Formal decision
The AAT set aside the decision under review and substituted a decision that Bryer qualified for handicapped child's allowance from June 1986.

Sickness benefit: recovery

WALKER and SECRETARY TO DSS (No. V86/552)
Decided: 30 November 1987 by J.R. Dwyer.

As the result of an industrial injury in 1975, Bruce Walker was obliged to give up working in 1981. He was paid sickness benefit from May 1981 to October 1982. He then received weekly payments of workers' compensation from October 1982 to October 1984.

In October 1984, the Victorian Workers' Compensation Board made a consent award of $32 500 compensation to Walker. The DSS then decided to recover $1874 sickness benefit from Walker. He asked the AAT to review that decision.

The legislation
At the time of the decision under review, s.115B(3) of the *Social Security Act* allowed the Secretary to the DSS to recover sickness benefit payments, where the Secretary was of the opinion that a payment of compensation received by a person was a payment, in whole or in part, by way of compensation for the incapacity for which the person had received sickness benefit. The right of recovery was limited to -

'(a) the amount of sickness benefit received by the person in respect of that incapacity; or

(b) the amount of the lump sum payment . . . or such part of that amount . . . as, in the opinion of the Secretary, relates to that incapacity -

whichever is the lesser amount.'

Identity of incapacity
The AAT noted that the Federal Court had decided, in *Siviero* (1986) 68 ALR 147, that the Secretary could only recover sickness benefit under s.115B(3) where the sickness benefit and compensation had been paid for the same incapacity 'in terms of cause, effect and time'.

The consent award declared that Walker abandoned 'all claims to past weekly payments of compensation' and 'claims to future medical . . . expenses'; and that the payment of $32 500 was in full settlement of Walker's claims for future compensation.

In the present case, it appeared from the consent award that the compensation was paid for incapacity from October 1984 on, whereas the sickness benefit had been paid for incapacity prior to October 1982. Accordingly, as the award stood, the necessary identity of incapacity was lacking.

A conclusive award
The DSS asked the AAT to look behind the terms of the award, arguing that it was a device to avoid the recovery provisions.

In *Siviero*, the Federal Court had said that it could not go behind the compensation award, even where it could not imagine a factual situation which would support the terms of the award.

The Tribunal noted that in *Castronuovo* (1984) 20 *SSR* 218 the AAT had said that the terms of the consent award in that case could not be taken at face value. But that, the Tribunal said, was because 'it was clear on the face of the award that there must have been some error in the statement': Reasons, para.25.

In the present case, there was no apparent error on the face of the award:

'27. In view of the clear statement by the Federal Court in *Siviero* that there is no basis to go behind the terms of an award, even where the Court could not conceive of a factual basis for the award, and the fact that in this matter, unlike in *Castronuovo*, there is no error apparent on the face of the award, I consider that the Tribunal and Secretary must accept the award at face value.'

Formal decision
The AAT set aside the decision under review and substituted a decision that the sum of $1874 was not recoverable.

Assets test: disposal of property

ROGERS and SECRETARY TO DSS (No. V86/02)
Decided: 23 October 1987 by R.A. Balmford, R.A. Sinclair and G. Brewer.

Annie Rogers asked the AAT to review a DSS decision that age pension was no longer payable to her because of the value of her property, including a farm.

Rogers argued that she had disposed of the beneficial ownership of the farm in favour of her sons.

The property
Rogers had inherited a dairy farm on the death of her husband in 1957. The farm was operated by sharefarmers and tenants until 1969, when Rogers' two sons, C and B, took over the farm. In 1975, the partnership between C and B was dissolved and, since then, the farm had been operated by C, who also worked full-time as a TAFE lecturer.

In 1980, the farm was divided into two lots. Lot 1, of 69 hectares with the farmhouse and other buildings, was sold by Rogers to C and his wife for $84 200. At the time of the hearing, Rogers was still owed $37 000, secured by an unregistered mortgage. The mortgage provided for annual repayments of the debt, free of interest, of $5000. No more than one instalment had been paid since 1980.

Lot 2, of 42 hectares, had been retained by Rogers but leased to C at a rent of $2800 a year. He regularly paid most of this rent.

Rogers' non-exempt assets consisted of an insurance policy ($3485); Lot 2 ($104 800); a fixed deposit ($2000); and the unregistered mortgage of Lot 1 (present value $20 870).

The legislation
Section 6 of the *Social Security Act* provides that where a person has disposed of property for inadequate consideration, on or after 1 June 1984, the value of that property is to be included in the value of the person's property for the purposes of the assets test.

Section 7 provides that the value of any property is to be disregarded for the purposes of the assets test, where *(inter alia)* -

(b) s.6 does not apply in relation to the person or the Secretary determines that s.6 should be disregarded;

(c) the person cannot, or could not reasonably be expected to, sell, realise or use the property as security for borrowing; and

(e) the Secretary is satisfied that the person would suffer 'severe financial hardship' if the property were taken into account.

No constructive trust
Rogers told the AAT that she proposed to leave Lot 2 to her sons as tenants in common in equal shares; and C told the AAT that he would be 'quite upset' if his mother sold Lot 2, because of his feeling for the land which had been in the family since 1860.

The AAT said that this did not fall into any of the recognised categories

of constructive trust: it would not be a fraud for Rogers to deny that that she held Lot 2 on trust for her sons. She remained the legal and equitable owner of the land.

