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-