inappropriate', as the AAT had expressed it in *Ivovic* (1981) 3 *SSR* 25.

The AAT said that, given the circumstances of Izard's case, he should be wholly released from his liability to repay the costs of rehabilitation training. Those circumstances included:

(1) the fact that, had it not been for the financial failure of the insurers, Izard's entitlement to workers' compensation would probably have been exhausted 2 years before he received his rehabilitation training; therefore there would have been no moneys from which the DSS could have tried to recover the cost of that training;

(2) the fact that the training had achieved its purpose by enabling Izard to return to work for 16 months, so removing his dependency on social security;

(3) the fact that the amount of compensation paid to Izard (because of the limits set by the Tasmanian Workers Compensation Act) was totally inadequate to compensate him for his incapacity to work; and

(4) the overall poor financial situation of Izard, who was now totally dependent on social security payments and had few assets.

Formal decision

The AAT varied the decision under review by directing that there were special circumstances by reason of which Izard should be wholly released from his liability to repay the cost of the rehabilitation training.

Income test: interest in estate

FLANIGAN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No.S83/77)

Decided: 19 July 1984 by W.A.G. Enright.

Leo Flanigan asked the AAT to review a DSS decision that, in calculating the rate of his unemployment benefit, payments received by his wife should be treated as his income.

These payments amounted to $257 a quarter and came from the estate of the wife's deceased mother. The payments represented the repayment to that estate of a loan which the deceased had made to another person before her death.

The legislation

Section 114(1) provides that the rate of unemployment benefit paid to a person is to be calculated by taking account of that person's income which, according to s.114(3), includes the income of the person's spouse.

'Income' is defined in s.106(1) as meaning –

> any personal earnings, moneys, valuable consideration of profits earned, derived or received by that person for his own use or benefit by any means from any source whatsoever . . .

Not income but capital

The AAT decided that the money being received by Flanigan's wife should be classified as a receipt of capital rather than a receipt of income. This was because, first, his wife's interest in that estate was a property interest (technically, an equitable chose in action) and the payments to Flanigan's wife were essentially a transfer to her of her own property; and, secondly, the definition of income in s.106(1) indicated that the words 'moneys . . . received' referred to money paid as reward or profit from personal exertion.

The Tribunal made the point that, if Parliament intended to include, in the definition of income, a receipt by a person of her or his own capital, this could only be achieved by the use of the clearest words and there were no such words in s.106(1).

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with the direction that all moneys, except interest payments, paid to Flanigan's wife by the trustees of her mother's estate were not income within s.106(1).

Age pension: payment outside Australia

DONOGHUE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/856)

Decided: 15 June 1984 by C.E. Backhouse.

Batt Donoghue had migrated to Australia in 1974. He was granted an age pension in May 1981 under the *Social Services (Reciprocity with United Kingdom) Regulations* on the basis that he had lived at least 10 years in the United Kingdom.

In October 1982, Donoghue left Australia; and the DSS cancelled his pension, after refusing his request for the pension to be paid overseas.

Donoghue asked the AAT to review the DSS decision.

No basis for payment outside Australia

Section 83AE of the *Social Security Act* provides that a pension payable under any reciprocity agreement is not payable outside Australia unless the regulations implementing the agreement direct payment outside Australia.

Neither the reciprocity agreement between Australia and the United Kingdom nor the regulations implementing the agreement allowed for payment of a pension outside Australia.

The AAT said that there was no legal authority for paying Donoghue while he was outside Australia. However, it was appropriate to suspend Donoghue's pension rather than cancel it.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that Donoghue's pension was suspended while he was outside Australia.

TOLOMEO and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. A82/49)

Decided: 26 October 1984 by R. Smart.

Adele Tolomeo had migrated to Australia from Italy with her husband in 1952 (when she was 45). She and her husband spent 3 months in Italy in 1971 and travelled to Italy again in 1972, where they purchased a property in their original village. Her husband did not return to Australia (from 1972 he was too ill to travel); but, in March 1980, Tolomeo returned to Australia and was granted an age pension. She travelled to Italy (claiming that she needed an operation and that her husband's health had deteriorated) after 6 months. In 1981 she returned to Australia for 2 months and, when she left for Italy in May 1981, payment of her pension was suspended by the DSS. Tolomeo asked the AAT to review that decision.

The legislation

Section 83AB of the *Social Security Act* declares that a person's right to be paid a pension is not affected by her leaving Australia, 'except as provided by this Part'.

One of those exceptions is set out in s.83AD(1), which says that a pension is not payable outside Australia to a former Australian resident who has returned to Australia, claimed a pension and left Australia 'before the expiration of the period of 12 months that commenced on the date of [her] return to, or [her] arrival in, Australia'. However, the Director-General has a discretion to waive s.83 AD(1) where the person's reason for leaving within the 12 month period 'arose from circumstances that could not reasonably have been foreseen at the time of [her] return to, or arrival in, Australia'.

A former resident?

Tolomeo claimed that she was not affected by s.83AD because she had not lost her Australian residence during her 8-year absence from Australia (1972-80). The AAT rejected that claim: she and her husband owned a home in Italy, received Italian pensions there and had no assets in Australia; Tolomeo had travelled to Australia on an Italian passport; and she had declared (on the entry card com-

pleted in March 1980) that Italy was the country of her residence and that she intended to stay in Australia for only 6 months. The Tribunal said that, in its opinion, Italy was 'the settled or usual abode of the applicant'.

The extension of the concept of 'residence' to include 'domicile' did not help Tolomeo. (At the time of the decision under review, this extension was effected by s.20, which incorporated s.6 of the *Income Tax Assessment Act* 1936.) Under the common law, Tolomeo's domicile followed that of her husband; and the evidence was sufficient to satisfy the AAT that her husband had decided to settle permanently in Italy when he returned there in 1972. That is, he had abandoned his Australian domicile of choice and reverted to his Italian domocile of origin.

