person' should not, in the view of the Court, be construed narrowly or restrictively. The word '*payable*' is defined in dictionaries as being a sum of money that is to be paid or is capable of being paid. If a sum is capable of being paid, then the amount to be paid must be calculated. Weinberg J rejected the argument that wherever 'payable' is used in the Act, it is a threshold question of whether an allowance is to be paid, and that the Act always addresses 'calculation of the rate payable' specifically. The sections of the Act must be read in light of the purposes of the Act and where appropriate, extrinsic material. A purpose of the Act is to ensure that people cannot deprive themselves of assets and then receive a pension.

> The word 'payable' in s.1125A, even when used in conjunction with the word 'whether', necessarily, albeit implicitly, assumes a capacity to calculate a rate of entitlement. This interpretation seems to me to accord with the requirement that a purposive construction be given to a provision of this nature.

(Reasons, para. 107)

The Court noted that the sections surrounding s.1126 dealing with disposal of assets in pension years incorporate calculation of the rate payable. It was logical that the same reasoning would apply to s.1125A.

> The distinction between pre-pension years and pension years which is embodied in ss.1125A and 1126, provides no reason why s.1125A alone should be construed as an 'all or nothing' provision, while s.1126 should be construed as incorporating the elaborate calculation methods.

(Reasons, para. 109)

Weinberg J specifically endorsed the finding of the SSAT that Anstis' interpretation of Note 4 to s.1125A would make the introduction of s.1125A meaningless. The SSAT was correct in finding that the purpose was to ensure that s.1125A was not applied retrospectively.

Parenting allowance

The Court accepted Anstis' arguments regarding the construction of s.1125A as it applied to his wife.

> The expression 'payable to the person' in s.1125A(1) should be confined 'to the person who has disposed of an asset' as set out in s.1125A(1)(a). It does not apply to the person who is claiming the pension, benefit, payment or allowance.

(Reasons, para. 114)

The Court acknowledged that the word '*person*' could be read broadly enough to encompass a person who claims a pension or benefit. This would accord with the objects of the Act, but:

> At the end of the day, however, I am not persuaded that I should give the word 'person' in s.1125A an interpretation which is so much at odds with the ordinary and natural meaning of the word in the context of the section in which it appears.

(Reasons, para. 120)

Pension year

The Court referred to the AAT decision of *De Ryk and Secretary to the DSS* (1994) 35 ALD 85, where the AAT had found that because s.1125A had been introduced into the Act after De Ryk had disposed of assets and lodged his claim, it did not apply to him. The AAT considered the definition '*pension year*' in s.11(10) and concluded that De Ryk had disposed of his assets before the commencement of the pension year because it was before De Ryk had applied for a pension. The Court did not believe that the AAT decision of De Ryk had been decided correctly because the words extending the meaning of pension year in s.11(1) had not been referred to.

The definition of 'pension year' in s.11(1) expanded the term for the purposes of s.1126. The term appeared to cover the 12 months prior to the date the pension first became payable, the 12 months from the date from which the pension year commences and the following 12 months. The Court did not finally determine the question because it did not find it necessary to do so for the purposes of this case. However, it noted that this was one possible interpretation.

Because s.1126(1) applied rather than s.1125A, the value of the assets disposed of by Anstis was to be taken into account for five years. Although s.1125A did not apply to Mrs Anstis, s.1126 did and thus the decision to take into account the disposed assets when determining her rate of payment was correct.

Formal decision

The appeal was dismissed, and there was no order as to costs.

[C.H.]

Newstart allowance: 'actively seeking paid work'

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

Decided: 24 June 1999 by Branson J.

Castleman appealed to the Federal Court against an AAT decision that his claim for newstart allowance should be rejected on the basis he did not satisfy the activity test.

The facts

Castleman is a certified practising accountant who has been employed as a university lecturer and by the Tax Department. He had also completed a Diploma of Teaching although at the time of the AAT decision he had not completed a period of practical teaching. Centrelink rejected his claim for newstart allowance on the basis that Castleman was not prepared to look for all types of work he was capable of doing.

The law

Section 593(1) of the *Social Security Act 1991* (the Act) provides that a person is qualified for newstart allowance if, throughout the period, the person is unemployed and satisfies the activity test. Section 601(1) of the Act states:

> **Activity test**
>
> **601.(1)** Subject to subsections (1A) and (3), a person satisfies the activity test in respect of a period if the person satisfies the Secretary that, throughout the period, the person is:
>
> (a) actively seeking; and
>
> (b) willing to undertake;
>
> paid work, other than paid work that is unsuitable to be undertaken by the person.
>
> **601.(1A)** The Secretary may notify a person (other than a person who is not required to satisfy the activity test) who is receiving a newstart allowance that the person must take reasonable steps to apply for a particular number of advertised job vacancies in the period specified in the notice.

