

> 'Part 3.12 — GENERAL PROVISIONS RELATING TO THE ASSETS TEST
>
> Division 1 — Value of person's assets
>
> Certain assets to be disregarded in calculating the value of a person's assets
>
> 1118.(1) In calculating the value of a person's assets for the purposes of this Act (other than subparagraph 263(1)(d)(iv) and sections 1125 and 1126), disregard the following . . .
>
> 1118.(2) If:
>
> (a) a person sells the person's principal home; and
>
> (b) the person is likely, within 12 months, to apply the whole or part of the proceeds of the sale acquiring another residence that is to be the person's principal home;
>
> so much of the proceeds of sale as the person is likely to apply in acquiring the other residence is to be disregarded during that period for the purposes of this Act.'

The Tribunal also referred to ss.1296 and 1072A(2).

Proceeds of the sale

Aconley argued that the combination of the amount gained on the sale of the house and the interest earned from the money on deposit were 'the proceeds of the sale'. As there was agreement that Aconley intended to purchase another house within 12 months, the 'proceeds of the sale' should be disregarded for any purposes of the Act. Accordingly, she argued that the proceeds could not be regarded as 'deposit money' and could not earn income for the purposes of assessment under s.1099DA.

The Tribunal looked at what 'purposes of this Act' meant within s.1118. The Tribunal concluded that the phrase as used in s.1118(2) could be characterised as 'the purposes of ascertaining the entitlement of a person of a kind mentioned in that provision to the income support entitlement of the Act': Reasons, para. 9.

The Tribunal characterised the sum of $100,000 deposited in the bank in two ways. For the purpose of assessing Aconley's entitlements under the Act, it retains its character as proceeds of the sale of the house and is to be disregarded. But the Tribunal also found that the sum may also be regarded as deposit money under s.1099DA, 'because for the purpose of this provision the sum of $100,00 is so disregarded. What is taken into account under s.1099DA is the interest earned on

that sum, and that interest money is a different sum': Reasons, para. 11.

The Tribunal referred to s.1072A(2) and concluded that as s.1118(2) 'does not have the effect that these moneys of the Applicant held on deposit are ignored for the purposes of Division 1A, there is no problem in simply applying them to the circumstances of the case of the Applicant':

Reasons, para. 14.

Formal decision

The decision under review is affirmed.

[M.A.N.]

Student Assistance Decisions

Austudy: Waiver of overpayment; AAT jurisdiction

TOBEN and SECRETARY TO DEETYA
(No. 10034A)

Decided: 2 July 1996 by M.T. Lewis.

This matter came before the AAT under liberty to apply, following a decision by the AAT which had affirmed the decision under review, that Toben was entitled to be paid AUSTUDY at the standard rate.

The issue

In the present application the AAT was asked to review the issue of an overpayment of AUSTUDY.

The facts

An overpayment occurred because, for the period 1 January 1994 to 4 February 1994, the applicant had been paid AUSTUDY at the standard rate and also at the away-from-home rate, thus receiving 'two lots of assistance'. The amount of the overpayment was $594.29. Recovery was sought of $546, as an amount of $48.29 had been waived by the DEETYA, for reasons unknown to the Tribunal. Toben sought waiver of the outstanding amount of $546.

Waiver and AAT jurisdiction

The AAT said that there was no doubt that the payment at the away-from-home rate had been made in error, and that DEETYA was empowered to raise the overpayment and recover it by way of deductions from an ongoing entitlement, under s.38 of the *Student Assistance Act 1973*. The issue was whether the overpayment should be recovered.

The application for review was lodged on 8 September 1994, and the AAT applied the provisions of the Act in force at that date.

It considered s.43(1)(a) of the Act, which defines a 'recoverable amount as a student assistance overpayment', and s.43(2) which provides for write off or waiver of the whole or part of a recoverable amount.

Although the jurisdiction of the Tribunal to review the recovery of the overpayment was not questioned by the DEETYA, the AAT said that it had to satisfy itself as to whether it had jurisdiction to review the decision.

Pursuant to s.36 of the Act, an application could be made to the Tribunal for review of a reviewable decision as defined in s.35. This meant a decision of the Student Assistance Review Tribunal (SART) which had 'either affirmed or varied a primary decision or had been made in substitution for a primary decision under s.28(1) of the Act: Reasons para.15. 'Primary decision' was defined in s.13(1) of the Act and did not include a decision made under s.42 of the Act.

Additionally subsections 20(3) or (3A) which allowed for reconsideration of decisions by a senior authorised person, or subsection 21(2) under which a person could request a review by SART, did not provide for a review of a decision made under s.43 of the Act.

The AAT concluded that a decision made under s.43 was not a primary decision as defined in s.13(1) of the Act, nor a reviewable decision as defined in s.35 of the Act. Therefore, the AAT decided that it had no jurisdiction under the Act, as then in force, to review a decision to write off or waive an overpayment. The AAT was also satisfied that no subsequent amendments to the Act had given the Tribunal retrospective jurisdiction to review the decision in question.

Formal decision

The Tribunal decided that it lacked jurisdiction to review a decision made under s.43 of the *Student Assistance Act 1973*

[G.H.]

[Contributors Note: Amendments to the Act brought about by the *Student Assistance (Youth Training Allowance) Amendment Act 1994* which commenced on 1 January 1995, instituted a new regime of review of decisions by abolishing SART and conferring jurisdiction in AUSTUDY matters on the SSAT. This jurisdiction includes the review of decisions concerning waiver and write-off of overpayments]