enterprises'. In the applicant's submission, farming land is a fundamental ingredient of a farm enterprise independent of ownership of the land and therefore the enterprise is the farming business carried on by the farmer.

The applicant submitted that the sale was on commercial terms and at arm's length since it was sold privately after being passed in at auction. The applicant also submitted that he could have retained the farm plant and machinery and moved it to another property and thereby, could have continued to carry on the farming enterprise. The applicant submitted that the purpose of the Scheme was to encourage unsuccessful farmers to leave agriculture and that it was clear that, due to his accumulated financial problems, he was an unsuccessful farmer and therefore a person to whom the policy of the Scheme was directed.

Respondent's argument

The respondent submitted that the applicant did not fulfill the requirements of s.8B because the bank refused to complete the required certificate due to the indebtedness of the applicant's partnership. Further, the respondent submitted the applicant was not effectively in control of the farm enterprise because, as contemplated by the note to s.8C, a mortgagee had taken possession of his farm and this constituted a loss of control despite the fact that the bank did not exercise its rights until a later date. The respondent submitted that even if the applicant had applied to re-finance the loan over the farm, such application would have been refused due to the indebtedness of the partnership with which Elliott was involved in relation to an earlier loan (the debt to the bank was $2.3 million). The respondent contended that another financial institution/person would not have agreed to re-finance the bank's first mortgage in these circumstances.

In the respondent's submission, legal possession and physical possession are different so that even though the applicant was allowed to farm the property until he vacated it on 11 September 1998, in effect he was farming the property on the bank's behalf with any benefit from his farming accruing to the bank.

The respondent did not agree with the applicant's contention that the land could be separated from the farming enterprise per se. Legal possession vested in the bank as at the date of the writ and accordingly, all proceeds from the auction were the property of the bank. The applicant had been unable to obtain the certificate from the bank required by s.8B.

Tribunal's findings

The Tribunal found that the applicant failed to satisfy s.8B because the bank refused to issue the necessary certificate. The Tribunal also found that the applicant was not in control of the farming enterprise following the issue of a writ of possession in favour of the bank by the Supreme Court. The writ entitled the bank to take possession of the property and sell it to offset the mortgage debt which had accrued to it. This conclusion was supported by the note to the section which specifically contemplates that effective control of a farm enterprise ceases when a mortgagee takes possession of the farm. Although the bank consented to the applicant remaining on the land after the writ of possession was issued, the bank was clearly 'effectively in control' of the farming enterprise and the bank's control is not negated by the applicant's physical possession and continued farming of the land. The Tribunal noted this view was consistent with Centrelink guidelines which, following *Drake and Minister for Immigration and Ethnic Affairs No 2* (1979) 2 ALD 634, could be taken into account because the guidelines were consistent with the legislation and do not unduly restrict the discretion of the decision maker.

The Tribunal also noted that the letter from the bank dated 15 July 1998, refusing the certificate sought by the applicant, concluded that, while no application for continued or additional finance had been made, any such application could not be entertained given the debt to the bank of $2.3 million.

In the Tribunal's view, control of farming land cannot be separated from control of the farming enterprise. Unless the relevant land was under the applicant's control the farming enterprise would have no purpose and could not function.

The Tribunal noted that one of the purposes of the Scheme is to provide an incentive for unsuccessful eligible farmers to leave farming; clearly there is no need for the government to provide such an incentive where the farmer has already effectively lost control of the farm property.

Formal decision

The AAT affirmed the decision under review.

[S.L.]

Federal Court

Family allowance: treatment of maintenance income

KING v SECRETARY TO THE DFaCS

(Federal Court of Australia)

Decided: 16 February 2000 by French J.

King appealed to the Federal Court against a decision of the AAT that the maintenance payments she received from time to time were to be annualised.

The facts

King had three children and received sporadic maintenance payments from her ex-husband. In April 1998 she received a maintenance payment of $1032 via the Child Support Agency. The money was collected in April to be paid to King before the seventh day of the following month and thus debited to May. On the basis of the maintenance payment received by King on 6 May 1998, Centrelink reduced family allowance payable to King for the fortnights commencing 7 May 1998 and 21 May 1998. Centrelink converted the rate of maintenance paid to King to an annual rate of $12,003.84.

The SSAT decision

The SSAT decided that the annual rate of maintenance received by King was the actual maintenance she had received over the year of $1435.

The AAT decision

The AAT set aside the SSAT decision and decided that the annual rate of income in May 1998 was $12,003.84.

The issue

The Federal Court described the issue to be considered in this matter as:

> Whether the annual rate is to be the sum of maintenance payments received over a year or a variable figure which depends upon maintenance payments received from time to time.

