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

his receipt of compensation. These were that the DSS had consistently advised him and his wife, before he applied for sickness benefit, that his wife was not eligible for unemployment benefit. If this misleading advice had not been given, she would have applied for and received unemployment benefit, which the DSS could not have recovered from his compensation payment.

The AAT accepted that this advice had been given by the DSS to Klobuchar. But the AAT did

'not see how this error on the respondent's part would make it unjust, unreasonable or inappropriate for the respondent to require the repayment of the sickness benefit. As was said in *Ivovic* (1981) 3 *SSR* 25, the *dominant* principle is that there should not be double indemnity for the same incapacity. Moreover, all that the applicant has had to repay is public [moneys] previously paid to him for an incapacity for which he was compensated by his former employer. This, I feel, is just, reasonable, and appropriate and does not frustrate ends or objects of the Act.'

(Reasons, para.8)

The AAT said that any redress for the DSS error should be for Klobuchar's wife to obtain. It considered whether she could be paid unemployment benefit from the time when she was told that she had no entitlement. The AAT said that it was not satisfied that she would have passed the work test in s.107(1)(c) of the Act from that time, because it was doubtful that she was willing to engage in suitable work.

Family allowance: 'temporary absence'?

PANAGIOTOU and SECRETARY TO DSS
(No. S87/21)
Decided: 1 February 1988 by J.A. Kiosoglous.

The AAT *affirmed* a DSS decision not to pay Panagiotou family allowance for her 4 children during the period from 1975 to 1985, when she and her children were absent from Australia.

At the time of the decision under review, s.104(1)(e) of the *Social Security Act* preserved the right to family allowance where a parent and child, whose 'usual place of residence' was in Australia, were 'temporarily absent from Australia'.

Panagiotou had migrated to Australia from Greece in 1959. In 1965 she married a man who had migrated from Greece in 1964. In 1975, they sold their flat because it was too small; and decided to take their children to Greece for no more than a year before purchasing another home. They sold their other possessions and purchased one-way tickets to Greece.

After their arrival in Greece, the illness of close relatives and shortage of money interfered with their plans to return to Australia. After the first year, the children enrolled in local schools and Panagiotou's husband found regular, part-time work. Panagiotou and her husband voted in a Greek election in 1981. Panagiotou said that, during the 10 years in Greece, she had always intended to return to Australia.

The AAT adopted the point made by the Tribunal in *Houchar* (1984) 18 *SSR* 184:

'For an absence to be temporary, not only must it be intended not to last indefinitely but the time for which it is intended to last must not be of great length.'

The AAT also referred to the decision in *Triantafillopoulos* (1984) 21 *SSR* 243, where a 10-year residence in Greece was held to be 'indefinite rather than as of a limited or temporary duration.' The AAT concluded:

'The Tribunal accepts that there were strong family pressures which obliged the applicant and her family to stay in Greece. However the Tribunal is satisfied that the absence became an indefinite absence, notwithstanding that circumstances have shown, with the benefit of hindsight, that the absence was not a permanent one. Further there are the additional facts that prior to leaving Australia, the family liquidated all of their assets and only purchased one way tickets. The applicant's husband obtained work and her children attended local schools whilst in Greece. The applicant's intention obtained objectively was for an indefinite absence.'

(Reasons, para.32)

Interest on money withheld by DSS

TRIMBOLI and SECRETARY TO DSS
(No.N86/837)
Decided: 24 February 1988 by R.A. Hayes.

Marino Trimboli had received sickness benefits and workers' compensation for the same incapacity. The DSS calculated that $15 114 of the sickness benefits was repayable by Trimboli, and recovered that amount from the insurer liable to pay the compensation.

Trimboli asked the AAT to review that decision.

Interest on money wrongly recovered

The AAT decided that the amount of sickness benefit recoverable by the DSS should be calculated in accordance with the decision in *Castronuovo* (1984) 20 *SSR* 218. On that basis, only $12 545 was recoverable; and the balance held by the DSS should be repaid to Trimboli.

Trimboli's counsel then argued that the DSS should be obliged to pay interest to Trimboli on the amount wrongly recovered. Counsel pointed out that the *Supreme Court Act* 1970 (NSW) and the *District Court Act* 1973 (NSW) gave those courts the power to order the payment of interest after entering judgment, and that Trimboli could have sued the DSS in either of those courts for the money wrongly recovered.

The AAT rejected this argument. It referred to the rule that, in the absence of parliamentary authorisation, a government department cannot lawfully pay out funds: *Auckland Harbour Board v The King* [1924] AC 318.

The AAT noted that, on the other hand, a payment by the Commonwealth in satisfaction of a clearly recognised legal liability (even though not yet established by a judgment of a court) would not be unlawful: *Commonwealth of Australia v Evans Deakin Industries Ltd* (1986) 161 CLR 254.

In proceedings in the NSW Supreme Court or District Court, recovery of interest against the Commonwealth would, in the absence of contrary Commonwealth legislation, be determined by NSW legislation: *Judiciary Act* 1903, ss.79 and 64.

But, the AAT said, the relevant provisions of the NSW legislation did not create any substantive right which the Tribunal could apply against the respondent nor did they overrule the common law principle that interest is not part of the action for money had and received.

Because Trimboli had chosen to seek administrative review, through the AAT, of the DSS decision to recover payment of sickness benefits, rather than sue in the NSW Supreme Court or District Court against the DSS for money had and received, the provisions of the Supreme Court Act and the District Court Act could not be relied on by Trimboli.

Formal decision

The AAT set aside the decision under review and decided that the DSS could recover only $12 545 from Trimboli's compensation award, and should make a refund to Trimboli of the excess recovered by it.