The Department submitted that the loans which Reid wanted to offset against the value of the land were loans for improvement and development of the property, rather than to purchase the property. It was also argued that there was no legal basis on which unsecured loans could be deducted from the value of land.

In relation to the argument that the land should be regarded as curtilage, the Department argued that Reid had indicated that if he was offered a reasonable amount he would consider selling the land. The fact that some trees were planted and the land was maintained did not mean that it was held by Reid for domestic purposes. The Department argued that if the land was sold in bulk, a discount of 30% would be appropriate.

The law

The legislation relevant to the argument that the land formed a curtilage to Reid's private home is s.118(1) and ss.11(5)(a) and (6). These provisions allow certain assets to be disregarded and define 'principal home' and 'private land'.

Findings

The Tribunal concluded that Reid purchased the land for commercial purposes. The fact that he planted trees on some of the blocks and maintained them did not mean that the properties were used primarily for private or domestic purposes. Consequently, land was not 'private land' as defined in the Act and did not form curtilage to his principal residence.

The Tribunal found that there was no evidence of a charge or encumbrance over the blocks and consequently there was no basis to reduce the value of the land on the basis of money borrowed by Reid.

In relation to the valuation of the land, the Tribunal noted that the Act is silent in relation to the meaning of value, however the Tribunal has consistently followed the principles outlined by the High Court in *Spencer v Commonwealth of Australia* (1907) 5 CLR 418.

As to whether a discount should be applied for bulk sales, the Tribunal noted the evidence of Reid's valuer that if three lots were sold at the one time, he would suggest a discount of between 20 and 25%. The Department argued that a 30% discount would be appropriate if ten lots were sold at the one time. The Tribunal noted that Reid owned 11 blocks and that there was very little demand for this property.

When considering the valuations and the evidence, the Tribunal accepted Reid's valuation of the property and discounted this by 20%.

Formal decision

The AAT affirmed the decision of the SSAT in relation to Reid's claim for newstart allowance and remitted the decision in relation to disability support pension to the Department for reconsideration in accordance with the reasons for decision of the Tribunal.

[R.P.]

Assets test: whether loan to private company forgiven

SECRETARY TO THE DFaCS and DOWNES
(No. 2002/737)

Decided: 30 August 2002 by R.G. Kenny.

Background

The Downes were the sole directors and shareholders of a private company, which was involved in investment activities. Over a period of years the Downes made loans totalling $337,100 to the company. Centrelink viewed this loan as an asset during the period November 2001 to January 2002.

Issues

The issue was whether the loan of $337,100 by the Downes to the company was an asset that had to be taken into account in determining the rate of payment of their age pension.

Legislation

Section 11 of *the Social Security Act 1991* sets out the assets test definitions.

Section 1122 states:

> If a person lends an amount after 27 October 1986, the value of the assets of the person for the purposes of this Act includes so much of that amount as remains unpaid but does not include any amount payable by way of interest under the loan.

Section 1129 sets out when the financial hardship rules can apply to application of the assets test.

Whether loan an asset?

Downes submitted that, whilst loans totalling $337,100 had been made to the company, the assets of the company had been dissipated by poor sales performance and by the accumulation of interest on moneys borrowed. Consequently the company was in no position to repay the loan. The company was still a legal entity but an application had been made for it to be deregistered. The only amount that the Downes were able to recover from the original investment of $337,100 was $11,002.

Downes argued that it was unfair that, prior to 21 November 2001, Centrelink had been aware of the loans to the company and had been willing to accept a valuation, which reflected the inability of the company to repay those loans.

Downes conceded that he and his wife were not in financial hardship and no application in that regard had been made by them.

The Department conceded that, prior to November 2001, the value of the loan of $337,100 had not been taken into account as an asset. There had been a change in policy in respect of loans to private companies and family trusts and they were taken into account where the legislation so required. There had been a further change in policy in January 2002, which, again, enabled the value of the loans not to be taken into account for asset valuation purposes. The decision under review related only to three fortnightly periods between November 2001 and January 2002.

The Department submitted that although the Downes had forgiven the company's obligation to repay the loan to them, as this had not been done as part of a process of winding-up the company, the loan was still to be taken into account as an asset in the period of reduced pension payments.

The Department argued that the notion of a non-recoverable loan being an unrealisable asset was only relevant if there was an application for financial hardship and this had not been made.

The Tribunal found that in the period November 2001 until January 2002, the loans had not been repaid and s.1122 was applicable. The value of the Downes' assets should include the amount of the unpaid loans.

The Tribunal decided that in the relevant period the Downes' loan to the company was an unrealisable asset. But this was not relevant as s.1129 only operates if a request in the approved form for the financial hardship provisions has been made. No such application was made by the Downes.

The Tribunal addressed the issue of whether the loan had been forgiven.

