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

he were directed to seek compensation for his work-related injury, this would breach the privilege against self-incrimination. He had previously been paid compensation for that injury in the name of Williams and now would have to apply in the name of Ryan. It would also be argued for Ryan that there was no longer an entitlement to compensation. The AAT noted that compensation payments had been suspended because of lack of medical certificates and not because of loss of entitlement as such. If Ryan was to reapply, a full investigation would be made of his entitlement to compensation payments. The AAT concluded that it was reasonable for Ryan to apply for compensation so that those investigations could be carried out.

Self-incrimination

The AAT referred to *Reid* v *Howard* (1995) 69 ALJR 863 where the High Court had found certain orders of the Supreme Court (NSW) invalid because they had purported to override the privilege against self-incrimination. This could only be overridden by the express words of a statute. Section 1164 of the Act did not expressly override the privilege. The AAT was referred to other judgments where it had been decided that where the privilege against self-incrimination was not abrogated by clear words, a court might still find an intention to override the privilege.

It was submitted that there was no intention here that Ryan incriminate himself. The AAT was referred to s.132 of the Act which provides that a notice may be given to a person requiring that person to give certain information to the DSS. Ryan had been required to inform the DSS that he was receiving compensation payments from 1992. He did not comply until 1995. This may be an offence under the Act pursuant to s.1346. According to his counsel Ryan had not appeared at the AAT because of the possibility of self-incrimination under the *Social Security Act*. To ask Ryan to apply for compensation would be tantamount to asking him to apply for prosecution under both the *Social Security Act* and the relevant compensation legislation.

The AAT concluded after considering all the evidence that it was reasonable that Ryan be required to apply for further workers' compensation payments. The AAT was guided by the High Court's views in this matter.

Formal decision

The AAT affirmed the decision under review.

[C.H.]

[Editor's Note: It is not clear from the reasons for the decision, how the AAT came to its conclusion. The High Court's view on the privilege against self-incrimination is that this privilege can only be overridden by the express words of a statute. The AAT found that there were no such express words in the *Social Security Act*. Nonetheless it still found that it was reasonable for Ryan to make a claim for compensation even though the possibility existed that this may be an offence.]

Rent assistance: overpayment

BLAKENEY and SECRETARY TO THE DSS (No. 11403)

Decided: 18 November 1996 by G. Ettinger and J.A. Shead.

The DSS raised an overpayment of rent assistance of $7139.50 in respect of the period from 7 January 1988 to 7 January 1993.

The facts

Blakeney's parents located and arranged the purchase of two houses in which Blakeney lived with her two children. She received rent assistance from the DSS in respect of her occupation of both properties.

In 1987 Blakeney was registered as the proprietor of a house in Umina. She believed that the house was put in her name because of her parents' age. Blakeney did not regard herself as the owner of the house, and regularly paid rent to her parents.

Following the sale of the Umina property Blakeney became the registered proprietor of a house in Thornleigh. She and her children lived there and she paid rent to her parents.

Blakeney's parents stated that their daughter did not contribute to the purchase price of either house but paid rent regularly. The houses were mortgaged against the parents' business and the rent paid by Blakeney did not cover the outgoings, which were paid by her parents.

The legislation

The legislation relating to rent assistance changed during the course of the period under review. For the period from 7 January 1988 to 11 June 1989 the provisions of the *Social Security Act 1947* were relevant. That Act was amended as at 12 June 1989 and it applied from then until 30 June 1991. The amendments introduced the concept of 'ineligible property owner'. The *Social Security Act 1991* (the Act) came into effect on 1 July 1991, and was the relevant legislation for the rest of the period under review.

The issues

The AAT considered the following issues:

- whether Blakeney qualified for rent assistance;
- whether she incurred an overpayment of rent assistance;
- whether she was an ineligible home owner at any time during the period; and
- whether there were grounds to waive or write off any overpayment.

Qualification for rent assistance

The AAT did not accept the submission of Blakeney that she held the properties as trustee for her parents. It decided that, as she was the registered proprietor of the properties, then the payments she was making to her parents in the period from 7 January 1988 to 11 June 1989 could not be regarded as rent. As she was not paying rent, she did not qualify for rent assistance.

Ineligible property owner

The AAT assessed whether Blakeney was paying 'rent' after 12 June 1989 in terms of the amended legislation, and whether she was an ineligible property owner. It concluded that the payments were not a condition of occupancy and that Blakeney had security of tenure in the houses. The AAT accepted the DSS submission that Blakeney was an ineligible home owner, and thus was not eligible for rent assistance.

Was the overpayment of rent assistance a debt?

The AAT accepted that when Blakeney informed the DSS that she was paying rent and that she did not own the properties, she had not intended to make untrue statements. However, although her statements were innocent mistakes, she had incurred a debt to the Commonwealth due to the provisions of s.1224(1) of the Act.

Waiver and write off

The AAT considered whether special circumstances existed to enable the debt to be waived or written off. It accepted the submission that Blakeney had accrued rights when she applied for review to the AAT of the decision in September 1993 and that, in accordance with the decision in *Lee v Secretary, Department of Social Security* (1996) 139 ALR 57, the *Hales* factors should be considered.