In July 1983, Mengi was granted a sickenss benefit but the DSS refused to pay an extra benefit for his wife and he asked the AAT to review that decision. (Before the hearing of this application for revew, that is on 24 June 1984, the Department of Immigration and Ethnic Affairs approved the entry of Mrs Mengi to Australia; and on 25 June 1984 Mengi was granted an invalid pension.)

**The legislation – uniformity**

Section 112(2) of the *Social Security Act* provides that the rate of sickness benefit payable to a married person is to be increased by a fixed amount where that person 'has a spouse who is resident in Australia', who is dependent on the married person.

The AAT said that, although there was no extended definition given to 'residence' as used in s.112(2), Parliament had not intended it to have a narrower meaning than it had in other parts of the *Social Security Act*, particularly Part III, which deals with age and invalid pensions. This meant that a person could be 'resident' in Australia, although not physically present in Australia (s.21, in Part III, clearly distinguished between residence and physical presence); and that a person would be resident in Australia if he or she was domiciled in Australia. Section 20, in Part III, extended 'residence' to include 'domicile', by incorporating s.6(1) of the *Income Tax Assessment Act*. Although there was no such incorporation in Part VII, the AAT took

> the legislature's intention throughout the entire Act to be one of uniformity insofar as the interpretation of 'residence' is concerned . . . In our opinion, therefore, the legislature, when enacting the Social Security Act, intended the word 'resident' to include a person whose domicile in in Australia.

(Reasons, paras 23-4).

**Domicile**

The AAT said that Mr and Mrs Mengi had acquired a domicile of choice in Australia when they migrated here in 1970 – they had intended to reside here permanently. And that domicile had not been lost when they returned to Turkey or when Mrs Mengi stayed in Turkey, because Mrs Mengi had not intended to stay in Turkey. The AAT pointed out that a domicile of choice could only be lost where the person 'cease[d] to reside in the country of domicile *and also* [ceased] to have the intention to return to it as his permanent home': Reasons, para. 28.

**Residence and temporary absence**

The AAT then referred to amendments to the *Social Security Act*, effective from 1 August 1984. Under these amendments, the extended meaning of 'residence' in Part III of the Act (so as to include 'domicile') operated only where the Director-General was not satisfied that the person had a 'permanent place of abode . . . outside Australia': ss.6, 20. This, the AAT said, meant that it had 'also to determine Mrs Mengi's residence status': Reasons, para. 31.

The AAT said that her initial absence from Australia did not deprive Mrs Mengi of her Australian residential status: her absence was intended to be temporary. But did her 9-year absence from Australia convert it from a temporary to a permanent one? The fact that Mr and Mrs Mengi had consistently tried, over that period, to have her admitted to Australia was the important factor, the AAT said: it was only 'physical preclusion preventing Mrs Mengi's return to Australia', just as in *Alam* (1982) 8 *SSR* 80 the civil war in the Lebanon had prevented the applicant realizing her intention of returning to Australia for more than 4 years.

**Formal decision**

The AAT set aside the decision under review and remitted the matter to the Director-General with a recommendation that Mengi be granted sickness benefit at the married rate from the date of its original grant until the grant of his invalid pension.

# Compensation award: refund of sickness benefit etc

**FARTHING and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/319)**

**Decided:** 27 August 1984 by B. J. McMahon.

The AAT *affirmed* a DSS decision to recover from Carol Farthing sickness benefits amounting to $904 from an award of damages recovered by her.

The decision had been made under s.115 of the *Social Security Act* (repealed from August 1982), which permitted the DSS to recover payments of sickness benefit from a person who had received compensation (including a damages award) for the same incapacity and the same period to which the sickness benefit related.

The Tribunal said that there were no 'special circumstances' which would justify the exercise of the discretion in s.115(4A) to waive recovery. Farthing had no assets and was currently unemployed—'I am a married woman and my husband prefers me not to work', she said. But the Tribunal thought that to require her to repay in 1984 money which she had first received in 1977 would not impose undue financial hardship:

> She has had the benefit of the use of the money all these years and is simply being asked to repay a debt in inflation-eroded dollars, interest free. In my view this more than compensates for any financial hardship which she may suffer by being required to pay the amount in one sum at long last. The public purse has been kept out of its money for no good reason for too long.

(Reasons, p.14)

**IZARD and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. T84/2)**

**Decided:** 19 July 1984 by RC Jennings.

Robin Izard had been injured in an industrial accident in 1975 and had been paid weekly workers' compensation for 1 year until his employer's insurers had stopped operating because of severe financial problems. (It appeared that, if the insurers had continued to operate, Izard would have continued to receive weekly workers' compensation until about 1979, when the maximum amount of compensation payable to him ($19 511) would have been exhausted).

During 1981, Izard received rehabilitation training from the DSS and, as a result of that training, he returned to work for 16 months. However, in April 1983, he was obliged to stop working and was granted an invalid pension.

In 1982, Izard recovered the sum of $15 702 as a lump sum workers' compensation award from a special fund established to meet claims on insolvent insurers.

The DSS then decided to recover from Izard the cost of the rehabilitation training provided to him, namely $3282.

**The legislation**

Section 135R of the *Social Security Act* obliges a person, to whom the DSS has provided rehabilitation treatment or training and who has recovered compensation for the same disability, to repay to the DSS the cost of that treatment or training. However, the Director-General has a discretion to release the person from that liability in 'special circumstances': s.135R(1B).

**'Special circumstances'**

The Tribunal said that, in deciding whether to exercise the discretion in s.135R(1B), it should be guided by the approach developed in the context of the discretion to waive recovery of sickness benefits under s.115(4A) of the *Social Security Act*.

That is, in the exercise of that discretion, the decision maker should 'be prepared to respond to the special circumstances of any particular case by reason of which strict enforcement of the liability created by the section would be unjust, unreasonable or otherwise

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.

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**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-