paid voluntary work or paid employment; and

(c) the cessation does not exceed 20 hours per week;

the person does not cease to be qualified for a carer payment merely because of that cessation.'

The AAT considered that the fundamental consideration was the amount of time available to care for a severely handicapped person, and to undertake other tasks. It was not the amount of time spent in employment,but the time during which constant care had ceased, that was critical.

The AAT also noted the provisions of s.198(2) which allows qualification for the carer payment to continue where a carer temporarily ceases to provide constant care for periods or aggregates of periods not exceeding 52 days a calendar year. The AAT concluded that the purpose of this sub-section was to allow carers to obtain respite for the equivalent of one day a week, without losing their entitlement to the carer payment, and that this provision was in addition to and separate from the provisions of s.198(2AA) above. The AAT noted that Retallack would be unable to hold permanent part-time employment unless the position allowed sufficient flexibility to meet the uncertain carer demands of her daughter. Nevertheless, the AAT concluded that Retallack was able, employment opportunity permitting, to work for more that 20 hours a week.

The decision

The AAT set aside the decision and substituted its decision that Retallack did not qualify for the carer payment.

[P.A.S.]

Rate of pension: carries on a business

EKIS and SECRETARY TO THE DSS (No. 12731)

Decided: 13 March 1998 by K.L. Beddoe.

The background

Ekis was a real estate agent in receipt of age pension during 1996 and 1997. In calculating her rate of age pension the DSS took into account gross earnings. Ekis sought to have her expenses as a real estate agent deducted under the social security legislation. The deductions sought had been allowed by the Commissioner of Taxation for assessment of income tax.

The issue

The issue before the AAT was whether Ekis was an employee or was 'carrying on a business', as it was only in the latter case that expenses could be deducted in calculating her level of income for social security purposes.

The legislation

Section 1075(1) of the *Social Security Act 1991* (the Act) provides:

'Permissible reductions of business income

1075(1) Subject to subsection (2), if a person carries on a business, the person's ordinary income from the business is to be reduced by:

(a) losses and outgoings that relate to the business and are allowable deductions for the purposes of section 51 of the Income Tax Assessment Act; and

(b) depreciation that relates to the business and is an allowable deduction for the purposes of subsection 54(1) of the Income Tax Assessment Act 1936 or Division 42 of the Income Tax Assessment Act 1997; and

(c) amounts that relate to the business and are allowable deductions under subsection 82AAC(1) of the Income Tax Assessment Act 1936.'

It was not in dispute that the earnings as a real estate salesperson were 'ordinary income' within the meaning of s.8 of the Act.

Real estate sales work

Ekis was a commission only salesperson with L.J. Hooker, at its Beenleigh office, though concurrent work with other agencies was allowed after prior arrangement and agreement of the franchisee. Ekis' income was a variable proportion of the net commission from sales once the franchise company had taken its percentage. There was no written contract between franchisee and salespersons as to terms of engagement though evidence was given of a verbal contract. Ekis and other salespersons spent roughly 50% of their time in the office, and for the rest organised their own work in sales in the field. Each salesperson was required to be in the office for a whole day once a week.

The responsibilities of the franchise company and franchise manager were to provide various office functions, such as receptionist, office telephones, stationery, contracts, receipts, etc. All property keys were secured at the office. Bulk advertising of listings under the L.J. Hooker banner were placed by the office in newspapers. Sales meetings were organised weekly. At these the franchise manager repeatedly stated to salespersons that they were 'a business within a business', a term to which the AAT attached some significance: Reasons, paras 18, 23, 24, 55. However the franchise manager's evidence to the AAT was that she considered the relationship between the franchise company and the salesperson to be that of employer/employee.

L.J. Hooker forwarded the salespersons' taxation instalments on a monthly basis to the Australian Taxation Office (ATO), and made superannuation contributions on behalf of salespersons.

The responsibilities of the salespersons included supplying their own business cards (though they bore a corporate logo); paying for the corporate wardrobe (though its use was optional); paying all outgoings of petrol, vehicle maintenance, parking fees, mobile phone charges, insurance for passengers they carried in their vehicles. (Workers compensation insurance was paid by the franchise company.) No sick leave or holiday pay was provided. Ekis held formal qualifications to practise on her own account as a principal, and to own her own franchise.

'Business'

The AAT looked at the approach taken by the SSAT, which accepted that the concepts of being an employee and of carrying on a business were mutually exclusive, and had determined that Ekis was an employee, applying principles arising from *Stevens and Bodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, and *Market Investments Limited v Minister for Social Security* (1969) 2 WLR 1.

The AAT noted that the Act provides no definition of the term 'business.' On the other hand, the *Income Tax Assessment Act 1936* (the Tax Act) defines 'business' as 'any profession, trade, employment vocation or calling but does not include occupation as an employee' (s.6(1)).

If it were the case that the meaning in social security legislation was to be the same as in the taxation legislation, the AAT said, it would have been easy to incorporate the definition of 'business' found in the taxation legislation into the Act. Absent that reference, the AAT considered it inappropriate to infer the exclusion of 'occupation as an employee', an exclusion found in the Tax Act. The AAT cited the High Court decision in *Read v Commonwealth of Australia* (43 *SSR* 555) for support for the need for caution in applying decisions construing concepts arising in taxation matters to matters arising in social security, though *Read* concerned the definition of 'income', which is specifically defined in the Act.

