told the AAT that full-time permanent employment was fundamentally incompatible with full-time study for a Ph.D. degree; and that part-time studies for that degree were only available to academic staff of tertiary bodies. Amongst the conditions laid down by the university for full-time candidates for the Ph.D. degree was a requirement that they undertake no more than 5 hours work a week if that work was not related to their advanced study and research.

Referring to the evidence given by the university official, the AAT said that Mathews was clearly not 'unemployed' in terms of s.107. The activities of a Ph.D. student were, as the Federal Court had put it in *Thomson* (1981) 38 ALR 624,

> '"so fundamentally incompatible with the person's being regarded as unemployed that no further inquiry is necessary". . . [I]f this were not so, the credibility of the Australian university system would be called into question.'

(Reasons, para.26)

Formal decision

The AAT affirmed the decision under review.

ELEFTHERIADIS and SECRETARY TO DSS
(No T85/61)
Decided: 17 April 1986 by R.C. Jennings.

Theodoros Eleftheriadis had completed a pass B.Sc. degree at Monash University in 1984. In February 1985, he was accepted for enrollment in the honours year of the B.Sc. degree at the University of Tasmania, a course which was to commence in July 1985.

In June 1985, Eleftheriadis moved to Tasmania, where he applied for and was granted unemployment benefit. At the beginning of July 1985, he began his course of study at the University of Tasmania and the DSS cancelled his unemployment benefit.

The DSS told Eleftheriadis that he could be paid unemployment benefit if he was enrolled as a part-time student. However, his Faculty would not allow him to enroll as a part-time student unless he could establish that he had found work.

Eleftheriadis asked the AAT to review the cancellation decision.

The legislation

Section 107(1) of the *Social Security Act* provides that a person is qualified to receive unemployment benefit if the person meets age and residence requirements and if -

> '(c) the person satisfies the Secretary that
> (i) throughout the relevant period he was unemployed [and meets the other elements of the work test].'

Commitment to study or employment?

Eleftheriadis told the AAT that, when he was granted unemployment benefit, he had taken few steps to find employment. However, from the time that his benefit was cancelled, he had intensified his attempts to find work. He said that, if he had been able to obtain work in a position related to his studies, he would have discontinued those studies; and if he had obtained work in another field, he would have continued the studies on a part-time basis. Eleftheriadis also told the Tribunal that, although his course had been classified as full-time, there were no formal contact hours and his studies could be undertaken outside normal hours.

In November 1985 (after he had been without income for almost 4 months), Eleftheriadis applied to the Commonwealth Department of Education for a TEAS allowance and that allowance was granted within a few weeks. In January 1986, he resumed full-time studies at university and stopped looking for work.

On the basis of this evidence the AAT concluded that,

> 'despite an earlier intention to pursue his honours degree as a primary objective, two factors produced a change of intent which was first evidenced on 25 July 1985. The first was rejection of his claim for unemployment benefit and the second was the fact that despite a willingness to work he did not have any. He could not live without money so he made a much more serious effort to secure full-time employment.'

(Reasons, p.11)

The AAT concluded that from one week after Eleftheriadis had learned of the DSS decision to cancel his unemployment benefit, he had been so committed to finding full-time employment that he met the requirements of s.107(1) and qualified for unemployment benefit. The AAT said that he had maintained this commitment and remained qualified until he resumed university studies in January 1986:

> '[H]is application for TEAS in November 1985 does not evidence an abandonment of intention to seek full-time employment. It merely shows that he needed money to live on. It was the only course left open to him when he was unable to fulfill the requirement that he produce evidence of Faculty approval of a part-time course.'

(Reasons, p.11)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that Eleftheriadis was entitled to unemployment benefit between 1 August 1985 and 14 January 1986.

Invalid pension: permanent blindness

SMITH and SECRETARY TO DSS
(No N85/475)
Decided: 16 April 1986 by J.O. Ballard, G.D. Howell and J.H. McClintock.

Lesley Smith had lost the sight of her right eye in 1972. In 1973 she was granted an invalid pension on the basis that she was 'permanently incapacitated for work'.

In 1984, her pension was cancelled because of the level of her husband's income. She then lodged another claim for invalid pension on the basis that she was 'permanently blind'. When the DSS rejected that claim, Smith asked the AAT to review the decision.

The legislation

Section 24 of the *Social Security Act* provides that a person is qualified for invalid pension if the person meets age and residence requirements and if the person 'is permanently incapacitated for work or is permanently blind'. According to s.28(2), an invalid pension granted to a person on the basis of permanent blindness is not subject to an income test.

Assessing blindness

The medical evidence established that Smith had myopia in her remaining eye and that her unaided vision was 6/60 (which meant that she had lost 85% of her vision). Her corrected vision was 6/24 (which meant that she had lost 65% of her vision). Although she had a restricted visual field, it was agreed that she was capable of moving around with the aid of spectacles and that she could carry out domestic work in a familiar environment.

