of paragraph (a) of the definition of "income" ... It is enough that the payments come within one of the paragraphs of the definition in order to be regarded as income for the purposes of the Act.'

(Reasons, para. 28)

The Tribunal considered that none of the exemptions listed in s.8 were relevant to Dewhirst's scholarship. In particular s.8(8)(zj) could not apply as Dewhirst's scholarship was not an approved scholarship nor could it be under s.24A.

The final point addressed by the Tribunal was whether the full amount received under the scholarship should be regarded as income. The Tribunal referred at length to comments made in *Marsh* on this issue. It concluded that although it was expected by the institution granting the scholarship that a large proportion of the scholarship would go toward research expenses, this was not relevant in calculating the rate of sole parent pension payable to Dewhirst. Scholarship payments 'are regarded as income because they are periodical payments in the nature of an allowance. Their gross amount must be taken into account without deduction': Reasons: para. 33.

Formal decision

The Tribunal affirmed the decision under review.

[M.A.N.]

Disability support pension: portability to New Zealand

SECRETARY TO THE DSS and FARR
(No. 11852)

Decided: 12 May 1997 by S.M.Bullock.

Background

Farr came to Australia in 1986. He was granted disability support pension (DSP) in March 1994. In September 1995, Farr and his wife attended a DSS office to advise that they needed to travel to New Zealand to visit Farr's sick mother. They were advised that their pension would be reviewed 6 months after their departure. Farr's mother died one week after they arrived in New Zealand. Payment of the DSP was stopped 4 weeks after the Farr's left Australia. Farr returned to Australia in November and sought review of the decision not to pay him for 2 paydays in November 1995. The SSAT set aside the DSS decision and as a result Farr was paid arrears of the pension in May 1996.

Issue

How long could Farr remain in New Zealand without affecting payment of his DSP?

The legislation

Section 1208(1) of the *Social Security Act 1991* (the Act) states that the provisions of a scheduled international social security agreement have effect despite anything in the Act. Schedule 4 of the Act contains an agreement between Australia and New Zealand. Article 8 of Schedule 4 deals with eligibility for Australian benefits by former residents of New Zealand and stated at the relevant time:

> 'A person who is present, but not ordinarily resident, in New Zealand shall not be eligible for an Australian portable benefit after a period which exceeds the period of temporary absence allowable for the corresponding New Zealand benefit under the legislation of New Zealand.'

The corresponding relevant New Zealand legislation is s.77(2) of the Social Security Act 1964 which states that a benefit shall be payable only for the first 4 weeks of any absence.

Department's advice

The DSS conceded that Farr had been advised by a departmental officer that his pension would be reviewed after 6 month's absence, despite the fact that counter staff should routinely advise clients that DSP was only portable to New Zealand for 4 weeks. The Farrs followed the departmental advice. The DSS acknowledged that the Farrs could have returned to Australia earlier if they had known that payment of the pension would cease after 4 weeks. However, the DSS submitted that the International Agreement applied to a person whether or not the person receives the pension under the Act or under the Agreement. It was not relevant how the person gets approved for DSP but only that the person is in receipt of DSP. Consequently s.1208(1) of the Act and the relevant New Zealand provisions applied. They argued that this section overrides s.1218 which deals with the payment of a pension for up to 6 months after a person's departure from Australia.

The Tribunal found that s.1208(1) overrides any other section of the Act and gives force to the Agreement between Australia and New Zealand. This is irrespective of whether 'the recipient of a disability support pension became eligible for that pension under the Act or the Agreement': Reasons, para. 37.

> 'The Tribunal finds that the effect of the Article 3.1 and Article 8.5 of the Schedule 4 Agreement in combination with s.77(2) of the New Zealand Social Security Act did apply to Mr and Mrs Farr with the effect that the disability support pension could only be paid to them for a period of up to but no more than 4 weeks absence from Australia.'

(Reasons, para. 38)

The DSS indicated at the hearing that if it was successful, it intended to recover the payments made to Farr as a consequence of the SSAT's decision. The Tribunal noted that Farr was honest and had followed departmental advice. The Tribunal commented that although no formal decision had been made about recovery of a debt, the Tribunal's view was that Farr should not be penalised for following departmental advice.

Formal decision

The Tribunal set aside the decision under review and determined that Farr was ineligible for the DSP for the pension paydays of 2 November 1995 and 16 November 1995.

[M.A.N.]

Overpayment: risk of suicide; whether special circumstances

SECRETARY TO THE DSS v ANDERSON
(No. 11920)

Decided: 30 May 1997 by J. Handley and C. Re.

Background

On 15 June 1994 Anderson suffered severe back injury during the course of his employment. For a short time after that he received weekly payments of compensation. He then received sickness allowance and later disability support pension.

On 29 May 1996 he settled a County Court action against his employer for the sum of $100,000. The terms of the settlement stated that the sum of $95,000 was paid for 'non pecuniary pain and suffering damages' and the sum of $5000 was paid for 'future lost earnings and lost earning capacity'.

