directed the DSS to defer its decision on recovery or waiver of the debt from Davis until 3 months after Davis's release.

[P.H.]

Assets test: valuation

PETERS and SECRETARY TO DSS

(No. 7797)

Decided: 4 March 1992 by J.A. Kiosoglou.

Roy Peters appealed against a decision of the SSAT affirming a DSS decision to pay him a reduced rate of age pension because of the value of his assets. The only matter in dispute concerned the value attributed to Peters' land, as he accepted the valuation of livestock, plant and equipment etc.

The land in question was 457 acres in the Freeling area, north of Gawler in South Australia. It was described by Peters and conceded by the DSS to be the worst piece of land in the district. It had a very high level of sodium and was used only for grazing sheep rather than growing crops.

The property had been valued by several organisations and individuals. Peters thought the correct value was $145 000; it had been valued at $162 000 by an independent valuer and at $216 000, later reduced to $200 000, by the Australian Valuation Office (AVO). The DSS accepted this last figure and had agreed to pay Peters' arrears of pension.

For the purposes of s.4 of the *Social Security Act* 1947, the AAT accepted that the correct value was the market value. The AAT preferred the valuation of the AVO, as the valuer had arrived at his valuation by taking into account the value of neighbouring land sold in recent times.

The AAT accepted the evidence of the AVO valuer that he had reduced the value of Peters' land below that of neighbouring holdings because of the poorer quality of the land. The AAT did not accept the independent valuer's report as it was lower than that of the District Council which, in the AAT's view, was usually accepted as being on the low side.

Formal decision

The AAT affirmed the decision under review.

[J.M.]

HUGHES and SECRETARY TO DSS

(No. W91/82)

Decided: 17 February 1992 by T.E. Barnett, J.G. Billings and R.D. Fayle.

This application concerned the review of a DSS decision to value a debt owed to the applicant from a family trust at $73 267.

The facts

On 31 March 1983, Hughes and his wife were made joint trustees for the Hughes Family Trust (HFT). The beneficiaries were Hughes, his wife and their children.

On 31 May 1983, Hughes transferred to the HFT the beneficial ownership in 51 944 units in a trust known as the Fertal Unit Trust (FUT), the trustee being Fertal Holdings Pty Ltd. Each of these units had a face value of $1 and Hughes had subscribed to these units sometime in 1979.

The transfer of the units to the HFT was for a consideration of $51 944, which was not paid by the HFT trustees and remained a debt owing by the trustees to Hughes at all material times.

The FUT carried on the business of manufacturing in the fertilizer industry and, after some initial successes, the business declined drastically after 1989 to the point that, by May 1990, the FUT was insolvent.

The AAT found as a fact that the HFT's beneficial interest in these shares was essentially valueless given the state of the FUT, there being no prospective purchasers for the units in FUT.

Before dealing with the substantive issues of the proper method of valuing the debt as part of Hughes' assets, the AAT noted that the DSS had miscalculated the debt insofar as it had double-counted a component of the debt. There was no contest on this point and an initial deduction of some $26 000 was allowed.

The legislation

At the time the decision under review was taken, the *Social Security Act* 1947 was still in force and the relevant provision for the purposes of this case was s.4(11), which provided:

> 'Where a person lends an amount after the commencement of this subsection, the value of the property of the person for the purposes of this Act shall include so much of that amount as remains unpaid but shall not include any amount payable by way of interest under the loan.'

Section 4(11) commenced on 27 October 1986.

The issues

The first issue for the AAT was the proper method of valuing the debt owed to Hughes from the HFT, given that the only assets of the HFT were the units held in FUT which were essentially valueless.

A further issue for the Tribunal was the effect of s.4(11) on the valuation of assets for pension periods falling after 27 October 1986 and whether a commercial approach should be adopted which took account of the lack of capacity of the FUT to repay the debt (*Lenthall* (1988) 41 *SSR* 524 and *King and Repatriation Commission* (1991) 62 *SSR* 861) or whether the effect of s.4(11) was that the debt must be valued at its full face value irrespective of the capacity of the HFT to repay the debt.

The AAT's decision

The Tribunal dealt with the decision in two parts.

First in relation to the valuation of the debts for pension periods before 27 October 1986, the AAT accepted that a commercial valuation was the appropriate method and that such a commercial valuation must have regard to the capacity of the HFT to repay the debt (*Lenthall* and *King*, above).

In relation to the pension periods falling after 27 October 1986, the AAT held that the effect of s.4(11) (which is now reproduced in s.1122 of the 1991 Act) was that the debt must be valued at its full face value without account being taken of the capacity of the HFT to repay. Accordingly, the debt represented an asset in Hughes' hands of the full face value of the loan, after allowance for the miscalculation referred to above.

