On the issue of permanency the Tribunal followed *McDonald* (1984) 18 *SSR* 188 as to the test of whether an incapacity is likely to persist into the foreseeable future. All the medical evidence, and Riley's own evidence, indicated that he would eventually return to some sort of employment. Therefore the incapacity, if it existed, would not continue into the foreseeable future.

The Tribunal also examined whether at least 50% of the permanent incapacity (if it had existed) would be directly caused by Riley's physical or mental impairment. It concluded that at all relevant times the physical impairment was mild only. During retraining the stress and anxiety improved and the major factor preventing Riley from obtaining paid work was his desire to keep on training. Neither the community nor Riley would benefit from a finding of invalid pension eligibility. He had the capacity to make something of his life and retraining should be encouraged. The Tribunal noted that its decision did not prevent consideration of whether Riley was eligible for a rehabilitation allowance under s.150 of the *Social Security Act*.

Formal decision

The AAT affirmed the decision under review.

[B.W.]

Blind pensioners: income test

RURAK and SECRETARY TO DSS (No. 5703)
Decided: 12 February 1990 by G.L. McDonald, M. Allen and J. Billings.

Alberta Rurak asked the AAT to review a decision originally made by the Department on 4 August 1988, varying her rate of invalid pension from $318.10 to $284.10 per week as a result of the application of the income test.

The facts

Rurak received an invalid pension as a result of being permanently blind, but also qualified for invalid pension on the basis of other conditions that permanently incapacitated her for work. She was unmarried, supported two dependent children aged 16 and 13 years and received $35 per week maintenance.

The legislation

Under s.33(6)(a) of the *Social Security Act* 1947, a blind person cannot receive additional pension for children under s.33(4) or guardian's allowance under s.33(3) unless she could qualify for an invalid pension if she was not permanently blind and was permanently incapacitated for work.

Section 33(6)(b) then purports to apply the income and maintenance income tests to these additional pension payments by stating that the person's pension '... shall not be increased by an amount under sub-section (3), or ... (4) ... that exceeds that amount that would, if the person were not permanently blind be the amount ... of the increase by virtue of sub-section (3), or ... (4) ... that comprises the annual rate of the person's age or invalid pension as reduced in accordance with sub-section (12)'.

Section 33(12) applies the income and maintenance income tests to 'a pension under this Part payable to a person (other than a person who is permanently blind and who is qualified to receive an age or invalid pension) ...'

[Section 33(10) is also relevant to the application of the income test to blind pensioners with children but was not referred to by the AAT.]

Conflict between s.33(6) and s.33(12)?

The AAT considered the wording of s.33(6)(b) and the exemption for blind persons from the operation of s.33(12), noting that the exemption in s.33(12) was amended by Act No. 130 of 1987 from 'other than a person who is currently blind' to its current wording set out above, which contains the additional words 'and who is qualified to receive an age or invalid pension'.

[Editor's note: These words were added because Act No. 130 of 1987 extended the operation of s.33 beyond age and invalid pensions to also cover wife's and carer's pension. Unfortunately the AAT did not seem to appreciate this.]

The AAT then said:

> 'It seems to the Tribunal that the closing words of [sub-section] 6 and the exception created by [sub-section] 12 are inconsistent and are unable to stand together. In those circumstances the maxim *leges posteriores contraris abrogant* applies and the section in the Act later in time is deemed to repeal the inconsistent earlier section ... In those circumstances the exemption from reduction provided for in s.33(12) must prevail in cases where a pensioner is both blind and otherwise entitled to an age or invalid pension. The applicant is therefore entitled to the receipt of her pension with guardian and other allowances not subject to reduction.'

(Reasons, p.5)

[The AAT did not clearly state why they thought there was an inconsistency nor why s.33(12) was regarded as the later in time. Perhaps the amendment by Act No. 130 of 1987 explains the latter.]

Formal decision

The AAT set aside the decision under review and remitted it with a direction that the applicant qualifies for the receipt of guardian and other allowances pursuant to the provisions of s.33(3) and (4) and that pursuant to the provisions of s.33(12) guardian and other allowances are not subject to reduction.

[D.M.]

Maintenance income test: transitional provision preserving 'total income'

JAKOVLJEVIC and SECRETARY TO DSS (No. 5384)
Decided: 13 September 1989 by J. Handley.

Ljubica Jakovljevic sought review of decisions by the DSS which (1) failed to increase her rate of widow's pension on 23 June 1988 in line with the general indexation increases of pensions and (2) reduced her pension from 13 October 1988 following an increase in maintenance paid to her by her former husband.

The legislation

This review was determined by the application of the savings provision in s.21(4) of the *Social Security and Veterans' Entitlements (Maintenance Income Test) Amendment Act* 1988. That Act introduced into the *Social Security Act* 1947 the maintenance income test, which commenced operation on 17 June 1988. Under s.21(4) of the amend-

ing Act the 'total income' (i.e. pension plus income plus maintenance income) of a person in the fortnight ending 17 June 1988 was preserved. This was to be achieved by adjusting the person's pension rate to ensure that her 'total income' after 17 June 1988 did not drop below her pre-17 June 1988 'total income'.