The reason for departing

Tolomeo claimed that she had left Australia in October 1980 for reasons which could not have been foreseen when she arrived here in March of that year. The AAT noted that she had not had the operation, which she had claimed was one of her reasons for returning to Italy; and said that the real reason was the deterioration in her husband's health. Looking at the history of her husband's health, the AAT observed that he had been seriously ill since 1972:

> In my opinion it is foreseeable, if not highly likely, that the condition of a man in this state of health, even if he were in one of his better periods, might deteriorate within a period of six months.
>
> In addition, the statement in Mrs Tolomeo's arrival card of 14 March 1980 that she intends to stay in Australia for 6 months detracts from any argument that a necessity to depart in October the same year arose suddenly from unforeseen circumstances.

(Reasons, p. 12).

Special benefit

The AAT considered the possibility of granting Tolomeo a special benefit under s.124 of the Act. It rejected the DSS argument that this benefit should not be granted to a person who could not meet the residence requirements in other parts of the Act: special benefit was 'an independent payment with its own tests for entitlement'. The AAT adopted the statement in *Kakouras* (1983) 17 *SSR* 172, to the effect that the Act did not forbid payment of the benefit overseas but that, as a matter of discretion, payment overseas should be confined to 'circumstances of extreme personal need'.

The AAT said that, if a claim for special benefit were lodged, then the DSS could exercise the discretion in s.124 in the light of all the circumstances, including Mr and Mrs Tolomeo's absence overseas, Mr Tolomeo's inability to travel, their Italian pensions and any provision of support by their children. But the AAT would not 'make a finding on special benefit before the Director-General has had an opportunity to consider it': Reasons, p. 13.

Formal decision

The AAT affirmed the decision under review.

Married persons—'separation under one roof'

DRIES and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N84/186)

Decided: 26 September 1984 by E. Smith, M.S. McClelland and A.P. Renouf.

Mervyn Dries asked the AAT to review a DSS decision to cancel his sickness benefit. That decision had been based on s.114 of the *Social Security Act*.

Section 114(1) provides that a person's sickness benefit is to be reduced according to the person's income. The section goes on to provide:

> (3) For the purposes of sub-section (1), the income of a person shall include the income of that person's spouse, unless that person and his spouse are living apart.
>
> (a) in pursuance of a separation agreement in writing or of a decree, judgment or order of a Court; or
>
> (b) in such circumstances that the Director-General is satisfied that the separation is likely to be permanent.

The issues

In the present case, the DSS had taken into account the income of Dries' wife; but Dries and his wife told the AAT that, at the time when his sickness benefit was cancelled, they had been living separately and apart in their jointly-owned home, that their marriage relationship had ended, but that, for religious reasons, they had not attempted to dissolve the marriage.

When the DSS cancelled Dries' sickness benefit, his wife had moved out of their jointly-owned home and the DSS had then restored his sickness benefit. The DSS argued that, because of this restoration, Dries was no longer a person whose interests were affected by a decision (as required by s.27(1) of the *AAT Act*) and that, therefore, he did not have standing to ask the AAT to review the decision to cancel his benefit. But Dries argued that because his wife intended to return to the jointly-owned home, he needed to know whether that return would affect his sickness benefit.

Standing to seek review

The Tribunal concluded that Dries did have 'an interest in the outcome of the proceedings and that the case should proceed . . . it is clear that to do otherwise would only be postponing the issue to the time when the applicant's wife moved back to the house': Reasons, para. 7.

Separation under one roof

The AAT noted that in *Karrasch* (1983) 17 *SSR* 169, the Tribunal had said that a husband and wife living separately in the one house were not 'living apart' as that term was used in s.114(3).

But, the AAT said, several decisions had established that a couple could be 'living apart', although living in the same house, for the purposes of age and invalid pension, which was dealt with by s.29(2); these included *Reid* (1981) 3 *SSR* 31; *McQuilty* (1982) 6 *SSR* 61; and *A* (1982) 8 *SSR* 29. While there were some differences between the wording of s.29(2) and s.114(3), the AAT said that the expression 'living apart' should be given the same meaning in each of those provisions:

> We can discern no principle in the legislation that a more technical meaning is to be given to that expression and there appear to be good reasons for giving it the meaning that has been given to similar provisions elsewhere in the Act. The Act is a welfare Act; it is not a technical statute, such as the Income Tax Assessment Act, where rights and liabilities are spelled out technically and technicalities necessarily govern the intention. We have concluded, therefore, that we should treat the principles applied in the cases we have cited in the last preceding paragraph as relevant in ascertaining whether the applicant and his wife are "living apart". For that purpose, we are of the view that spouses *can* be living apart for the purposes of s.114(3) notwithstanding that they live under the same roof.

(Reasons, para. 11).

The AAT said that the evidence in this case established that Dries' marriage was at an end; and that the principal reason for their continuing to live in the one house was financial – if the house was sold, it would not provide sufficient funds to finance the purchase of two separate dwellings. Applying the decision in *A* (above), the Tribunal concluded Dries and his wife should be treated as 'living apart' in circumstances which were likely to be permanent and that, accordingly, the income of Dries' wife should not be taken into account when fixing the level of his benefit.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that Dries was, at all relevant times, entitled to sickness benefit regardless of the income of his wife.

IVOVIC and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/265)

Decided: 17 September 1984 by R. Balmford.

Pedrag Ivovic was granted an invalid pension in 1979. In 1982, the DSS decided that the rate of his pension should be calculated by taking account of half the income of his wife (in accordance with s.29(2) of the *Social Security Act*).