school in Ballarat, where he lived with his mother, until the beginning of 1986, when he enrolled at a special school in Melbourne. During the school term, A boarded 4 nights in each week with another family in Melbourne. On the remaining 3 nights and during school holidays, A lived at home with Williamson.

Williamson told the AAT that she made all decisions about A's activities and care; and that the family with whom he boarded were 'baby-sitting' him during the week. She said that she considered A's home to be in Ballarat with her; and his stay in Melbourne to be temporary, so as to enable him to attend the special school until he turned 16 years (in 1989).

Entitlement preserved

The AAT said, first, that the reference in s.105KA(1) to absence 'for a period of not more than 28 days' in a year was a reference to a continuous period: it did not permit the DSS to add separate, shorter, periods together.

It followed that a parent's eligibility for the allowance was preserved by s.105KA(1) where her child spent 4 days in each school week absent from home: none of the periods of absence was more than 28 days (although those periods would aggregate considerably more than 28 days in any year).

Secondly, the AAT said that, if its reading of s.105KA(1) was wrong, this was an appropriate case for the exercise of the discretion in s.105KA(2). The child's absences from home were 'limited to the fulfilment of a passing purpose' and were therefore 'temporary', as the Federal Court had interpreted that term in *Hafza v Director-General of Social Security* (1985)26 *SSR* 321.

After noting that Williamson drove A to school each Monday and collected him each Friday, and played an active role in controlling A's activities during his absences from home, the AAT said:

> 'Welfare legislation should not be interpreted narrowly so as to exclude from its operation those applicants who at great personal cost to themselves provide for a handicapped child so that the child may reach her or his potential.'

Formal decision

The AAT set aside the decision under review and directed the Secretary that Williamson be paid handicapped child's allowance from the date of the cancellation.

Assets test

CALDWELL and SECRETARY TO DSS (No. N87/643)
Decided: 27 November 1987 by A.P. Renouf.

The AAT *affirmed* a DSS decision to value the applicant's shares, for the purpose of the assets test, at the market price.

Caldwell argued that, while this was an appropriate valuation method for share traders, it was not a fair valuation for long-term investors. He proposed an alternative valuation formula to discount non-constant factors.

The AAT noted that the *Social Security Act* did not prescribe a valuation method, but that the DSS had used the market value as a convenient, simple and consistent method.

The AAT said that Caldwell's proposal was 'worthy of consideration by government'; but implied that the Tribunal could not adopt it:

> '5. It would appear that it is for the Minister and through him the Department of Social Security rather than this Tribunal to examine the suggestion for what the applicant is really seeking, as he admits, is a change of government policy or practice.
>
> 6. The decision under review is merely one application of that policy or practice and I can find nothing wrong with the application in the [present] instance.'

[**Editor's note:** The AAT was apparently unaware of the Federal Court's decision in *Drake v Minister for Immigration* (1979) 2 ALD 60, to the effect that the Tribunal should not uncritically adopt government or departmental policy; and that, if it simply adopts any such policy without making an independent assessment of its propriety, the Tribunal commits an error of law.]

SOTTOSANTI and SECRETARY TO DSS (No. V87/163)
Decided: 24 February 1988 by R.A. Balmford.

Antonio Sottosanti had been granted an age pension in 1977. When the assets test was introduced in March 1985, the DSS decided to cancel his pension. He asked the AAT to review that decision.

The evidence

Sottosanti had come to Australia in 1948, when he was 38 years of age, to join his father, who had been here for 21 years. Sottosanti and his wife and 3 children lived on his father's farm. Over the next few years Sottosanti bought 5 blocks of residential land and built a small house for his family. The titles to this land were later consolidated, into a parcel slightly less than a hectare, and known as the 'brown land'.

After his father's death, Sottosanti acquired title to the farm, of 10 hectares, known as the 'pink land'. He also acquired three pieces of land adjacent to the 'pink land', known as the 'green land' (50 hectares), the 'red land' (11 hectares), and the 'red-hatched land' (3 hectares).