There was no material before the Tribunal to indicate that the policy guidelines should not be applied. So the Tribunal referred to paragraph 4.6.5.110 of the guide which details procedures to be adopted when assessing failed financial investments in the form of loans. In discussing the forgiving of a loan, the policy says, in the case of a loan to a company, the forgiving of a loan must occur when 'the company that borrowed the money is wound up' or 'is in in the process of winding up'.

The Tribunal noted that although there had been a winding down of the company's operations, the company has not been wound up as at the date of the hearing and was not in the process of winding up as at the date when the loan was treated as an asset by the applicant. Accordingly, the loan was to be taken into account as an asset.

> The loans in this case must be given their face value rather than any reduced rate which would recognise a component of their unrealisability ...The terms of section 1122 are clear and their application in this case means that the value of the assets of the respondents must include the loans to the company in the amount of $337,100.

(Reasons, para. 23)

The Tribunal refered to *Ling and Secretary, Department of Family and Community Services* [1999] AATA 797; *Mendes and Secretary, Department of Family and Community Services* [2000] AATA 22; and *Hughes and Secretary, Department of Social Security* (1992) 25 ALD 754.

Formal decision

The Tribunal set aside the decision under review and substituted its decision that the rate of age pension of the respondents in the three fortnightly periods from 21 November 2001 until 7 January 2002 was to be calculated on the basis that their assets included the loan of $337,100.

[M.A.N.]

Austudy: full-time study

FERRIER and SECRETARY TO THE DFaCS (No. 2002/868)

Decided: 4 September 2002 by S.M. Bullock.

Background

Ferrier applied to the AAT for review of the rejection of her claim for Austudy. The basis for the rejection was that she could not be considered to be a full-time student as she was undertaking two part-time courses. The courses were Certificate II in Horticulture and a Certificate IV in Craft and Visual Art Practice — Business Skills. The Horticulture Course consisted of 12 hours per week while the Craft and Visual Art Practice was for six hours per week over 18 weeks. Both courses were advertised and offered as part-time courses and the applicant was enrolled in two different faculties at the Bega Campus as a part-time student of each faculty. The courses did not attract HECS fees.

The issue

The issue in this appeal was whether the applicant could be considered a full-time student counting her two part-time courses for the purpose of qualifying for Austudy.

The law

To qualify for Austudy, a person must satisfy the activity test. To satisfy the activity test a person must be undertaking qualifying study within the meaning of s.569A of the *Social Security Act 1991* (the Act). This depends on whether a person is a full-time student within s.569C. Section 569C of the Act states that a person is a full-time student, if the person is undertaking at least three quarters of the normal amount of full-time study in respect of the course for that period. The normal amount of full-time study is defined in s.569E of the Act. Relevantly to the applicant's case, s.569E provides:

> **569E(1)** For the purpose of this subdivision, the normal amount of full-time study in respect of a course is:
>
> (a) ...
>
> (b) if the course is not such a designated course and the institution defines an amount of full-time study that a full time student should typically undertake in respect of the course — the amount so defined; or
>
> (c) otherwise — an amount of full time study equivalent to the average amount of full-time study that a person would have to undertake for the duration of the course in order to complete the course in the minimum amount of time needed to complete it.
>
> **569E(2)** Without limiting subsection (1), the normal amount of full-time study in respect of a course is an average, taken over the duration of the period for which the person in question is enrolled in the course, of 20 contact hours per week.

The evidence

The applicant gave evidence that she had enrolled in the two part-time courses because both courses were consistent with her plans to develop a gardening business focusing on garden art. She told the Tribunal that she needed both the horticultural knowledge to assist with propagation and the care of plants in addition to the business skills from the other course.

The applicant said that there were few opportunities to undertake full-time study in the country and where such courses were offered, their scope was very limited. The applicant told the Tribunal that she could only undertake the courses in the form available at her local TAFE college at Bega. The applicant said that she would have studied the courses full time if such courses were available.

Legal submissions

The applicant submitted that although the courses were each part time, effectively they amounted in total hours to a full-time course of study, which were in related fields and were being studied for the purpose of her establishing her own business.

The Department argued that the applicant was not a full-time student because neither course was a full-time course. The information from Bega TAFE was that the applicant was enrolled as a part-time student for each of the courses.

The Department also argued that ss.569E(1) and (2) did not allow two part-time courses to be assessed as full-time study. The subsections refer to full-time study in terms of 'the course'. The Department contended that the phrase, 'the course' relates to a singular particular course, rather than 'any' or 'more than one course'. The Department also submitted that the purposive approach to the interpretation of the legislation intends that full-time study is examined in terms of one course and that such an approach is supported by the newstart provisions that provide that students undertaking part-time study may qualify for newstart allowance.

Moreover, the Department contended that while the 'the Guide to Social Security Law' did not provide an explanation as to how to assess the enrolment of two part-time courses, it did provide instruction on how to assess study at more than one institution. The Department argued that how study of two part-time courses is to be treated could be extrapolated from this explanation. The Guide indicates that a student