Research Council Report, *Home Equity Conversion in Australia*. That report made reference to the distinction between sale and loan plans for equity conversion in the following terms:

> 'Under a sale plan, older people sell their homes to an investor in return for a "life or long term tenancy" agreement . . .
>
> Under a loan plan, older people mortgage their home to an investor or financial institution and retain ownership of the home . . .
>
> The repayment of the loan and interest is not made until the end of a specified period or the older owner moves out or dies.'

It was submitted for McDicken that a home equity conversion arrangement is different from a home equity loan in that in the latter, the equity in the home is merely used as security for the loan. With a home equity loan there is periodic repayment towards repayment in full. The home equity loan does not anticipate the sale of the house to effect repayment.

It was submitted that ambiguity in the definition of 'home equity conversion agreement' required recourse to the Explanatory Memorandum to determine meaning. The AAT agreed that such recourse was appropriate as the literal meaning required clarification in accordance with s.15AA of the *Acts Interpretation Act 1901*, in order to establish the purpose or object of the provision. The AAT said that the Explanatory Memorandum made it clear that the new provision was not intended to apply to ordinary home loans. The AAT said that what the Government intended was that the provision deal with home equity conversion plans, not ordinary loan agreements, secured by a mortgage, requiring ongoing periodic interest payments, as was the nature of McDicken's loan. The potentially wide definition in s.8(1) therefore should be read down. The AAT noted that support for its approach was to be found in *Secretary Department of Social Security v McLaughlin* (1997) 48 ALD 536 which confirmed that the term 'income' does not extend to a bona fide loan.

The AAT pointed out that the Act makes provision for assessing income on investments such as the investment that McDicken had financed by taking out the loan and for the Department to assess both the investment and the loan as income would be 'double dipping'.

Formal decision

The AAT set aside the decision under review.

[M.C.]

Federal Court Decisions

Sole parent pension: dependent child

SECRETARY TO THE DSS v LOWE
(Federal Court of Australia)

Decided: 28 May 1999 by Burchett, Kiefel and Hely J.J.

The DSS appealed against the judgment of the Federal Court at first instance that neither Lowe nor his ex-wife Schembri, had a dependent child, and thus neither were entitled to be paid sole parent pension.

The facts

Lowe and Schembri have one child, Serena. They divorced in 1992 and agreed to share the care of Sarina and so did not obtain a court order. Sarina lived with each parent on alternate weeks, the changeover day being Friday. The financial burden of caring for Sarina had been shared, and major decisions about her care had been made jointly. The parent with whom Sarina was living at the time made the daily decisions. The AAT had found that Lowe and Schembri shared equally all the parenting rights, duties, responsibilities, care, concern, contact time, love, affection, hopes and ambitions.

The AAT decision

Because Schembri had ceased work to spend more time with her daughter, the AAT decided that Schembri's financial needs were greater than Lowe's and on this basis she should be paid the sole parent pension.

The Federal Court at first instance

The Court decided that this particular situation did not fall within s.251 of the *Social Security Act 1991* (the Act) and pension could not be paid to either parent.

The law

Section 249(1) of the Act provided that sole parent pension could only be paid to a person who has an 'SPP child'. According to s.250 the natural child of a person can only be an SPP child if the child is a 'dependent child of the adult' and had not turned 16. Sarina had not turned 16. 'Dependent child' is defined in s.5(2) as:

> **'5.(2)** Subject to subsections (3) and (6) to (8), a young person who has not turned 16 is a **dependent child** of another person (in this subsection called the **'adult'**) if:
>
> (a) the adult is legally responsible (whether alone or jointly with another person) for the day-to-day care, welfare and development of the young person, and the young person is in the adult's care; or
>
> (b) the young person:
>
> (i) is not a dependent child of someone else under paragraph (a); and
>
> (ii) is wholly or substantially in the adult's care.'

Section 251 of the Act provides:

> **'251.(1)** A young person can be an SPP child of only one person at a time.
>
> **251.(2)** If the Secretary is satisfied that, but for this section, a young person would be an SPP child of 2 or more persons, the Secretary is to:
>
> (a) make a written determination that the Secretary is satisfied that that is the case; and
>
> (b) specify in the determination the person whose SPP child the young person is to be; and
>
> (c) give each person a copy of the determination.'

'At a time'

At first instance the Judge decided that Sarina was in the care of each parent for one week only. She was never in the care of both parents at the one time so there was no reason to apply s.251(2)(b).

The Full Court found this reasoning incorrect for two reasons. It found the construction of the term 'at a time' by the judge narrow and inflexible, and it ignored the purpose and context of s.251:

> 'This is not the way beneficial legislation should be construed. The purpose is plainly to identify the parent who should receive the provision in respect of the child, not to eliminate the provision. A generous construction of the language of this legislation, preferring the substance to the form, and so as to promote the fair and consistent effectuation of its objects, is required by the Court.'

(Reasons, para. 7)

The Full Court found that 'time' is not restricted to a short time and may refer to a substantial period. The expression 'at the same time' can be construed as 'during the same period'. Section 251 looks at the arrangements for the care of the child during a period and:

> 'Asks whether, during that period, more than one person would, but for the section, fulfil the statutory conditions for entitlement to the pension. It stands to reason the period in question must be long enough to make the inquiry meaningful — the period must be sufficient to be

capable of entitling a person or persons to the pension.'