One of Sottosanti's son, G, had farmed all of this land, along with his own block of 42 hectares, since 1977. The land had recently been found to be affected by dieldrin, which was likely serously to affect its use as a farm.

Sottosanti's land was valued at $550 000; and the commercial rent from the land, apart from the brown land, had been estimated at $6080 a year.

Evidence was given to the AAT of Sottosanti's attachment to the land, and the expectation that he would leave it to his 5 children.

G had originally paid no rent for the use of Sottosanti's land but had later agreed to pay $1500 a year. When Sottosanti's pension was cancelled, G increased this payment to $4500; but he was forced to increase his overdraft to do this; and he would now need to sell some of his land to reduce that overdraft. G had taken out a mortgage of $50 000 on his own land to finance the building of a house for Sottosanti and was paying $16 560 under the mortgage.

The taxable income of G and his wife was $25 192 in 1985-86 and $7888 in 1986-87. At the end of 1987, G owed a total of $145 932 to the bank.

Reasonable to sell part of property?

The DSS accepted that the financial hardship provision, now s.7(1) but formerly s.6AD(1), applied to the red and green land which directly adjoined G's land, because Sottosanti could not reasonably be expected to sell, realise or use it as security for borrowing. But the DSS argued that this could not be said of the brown, pink or red-hatched land which did not adjoin G's land. G's farming operations, the DSS said, could be carried on without this land.

The AAT rejected the DSS argument. It referred to a news release in May 1985 from the Minister for Social Security, to the effect that a person would not be expected to sell farming property owned for 20 years or worked by a close relative for 10 years. Those periods were satisfied in this case.

The AAT also said that selling part of the land -

> 'would turn a marginal farm into a more marginal farm. If this farm is worth retaining in the Sottosanti family - which the respondent, by his concession in respect of the red and green land accepts it is - then it should be retained as a whole. If the applicant cannot reasonably be expected to sell part of the farm then he cannot reasonably be expected to sell the whole.'

(Reasons, para.28)

Deemed income

As Sottosanti qualified under the hardship provisions of s.7(1) for the whole property, the AAT turned to the question of the income which he could reasonably be expected to derive from that property, as required by s.7(4), formerly s.6AD(3).

The AAT noted that, according to the Federal Court decision in *Copping* (1987) 39 *SSR* 497, the personal circumstances of Sottosanti had to be taken into account in determining what income could reasonably be expected to be derived. This included what amount the person currently using the property 'would be able, without serious harm to his own economic interests, to pay in all the circumstances of his own and his family's economic circumstances', as Jenkinson J. had said in *Copping*.

In the present case, the AAT said, that amount was $1500, the amount which G had been paying until the DSS decision to cancel Sottosanti's pension.

The new legislation

The AAT noted that s.7(4) had been amended from 13 November 1987. The subsection now deemed the income from disregarded property to be either 2.5% of its value or the commercial rent, whichever was the lower. In the present case, the likely commercial rent was $6560; and 2.5% of its value was $13 750. However, as the amendment of s.7(4) had not been passed at the time of the hearing of this matter, the AAT made no decision under the new provision.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that the whole of Sottosanti's land was covered by s.7(1) of the *Social Security Act*; that the income which could reasonably be expected to be derived under s.7(4) prior to 13 November 1987 was $1500.

Sickness benefit: recovery from compensation

ZITO and SECRETARY TO DSS
(No. N87/481)
Decdied: 3 November 1987 by A.P. Renouf, J.H. McClintock and M.T. Lewis.

The AAT *set aside* a DSS decision to reduce the applicant's sickness benefit by $62 a week, because of his receipt of a workers' compensation payment of $55 000, and directed the DSS to recalculate the appropriate reduction.

Zito's award of compensation had been made early in 1985; and the DSS had granted him sickness benefit in December of the same year.

Part of this appeal was taken up with the apportionment of the compensation payment, on the principles laid down in *Castronuovo* (1984) 20 *SSR* 218. The AAT decided that the DSS calculations should be varied, taking the date when periodic payments of compensation to Zito had ceased (12 December 1983) as the date from which the compensation payment should be apportioned.