The facts

Jakovljevic's total income at 17 June 1988 was $11 549.20 per annum, being $7909.20 pension ($304.20 per fortnight) and $3640 maintenance ($70 per week). The application of the maintenance income test would have resulted in her pension reducing to 4280.10 per fortnight after 17 June 1988 but, because of the application of the subsection 21(4) savings provision, it remained on $304.20 per fortnight.

On 10 August 1988 her weekly maintenance was increased by a consent order from $70 to $85 per week. This resulted in a $30 per fortnight reduction of her pension to $274.20. Her 'total income' therefore remained at $11 549.20 per annum, being $7129.20 pension and $4420 maintenance. [Unfortunately, the AAT did not say what her pension would have been under the normal operation of the maintenance income test.]

Application of the savings provision

The AAT noted that Jakovljevic had a reasonable expectation that her total income would increase with the increase in her maintenance payments (which was obtained after some anguish). However, it was pointed out that s.21(4) effectively leads to the means testing of increased income or maintenance on a dollar for dollar basis. The AAT commented that

> 'By applying to have her former husband pay increased maintenance the financial responsibility of child maintenance has shifted in part from the Respondent (and therefore the community as a whole) to the parents and it is this that is intended by the *Maintenance Income Test Act*.'

(Reasons, p.5)

Formal decision

The AAT affirmed the decisions under review.

[D.M.]

Income test: use of tax returns to ascertain business profits

FISHER and SECRETARY TO DSS (No. 5702)
Decided: 15 February 1990 by D.P. Breen, K.J. Lynch, and J.D. Horrigan.

Helen Fisher sought review of an SSAT decision to include as her income, for the purposes of calculating her rate of unemployment benefit, annual income of her *de facto* husband, K, as evidenced by relevant tax returns. The sole issue was the appropriate way of ascertaining the amount of K's income.

Fisher's unemployment benefit was cancelled on 23 October 1987 after it was determined that she was living in a *de facto* relationship with K. She reapplied on 6 November 1987.

K was a primary producer. His tax assessment advice for 1987/1988 indicated an assessable income of $9850. The DSS took this amount into account as $379 per fortnight in applying the income test to Fisher.

Applicant's case

It was argued for Fisher that K's tax assessment advice provided an illusory figure of K's annual income and should not be used to determine K's income for the purposes of the *Social Security Act*. The tax assessment was said to produce an illusory income figure because, as required by s.28 of the *Income Tax Assessment Act* 1936, it included the excess of the closing value of K's trading stock over the opening value (the stock adjustment calculation).

It was submitted that a cash flow analysis, rather than reliance on a tax return, should be used to determine K's income for the purposes of the *Social Security Act*, bearing in mind that Act's intended purpose of income maintenance. Evidence was given that in the 1987/1988 year K's business had income receipts of $81 370 and expenses of $101 119, leaving a deficiency of $19 749, which was further reduced by a depreciation figure. K's accountant gave evidence that their normal accounting procedure was to match expenses against revenue.

The Tax Act's requirement of including the value of trading stock gave a higher income figure than was produced by the cash flow analysis (presumably because, under the cash flow analysis, expenditure on stock was included as an expense that occurred in the year of expenditure).

Department's submissions

The DSS justified its use of tax returns on two bases. First, it was submitted that money expended on capital items was a re-investment of profits, and only capital expenses relatable to income receipts of a capital nature could be considered true expenses. Second, it was argued that, in any event, when looking at business profits the tax return figure of a person's assessable income is the best guide to income for the purposes of social security entitlements.

Different meaning of 'income' under the Social Security Act

The AAT quoted from decisions of the AAT in *Shafer* (1983) 16 *SSR* 159, the Federal Court in *Haldane-Stevenson* (1985) 26 *SSR* 323 and the High Court in *Read* (1988) 43 *SSR* 555, which had stressed that 'income' has a different meaning under the *Social Security Act* than under the *Income Tax Assessment Act*. It then concluded that the quoted passages —

> 'afford the clearest authority for the proposition that, though perhaps of considerable administrative facility, the Department's policy of applying for the purposes of the *Social Security Act* the quantum of a person's income taken from the person's income tax return does not accurately reflect the law. Of course, there will be many instances in which a person's income tax return will constitute accurate evidence of the person's income in that year for the purposes of the *Social Security Act*. In those instances the law and administrative convenience will run in parallel. On the evidence in this case, however, we are of the view that that compatibility does not occur. We find that to the extent that the stock adjustment calculation has a significant bearing upon the amount shown as taxable income in [K's] taxation returns, there is an incompatibility between that amount and a proper calculation of income for the purposes of the *Social Security Act*'.

(Reasons, para. 19)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Department for calculation of Fisher's benefit entitlement in accordance with the finding that to the extent that the income showed by the relevant tax returns of K took into account certain stock adjustment calculation, they did not accurately reflect K's income for the purpose of calculating Fisher's entitlement under the *Social Security Act* 1947.

[D.M.]