amounted to 'income' for the purposes of the *Social Security Act*.

The AAT adopted the approach taken in *Guarnaccia* (noted in this *Reporter*) and concluded that the whole of Zanon's INPS pension entitlement was income 'derived' by him, even though he only received the amount transferred to Australia after deduction of Italian taxes and bank charges.

The Tribunal also said that, until the reciprocal agreement between Australia and Italy came into force on 1 September 1988, the 'supplement' component of his INPS pension was income for the purpose of calculating the rate of his age pension.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Income test: superannuation fund

REANEY and SECRETARY TO DSS
(No. 5360)
Decided: 3 August 1989 by J.A. Kiosoglous.

George Reaney was granted an age pension in April 1982. He then opted to retain his investment in a superannuation fund for a period of 5 years.

When Reaney redeemed this investment in 1987, he was paid his initial investment of $6500 and profits of $17 315.

The DSS decided that the profits should be treated as Reaney's income in the period of 12 months following redemption of the investment.

Reaney asked the AAT to review that decision.

Formal decision

At the time of the DSS decision, s.6(1) of the *Social Security Act* defined 'income' to mean —

> '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 . . .'

At the time of the DSS decision, there was no provision in the *Social Security Act* for the treatment of the profit element of realised investments.

However, the DSS had developed guide-lines for treating those profits and these appeared in para. 5.542 of the DSS Pension Manual. This declared that any profits received on the redemption of a retirement fund scheme 'should be treated as income for pension purposes and included in the assessment for 12 months'.

That approach was subsequently expressed in s.3A(5) of the Act, a provision which was not in force at the time of the DSS decision.

Spreading the profits

The AAT said that the definition of 'income' in s.6(1) had been 'wide enough to embrace receipts of a capital nature as well as receipts of income', so that the amount received by Reaney on the realisation of his superannuation investment was income. On this point, the AAT referred to the High Court's decision in *Read* (1988) 43 *SSR* 555.

The AAT said that the DSS had not been bound to follow the policy guide-lines to the exclusion of all other considerations. In the absence of a legislative requirement, it would have been reasonable for the DSS to have apportioned the profit element received by Reaney over the 5 years of the life of the investment:

> 'Thus the applicant would not have received the benefit of being paid the full age pension as well as receiving the profits from his superannuation investment, but his financial situation would not have been as precarious as it undoubtedly was. In the circumstances, the Tribunal finds that the inflexible application of what was purely departmental policy imposed on the applicant a financial burden not contemplated by the Act and which could have been alleviated by a more flexible attitude on the part of the Department.'

(Reasons, para. 11)

Formal decision

The AAT set aside the decision under review and substituted the decision that Reaney's pension should be re-calculated by apportioning the profits from the superannuation investment fund over a 5 year period, treating one-fifth of the income as his annual income in each of the five years.

[P.H.]

Assets test: disposal of assets

LOMAX and SECRETARY TO DSS
(No. 5174)
Decided: 23 June 1989 by H.E. Hallowes.

Clive Lomax was granted an age pension in May 1986. The rate of his pension was calculated on the basis that the value of his principal home should be disregarded in applying the assets test to him.

In mid-1987, Lomax sold his principal home and purchased 3 home units, transferring 2 of the units to his children and retaining the third for himself and his wife.

When the DSS decided that the value of the 2 units transferred to his children should be included in the value of Lomax's assets, he asked the AAT to review that decision.

The legislation

The DSS had decided that the transfer of the two home units to Lomax's children amounted to a disposal of property under s.6(10) of the *Social Security Act*.

Section 6(10) provides that a person disposes of property if the person diminishes the value of her or his property without adequate consideration for the purpose of qualifying for pension at a higher rate than would otherwise be payable.

According to s.6(1), half the value of any such property, in excess of $4000, is to be included in the value of a married person's assets for the purposes of the assets test.

Consideration

Lomax argued that the transfer of the property to his children had been in return for adequate consideration. This consideration took the form of help provided to Lomax and his wife by his children, who performed basic domestic chores for them and provided daily care to his wife.

However, the AAT said that the term 'consideration' used in s.6(10) was used in its technical legal sense. The Tribunal referred to the Federal Court's decision in *Frendo* (1987) 41 *SSR* 527, where it was said that, to escape the effect of s.6(10), a person —

> 'must receive consideration, in the sense recognised by the law of contract of an act,