unemployment benefit entitlements for that week. Lewis asked the AAT to review the DSS decision.

The legislation

Section 114 of the *Social Security Act* provides for the rate of unemployment benefit payable to a person to be reduced by reference to that person's weekly income.

Section 106(1) defines 'income' as meaning—

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

(With effect from June 1984, s.106 was amended by the insertion of sub-section (2A) which provides that a person who receives a lump sum payment on the termination of the person's employment is deemed to have received that lump sum on the date of termination.

The 'income' component

The AAT adopted the view expressed in *Turner* (1984) 19 *SSR* 205, that the refund of Lewis' contributions to the superannuation fund was not 'income' within s.106(1)—rather, it was a capital payment. The AAT noted that, in *Turner*, it had been said that the interest component in such a payment would amount to income, if it could be identified. Although it had not been possible to make that identification in *Turner*, in the present case the interest component was clearly identified as $482. Accordingly, that component should be treated as Lewis' income.

When was the income 'derived or received'?

Lewis argued that the interest component in the superannuation refund should be treated as income in the week when his employment had been terminated—that is, some 5 weeks before he was granted unemployment benefit. On the other hand, the DSS argued that it was proper to treat this payment as income in the week of 24 April 1984.

The AAT said that the amendment made to the *Social Security Act* (the insertion of the new sub-section (2A)) was relevant in the present case because it had been made after the period out of which the present dispute arose.

The only basis on which the superannuation refund payment could be treated as income in the week of the termination of Lewis' employment was if he could be regarded as having 'derived' that payment at that time. A person 'derived' a payment at the time when he or she had a clear present legal entitlement to demand the payment, the AAT said. An examination of the regulations which governed the payment of refunds under the Commonwealth Superannuation Scheme showed that a former contributor to the Commonwealth Superannuation Fund was entitled to receive a refund from the fund consisting of the person's contributions to the fund and accrued interest. This benefit was payable on the person's last day of service or on the 14th day after the Superannuation Commissioner had determined the amount of benefit payable to the person, whichever was the later. In the present case, Lewis' last day of service had been 27 January 1984 and the Commissioner had determined the amount of benefit payable to Lewis on 10 April 1984. It followed that Lewis had no legal entitlement to the payment of the interest from the superannuation fund (that is, the 'income' in question in the present matter) until 24 April 1984 and the interest component should be treated as Lewis' income in the week of 24 April 1984.

Formal decision

The AAT affirmed the decision under review.

Federal Court decision

Invalid pension: permanent incapacity

ANNAS v DIRECTOR-GENERAL OF SOCIAL SECURITY
(Federal Court of Australia)
Decided: 21 November 1985 by Northrop, Morling and Wilcox JJ.

This was an appeal against a decision of a single judge of the Federal Court. That judge had dismissed an appeal, under s.44(1) of the *AAT Act*, against a decision of the AAT, which had affirmed a DSS decision to reject Annas' application for invalid pension.

The AAT had found that Annas suffered several physical disabilities, as a result of which he had a reduced capacity for work. But the AAT had also found that Annas had substantial experience in managing small businesses and that, despite his disabilities, he would be able to run a small business (such as a shop or cafe), delegating the tasks which were beyond him to an employee. The AAT had also said that Annas would be able to borrow the necessary money to finance such a business from relatives and friends. On the basis of these findings, the AAT had concluded that Annas' incapacity for work did not amount to 85%, as required by s.23 of the *Social Security Act*.

'Incapacity for work' and self-employment

The Federal Court referred to the decision in *Panke* (1981) 2 *SSR* 9 and approved the approach taken by the AAT in that case. The Court adopted the approach taken in *Panke* to a person whose disability was significant but not totally destructive of the person's working capacity. In those cases it was necessary to consider the impact which the disability was likely to have on the person's capacity to undertake suitable work - bearing in mind such factors as the person's age, previous work experience and the types of paid work accessible to the person.

Amongst the factors which should be taken into account in assessing a person's capacity for work were any capacity which the person might have to work in her or his own business and any financial resources to which the person might have access so as to enable her or him to set up and run such a business.

In the present case, the AAT had quite rightly referred to Annas' previous experience in operating small businesses. But the AAT had, the Federal Court said, merely assumed that appropriate finance was available to Annas so as to enable him to set up such a business. The theoretical possibility of such finance was not a fact on which the AAT should have relied.

The Federal Court said that, before Annas could be held to have a capacity to work in his own business, it would be necessary to show that he had access to finance on a scale and terms (as to repayments and interest) which was adequate to allow him to establish a profitable business.

The Federal Court pointed out that there was a direct link between the adequacy of the finance and the level of Annas' remaining capacity for work: if he could borrow only enough money to set up a small business, he would probably be unable to delegate many of the tasks involved in the

business; and, given his reduced capacity for work, such a small business would probably be beyond him.

On the other hand, if his reduced capacity for work made it necessary for him to delegate many of the tasks involved in a business, it would have to be established that the running of a business with several employees was within his managerial capacity.

In the present case, the Federal Court pointed out, the AAT had not addressed these questions and, accordingly, its decision had involved an error of law and should be set aside.

Formal order

The Federal Court allowed the appeal, set aside the decision of the AAT and remitted the matter to the AAT to be heard and decided again.

