That provision, the AAT said, would have been unnecessary if 'income' had carried its full meaning in s.108(1).)

Overpayment?

The AAT considered whether the DSS could recover from Wood the amount of sickness benefit paid to her between July and December 1982.

The Tribunal said that she could properly have been paid a special benefit for that period; and the money she had received should be treated as having been paid to her as sickness benefit. The appropriate rate of special benefit was marginally lower than the rate of sickness benefit which she was paid. The Tribunal commented:

> However, the [excess] amount she received before was small and was paid due to an error by the Department of which the applicant could not have been expected to be aware and through no fault on her part. We think, therefore, that it would not be reasonable to recover it from her now.

(Reasons, para. 20)

From 31.12.82: qualified only for lower rate

Amendments to the legislation which took effect from 31 December 1982 provided that a person could qualify for sickness benefit, even though the person had not suffered a loss of salary, wages or other income, if the person satisfied the Director-General 'that he would but for the [temporary] incapacity, be qualified to receive an unemployment benefit in respect of the relevant period': s.108 (1)(c)(ii).

Further, a new s.113 provided that the rate of sickenss benefit for such a person should not exceed the rate of unemployment benefit payable to the person if the person were receiving unemployment benefit: s.113(b).

It followed that, from 31 December 1982, Wood qualified for sickness benefit and the rate at which this benefit was payable was the rate fixed by the DSS in July 1982 – the relevant rate of unemployment benefit.

Formal decision

The AAT affirmed the decision under review but declared that the applicant had not been qualified to receive unemployment benefit for the period from 5 July 1982 to 30 December 1982.

Child endowment: child in institution

GRAY and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. S83/119)

Decided: 2 March 1984 by E. Smith, F.A. Pascoe and J.T. Linn.

Gerald Gray claimed child endowment (as it was then called) for his children for the period 21 October 1972 to 9 December 1972. During that period the children were inmates of a children's home and the applicant paid that home $10 per week towards the maintenance of each child. The claim was refused and the applicant applied to the AAT for review.

The legislation

Section 95 of the *Social Services Act* then read:

> (1) Subject to this part, a person who has the custody, care and control of a child (not being a child who is an inmate of an institution) or an institution of which children are inmates is qualified to receive an endowment in respect of each such child in accordance with this section.

Section 103 read:

> (1) Subject to Section 104, an endowment payable to an endowee in respect of a child ceases to be payable if –
>
> (a) the endowee ceases to have the custody, care and control of the child;
>
> (b) the child, being a child in the custody, care and control of a person other than an institution, becomes an inmate of an institution;
>
> (c) the child, being a child who is an inmate of an institution, ceases to be an inmate of the institution . . .

These provisions operated to qualify the children's home for payment of child endowment and to disentitle the applicant to that payment. The legislation did not provide for the case where a parent contributed to the maintenance of his children while they were in the home.

Formal decision

The AAT affirmed the decision under review.

Invalid pension: permanent incapacity

RALSTON and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. V83/345)

Decided: 16 March 1984 by B.J. McMahon, A.P. Renouf and I. Prowse.

The AAT *set aside* a DSS decision to cancel the invalid pension held by a 35-year-old former truck driver who had injured his spine in 1977 and had not worked since that time.

The Tribunal accepted medical evidence that Ralston was in constant pain and found that he had quite limited work skills, 'being of dull normal intelligence, with very basic education and very little capacity for expressing himself verbally'.

It was, the AAT said, 'most unlikely that a sympathetic employer could be found who would remunerate him for the limited type of work which he is physically capable of doing'. That inability to attract an employer did 'not stem from the general economic circumstances of the community, but overwhelmingly from the medical causes'. (However, the AAT did not concede that economic considerations were irrelevant when assessing incapacity for work.)

Permanence

The AAT rejected a DSS argument that, because of Ralston's age, his incapacity could not be described as permanent:

> The fact that Mr Ralston's condition has not been alleviated by three surgical operations, the passing of seven years, a period at the Mount Wilga Rehabilitation Centre, including the pain programme in April, 1982 and an assessment at Westmead Centre pain clinic in November, 1982, physiotherapy, Marcain infusions, acupuncture, transcutaneous nerve stimulation and multiple use of analgesics, indicates a degree of permanence which falls well within the concept referred to in *Tiknaz's case*. If ever a condition persisted despite all possible treatment and gave every indication of persisting indefinitely, this would have to be it.

(Reasons, p. 8)

Work motivation

The AAT also rejected a DSS argument that, because Ralson had made little effort to find employment, his incapacity for work was a result of disinterest in working. Adopting the language used in *Vranesic* (1982) 10 *SSR* 95, the AAT said that this was a case where 'a person's perception of himself (rightly or wrongly) as an invalid incapable of work, [has] become so entrenched and so ineradicable as to itself constitute a psychological condition which destroys the person's capacity for work': Reasons, p. 9.

STAMBERG and DIRECTOR-GENERAL OF SOCIAL SECURITY
(V82/412)

Decided: 10 February 1984 by R. Balmford, E. Coates and H.E. Hallowes.

The AAT *set aside* a decision by the DSS to refuse an invalid pension to a 57-year-old former clerical worker and storeman who suffered from arthritis.

Stamberg's unemployability derived initially from his medical condition and combined with his age, the state of the labour market and his self-perception as an invalid to render him permanently incapacitated for work. The AAT said that 'medical considerations form part only of the evidence to be taken into account in determining eligibility for invalid pension'. In the present case, Stamberg's incapacity derived initially from medical factors but was reinforced . . . by the difficulties of a man of his age in the labour market . . .': Reasons, paras 21, 22.

FOSKETT and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N83/270)

Decided: 16 March 1984 by B.J. McMahon, J. McClintock and I. Prowse.

