purpose or object underlying the Act . . . shall be preferred to a construction that would not promote that purpose or object'. This provision, the AAT said, did not authorise it to impose on the words of s.153(1) (in its pre-16 December 1987 form) a meaning which the words did not 'fairly bear'. It only dealt with the situation where there were two possible interpretations open.

Rather, the AAT said, it was s.15AB which was relevant. This section permitted reference to 'material not forming part of the Act' in order to determine the meaning of a provision which was ambiguous, obscure, or whose ordinary meaning 'leads to a result that is manifestly absurd or is unreasonable'.

The AAT said that the ordinary meaning of s.153(1) in its pre-16 December 1987 form (as retrospectively amended by the *Social Security Amendment Act* 1988) did lead to a 'manifest absurdity'. The words '(whether before or after becoming so qualified)' were, the AAT said, 'quite obviously an absurdity': Reasons, para. 9.

The explanatory memorandum which accompanied the *Social Security Amendment Bill* 1988 stated that the retrospective amendment to s.153(1) would 'clarify that the sub-section may apply whether compensation was received before or after the date on which the person became qualified to receive a pension'. The AAT said:

> '19. It seems clear from the above reference that non-retrospectivity of the amendment [made to s.153(1) from 16 December 1987] escaped the notice of the Parliamentary Draftsman and the intent was, as stated, to prohibit subsequent to 1 May 1987 the payment of pension after the receipt of an award of damages whether that award was received before or after the claimant became qualified in all other respects to receive a pension.
>
> 20. The intent of the legislature can be achieved if the word "receiving" in s.153(1) is read as "receiving or qualified to receive". Given the authority referred to above and the obvious intention of the legislature I am prepared so to do.
>
> 21. Applying this interpretation to the facts of this case, as at the time the decision was made to refuse the applicant unemployment benefits, namely 28 October 1987, he was qualified to receive those benefit. On 29 October 1987, however, he received a lump sum payment by way of compensation. Thus he, in the terms of s.153(1) as I interpret it, was rendered ineligible to receive that benefit.'

Formal decision

The AAT remitted the matter to the Secretary with a direction that the applicant was, pursuant to s.153(1), not entitled to receive unemployment benefit consequent upon his application made on 8 September 1987.

[P.H.]

Assets test: 'deemed income'

WALLACE and SECRETARY TO DSS

(No. V87/209)

Decided: 22 August 1988 by I.R. Thompson.

Norman Wallace was granted an age pension in 1978. In July 1985 the DSS cancelled his pension because of the value of his assets. Subsequently, the DSS re-valued Wallace's assets and restored his pension, but at a reduced rate, on account of 'deemed income' from Wallace's assets.

The property in question consisted of a farm of 91.64 hectares which was valued at $150 000 (excluding Wallace's house and its curtilage). Originally, this farm had been part of a much larger area; but adjoining property had been transferred to Wallace's brother, son and daughter. All of the properties were farmed using natural organic methods - that is, no chemical fertilisers were used on the properties. (Wallace's brother had acquired a reputation as an inventor and innovator in organic farming, having developed a special plough for aerating the soil without turning over the topsoil.) Wallace was adamant that, if he were to lease his land (which he was no longer farming) it would be on the strict condition that organic farming methods were used.

The AAT accepted evidence from a valuer that Wallace's farm could be let for an annual rental of $5520. However, before this could be done, the property required fencing and the construction of a stockyard, at a total cost of at least $9 000.

The AAT said that the principles set down by the Federal Court in *Haldane-Stevenson* (1985) 26 *SSR* 323 should be applied when calculating income for the purposes of s.6AD(3) [now s.7(4)] of the *Social Security Act*. That is, it was net income which was relevant. On the assumption that Wallace could lease the property out for $5 520 a year and that any tenant who paid $9 000 for erecting fences and a stockyard would withhold that amount from the rent payable, the AAT decided that the amount of rent which 'could reasonably be expected to be derived from . . . the use of [the] property' (the phrase used in s.6AD(3)) and 'the amount per annum that could reasonably be expected to be obtained from a purely commercial application of that property' (the phrase used, from 13 November 1987, in s.7(4)) was nil in the first year and $2040, less the rates payable on the land in the second year. However, in the third year (which the AAT calculated to run from 14 November 1987), the deemed income would be the full $5 520 less the rates payable on the land. It would be that amount of deemed income which would be used to reduce the rate of pension payable to Wallace.

The AAT observed that, taking into account the rates payable on the land, it was likely that the net deemed income would exceed 2.5% of the land's value. In that event, s.7(4) (as it operated from 13 November 1986) required that the lesser amount be treated as Wallace's deemed income.

In addition, the AAT noted that Wallace had made a loan to his daughter and son-in-law in 1985 and that they had made small repayments of the loan each year since then. The AAT said that the definition of 'income' in the former s.6(1) [now s.3(1)] of the *Social Security Act* was so broad that the receipt of the repayments of the loan should be treated as Wallace's income so as further to reduce the amount of pension payable to him and to his wife.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary for reconsideration.

[P.H.]

Amnesty: voluntary declaration

GARRAFFO and SECRETARY TO DSS

(No. V88/75 and V88/131)

Decided: 7 September 1988 by H.E. Hallowes.

Mr and Mrs Garraffo had been receiving age pension since 1976 and 1979. In 1983, Mr Garraffo told the DSS that he was receiving a pension from the Italian Pension Fund, INPS.

