retirement as a Professor of Anthropology) was paid on a monthly basis when Rose was in the GDR but was not transferable or payable outside the GDR and that Rose's only other income was $10–$15 a week, from book royalties paid in Australia.

It appeared that Rose visited the GDR for some months every year, for work and health reasons, and that when he was living in Australia he relied on relatives and friends to support him. He was a resident of Australia for the purposes of the *Social Security Act*.

The issue before the AAT was whether the GDR pension fell within the definition of 'income' in the Act:

> 'personal earnings, moneys, valuable consideration or profits, whether of a capital nature or not, earned derived or received by that person for the person's own use or benefit by any means from any source whatsoever within or outside Australia, and includes a periodical payment or benefit by way of gift or allowance . . .'

A general beneficial interpretation?

Rose argued that his GDR superannuation was not for his use or benefit in Australia and an adverse decision in this case would force him 'to leave his homeland to survive'. He argued that this was not the aim of the Act and, as the *Social Security Act* was beneficial legislation, it should be interpreted favourably to him.

The Tribunal said that it was only if there was an ambiguity in the legislation that a beneficial interpretation could be given and it perceived no ambiguity.

'Earned, derived or received'

The definition of 'income' in the Act refers to income 'earned, derived or received by that person for the person's own use or benefit' and, Rose argued, this meant realized, that is, available for him to use in Australia.

Rose relied on the High Court decision in *Read* (1988) 43 *SSR* 555 to support his argument. However, the AAT distinguished *Read* and concluded that, as the superannuation entitlement was paid into Read's bank account in the GDR, the entitlement had been derived by him and as far as possible realized.

'Use or benefit . . . within or outside Australia'

Did the words 'within or outside Australia' only qualify the words 'from any source whatsoever', as Rose argued, or did they also apply to the whole definition, in particular, 'for the person's use or benefit' as the DSS argued?

The AAT considered the earlier decision in *Hoogewerf* (1988) 45 *SSR* 577, where the AAT had decided that money paid by the Indian government in India to applicants for an Australian pension, but where access to the money in India was impractical, was not to be treated as income under the *Social Security Act*.

The AAT in Rose's case said that *Hoogewerf* turned on its facts: the cost of travel to India and the age of the applicants in that case had been crucial factors. The AAT further noted that *Hoogewerf* followed the Federal Court decision in *Inguanti* (1988) 44 *SSR* 568, where the court stated that in deciding whether income was earned derived or received:

> 'The question is one of fact and degree... [I]t will be open to a Tribunal of fact to determine the matter in accordance with the facts and circumstances of the case as it sees them. If the prospect of the moneys ever being received is remote, or, if receipt of them, although certain, is likely to be so far in the future as to make entitlement to them of no relevant benefit at the time the matter is considered, it will be correct to say that the moneys are not being "derived".'

The AAT noted that, as the dispute in *Inguanti* concerned an Italian pension payable in Italy, the Court had been dealing with moneys "'derived" outside of Australia and for a "use or benefit" both "outside" of and "inside" Australia': Reasons, p.12. Thus the AAT concluded that the words 'within or outside Australia' qualified both the phrase 'use and benefit' and their derivation.

The AAT found that Rose spent a large proportion of his time in the GDR, and was domiciled there, and that he had the use and benefit of the superannuation payment whilst there. It concluded that it was income for the purposes of the Act, noting in passing that '[i]f he resided in Australia and was not able to use the entitlement or benefit from it, then a different situation might well arise': Reasons, p.13.

Formal decision

The AAT affirmed the decision under review.

[J.M.]

Assets test: orally declared trust

JAMES and SECRETARY TO DSS (No. 5041)

Decided: 21 April 1989

by G.L. McDonald.

James applied for an age pension in December 1987, which was granted at a reduced rate because of the operation of the assets test. She sought review of the DSS decision to include as an asset a unit registered in her name which she said was held in trust for her daughter and grand-daughter.

The legislation

The only issue was whether the unit was properly included in the value of James' property pursuant to ss.4(1) and 8 of the *Social Security Act* 1947.

The facts

James purchased the unit, which was adjacent to the unit in which she lived, in June 1983. The AAT accepted her evidence that the unit was purchased to provide accommodation for her daughter and grand-daughter, who exclusively occupied it. Her daughter suffered from brain damage and epileptic fits and required constant medication. Prior to the purchase of the unit they lived with James.

James told the AAT that the unit was purchased to give her daughter and grand-daughter some degree of independence and yet be close enough for James to supervise her daughter's medication. She said she felt a need to protect her daughter from 'gentlemen with less than honourable intentions', and did not register the unit in her daughter's name to safeguard her daughter.

James also said in evidence that it was always her intention, if her daughter and grand-daughter moved from the unit, to sell it and place the proceeds in a fund for their benefit.