On 5 June 1996 the DSS wrote to the compensation insurer seeking recovery of the sum of $14,232.14, being benefits paid to Anderson for the period 27 August 1994 to 10 May 1996. Because the DSS had failed to notify the insurer prior

to settlement, however, the settlement funds had been released to Anderson. The DSS then sought recovery from Anderson.

Anderson requested the DSS to review the matter and to disregard the compensation payment on the ground of special circumstances. An authorised review officer varied the decision by increasing the debt to $26,375.30. Anderson appealed to the SSAT, which decided that there was no debt as the compensation should be disregarded because of the special circumstances of the case. The DSS then appealed to the AAT for a review of the decision.

The issue

The issue was whether in the special circumstances of the case, the whole or part of the compensation payment received by Anderson should be treated as not having been made.

The legislation

The AAT referred to s.17 of the Social Security Act 1991 which contains the definition of compensation and provides that a disability support pension or a social security benefit are payments affected by compensation. The AAT also referred to s.17(3) which provides that the compensation part of a lump sum compensation payment is 50% of the payment where the payment is made in settlement of a claim.

It also referred to s.1184 which empowers the Secretary of the DSS to treat the whole or part of the compensation payment as not having been made if it is appropriate to do so in the special circumstances of the case.

Special circumstances

The AAT was satisfied that under the legislation the DSS could raise a debt of $26,375.30 against Anderson.

As to whether special circumstances could be found to exist, the AAT referred to the case of *Beadle v Director General of Social Security* (1985) 7 ALD 670, as the most useful basis for consideration of that term. That case considered that 'special' referred to circumstances that were uncommon, unusual or exceptional but were not required to be unique.

The AAT found that Anderson's dissatisfaction with legal advice received from his solicitor and the amount of legal costs paid by him, did not constitute special circumstances. However, the AAT found that it was appropriate to treat the whole of the compensation as not having been made because it found as a fact that Anderson was seriously and genuinely suicidal. The AAT said that Anderson's aggression, distress and sense of hopelessness were demonstrated during the hearing. The AAT also heard from Anderson's treating psychologist and accepted his evidence that he suffered from a severe depression by reason of his chronic pain and a severe personality disorder.

The AAT concluded that it was satisfied that the circumstances of Mr Anderson were 'special' as they were markedly different from the usual run of cases.

Formal decision

The SSAT decision was affirmed.

[G.H.]

Student Assistance decisions

AUSTUDY: meaning of full-time workload

SECRETARY TO THE DEETYA and STOJANOVIC (No. 11846)

Decided: 9 May 1997 by B.H. Burns.

The DEETYA sought review of a decision of the SSAT which had set aside the decision that Stojanovic was ineligible to receive AUSTUDY in Semester 1 of 1995 and that a debt of $4220.54 was recoverable from her.

The facts/circumstances of the case

In 1995, Stojanovic was in the second year of the Bachelor of Nursing at the University of South Australia. She was unable to undertake the normal second year program because she had to repeat a subject she had failed in the first semester of her first year. She had a HECS loading of 0.250 in Semester 1 and 0.500 in Semester 2. Looking over the academic year as a whole, her HECS loading was 0.750, which represented 75% of the normal full-time workload for a year of the course. On this basis, she was designated as a full-time student by the university.

On her AUSTUDY (Continuing) Application form, she indicated that she was a full-time student in 1995 and would be studying at least 1 year-long subject. She was paid at the independent rate during Semester 1 of 1995. An enrolment check conducted between the DEETYA and the university in June/July of 1995 indicated that she was not a full-time student in Semester 1 because her HECS loading for that semester was only 0.250.

The legislation

Regulation 34 of the AUSTUDY Regulations requires a student to be enrolled in at least three-quarters (75%) of the normal amount of full-time work for a period as set out in regulation 35. Regulation 35(1)(a) provides that, for a year of the course, the normal amount of full-time work is the standard student load determined by the institution for the purposes of HECS. Regulation 35(1)(b) provides that, if the course is a HECS designated course, the normal amount of full-time work for a semester of the course is '0.5'. Regulation 36 provides for a reduction to two-thirds (66%) of the normal workload if the student cannot meet the normal workload because of the institution's requirements, or a direction or recommendation from the academic registrar or equivalent officer. Regulation 36 cannot apply to more than half of an academic year.

The issue

The critical issue was whether the workload test is a year-long test, a semester-long test, or both.

The DEETYA submitted the workload test is a semester-long test. It argued that Stojanovic did not meet the requirement of 75% of the normal course workload for Semester 1 of 1995 because her HECS loading of 0.250 represented only 50% of the normal course workload. Although the DEETYA conceded that the concession in regulation 36 applied to Stojanovic in Semester 1 because her failure of a subject in the first year of her course meant that she was unable to meet the university's usual course requirements in 1995, her HECS loading in that semester did not satisfy the reduced test of 66% of the normal workload in that semester (that is, a HECS loading of 0.325). However, her HECS loading of 0.500 in Semester 2 represented 100% of the normal course workload. Therefore, she was eligible for AUSTUDY in Semester 2 only.

Stojanovic submitted the workload test is a year-long test which may be applied across a full year so that if the student meets the HECS loading threshold of 0.750 (or 0.666 if the regulation 36