Over the next 3 years, Mr and Mrs Garraffo were asked by the DSS to report any change in their level of income; but they failed to report the increases in their INPS pensions.

In May 1986, Mr Garraffo and his son, A, attended at an office of the DSS, where A said that his father wanted to report details of his increased income. A DSS officer then asked Mr Garraffo to complete an entitlement review form with details of his INPS pension. Mr Garraffo did this.

The DSS then calculated that Mr Garraffo had been overpaid $3763and Mrs Garraffo had been overpaid $3688; and that these amounts were recoverable as debts due to the Commonwealth under s.140(1) [now s.181(1)] of the *Social Security Act*.

Mr and Mrs Garraffo asked the AAT to review the DSS decision. Before the application for review was heard, Mr Garraffo died but Mrs Garraffo indicated that she wished to proceed with the application, both in her own right and as the executrix of her late husband's estate.

Death of applicant

The AAT said that Mr Garraffo's death did not affect the power of the Tribunal to deal with the application for review. As the High Court had said in *Ryan v Davies Brothers Ltd* (1921) 21 CLR 527, 'as a general rule the death of a party pending appeal does not destroy and end the appeal. It may be continued by appropriate proceedings'. The AAT endorsed the adoption of this principle in the earlier Tribunal decision of *Davis* (1984) 23 *SSR* 272.

The amnesty

The AAT noted that its review jurisdiction was limited, by ss.16 and 17 of the *Social Security Act*, to reviewing a decision made under this Act. Any decision made within the DSS about eligibility for the amnesty under the *Social Security Legislation Amendment Act* 1986 was not a decision made under the *Social Security Act*.

Accordingly, if the only question raised in the present application for review was whether Mr and Mrs Garraffo were eligible for the amnesty, the Tribunal would have no jurisdiction to review: the *Amendment Act* did not amend the *Social Security Act* nor did it provide for review of a decision by the AAT.

However, in the present matter the respondent had made a decision under the *Social Security Act*, namely a decision that there had been an overpayment under the former s.140(1) of the *Social Security Act*. The AAT had jurisdiction to review all aspects of that decision, including the question whether s.45 of the *Social Security Legislation Amendment Act* 1986 prevented a debt arising in favour of the Commonwealth.

It was argued on behalf of Mrs Garraffo that she and her husband had qualified for the amnesty allowed by the Government in February 1986. That amnesty was given legislative force in Part III of the *Social Security Legislation Amendment Act* 1986.

Section 45 of the *Amendment Act* provided that a person could not be guilty of an offence because of failure to notify changes in circumstances, nor would the person be indebted to the Commonwealth for any overpayment made because of the failure to notify a change in circumstances, if -

> 'during the period commencing on 12 February 1986 and ending on the expiration of 31 May 1986, the person has voluntarily informed the Department of the occurrence of the event or the change of circumstances'.

Section 45(5) provided that a person should be deemed not to have voluntarily informed the Department if the person informed the Department in response to a notice served on the person or in response to a question asked of the person by the Secretary or any other officer of the Department.

The DSS argued that, although Mr and Mrs Garraffo had declared their income from INPS pensions during the amnesty period, their declaration had not been voluntary, but had been made in response to an entitlement review form and questions asked by a DSS officer.

The AAT said that this argument raised a question of fact - namely, whether Mr and Mrs Garraffo's son, A, had told the DSS officer about his parents' income before that officer had asked Mr Garraffo to complete the entitlement review form. The AAT noted that where a pensioner had, during the amnesty period, simply responded to a series of questions on an entitlement review form, the pensioner could not take advantage of the amnesty because those responses would not amount to the pensioner voluntarily informing the Department. But where the pensioner had completed and lodged the entitlement review form after first informing the Department of changes in her or his circumstances, the pensioner would have to be treated as having voluntarily informed the Department.

Looking at the facts in the present case, the AAT found that the evidence established that A had told an officer of the Department about his parents' income before his father was asked to complete the form. It followed that Mr and Mrs Garraffo should be treated as having voluntarily informed the Department within the amnesty period and, accordingly, s.45 of the *Social Security Legislation Amendment Act* 1986 prevented a debt arising in favour of the Commonwealth under the former s.140(1) of the *Social Security Act*.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that the applicants had voluntarily informed the DSS of the change of circumstances during the amnesty period and were not indebted to the Commonwealth for any overpayment made because of their earlier failure to notify the Department.

[P.H.]

Assets test: reasonable to sell?

TONKIN and SECRETARY TO DSS

(No. S87/205)

Decided: 29 July 1988 by R.A. Layton.

The AAT *set aside* a DSS decision cancelling Eunice Tonkin's invalid pension because of the value of her property.

The property in question was a small farm, of some 37 acres, valued at $277 000. Tonkin had lived on the property and worked it for some 30 years. About 9 years ago she had changed its use from a dairy farm to a beef cattle farm. Since that time, she had invested money and time in improving the property but had not made any profit from her farming enterprise. However, she now anticipated that it would return a modest profit of at least $2000 a year.

The DSS argued that Tonkin should sell 28 acres of the farm (with a value of $137 000) to support herself. Tonkin said that the sale of this land would dramatically change her lifestyle because she could not run beef cattle on the remaining land and she would no longer be living in a farm environment. She also told the AAT that, having lived