The Tribunal *set aside* a DSS decision to reject a claim for invalid pension lodged by a 57-year-old former bus driver who suffered from degenerative disease of the spine and a disabling psychological conditiion.

The Tribunal said that his mental and physical 'impairments would impinge upon his capacity to sustain his work in any normal avenue of employment [and that he was] permanently incapacitated for full time work of any kind': Reasons, p. 9.

Accordingly, the Tribunal did not find it necessary to consider the effect of current economic conditions on Foskett's capacity to work. However, the Tribunal indicated (Reasons, p. 7) that it was not prepared to accept the DSS' argument that a person's incapacity for work should always be assessed in isolation from current economic conditions.

CHIARAVALOTTI and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. V83/85)

Decided: 26 January 1984 by I.R. Thompson

The AAT *set aside* a DSS decision to cancel the invalid pension of a 43-year-old former wall builder who suffered from back, heart and peptic ulcer conditions. The applicant also had an entrenched perception of himself as an invalid.

The Tribunal accepted medical evidence that rehabilitiation was unlikely to be successful. Though there was a suggestion by the AAT that the likely success of rehabilitation did not necessarily disqualify an applicant for invalid pension.

> I have given careful consideration to the question whether or not there is a settled expectation that his incapacity will continue indefinitely. In that regard the provisions of section 135M of the Act are of some significance. Implicit in them is a recognition that a person may be permanently incapacitated for work notwithstanding that suitable treatment is available for his physical rehabilitation.

(Reasons, para. 24).

ARNOLD and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N82/475)

Decided: 21 February 1984 by W.A.G. Enright, J. McClintock and A. Renouf.

The AAT *set aside* a DSS refusal to grant invalid pension to a 43-year-old former moulder who suffered from back problems.

In relation to the permanence of the incapacity, the Tribunal said:

> Retraining is really out of the question. The applicant is a poorly educated man whose formal education ended many years ago. He has been a long time out of the work force and even, given retraining, would present as a poor prospect to an employer.

(Reasons, para. 28)

The AAT also decided, and handed down Reasons for Decision, in the following invalid pension cases. On our reading, none of these raised any issue of principle but depended solely on the assessment of medical evidence and evidence on the applicant's work experience and skills.

DSS decision set aside

Beladakis (N82/502) 8.2.84
Brinkley (Q81/101) 14.2.84
Bussell (N82/348) 21.2.84
Damaggio (V82/458) 29.11.83
Hayek (N83/367) 16.3.84
Lazarou (N82/174) 6.3.84
Morante (N82/465) 2.2.84
Ponce (N82/526) 6.3.84
Saqqa (N83/216) 29.3.84
Schembri (N83/394) 23.3.84
Shennag (N83/401) 29.3.84

DSS decisions affirmed

Biyikli (N82/167) 8.2.84
Finnimore (N82/489) 8.2.84
Khoury (N83/49) 27.3.84
Mouhammed (N81/247) 16.2.84
Roberts (Q82/163) 25.1.84
Stone (V82/478) 20.1.84

Federal Court decisions

Invalid pension: medical treatment

DRAGOJLOVIC v DIRECTOR-GENERAL OF SOCIAL SECURITY
Federal Court of Australia

Decided: 6 February 1984 by Smithers J.

This was an appeal from the decision of the AAT in *Dragojlovic* (1983) 16 *SSR* 162, where the Tribunal had decided that the applicant was not qualified for an invalid pension because his 'incapacity for work' was not 'permanent' within s.24 of the *Social Security Act*.

Dragojlovic suffered from a back condition which, according to medical opinion, could respond to surgery. Dragojlovic had refused to undergo the operation and the Tribunal had taken the view that this refusal was unreasonable and that, therefore, Dragojlovic's incapacity could not be regarded as permanent. In coming to this conclusion, the Tribunal had relied on rules developed in worker's compensation and tort law, to the effect that an accident victim was obliged to take reasonable steps to reduce his incapacity before claiming compensation or damages.

Refusal to undergo surgery: is incapacity 'permanent'?

The Federal Court decided that the Tribunal had 'erred in law in a critical way' and allowed the appeal. The Court quoted extensively from another Tribunal decision, *Korovesis* (1983) 17 *SSR* 175, where R.K. Todd had said that a person's refusal to undergo medical treatment had to be accepted, no matter how unreasonable, for the purposes of eligibility for invalid pension.

The Court accepted that the purposes of compensation law and of social security law were quite different: the former aimed to distribute the cost of injury between the victim and the wrongdoer; but social security law aimed to provide a 'safety net' under a person in crisis. The right to claim invalid pension depended

> on the existence of a single state of fact, namely whether or not, within the meaning of the words used in the statute, the applicant is permanently incapacitated for work. It is for social purposes that is done that way. The Act is concerned with the fact, and not with the performance by the claimand of some notional duty to mitigate the severity of the disability causing his incapacity.

(Judgment, p. 6)

The Court conceded that a disability which could be relieved by available treatment was not permanent. But if a person could not, for fear or religious belief or for some other reason of a genuinely compulsive nature, accept that treatment, the disability should be treated as permanent. Here, the applicant had a real fear of undergoing surgery (a laminectomy).

> Whether this fear be reasonable or unreasonable or even baseless, in the light of the applicant's knowledge of the cogent factors favouring his undergoing of the operation, the applicant will remain incapacitated so long as it lasts. If the fear actually is compelling and permanent then the incapacity is permanent. In that case the fact upon which entitlement under the Act depends is established.

(Judgment, p. 7)

The Court cautioned that this principle could not be extended to a person who refused medical treatment as 'a tactical exercise designed to obtain a pension which lacks bona fides':

> In any case in which treatment is refused the question for the [DSS] or the Tribunal is not whether the refusal is reasonable or