Prior to commencing the doctorate McAvoy enquired with the DSS as to how he should answer the question on the Application for Payment of Newstart Allowance form relating to whether he was enrolled for a course as a full-time student. He was advised to tick the 'No' box on the basis that the DSS saw a distinction between course work, and research work, and did not regard a research doctorate as a 'course'. McAvoy repeated this enquiry when the form was changed in 1993 and in the course of several reviews by the DSS and was always given the same advice.

Enrolled as a full-time student?

The AAT reviewed the case law relating to whether a person is 'enrolled in a full-time course'.

In determining whether McAvoy was enrolled as a full-time student, the AAT accepted that this requires consideration of both the enrolment particulars held by the university, and the facts surrounding the study undertaken. In view of the hours he spent in research and his enrolment status, the AAT was satisfied that McAvoy was enrolled as a full-time student.

Enrolled in a course of education?

The AAT saw no distinction between a student enrolled in a 'course of education' and one conducting a PhD by research. It decided that as a 'course of education' includes a research doctorate, McAvoy was enrolled in a course of education.

Waiver

Having found that there was an overpayment of job search and newstart allowance the AAT determined that the overpayment was a debt pursuant to s.1224 *Social Security Act 1991* (the Act). This was on the basis that the debt occurred due to McAvoy making false statements to the DSS. The AAT then considered whether the debt should be waived.

The AAT referred to s.1237A(1) of the Act which provides that a debt must be waived if it was attributable solely to an administrative error made by the Commonwealth, and the payments were received in good faith by the debtor. It decided that McAvoy's enquiries with the DSS had lead him to complete the forms in the way he did, and thus the debt was caused by administrative error. The AAT reviewed the meaning of 'good faith' and decided that his conduct evidenced good faith.

The AAT then went on to consider whether the debt could, in the alternative, be waived under s.1237AAD, which provides a discretion to waive a debt if certain criteria are met and special circumstances exist which make it desirable to waive the debt.

The AAT discussed the criteria of s.1237AAD which had to be satisfied. It did not accept the submission of the DSS that errors committed by DSS officers in the giving of advice similar to that given to McAvoy, were not special because they were so common. The AAT concluded that the debt could also be waived on this ground.

Formal decision

The AAT's formal decision was:

- to set aside that part of the decision of the SSAT made on 1 February 1996 which decided that McAvoy was not enrolled in a full-time course of education and to substitute the decision that McAvoy was enrolled in a full-time course of education;
- to set aside that part of the decision of the SSAT made on 1 February 1996 that there was no debt to the DSS by McAvoy and to substitute the decision that a debt exists in the sum of $37,574.25; and
- to affirm that part of the decision of the SSAT 'that if there be a debt raised against Mr McAvoy the right of the Commonwealth to recover should be waived pursuant to the provisions of s.1237A(1)'.

[A.A]

Disability support pension: valuation of property

KEREMELEVSKI and SECRETARY TO THE DSS (No. 11247)

Decided: 17 September 1996 by M.T. Lewis and I.R. Way.

Keremelevski sought review of a decision of the SSAT which purported to affirm the decision of an Authorised Review Officer of 18 January 1995 to affirm a primary decision of the DSS on 22 December 1994 to reduce the rate of disability support pension (DSP) paid to Keremelevski, because of the value of a property owned by him and his wife.

Keremelevski first received the DSP in 1991. The property, a house in poor condition at Cronulla, was not his principal home and so was an asset under s.11(1) of the *Social Security Act 1991*. It was first valued by a 'roadside valuation' in February 1992 by the Australian Valuation Office (AVO) at $200,000. Several subsequent valuations were conducted by the AVO, including a sworn valuation as at November 1993 at $284,000 and another as at June 1995 at $310,000.

Keremelevski challenged these valuations in declarations of estimated value, based on numerous estimates of the market value of the property by real estate agents, ranging from $250,000 to $280,000. However, he did not obtain a private valuation.

Jurisdiction of the AAT

The AAT was unable to identify the primary decision dated 22 December 1994, referred to by the SSAT. Instead, it identified a primary decision of 29 April 1994 and two decisions by a review officer, in June 1994 and, after further contact had been made with Keremelevski, in January 1995. It decided that as there was an identifiable primary decision by the DSS to reduce the Keremelevski's DSP on 29 April 1994 on the basis of the AVO valuation, it concluded that it had jurisdiction to hear the matter in spite of the SSAT decision.

The AAT decided that the matter related to the valuation of the property through the entire period that the DSP was paid. Further, it considered, and the DSS agreed, that it had jurisdiction to consider the valuations made up to the time of the hearing, including the valuation of June 1995 at $310,000.

Valuation of property

The AAT accepted that the correct valuation of the property must be determined assuming both a hypothetical willing but not anxious seller, and a hypothetical willing but not anxious purchaser, following *Spencer v Cth* (1907) 5 CLR 418.

On this basis, the AAT accepted all the AVO valuations, in particular the two sworn valuations, finding that they were careful and conservative, in contrast to some of the real estate agent valuations submitted by Keremelevski. The increase in value of the property was the result of its prestigious location. The AAT consequently determined that at all material times the valuations of the property provided by the AVO were to be used in calculating the rate of DSP payable to Keremelevski.