The AAT decision

The AAT found that Castleman was making written applications for employment in his particular field of expertise but was not prepared to actively seek work outside that field. The AAT stated that paid work was any work except for work that was unsuitable to be undertaken by the person. The AAT also found that Castleman had

refused to sign a 'pre-grant activity check list' which committed him to look for at least five jobs a fortnight as required by s.601(1A). The AAT emphasised that Castleman was required to apply for jobs that he might obtain even though he believed himself to be over-qualified for those jobs. A job seeker is not restricted to searching for jobs in his or her preferred employment area. The AAT found that the requirement that Castleman make five applications a fortnight was lawful and by refusing to even attempt this level of applications, he prevented himself from selling his labour on the open market.

'Satisfies the activity test'

Branson J noted that the AAT had misquoted s.601(1A) of the Act, and that the subsection had no application in this case. It applied only to persons who were receiving newstart allowance.

The Court quoted *Spencer v Secretary to the DSS* (1998) 83 FCR 306 where it had been found that the activity test did not require that steps taken to obtain work be reasonable or have a realistic prospect of success. Section 522(1) did not require reasonable steps to be taken to obtain employment. Branson J found that the issue in this case was:

> Whether it [the AAT] was satisfied that in respect of any relevant period the applicant was actively seeking, and willing to undertake, paid work other than paid work that was unsuitable to be undertaken by him.

(Reasons, para. 17)

This could be divided into two aspects, namely when the applicant was actively seeking paid work throughout the period (other than unsuitable work), and whether the applicant was willing to undertake paid work. The term 'paid work' in the context of s.601(1) 'creates an obligation on a person required to satisfy the activity test to seek every kind of paid work which is not unsuitable for him or her to undertake, or even a range of such work': Reasons, para. 18.

A person is required to actively seek paid work, not just a particular class of work, even though the possibility of actually obtaining such work was low. If the person restricted their search, then the Secretary (or the AAT) may conclude that the person was not genuinely seeking paid work, or they were not actively seeking paid work. Branson J found that the AAT failed to consider this question because it found that Castleman had refused to attempt to make five applications each fortnight and thus prevented himself from selling his labour on the open market. This was not the test for eligibility for newstart allowance in s.593(1) and s.601(1).

Formal decision

The Federal Court set aside the decision of the AAT and remitted the matter to be reconsidered according to law.

[C.H.]

AUSTUDY: full-time student for calendar year

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

Decided: 13 September 1999 by Hill J.

This was an appeal by the DEETYA from a decision of the AAT that Gray's application for AUSTUDY benefits for the period 18 December to 31 December 1996 should be granted.

The facts

Gray was studying Arts/Law in the 1996 academic year. His workload was unevenly spread over the two semesters of the year. His total workload in 1996 was 80% of the full-time course, of which he undertook 50% in the first semester and 30% in the second semester. Gray applied for AUSTUDY on 7 October 1996 and was advised on 8 October that he would be eligible for AUSTUDY at the independent rate from 8 December 1996, the day he became 22. In 1996 the independent rate was paid to students 22 years and over. On 19 December 1996 the DEETYA decided to reverse that decision on the basis Gray did not meet the full-time study requirements. The law changed from 1 January 1997 and only students 25 years and over could be paid AUSTUDY at the independent rate. Therefore if AUSTUDY was not granted until 1997 Gray would not be paid at the independent rate. If Gray was granted AUSTUDY in 1996 he would continue to be paid AUSTUDY at the independent rate in 1997.

The law

Section 7 of the *Student and Youth Assistance Act 1973* (the Act) enabled the Secretary to pay a benefit to a person who complies with the provisions of the Act and the Regulations. The AUSTUDY Regulations set out the requirements a tertiary student must comply with to be paid a benefit. Regulation 6 sets out the approved courses, which can take three forms:

- a short course that lasts for 30 weeks or less;
- a late starting course which lasts for more than 30 weeks, and starts after 31 March but before 1 July, or starts after 31 July;
- or a full year course that lasts for more than 30 weeks, including vacations.

This distinction between full-year courses and shorter courses is continued throughout the Regulations.

Regulations state that a student must be undertaking an approved tertiary course (reg. 33(2), must study full-time (reg. 34(1) and 'undertake at least three-quarters of the normal amount of full-time work for a period as set out in regulation 35' (reg. 34(2)). Regulation 35 provides:

(1) If a course is a designated course for the Higher Education Contribution Scheme (called HECS) under subsection 34(1) of the *Higher Education Funding Act 1988*:
  (a) the normal amount of full-time work for a year of the course is the standard student load determined by the institution for the purposes of HECS; and
  (b) the normal amount of full-time work for a semester of the course is 0.5 of the standard student load ...

(2) If the course is not a designated course for HECS, the normal amount of full-time work for a year of the course is:
  (a) if the institution specifies an amount that a full-time student should typically undertake — the amount specified; or
  (b) in any other case — the amount calculated using the following formula:

$$\frac{\text{total work of course}}{\text{total length of course}}$$

where:

'total work of course' is the total amount of work of the course;

'total length of course' is the minimum number of years needed to complete the course.

(3) If the course is not a designated course for HECS, the normal amount of full-time work for a semester of a course is:
  (a) if the institution specifies an amount that a full-time student should typically undertake — the amount specified; or
  (b) in any other case — half the normal amount of full-time work for a year of the course.