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

on the land for 30 years, she was extremely attached to it.

In this application, the AAT focused on the question whether it would be reasonable to expect Tonkin to sell or realise part of the land - a question posed by the former s.6AD(1) [now s.7(1)(c)].

The AAT said that, in other decisions, the Tribunal had decided that it was not unreasonable for pensioners to remain in the social and geographic environment to which they were accustomed so long as that was 'not an indulgent lifestyle preference'. Tonkin did not fall into that category - she did 'not wish to establish an indulgent lifestyle, but rather to continue to work and live in a rural environment which she has done almost all of her life'.

The AAT referred to a Press Release from the Minister for Social Security, dated 26 May 1985:

> 'The Department will also accept that it would not be reasonable to expect a pensioner to sell a farm, or land larger than the normal building block, if they have lived on the property for at least 20 years or have been farmers for over 20 years.'

The AAT also decided that Tonkin could not be expected to use the land as security for borrowing because she had an inadequate income to service any loan; and that she would suffer severe financial hardship if the value of the property were taken into account for the purposes of the assets test.

[P.H.]

Invalid pension: claim for another benefit

FAVARA and SECRETARY TO DSS

(No. N88/137)

Decided: 26 August 1988 by B.J. McMahon

Favara was badly injured in a motor car accident in November 1983. The DSS conceded that he then became permanently incapacitated for work and, if he had applied for an invalid pension, would probably have been granted one. However, Favara did not apply then, believing that his compensation payments precluded him.

In April 1984, Mr and Mrs Favara applied for Family Income Supplement. They later said that they had asked about eligibility for other DSS payments and had been told they had none.

It was not until April 1987, on advice from the CES, that Favara lodged a claim for invalid pension, which was granted from April 1987. Favara appealed against the date of commencement of his pension, arguing that he should have received it from about November 1984.

The legislation

The AAT said that in order to receive payment of invalid pension from an earlier date, Favara needed to show that the DSS should have treated his application for FIS as an application for invalid pension.

It was agreed that the relevant legislation was that at the date of the decision under review, i.e. the decision to grant invalid pension made on 29 May 1987. The relevant legislation was then s.135TB(5) [in the same terms as the current s.159(5)].

This sub-section provides that, where a claim is lodged for a payment under the *Social Security Act* (or some other Act) and the Secretary considers it reasonable that it should be treated as a claim for some other payment under the *Social Security Act* that is similar in character to the payment applied for, it may be treated as a claim for the appropriate payment.

Section 135TB(5) embodied an amendment to the previous s.145, made in September 1985, which had added the requirement that the second allowance had to be 'similar in character' to the first actually claimed for.

'Similar in character'

Favara argued that an invalid pension was similar in character to a family income supplement because they were both 'designed to alleviate hardship for lack of income'. The AAT rejected such a broad approach, stating that all payments under the Act were designed for this purpose (with the possible exception of 'anomalies' like the blind pension). Such an approach would mean that the proviso had no meaning.

The AAT then went on to consider the nature of the two payments. It stated that there were three factors to look at: 'the use to which it is intended the payments should be put, the criteria of eligibility' and the administrative classifications of the Department.

It concluded that FIS and invalid pension were not similar in character for three reasons:

- First, invalid pension is designed to be a complete income replacement, whereas FIS is designed as a 'top up' measure paid in cases of 'unacceptably low family income'.
- Secondly, 'invalid pension is paid for the support of a claimant, wheras FIS is paid in respect of children'. The AAT noted that there was nothing in the Act to ensure that FIS payments were expended for the benefit of children, but it was clear that they should be the prime beneficiaries.
- Thirdly, 'throughout the Act there is a clear distinction between what may be called mainstream payments, which are usually referred to as pensions, and supplementary payments, which are usually referred to as allowances or benefits': Reasons, para 24.

The AAT concluded that, at the time of decision under review, the Secretary had no power to substitute the FIS application for an invalid pension application.

Formal decision

The Tribunal affirmed the decision under review.

[J.M.]

Correction

One of our vigilant readers has pointed out that our note on *Shine* (1988) 44 *SSR* 562 could give the wrong impression about a witness in that case. The note records that 'Shine's counsel suggested that . . . evidence [given by an Aboriginal Liaison Officer] was unreliable because of a personal interest in G.' However, the note omitted to mention that the AAT said that the suggestion, made by G, that the Liaison Officer had such an interest, was 'skittish and false'; and that, although the AAT did not find the Liaison Officer's evidence of great assistance, it remarked on her truthfulness, intelligence, courage and dignity.

We are grateful to our reader for pointing out this omission on our part; we can only plead that, in summarising often complicated (and sometimes long-winded) AAT decisions, we do have to make choices: sometimes we slip up.