(Reasons, para. 1)

The law

Section 838 of the *Social Security Act 1991* (the Act) sets out the qualifications for family allowance and includes an income test. Section 10 of the Act defines 'maintenance income' as including maintenance for a dependent child. The rate of family allowance is calculated according to the rate calculator in s.1069. To establish the appropriate rate the maintenance income test in Module J of s.1069 is to be applied. Module J states that maintenance income is to be worked out on an annual rate.

Annual rate of income

The Court noted that when the AAT had calculated the annual rate of maintenance income it had considered that King had been paid $1032 for the month of May. Therefore the annual rate of King's maintenance income was $1032 multiplied by 12. This contrasted to the SSAT's decision where it had simply added up the actual income received by King over the 12-month period. According to French J:

> The critical issue in my opinion reduced to whether the 'annual rate of ... maintenance income' referred to in Step 1 of Point 1069-J1 in Module J was the total of maintenance income received in a given year or a rate calculated each fortnight for which maintenance income was treated as received.

(Reasons, para. 16)

The Act does not provide any prescription for calculating the annual rate.

French J noted that King's argument, that the actual amount she had received over the 12 months should be taken into account, was a perfectly understandable common sense approach by her. However, this was not the process set out in the Act. Step 1 of Module J requires calculation of an annual rate of maintenance. In the High Court in *Harris v Director General of Social Security* (1985) 59 ALJR 194 the Court was concerned with the annual rate of income for the purposes of establishing the rate of age pension. The High Court was at pains to point out that it was not an annual amount of income but rather an annual rate. On this reasoning, according to French J, the AAT had correctly calculated the annual rate of maintenance income. That rate of maintenance income was the annualised rate of maintenance King received from time to time. Therefore, in May the annual income was $12,003.84.

Formal decision

The Federal Court affirmed the decision of the AAT and dismissed King's appeal.

[C.H.]

AUSTUDY: assets test; family home also used for business purposes

SECRETARY TO THE DEETYA v OVARI

(Federal Court of Australia)

Decided: 6 April 2000 by O'Connor, Heerey and Finkelstein JJ.

DEETYA appealed against a decision of the Federal Court at first instance (Gyles J) that Ovari was entitled to AUSTUDY in 1996.

The facts

The facts are outlined in the summary of Ovari in (1999) 3(12) *SSR* 193. Briefly, the Ovari family home was also used for business purposes, and for tax purposes 53.3% of outgoings were allowed as deductions. The AAT had decided that 46.67% of the value of the family home should be included as an asset for the purposes of the assets test. The family home is normally excluded from the assets test.

The law

Regulation 13 of the AUSTUDY Regulations states that a student cannot get AUSTUDY if the maximum value of their assets exceeds a certain limit. Regulation 14 sets out what is included in assets and regulation 15 what is excluded. According to regulation 15(1) the principal home is excluded.

Gyles J

Gyles J had found that once a property was found to be the principal home of the person then no right or interest which that person has in that home is to be included in the assets test. There is no reason why business activities were inconsistent with or detracted from the function of the house as a home. Deductions for the purposes of tax were worked out under a quite separate statutory regime.

The principal home

The Full Court stated:

> The term 'principal home' as such is not defined in the regulations. Regulation 15(1) only deals with some specific situations in which there might be some room for argument as to the physical extent of the 'principal home'. It could not be doubted that a suburban residence of the kind described was a home of the respondent's family. The adjective 'principal' is directed to excluding holiday homes and the like.

(Reasons, para. 12)

Once the principal home is identified then it is to be excluded. Nothing in the regulations allows for apportionment because part of the home is used for non-domestic uses. There was no evidence that the property had increased or decreased in value because it was used partly for business purposes. According to the Full Court this would be unlikely. There was also no finding by the AAT that some physical part of the property was exclusively used for business purposes. Therefore there was no basis for including any part of the principal home as part of the assets test.

Formal decision

The Federal Court dismissed the appeal by DEETYA.

[C.H.]

Sole parent pension: section 251; which parent entitled following repeal of SPP provisions

SECRETARY, DEPARTMENT OF FAMILY AND COMMUNITY SERVICES v HOLMES

(Federal Court of Australia)

Decided: 20 April 2000 by Gyles J.

DFACS appealed against a decision of the AAT that Holmes was entitled to be paid parenting payment.

The facts

Holmes claimed sole parent pension in December 1997, and this was rejected by letter dated 30 December 1997. At the time of this claim the qualifications for sole parent pension were set out in Part 2.6 of the *Social Security Act 1991* (the Act). In March 1998 Part 2.6 was re-