James' daughter paid her $40 a fortnight which was to cover rates, taxes and insurance costs of the unit and therefore was not rent.

Separation of legal and beneficial interests

The DSS had not disputed that, 'in assessing the value of property for the purposes of the Act, the legal and beneficial interests can be separated': Reasons, p.2.

The AAT decision in *Christian* (1987) 39 *SSR* 492, that the value of a person's property 'includes a valuation of that interest in property, whether it be legal and beneficial or beneficial only', was followed.

Family arrangements

The AAT further decided that family arrangements with respect to property could be capable of legal enforcement, and said that '[e]ach case must be examined on its own facts in order to determine the intentions of the parties': Reasons, p.3.

Oral declaration of trust

The AAT accepted that James' discussions with accountants, lawyers and family members when she purchased the unit evidenced an oral declaration of a trust. 'No special words are required to indicate the creation of a trust': Reasons, p.6.

Written manifestation of the trust

Section 34(1)(b) of the *Property Law Act* 1969 (WA) required that

> 'a declaration of trust respecting any land or interest therein shall be manifested and proved by writing signed by a person who is able to declare the trust . . .'.

The AAT followed *Rochefoucauld v Boustead* [1897] 1 Ch 196, which held that a trust need not be declared in writing in the first instance. It is sufficient 'that there be a subsequent written manifestation as evidence of the existence of the trust': Reasons, p.7.

The AAT found sufficient written confirmation of the trust in a letter which James sent to the DSS on 23 November 1983, seeking assistance for her daughter, in which she said the unit was purchased for her daughter and grand-daughter to live in and to make provision for them.

Alternatively, the AAT was prepared to rely upon a document appended to James' December 1987 pension claim form in which she said that the unit was purchased for her daughter and grand-daughter. The AAT added that the terms of the trust could be clarified by looking to extrinsic evidence.

Formal decision

The AAT set aside the decision under review and remitted the matter with a direction that, as the applicant did not hold the beneficial ownership of the unit, its value should not have been included in the total value of her assets.

[D.M.]

Assets test: 'value of property' — land

MORIARTY and REPATRIATION COMMISSION
(No. 4951)
Decided: 10 March 1989
by M.D. Allen.

The Repatriation Commission, in applying the assets test to the Moriartys, took into account the market value of real estate without deducting agents' and solicitors' fees that would be incurred if the real estate were sold. The applicants applied to the AAT solely in relation to the Commission's refusal to make those deductions.

The legislation

The crucial provision in this case was s.54 of the *Veterans Entitlements Act* 1986, which requires the calculation of a 'pension reduction amount', where 'the value of the property of the person' exceeds a certain amount. [As far as is relevant to the decision in this case, this provision is identical to s.8 of the *Social Security Act* 1947.]

The AAT decided that the term 'value of the property' means 'what on normal valuation principles is regarded as the value of the land to an owner in possession': Reasons, para. 22; which is the market value without deduction for agents' or solicitors' fees.

Manning v Shire of Yarrawonga (1929) VLR 258 and *Re Firth and Minister for Capital Territory* (1978-80) 2 ALD 183 were cited as authority for the proposition that, in ascertaining the value of land, agents' fees were not a permissible deduction. Similar principles applied to solicitors' fees.

It was necessary to distinguish *Re Clarke and Repatriation Commission* (1987) 13 ALD 396, which followed the High Court's decision in *Commissioner of Stamp Duties (Queensland) v Lansdowne* (1927) 40 CLR 115.

In those two cases notional brokerage was deducted in valuing shares. The AAT distinguished those cases on the basis that, in the High Court decision, 4 of the judges referred to the necessity of using a broker to realise the market value of shares. By contrast there is no obligation to engage an agent or a solicitor when selling land.

The AAT also referred to *Cowling* (1986) 37 *SSR* 464, where it was said that, in applying the social security assets test, all property should be valued at its market value. According to the AAT, this decision was not authority for the proposition that shares and land must be valued in the same way.

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Supporting parent's benefit: living separately and apart

MILAS and SECRETARY TO DSS
(No. 4979)
Decided: 21 March 1989
by J.A. Kiosoglous.

The AAT *set aside* a decision of the DSS to cancel the applicant's supporting parent's benefit. The delegate had considered she was not an unmarried person pursuant to s.53(1) of the *Social Security Act* 1947, and accordingly was not qualified to receive the benefit under s.54 of the Act.

The facts

The applicant told the AAT she married in 1973 and there were 3 dependent children of the marriage. Problems in the marriage developed as early as 1977. Her husband was often unemployed and the family moved many times to seek employment for him. There were also problems between him and members of Milas' family. As the problems increased her husband became depressed and violent towards her.

In March 1983 her husband left his family. Milas said she had no idea where he had gone and had no contact with him for 9 months. She considered the marriage had broken down and the separation was permanent. On 23 march 1983 she applied for supporting parent's benefit. She heard nothing of