However, the AAT rejected Zito's argument that there were 'special circumstances', under s.115E of the *Social Security Act*, for disregarding his receipt of compensation.

First, the Tribunal said that his solicitors' advice that he would receive a larger compensation settlement did not amount to 'special circumstances':

> 'If Mr Zito was misled by his legal advisers, he should seek redress elsewhere. The public [moneys] of which the respondent is the custodian cannot be allowed to suffer for this reason.'

(Reasons, para.10)

Secondly, Zito's lack of education, limited work skills and poor English were not 'unusual, uncommon or exceptional', and were, therefore, not 'special circumstances', as that phrase had been interpreted in *Beadle* (1984) 20 *SSR* 210.

Finally, Zito was not suffering financial hardship: he had made substantial withdrawals from his bank account, he owned a large equity in his house, and his wife had been granted an invalid pension. The AAT rejected evidence from Zito's daughter that she had loaned her father $150 a week over 15 months, so that he now owed her $8400. The Tribunal thought it unlikely that a 17-year-old shop assistant could make such loans over an extended period.

JERKIN and SECRETARY TO DSS
(No. N85/1]
Decided: 5 February 1988 by A.P. Renouf.

The AAT *affirmed* a DSS decision that Jerkin was liable to repay $1792 in sickness benefits, following his receipt of compensation for the same incapacity.

Jerkin admitted that he had been paid sickness benefits and compensation for the same incapacity; and that he was legally obliged to repay the sickness benefits under the former Division 3A of the *Social Security Act*.

But Jerkin argued that there were 'special circumstances', for the DSS ignoring the payment of workers' compensation, under s.115E. He said that his lawyers had wrongly advised him, before the settlement of his compensation claim, that no more than $1000 had to be repaid to the DSS; and he had settled his claim on that basis.

The AAT rejected the argument that this amounted to 'special circumstances':

> '[T]he respondent is in no way responsible for the error which was one by the applicant's legal representatives . . . [T]he public purse should not have to bear the brunt of an error that was made by the applicant's agents. The applicant's recourse in such circumstances is rather against the agents.'

(Reasons, para.4)

STANKOVIC and SECRETARY TO DSS
(No. N87/456)
Decided: 15 February 1988 by A.P. Renouf, D.J. Howell and M.S. McLelland.

The AAT *affirmed* a DSS decision that Stankovic was liable to repay $1901 in sickness benefits, following her receipt of workers' compensation for the same incapacity.

The Tribunal rejected an argument that the DSS was estopped from recovering the sickness benefit. The DSS had originally told Stankovic that the compensation received by her would be treated as 'income' in the week of payment, so that she would only be treated as having been overpaid the sum of $74.15 by way of sickness benefit in that week. It was not until almost a year later that Stankovic was advised by the DSS that she was obliged to repay all the sickness benefit received by her.

The AAT said that there was 'considerable doubt . . . whether the proper exercise of statutory duties or powers can be fettered by estoppel.' If protection of the public interest had priority over private interests, such an argument could not be raised to prevent performance of statutory duties or powers. There was 'a public interest in the prevention of "double dipping" and in the recovery of public moneys', which would prevent Stankovic raising an estoppel against the DSS: Reasons, para.8.

On the other hand, there were decisions which protected 'persons who have acted to their detriment in reliance on misleading advice given to them by employees of statutory authorities.' But this was not a case in which such an estoppel could operate: the applicant had not established that she had acted to her detriment because of the advice given to her by the DSS in September 1982.

KLOBUCHAR and SECRETARY TO DSS
(No. N87/1058)
Decided: 26 February 1988 by A.P. Renouf.

The AAT *affirmed* a DSS decision to recover $5158 in sickness benefits from Klobuchar following his receipt of a compensation settlement.

Klobuchar claimed that there were 'special circumstances', within s.115E of the *Social Security Act*, for disregarding