Disposition of property
The AAT pointed out that Rogers was not receiving regular repayments under the mortgage although the mortgage debt was recorded as reducing each year; and she was only receiving part of the rent for Lot 2. She was, it appeared, forgiving payment of those amounts and this amounted to a disposition of property under s.6.

Should the property be disregarded?
For Rogers to take advantage of s.7, and have some or all of her property disregarded, the discretion in s.7(1)(c) would have to be exercised in her favour.

The AAT said that this was not an appropriate case for exercising that discretion. The farming property owned by Rogers had the potential for subdivision, being close to Melbourne; and her son's farming enterprise was financially precarious. This was not a case where a viable farm property was required for the support of the next generation.

Moreover, the AAT said -

> 'to give Mrs Rogers the benefit of s.7 would be, ultimately, to continue the community's support for a property which is not viable.'

(Reasons, para.24)

Formal decision
The AAT affirmed the decision under review.

Assets test: equitable transfer

DINEEN and SECRETARY TO DSS (No. V87/43)
Decided: 26 November1987 by H.E. Hallowes, H.C. Trinick and G.F. Brewer.

Following the introduction of the assets test, the DSS decided that Michael Dineen's age pension should be reduced because of the value of his farm property.

The DSS subsequently decided that the property should be disregarded under the financial hardship provisions; but that his pension should be reduced because of 'deemed income' of 2.5% of the value of the property.

Dineen asked the AAT to review that decision.

The legislation
At the time of the decision under review, s.6AD(1) of the *Social Security Act* provided that a person's property should be excluded from the assets test, where it was not reasonable to expect the person to sell, realise or use the property as security for borrowing, and where the person would suffer 'severe financial hardship' if the value of the property were taken into account for the purposes of the assets test.

Section 6AD(3) provided that, where property was disregarded under s.6AD(1), the person's pension should be reduced by the income which could reasonably be expected to be derived from that property.

The evidence
Between 1938 and 1948 Dineen, who was born in 1904, acquired 3 pieces of land, totalling 132.5 acres, which he operated as a dairy farm. Dineen's elder son, J, worked on the farm for board and keep from 1952. He was followed by the younger son, M, in 1958. Each of them worked away from the farm for a time but returned in 1970 and 1974.

In 1975, Dineen had retired from active involvement in the farm, and transferred 9 acres from one of the properties ('R') to J, who then established a poultry farm. J told the AAT that he expected title to the remainder of 'R' to be transferred to him on his father's retirement or death; and that, in the meantime, he had used the land as he liked, and had made improvements to the property.

M said that he had understood from 1969 that title to another of the properties ('W') would be transferred to him on his parents' death; and that he had completely taken over the running of that property in 1983 and made improvements to it.

Dineen said that, on the death of his wife in 1980, he had decided to transfer 'R' to J and 'W' to M but had not proceeded because of the costs involved. Dineen's will, made at that time, left 'R' to J, 'W' to M, and divided the third property between them, conditional on a bequest to his daughter; and, in the event of either M or J predeceasing Dineen, the properties were to go to Dineen's grandchildren by that son. Dineen told the AAT that he wanted his family to build upon the properties, one of which he had inherited from his own father; and that selling the properties was the 'last thing' he wanted to do.

In June 1987, Dineen executed a declaration of trust acknowledging that the properties in question had been held by him in trust for J and M since 1980.

Equitable transfer?
The major point argued on behalf of Dineen was that, at the time of the introduction of the assets test, he had ceased to be the beneficial owner of the property in question, because a trust had been created in favour of his sons.

The AAT decided that there had been, during the period under review, no equitable transfer of the properties; and that they had remained the property of Dineen.

First, no **express trust** had been created over the properties before June 1987. Dineen's declared intention to give the properties to his sons was not enough to create a trust, as the High Court had decided in *Olsson v Dyson* (1969) 120 CLR 365.

Secondly, no **constructive trust** had arisen over the properties in favour of Dineen's sons. There was no evidence of any common intention between Dineen and his sons that he held the properties in trust for them during their lifetime; nor had the sons acted to their detriment - the factors which decisions such as *Butler v Craine* [1986] VR 274 and *Thwaites v Ryan* [1984] VR 65 had said were essential. There had been no more than family arrangements, which had not been made to create a legal relationship.

Thirdly, Dineen had not intended to create a trust over the subject properties, but to transfer the properties by way of his will. Accordingly, until his execution of the declaration of trust in June 1987, no **implied trust** had arisen over the subject properties in favour of his sons.

Fourthly, the improvements made by Dineen's sons had not created an **estoppel by acquiescence** against Dineen. He had not encouraged his sons to make improvements for his advantage; nor had they expended money in any mistaken view as to their legal rights. So the present case did not involve the elements required to create such an estoppel, according to the decisions in *Chalmers v Pardoe* [1963] 1 WLR 677; *Morris v Morris* (1982) 1 NSWLR 61; and *NSW Trotting Club v Glebe Municipal Council* (1937) 37 SR (NSW) 288.

Fifthly, no contractual arrangement had been made between Dineen and his sons about the subject properties. Accordingly, there was no contract which might be rendered enforceable because of acts of **part performance** on the part of Dineen's sons.

Financial hardship
The AAT went on to decide that the property in question should be disregarded for the purposes of the assets test: it was not reasonable to expect Dineen to dispose of the property; and he would suffer 'severe financial hardship' if it was taken into account.

'Deemed income'
The AAT then decided that the annual rate of income which Dineen could be expected to derive from the properties was $40 an acre - a total of $4740.