The bulk of the 1987-88 Annual Report consists of separate reports from each of the States and Territories; and, as with the 1986-87 Report, there are wide variations in detail and in the perspective taken. Most of the separate Tribunal reports reflect on policy issues: common issues raised here include the DSS's practice in recovering overpayments, the impact of the new preclusion rules (following receipt of compensation) and the new rules (introduced in July 1987) for determining a person's eligibility for invalid pension.

In this context, the reports from the New South Wales, Victorian, Queensland, and South Australian Tribunals raise some valuable criticisms.

On the other hand, the ACT Tribunal made only a brief reference to policy issues (in contrast to its well developed and cogent criticisms in the 1986-87 Report), the Tasmanian Tribunal had nothing to say about policy issues and the West Australian Tribunal concentrated largely on its own procedures, with passing reference to only two policy issues.

The second Annual Report of the SSAT is certainly an improvement, in organisation and coherence, on the first Annual Report - the consolidated national statistics present a much clearer picture of the Tribunal's operations than the previous Report. Between them, the two Reports provide valuable information about the functioning of the 'old' SSATs, against which we should be able to make some evaluation of the effectiveness of the new Tribunal, with its decision-making powers.

[P.H.]

Administrative Appeals Tribunal decisions

Jurisdiction: 'decision' income test: Italian pension

FURNARI and SECRETARY TO DSS
(No. 4938)
Decided: 23 December 1988 by J.R. Gibson.

Carmelo Furnari received an age pension. On 1 October 1987 the Department decided to take into account as his income, his Italian superannuation pension which was used to support his mother in Italy. This resulted in his rate of pension being reduced.

He appealed to the SSAT on the grounds that the amount of Italian pension taken into account was overstated and that the Italian pension was not his income because of the arrangements for its use in Italy. The first ground was conceded by DSS and the amount adjusted prior to the SSAT hearing. The SSAT decided that whole or part of Furnari's Italian pension was the subject of a trust for his parents and therefore not his income but the Department declined to follow this recommendation and affirmed the original decision.

Furnari asked the AAT to review that decision. Before the AAT, Furnari's representative did not pursue the argument that his Italian pension was not income. Instead he sought to rely on Article 17 of the reciprocal agreement with Italy which came into force on 1 September 1988. Article 17 provides that an Italian supplement paid to increase an Italian social security benefit shall not be included as income for the purpose of Australia's social security laws. (N.B. Section 65 of the *Social Security Act* states that the provisions of a reciprocal agreement have effect notwithstanding anything in the Act.) The Department argued that the AAT had no jurisdiction to determine the applicability of the reciprocal agreement because the Department had not made a decision on that issue.

Jurisdiction

The AAT decided that it did have jurisdiction:

> '... the Tribunal is not confined to material which was before the primary decision-maker or to events which occurred up to the time of the primary decision *(Commonwealth v Ford* 9 ALD 433 at 437-9). The word "decision" in the *Administrative Appeals Tribunal Act* is not to be construed narrowly *(Director-General of Social Services v Hales* 47 ALR 281, per Lockhart J at 305). The primary decision in this matter was concerned with the effect which an Italian pension payable to the applicant had on the rate of his age pension and ... that is the issue which the applicant now seeks to have determined ...'

(Reasons, para. 7)

Determining the amount of the Italian pension

Furnari made contributions to the Italian pension fund up until 1952 when he migrated to Australia. From about 1975 his father made contributions to the fund on the applicant's behalf. Furnari became entitled to a pension from the fund in March 1979 and arranged for it to be received in Italy and used for the benefit of his parents.

A departmental expert on the Italian pension system gave evidence that Furnari's Italian pension almost certainly contained a supplement. However he was unable to calculate the supplement component of the applicant's pension. In his experience the supplements ranged from about 5% to 100% of the amount of Italian pensions paid to people in Australia. The average supplement was about 70%. There were extra delays involved in ascertaining from the Italian authorities the supplement component of a pension that was being paid in Italy and the Italian authorities would not disclose that information directly to the Department of Social Security. The Department could only obtain that information through the pensioner.

It was argued for the applicant that the High Court's decision in *Harris* (1985) 24 *SSR* 294 required all factors to be taken into account in calculating the rate of a pension and that, to avoid hardship to the applicant, the AAT should use a conservative estimate that 50% of his Italian pension was composed of the supplement.

The AAT concluded that it seemed probable that Furnari's Italian pension contained a significant supplement component. However, it was not prepared to make an educated guess as to the extent of the supplement.

Formal decision

The AAT affirmed the decision under review.

[D.M.]