KOUTSAKIS v DIRECTOR-GENERAL OF SOCIAL SECURITY (Full Court of Federal Court of Australia)

Decided: 1 November 1985 by Northrop, Morling and Wilcox JJ.

This was an appeal against a decision of a single judge of the Federal Court (*Koutsakis* (1985) 26 *SSR* 322), which had upheld a decision of the AAT, which in turn had affirmed a DSS decision to cancel Koutsakis' invalid pension.

The AAT had concluded that, although Koutsakis was incapacitated for work because of an anxiety state and depression, this incapacity was not permanent because there was treatment available for Koutsakis' condition. Koutsakis had refused to undergo that psychiatric treatment because he insisted that his incapacity had a physical basis. The AAT had said that the treatment available to Koutsakis offered prospects of rehabilitation and his objections to undertaking the treatment were groundless and unreasonable.

In a unanimous judgment, the Federal Court said that 'the mere failure of a person to undertake medical or other treatment which is recommended to him does not disentitle him from receiving a pension or an award of compensation': Judgment, p.6. This much, the Court said, had been established in *Fazlic* v *Milingibi Community Inc.* (1982) 38 ALR 424 and *Dragojlovic* (1984) 18 *SSR* 187.

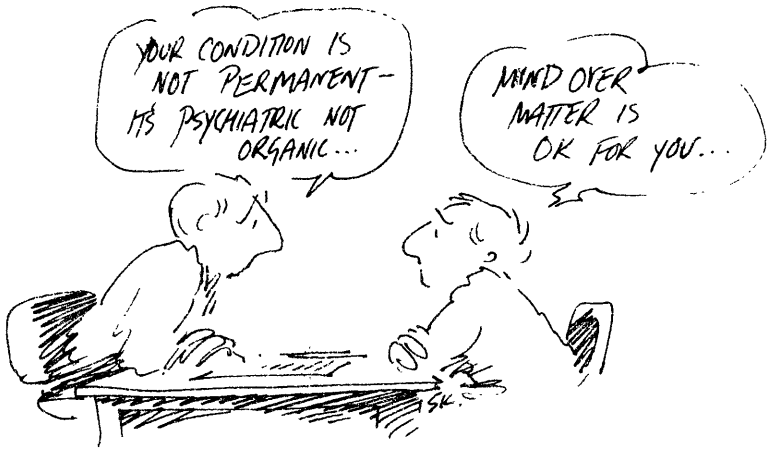
The Court said that, where a person entertained real fears or other objections to a course of medical treatment, the person's refusal to undergo medical treatment should be regarded as genuine even though the person's objections might (objectively) be regarded as irrational or groundless:

> '[G]iven a finding that the appellant does have fears, it is difficult to see how there could be a concurrent finding that they are not genuine. They may well be irrational and groundless, but that is not to say they are not genuine.'

(Judgment, pp.8-9)

Formal order

The Court allowed the appeal and ordered that the AAT's decision be set aside and the matter remitted to the AAT for determination.



Legislation

WAR RESTITUTION PAYMENTS

The *Social Security (Reparation for Persecution) Bill* 1985 will, when passed by Parliament, specifically exempt, from the definition of 'income' in the *Social Security Act*, West German compensation and restitution payments paid to victims of Nazi persecution. This amendment will settle the doubts left by the AAT decisions in *Artwinska* (1985) 24 *SSR* 287, *Kolodziej* (1985) 26 *SSR* 315 (which decided that the restitution payments were not 'income') and *Teller* (1985) 25 *SSR* 298 (which came to the opposite conclusion).

NEW PORTABILITY RULES

The Commonwealth Government has foreshadowed a new system for the payment of pensions overseas. This structure is to be based on amendments to the *Social Security Act* contained in the *Social Security (Proportional Portability of Pensions) Bill* 1985, introduced in the House of Representatives on 20 November 1985.

Social Security Minister Howe described the objective of the new system as the provision of 'improved social security assistance to people who move between countries'. But the terms of the Bill suggest that the real concern of the Government is to reduce entitlement to payment of pensions overseas.

Subject to provisions which protect the position of persons resident in Australia on 8 May 1985 (s.83AC(5)), full rate pensions and supporting parents' benefits will only be payable outside Australia to those persons who have accumulated 25 years residence in Australia (between the ages of 16 and 65 years): s.83AC(1) and (3). Persons who leave Australia (for more than 12 months) with a shorter period of accumulated residence will only qualify, while outside Australia, for a proportional pension or supporting parent's benefit.

An indication that the Government's real concern is to reduce expenditure, rather than to address the problems of Australia's immigrant community, lies in the retention of s.83AD of the *Social Security Act*. In his second reading speech, The Social Security Minister accurately identified, as one of the problems with the existing system, the difficulties faced by former immigrants to Australia who return to their countries of origin before qualifying for an Australian pension. These difficulties are caused by such provisions as s.21(1) (which requires presence and residence in Australia at the time of claiming an age pension) and s.83AD (which requires a former Australian resident who returns to Australia and claims a pension to spend at least 12 months here before her or his pension can be paid overseas: see *Dracup* in this issue of the *Reporter*). But the 1985 Bill contains no clauses which would displace these requirements.