The AAT noted the unfairness of this approach and said as follows:

> 'The Tribunal is in no doubt that the respondent should succeed in its contention in relation to the valuation of loans made to the Family Trust since the commencement of the sub-section to the extent that those amounts remain unpaid. In passing, the tribunal also noted the

possible anomalous results that this provision could cause. For example, take a situation where an applicant for a pension had made deposits with an institution which had since been put into liquidation and the best estimate of the liquidator was that no dividend would be paid to the depositors. In this event, even though the deposit had no commercial value, it would be shown at its face value for s.4 purposes because it had not yet been extinguished and remains as a right, albeit worthless. It is doubtful that the legislature intended that result, but the words are plain, whilst their literal meaning is clear and whilst they may produce an unfair result they do not give rise to any ambiguity.'

Formal decision

The AAT determined that the appropriate amounts to be taken into account as an asset in the applicant's hands prior to 27 October 1986 should be based on the net worth of the HFT whereas, after that date, the value of the asset in the applicant's hands was the full face value of the debt remaining outstanding at that date.

[A.A.]

Assets test: disposition

McGUIRK and SECRETARY TO DSS

(No. 7929)

Decided: 1 May 1992 by H.E. Hallowes

Michael and Gwen McGuirk appealed against an SSAT decision affirming a decision of the Department to include an amount of $31 000, given by Gwen McGuirk to Pope John Paul II, as property of the applicants for the purposes of calculating the rate of age pension.

In October 1990, Mrs McGuirk told the Department she had received a cheque for $41 983.36 from the Public Trustee, being her brother's deceased estate. She had immediately withdrawn $35 000 and paid this amount to her parish priest to give to Pope John Paul II.

The AAT accepted Mrs McGuirk's account that she was fulfilling an undertaking given to her brother while he was alive that she would carry out his wishes to give his money to the poor. He had been unable to do this in his lifetime as his affairs were managed by the Public Trustee.

The legislation

The DSS had treated this gift as a disposal of property under 6 of the *Social Security Act* 1947. This provided that, where property of more than $4000 was disposed of, that property had to be included in the value of the property of the person. And property was disposed if no or inadequate consideration was received for it.

Property disposed of?

Mr McGuirk argued that it was unfair that the DSS had a discretion to protect investors in the Pyramid Building Society but could not or would not take into account the charitable motives of his wife in disposing of the money.

The AAT decided that Mrs McGuirk had not received valuable consideration for the disposal of the money as 'consideration' in the Act had been used in a technical legal sense. It also rejected an argument, without further comment, that Mrs McGuirk had no discretion and was obliged to carry out her brother's 'trust'.

Formal decision

The AAT affirmed the decision under review.

[J.M.]

Assets test: superannuation relinquished

POOLE and SECRETARY TO DSS

(No. 7859)

Decided: on 30 March 1992 by M.D. Allen.

Mr Poole had been receiving a pension pursuant to the *Superannuation Act* 1922 of $719.64 a fortnight. He chose to relinquish his pension, to which he had a continuing entitlement, because he wanted it 'under the heading of entitlement'. He applied for age pension and sought payment on the basis that he had no income.

Legislation

Section 8(1) of the *Social Security Act* 1991 defines 'income' to mean an income amount earned, derived or received by a person for the person's own benefit or use. An 'income amount' means valuable consideration or personal earnings or moneys or profits, whether of a capital nature or not.

Section 9(5) provides that for the purposes of the Act a superannuation pension is taken to be presently payable at all times after the commencement of the first period in respect of which it is payable.

Was the superannuation pension income?

The issue was whether the superannuation pension, which was payable to Poole but which he declined to receive, was income under the Act.

The AAT referred to *Rose v Secretary to DSS* (1990) 92 ALR 521; 54 *SSR* 727, where the Federal Court had held that a pension payable to Mr Rose in East Germany, but which he could not access from Australia, was income under the Act.

The AAT said that, if a pension that a person could not access was taken to be income, 'how much more so in the case of Mr Poole who by his own voluntary act has deprived himself of the income'.

The AAT concluded that the superannuation pension was income to be taken into account in assessing his entitlement to age pension.

Formal decision

The AAT affirmed the decision under review.

[P.O'C.]

Newstart training allowance

SECRETARY TO DSS and DIEPENBROECK

(No. 7970)

Decided: 19 May 1992 by O'Connor J.

David Diepenbroeck was granted newstart allowance on 19 August 1991, when he was 19 years of age.

On 26 August 1991, Diepenbroeck started a vocational training course approved by the CES. He applied for a newstart training supplement under s.644 of the *Social Security Act* 1991. An officer in the Department of Employment, Education and Training (DEET) rejected Diepenbroeck's application.

On review, the SSAT decided that Diepenbroeck was eligible for the supplement. The Secretary to the DSS applied to the AAT for review of that decision.