The AAT made reference to a dictionary definition of 'business' as 'one's occupation, profession or trade'. It was

noted that this definition makes no reference to whether a person was an employee.

'Carries on a business'

The Act allows income to be reduced by deductions allowable under the Tax Act, if a person carries on a business (s.1075(1)). In s.51(1) of the Tax Act, allowable deductions include losses and outgoings incurred in 'carrying on a business'. The AAT said that some guidance could be found from the case law interpreting s.51(1) under the Tax Act. Reference was made to *Ferguson v FCT* 79 ATC 4261 where a number of elements were considered, including the nature of the activities and whether they have the purpose of profit making, the repetition and regularity of the activities, the organisation of the activities in a business-like manner, the keeping of books and records and the use of a system, and the volume of the operation and the amount of capital involved.

However, the AAT said that whilst guidance could be found in the case law relating to 'carrying on a business' for taxation purposes, ordinary concepts of 'carries on' also were applicable.

Allowable deductions

The AAT found that Ekis was carrying on a business. The factors said to point to this were:

> 'the skill and personality . . . employed in discharging her duties, the ability she had to seek and establish her own sales leads as well as follow up those sales . . . the supply of the majority of her own equipment to effect sales, the bearing of all operating maintenance and insurance costs, the fact that the majority of her time and thus her duties discharged in that work time was not supervised or directed by the franchise operator and perhaps most importantly the possession of an agent's licence allowing her to operate as a principal.'

(Reasons, para. 52)

The AAT went on to find that Ekis' ordinary income was derived from her business as a real estate salesperson in accordance with s.1075(1), and both elements of s.1075(1)(a) were met: the first element being met because the outgoings related directly to Ekis' business, and the second, because deductions had been allowed by the ATO.

Reference was made by the AAT to the inconsistencies that necessarily arise within the Act in the treatment of income of an employed agent, and of an agent found to be conducting his or her own business. There is some suggestion in the reasons that this is anomalous, but as the AAT points out, it is so because of the specific wording of s.1075. Whereas s.1075 only allows deductions for outgoings where a person carries on a business, s.51 of the *Tax Act* allows deductions both for outgoings where incurred when carrying on a business and where incurred in gaining or producing assessable income.

Formal decision

The AAT set aside the decision under review and substituted the decision that Ekis' losses and outgoings as a real estate salesperson were deductible from her ordinary income for purposes of calculating her rate of pension.

[Contributor's Note: Ekis has been appealed by the DSS to the Federal Court. It is also of interest to note that in *Laman and the DSS* (decided 15 May 1998 by K.L. Beddoe), the importance of the holding of a principal's licence and the receipt of commission-only payments is also highlighted. In *Laman* neither feature was present, and it was held that Laman was not carrying on a business as real estate sales person and therefore gross income was to be used to calculate the rate of payment of allowance.]

[M.C.]

Family payment debt: waiver

WILSON and SECRETARY TO THE DSS
(No: 12836)

Decided: 28 April 1998 by D.P. Breen.

The SSAT had affirmed a DSS decision to raise and recover a debt of family payment of $499.40 for the period 4 January 1996 to 23 May 1996.

The facts

Wilson's husband had changed jobs and consequently increased his salary. Wilson immediately notified the DSS and was sent an estimate form concerning her combined income. She completed this form and returned it to the DSS. In December 1995 she received a letter in which it was stated that the DSS would continue to pay her family payment in 1996 on the assumption that her combined income for 1994-95 was below the limit. Wilson was advised to contact the DSS within 14 days if this was incorrect. Wilson did not respond to this letter even though her combined income for 1994-95 was above the limit. As a result a debt was raised for family payments paid in 1996.

The law

Section 1237A(1) of the *Social Security Act 1991* provides:

> 'Administrative error
>
> Subject to (1A), the Secretary must waive the right to recover the proportion of a debt that is attributable solely to an administrative error made by the Commonwealth if the debtor received in good faith the payment or payments that gave rise to that proportion of the debt.'

The debt

It was not argued before the AAT, and the AAT accepted, that Wilson owed the debt.

Waiver

The DSS argued that Wilson had failed to provide relevant information as requested in the letter of December 1995. Wilson argued that the overpayment was caused by departmental error. She had previously advised the DSS in writing in the form provided, that her family's income would increase above the limit. Wilson further argued that even if she had provided the information in December 1995, there was no guarantee that the DSS would not have continued to pay her in error.

The AAT found Wilson to be prompt and honest in her dealings with the DSS, as proven by her contact after her husband changed his job. Wilson had done her best to keep the DSS fully informed of her income. The AAT concluded that Wilson had not intended to mislead the DSS.

The AAT found that the debt was due solely to departmental error and therefore the debt should be waived.

Formal decision

The AAT set aside the decision of the SSAT and substituted its decision that the family payment debt of $499.40 is to be waived.

[C.H.]

[**Contributor's note**: Presumably the finding by the AAT that Wilson was prompt and honest, and had not intended to mislead the DSS was a finding of 'good faith'. This finding takes no account of the Federal Court in *Secretary to the DSS v Prince* (1997) 3(3) *SSR* 37.]