Formal decision

The AAT set aside the decision of the SSAT, and substituted its decision that

the valuations provided by the AVO were to be used when calculating the rate of DSP payable to Keremelevski.

[M.S.]

Job search allowance: whether moneys received 'income'

PATRICK and SECRETARY TO DSS
(No. 11366)

Decided: 7 November 1996 by Handley J.

The facts

Patrick sought review of a decision of the SSAT affirming a decision to reject his claim for job search allowance (JSA) in 1995, on the basis that his income exceeded the annual income threshold then applying ($16,744).

Patrick had been a partner in an accountancy firm known as Duesburys since 1987, when he had borrowed $160,000 from a bank to fund his entry to the firm. In 1993, Duesburys and Deloitte Touche Tohmatsu (Deloitte) merged. In December 1994, Patrick retired and agreed to assign his interest in Deloitte for the following consideration:

- Deloitte would lend the applicant $170,000 for 12 years, paid directly to the bank to pay off his loan taken out in 1987;
- the applicant would repay the loan to Deloitte, with interest, by 144 monthly payments of $1401.56;
- Deloitte would pay the applicant as a 'pension' $15,681.28 annually for 12 years in lieu of annuities; and 144 monthly payments of $1401.56.

The above payments by Deloitte to Patrick amounted to $32,500 annually. The DSS, in assessing whether Patrick was entitled to JSA, concluded that all the amounts paid by Deloitte to him were income, and hence Patrick received income in excess of the annual income threshold.

Patrick was living in New York, and the AAT decision was made on the basis of a written submission of the DSS, several letters from Patrick, and a letter from Deloitte.

Valuable consideration, earnings

The definition of 'income' in the *Social Security Act 1991* is very wide and includes any amounts earned, derived or received by a person for his or her own use or benefit, by any means and from any source, including valuable consideration, personal earnings, moneys or profits, whether it is of a capital nature or not (s.8(1) and (2)).

Patrick submitted that the payments he received from Deloitte were repayments of capital invested in the partnership and not income, or that he had purchased a pension for $170,000.

The AAT concluded that all the sums received by Patrick from Deloitte were income because they were valuable consideration for his retirement, and assignment of income in the partnership, or they were personal earnings or moneys or profits. It held that the phrase 'whether of a capital nature or not' in s.8(1) applied to each different kind of income, distinguishing *Hungerford & Repatriation Commission* (1990) 21 ALD 568 (a decision concerning the *Veterans Entitlements Act)*. It was thus irrelevant whether the payments were of a 'capital' nature. Further, although the monthly pension amounts were used to repay the loan and so Patrick did not 'receive' them, he had derived them because he was entitled to them under the agreement with Deloitte.

The AAT also found that the moneys payable to Patrick by Deloitte over 12 years were not an 'annuity' in the sense of being a payment to him on account of any purchase of an annuity (through the investment of moneys). Thus, it was not necessary to consider the 'immediate annuity' provisions in the Act.

Formal decision

The AAT affirmed the decision under review.

[M.S.]

Compensation recovery: requirement to claim compensation

RYAN and SECRETARY TO DSS
(No. 11330)

Decided: 24 October 1996 by G. Ettinger and J. Barber.

On 22 April 1996 the SSAT affirmed the DSS decision to cancel Ryan's disability support pension (DSP). Ryan had suffered a compensable injury whilst employed, and later had been paid the DSP. The DSS had cancelled his pension because it was argued that Ryan had an entitlement to workers' compensation payments, and had not made a claim for those payments.

The facts

Ryan did not attend the hearing, but evidence was provided by fellow workers, Simpson and Silva. Simpson told the AAT that Ryan had been employed under his own name as a security guard, and under the name of Williams as a handyman. Whilst working as Williams, Ryan fell over and injured his knee. He claimed workers' compensation. The workers' compensation insurer gave evidence that the last medical certificate provided by Williams (Ryan) was for August 1995, and so he was paid workers' compensation until then. The insurer had also been told that Williams was now working for another organisation.

The law

Section 1163 of the *Social Security Act 1991* provides that a DSP is a social security payment which might be affected by the receipt of a compensation payment. Section 1164(2) of the Act provides:

> 'If:
>
> . . .
>
> (c) the person or the partner has taken:
>
> (i) no action to claim or obtain the compensation; or
>
> (ii) no action that the Secretary considers reasonable to
>
> claim or obtain the compensation;
>
> the Secretary may require the person or the partner to take action specified by the Secretary.'

According to s.1164(3) the action to be specified by the Secretary must be action considered 'reasonable to enable the person to claim or obtain compensation'. If that action is not taken then the pension is not to be granted to the person until the person complies with the requirement (s.1164(5)). The AAT set out the issue to be decided as, whether Ryan had a continuing entitlement to compensation, and whether it was reasonable that the AAT direct Ryan to pursue a particular course of action to claim that compensation.

Entitlement to compensation

The AAT decided that Ryan and Williams were the same person, even though Ryan was not present at the hearing. It accepted the evidence of his fellow workers.

Ryan had been receiving the DSP since 1992, which was suspended in August 1995. It was argued for Ryan that if