The AAT noted that in *Touhane* (1984) 21 *SSR* 239 and *Zironda* (1985) 27 *SSR* 337, it had been suggested that a person's sight should be assessed without the aid of any correcting lens. However, the AAT said that the correct approach was to make the assessment on the basis of the person's corrected sight:

> 'We have considered the views expressed in *Zironda's* case and have reached the conclusion that insufficient reliance was placed upon the utilisation of the word "blind" in the Act in contradistinction to the use of the term "loss of sight" which appears in long-standing

compensation legislation both at State and Federal level.

16. Ms Godtschalk for the respondent also argued that the Act provided financial support for those in need. The blind pension was not means tested. It would be unfair if, when vision could be corrected by glasses, a blind pension should be paid so that a person might still get the pension and be able to work. Furthermore Ms Godtschalk argued that if blindness could be corrected it could not be described as "permanent" for the purposes of s.24 of the Act.

17. We think the argument based upon the objectives of the Act [is] telling . . .

18. [W]e think there is sufficient in the word blindness to justify the application of an objective test as to what can be seen with normal correction by spectacles or contact lenses.'

(Reasons, pp.10-1)

Meaning of 'blind'

The AAT said that it did not 'feel competent to lay down a test for all cases for determining what permanently blind means'. It noted that the assessment of blindness did 'not include any consideration relating to incapacity for work' which was dealt with separately under s.24:

'Seen in the overall context of the Act it seems reasonable to interpret the intention of Parliament as requiring something more than incapacity to work due to lack of sight otherwise there would be no need for the separate qualifications of permanent blindness.'

(Reasons, para.21)

The AAT said that it was sufficient for it to conclude, from the evidence given in the case, that Smith was not permanently blind.

Formal decision

The AAT affirmed the decision under review.

Federal Court decisions

Age pension: income test

SECRETARY TO DSS v. BURMAN
(Federal Court of Australia)
Decided: 18 April 1986 by Neaves J.

This was an appeal, under s.44(1) of the *AAT Act*, against the AAT's decision in *Burman* (1985) 27 *SSR* 332, where the Tribunal had set aside a DSS decision to treat as 'income' of Burman money paid to her by her daughter and son-in-law.

Burman, who was an age pensioner, had entered into a formal agreement with her daughter, M, and son-in-law, D. Under this agreement, Burman lent M and D $20 000 to enable M and D to purchase a house, which Burman was to rent from them at a rent of $350 a month for 2 years. M and D were to pay Burman interest on the loan at the rate of 12.5% a year - which was $200 a month. Clause 4 of the agreement read as follows:

'The lender will pay the borrowers an amount of $150 a month which represents the rent money payable by the lender to the borrowers of $350 per month less the interest payable by the borrowers to the lender of $200 per month.'

M and D purchased a house, which Burman occupied between January and November 1984; and Burman paid M and D $150 each month during that period.

In November 1984, Burman moved out of the house when M and D were obliged to sell it because of financial difficulties. Between that date and March 1985 (when the sale was settled and M and D repaid the $20 000 loan), M and D paid Burman $200 a month.

The question raised by the DSS and AAT decisions, and in this appeal, was whether Burman should be regarded as having received 'income' of $200 a month from January 1984 to March 1985.

The legislation

At the time of the decision under review, s.18 of the *Social Security Act* defined 'income' (which, under s.28(1) could reduce an age pension) as meaning -

'any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person . . . and includes any periodical payment or benefit by way of gift or allowance from a person other than the . . . daughter . . . of the first-mentioned person . . .'

An allowance from Burman's daughter?

The AAT had decided that the $200 a month fell within the first part of the definition of 'income': the payments were 'moneys . . . derived or received'. The AAT had then concluded that the payments were an 'allowance . . . from [her] daughter' and were accordingly excluded from the s.18 definition.

The Federal Court noted that the first finding was not challenged by the parties; and, similarly, the assumption that the payments would fall outside the s.18 definition if they were an 'allowance' provided by Burman's daughter was not challenged.

The AAT had said that the character of the monthly payments could not be judged solely by the terms of the agreement; they had to be seen as part of a family arrangement assisting Burman to have somewhere to live.

However, the Federal Court concentrated on the terms of the agreement. It had several features, the Court said,

'which support the finding that it was intended to create legally enforceable rights, although it was probably never contemplated that those rights would be, or would need to be, enforced by legal process.'

(Judgment, p.12)

Those features included the fact that the agreement was drawn up after Burman had obtained legal advice; Burman's understanding that the arrangement was for a loan bearing interest; the description in the agreement of the arrangement as a 'loan', of Burman as the 'lender' and of M and D as the 'borrowers'; and the fact that, at the time when the agreement was drawn up, 12.5% was a commercial rate for interest and $350 a fair rent for the premises in question.

Taking those considerations into account, the Court said, there was no conclusion open other than that the amounts of $200 a month 'were properly to be characterized as payments of interest on loan moneys'. They could not be characterized as 'a payment or benefit by way of gift or allowance': Judgment, p.13.

Formal order

The Federal Court set aside the decision of the AAT and restored the decision of the Secretary to the DSS.