(Reasons, para. 7)

The Court then considered the history of s.251 and noted that the section had been in the *Social Security Act 1947*. When the 1947 Act had been repealed and replaced by the 1991 Act, Parliament made clear that the new Act was intended to reflect existing policy but in clear English. Section 52 of the 1947 Act did not use the expression 'an SPP child of only one person at a time'. It simply provided that where the child was a qualifying child of two or more persons, a determination was to be made that the child was a qualifying child of one person only. Section 251 was not intended to amend the law but to make it simpler to understand. Therefore the original form of s.52, can be used to confirm that construction of s.251.

The Full Court found that the judge at first instance was incorrect to require the young person to be in the adult's immediate physical presence at all times over a fortnightly period. It was noted that most children would attend school, visit relatives and go on holidays, without their parent. During that time the child remained a dependent child of the caring parent. The Court referred to the meaning of 'care' as outlined in several AAT and Federal Court decisions and found that 'care' had a broad meaning.

Dependent child

In *Secretary to the DSS v Field* (1989) 25 FCR 425; (1989) 52 *SSR* 694 the Full Court of the Federal Court considered the definition of 'dependent child' in the Act which then referred to the parent having the right to make decisions about the child's care and control. The Court recognised that a right of access to the child may also involve the right to have and make decisions concerning the child's care and control. However, the corollary of that finding was that the custodial parent will continue to have a right to care and control of the child during short access periods even where those periods are frequent. The Court noted that amendments to the *Family Law Act* in 1996 had shifted the focus from parental rights to parental responsibilities with respect to the child. However, it found that this did not affect the earlier court decisions that the custodial parent retained the right to care and control during short periods of absence of the child.

The Court endorsed the conclusion in *Vidler v Secretary to the DSS* (1995) 61 FCR 370 that, where the care of the child is shared, there is nonetheless a statutory obligation to make a choice in favour of one of the competing parties to the exclusion of the other.

Qualification for pension

At first instance the judge had found that neither parent was qualified for the pension for the whole of the pension period before the pension was paid. That is, the legislation did not apply to a parent who had the care of a child for a series of discontinuous periods. The Full Court referred to *Secretary to the DSS v Wetter* (1993) 40 FCR 22; (1993) 73 *SSR* 1065 and concluded:

> 'These authorities are united in suggesting that the whole of the arrangements for the care of a child should be considered when a determination is made as to whether the child is in a particular parent's care. It is not appropriate to dissect overall arrangements into discrete segments, unless those segments are sufficiently to substantial to attract the principle discussed in *Field*.'

(Reasons, para. 14)

The Full Court found that the care of Sarina was shared by both her parents and it was not appropriate to regard either of them as having the care of Sarina in an exclusive sense each alternate week. The arrangement for making decisions about Sarina's care was agreed between the parents so they did not exercise their responsibilities exclusively. The Court quoted with approval the AAT decision of *Vidler and Secretary to the DSS* (1994) 20 AAR 223; (1994) 82 *SSR* 1194 where the AAT had found a consistent pattern of care and control between the two parents, alternating every few days. This meant that both parents had the child as a dependent child for the whole of the period. The Court concluded that this was also the case here. Lowe and Schembri had care of Sarina through the whole of the period.

Formal decision

The Full Court allowed the appeal.

Because Schembri had not been joined as a party to the proceedings and because Lowe's appeal had been dismissed at first instance, the Full Court had to elaborate on the Order to reflect its reasons for judgment. It made a declaration that the AAT did not err in law in awarding the sole parent pension to Ms Schembri.

[C.H.]

Case management activity agreement: notices

ARNOLD v SECRETARY TO THE DEETYA
(Federal Court of Australia)

Decided: 18 December 1998 by Wilcox J.

Arnold appealed against the decision of the AAT that she had failed to enter a new Case Management Activity Agreement (CMAA). This was a breach of the *Employment Services Act 1994* (the ESA Act) and payment of her newstart allowance was cancelled.

The facts

In late 1995 Arnold was being paid newstart allowance and had entered into a CMAA. In October 1995 the DEETYA wrote to Arnold requesting that she attend an interview. Arnold failed to attend that interview. On 30 November 1995 a further letter was sent to Arnold requesting that she attend an interview on 8 December 1995. Arnold contacted her case manager and advised she was unable to attend because of an exam. A new appointment was made for 18 December and Arnold was sent a letter on 11 December. The letter advised of the date and place of the interview and stated 'the focus of this interview is to complete a case management activity agreement'. On the same day Arnold was sent a letter from her local office referring to the interview and advising that a new agreement would focus on helping her obtain work. Arnold did not attend the interview on 18 December. As a result, a further letter was sent to her stating 'I am satisfied that you have unreasonably delayed entering into an agreement'.

'Requirement' in section 38

Section 38(5) of the ESA Act provides:

> '(5) If the person is required to enter into a Case Management Activity Agreement under subsection (3) or (4), the Employment Secretary must give the person written notice of: . . .'

Arnold argued that if a notice is to comply with s.38(5) it must use the word 'require'. Because the letters did not use that word, they did not comply with s.38(5). The Court agreed with the AAT that the letters had been sufficiently clear because they had referred to 'the focus of the interview' as being to complete a CMAA. There was an expectation a new