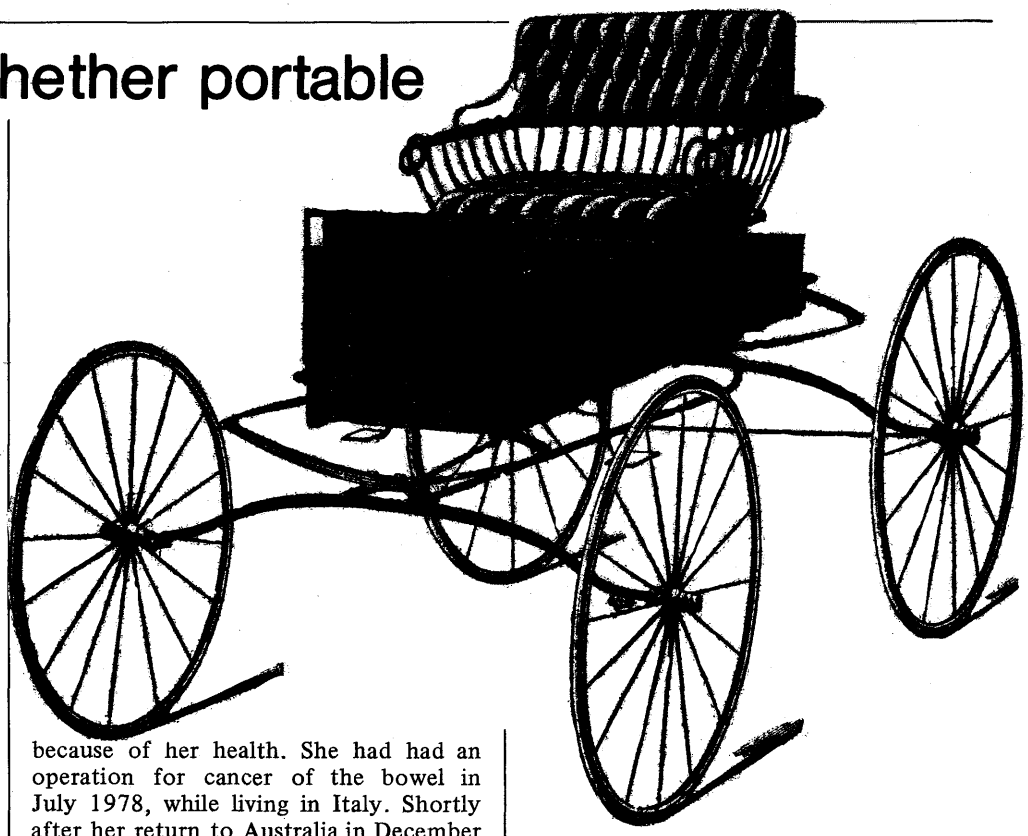
Age pension: whether portable



MUNNA and DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. V81/15)
Decided: 21 October 1981 by J.D. Davies J, A.N. Hall and M. Glick.

Elena Munna was an Italian citizen who had lived with her husband in Australia, continuously, from 1948 to 1963, when they returned to Italy. In 1975 the couple came to Australia for a short visit. On 13 December 1978, Elena Munna returned alone to Australia and, in January 1979, she lodged a claim for an age pension and stated that she intended to stay in Australia, that she was not being supported by her husband and that she had no income.

In March 1979, the DSS granted Munna an age pension, apparently at the full single rate, ignoring (as s. 29(2)(b) allows) the income being received by her husband.

In May 1979, Munna returned to Italy and, in September 1979, the DSS terminated payment of her pension. Munna applied to the AAT (after an appeal to an SSAT) for review of this termination.

Generally, a pensioner is entitled to continue receiving a pension if that person leaves Australia: *Social Services Act*, s. 83AB. But s. 83AD provides an exception to this general rule. This section says that, if a former Australian resident has returned to Australia and, within 12 months, has claimed a pension and left Australia, any pension granted to that person shall not be payable for any period while that person is outside Australia: s. 83AD(1). However, the Director-General has a discretion to exempt any person from the effect of this provision, where he is satisfied that the person's reason for leaving 'arose from circumstances that could not reasonably have been foreseen at the time of [her] return to Australia': s. 83AD(2). This exemption is to be made 'by instrument in writing'.

The AAT was satisfied that Munna had left Australia for Italy in May 1979 because of her health. She had had an operation for cancer of the bowel in July 1978, while living in Italy. Shortly after her return to Australia in December 1978, a surgeon had discovered another lesion and recommended an operation. Her medical conditon had deteriorated and, following her return to Italy in May 1979, she had nine operations.

The AAT said that, when Munna had first arrived in Australia (in December 1978) 'it was reasonably foreseeable that [she] could have had further serious medical problems'. The report of the surgeon who had operated in July 1978 made 'it clear that there was . . . either a malignancy or a real possibility of a malignancy . . . It is commonly recognized in the community that surgery does not always provide a cure for the condition from which Mrs. Munna suffered'. And the Tribunal referred to Harrison's textbook, *Principles of Internal Medicine* (9th ed at pp. 1432-3) which said, 'In 40 to 50 percent of patients who have had polyps removed new polyps will develop in the subsequent decade'.

Accordingly, tne Director-General could not excercise any discretion under s. 83AD(2). And, even if her reason for leaving arose from circumstances which were not reasonably foreseeable on 13 December 1978, the AAT thought that this was not a case for exercising the discretion in favour of Munna. Amongst the factors which the AAT thought relevant on this point was:

(a) Munna had not had such a connection with Australia that there was any duty on Australia to support her.

(b) Nor was her financial situation serious: she was, apparently, being supported by her husband who had been the director of tourism in the Italian region of Liguria; he had a claim for a pension arising out of that position; and the couple owned their own apartment.

The AAT concluded by affirming the decision under review.

Child endowment: late application

FAA and DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. Q81/37)
Decided: 23 September 1981 by J.B.K. Williams, L.G. Oxby and M.S. McLelland.

In this matter the applicant asked the AAT to review the Director-General's refusal to back-date payment of child endowment for her 'student child'.

Faa had received child endowment for her child (paid into a bank account) but, when he turned 16 in January 1980, the DSS had cancelled the endowment. The Department's records showed that it had mailed to Faa a claim form for 'student family allowance' (that is, endowment for a full-time student aged 16 or more); but Faa denied having received this form.

She did not claim student family allowance for her son until 19 January 1981. (He had been a full-time student throughout 1980 and was to continue full-time studies in 1981.) The DSS granted the student family allowance from January 1981 but refused to back-date it.

Where a person claims child endowment more than six months after becoming eligible, the Director-General has a discretion, under s.102(1)(a) of the *Social Services Act*, to back-date the payment of child endowment 'in special circumstances'.

Faa claimed that there were 'special circumstances' in her case: she had not received the claim form mailed out by the DSS in January 1980; and she had not noticed the reduction in payments to her bank account and, therefore, she had not realised she was no longer being paid endowment for her son or that she needed to apply for student family allowance.

The AAT held that neither of these was a special circumstance – that is, neither was 'exceptional in character, quality or degree'. The DSS was under no legal obligation to send her a claim form; and her failure to notice the reduction in payments to her account was due to carelessness on her part.

The AAT did 'not wish to categorize what may constitute "special circumstances" '; but Faa's carelessness, and her ignorance of her need to claim student family allowance after her son turned 16 did not answer that description: Reasons for Decision, para.11.

The AAT concluded by saying that the decision in *de Graaf* (3 *SSR* 26) was a special one, confined to its own peculiar facts.