her. Taxis asked the AAT to review that decision.

'Moneys . . . derived . . .'

According to the former s.6(1) [now numbered as s.3(1)] of the *Social Security Act*, the term 'income' was defined at the time when the payment was made as meaning —

> 'personal earnings, moneys, valuable consideration or profits earned, derived or received by [a person] for the person's own use or benefit by any means from any source whatsoever . . .'

In the present case, the money in question, $5460, had been paid by Taxis' former husband to settle a debt which Taxis owed to a finance company, representing interest payable on a bridging loan negotiated to cover the purchase of a house for Taxis and her daughter following the dissolution of Taxis' marriage.

The payment had been negotiated as the final settlement of the financial aspects of the separation and divorce of Taxis and her former husband, and was embodied in a consent order made by the Family Court, where it was described as a payment 'in lieu of maintenance for the wife and child of the marriage for a period of 12 months'.

On behalf of Taxis, it was argued that the payment was a capital transfer, rather than income. The AAT rejected this argument. After quoting from the judgments in *Read v Commonwealth* (1988) 43 *SSR* 555, the Tribunal said that capital receipts were caught by the definition of 'income' in s.6(1), even before that definition was amended to expressly cover capital receipts.

In the present case, Taxis had 'derived' the benefit of the payment made by her former husband to the finance company and, accordingly, the payment should be treated as her income within the *Social Security Act*.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Invalid pension: incapacity while an Australian resident

SECRETARY TO DSS and MANCER
(No. 5563)
Decided: 22 December 1989 by D.P. Breen.

The Secretary sought review of an SSAT decision that Deepika Mancer was eligible to receive an invalid pension from the day she applied, 5 September 1988.

The facts

Mancer was the adopted daughter of a couple who were directors of a handicapped persons' institution. She was born in Sri Lanka on 13 August 1971 where she lived in a government children's home.

On 9 August 1985, Mancer came to Australia with her adoptive parents, entering under a visa which conferred a right to stay indefinitely. Therefore she had been an 'Australian resident' since her arrival. Her condition upon arrival in Australia was described as the physical maturity of a 6-year-old and the emotional developmental level of a 4-year-old. She attended primary school in Australia until the age of 16.

The Department rejected Mancer's claim for invalid pension without establishing the level of her physical and/or mental retardation because 'clearly . . . any retardation existed when Deepika arrived in Australia'. That decision was set aside by the SSAT and the Secretary then sought review by the AAT.

The legislation

Section 30(1)(a) of the *Social Security Act* states that a person shall not be granted an invalid pension unless she 'became permanently incapacitated for work . . . while the person was an Australian resident'.

Incapacity while an Australian resident

The AAT adopted the reasoning of the SSAT, which had decided that Mancer's incapacity for work commenced when she left school on 30 August 1988, at which time she was an Australian resident.

The foundation for this decision was the distinction between an injury or disease and an 'incapacity for work' that was made by the AAT in *Panke* (1981) 2 *SSR* 9 and approved by the Federal Court in *Annas* (1985) 29 *SSR* 366.

The SSAT had said that the DSS had confused the origin of Mancer's disability with the origin of her incapacity, and that Mancer did not suffer an incapacity for work until she reached a working age.

However, the SSAT had also said it was not necessary to determine whether the incapacity commenced at 15 (the age at which a person is lawfully entitled to leave school in South Australia) or 16 (the age at which 'the *Social Security Act* deems a person to have a capacity for labour to sell') as Mancer was over 16 years of age when she left school on 30 August 1988. [Presumably the SSAT intended to say that it was not necessary to choose which of these 3 dates was the correct one because Mancer was an Australian resident on all of them.]

The AAT did not cast any light on this problem other than to say that, as Mancer would have been subject to the *prima facie* legislative requirement to remain at school until the age of 16 years, the Department was incorrect in submitting that her incapacity for work arose prior to her coming to Australia. The AAT rejected an argument by the DSS that, because the school leaving age requirement could be waived, incapacity for work arose prior to that age. Also, in the AAT's opinion, the fact that South Australian compensation laws covered workers regardless of their age did not support the Department's contention.

Formal decision

The AAT affirmed the decision of the SSAT under review.

[D.M.]

Invalid pension: impairment

ORAK and SECRETARY TO DSS
(No. 5506)
Decided: 29 December 1989 by J.R. Dwyer, J.H. Wilson, and D.M. Sutherland.

In March 1988, Gelter Orak, a 54-year-old woman, lodged a claim for invalid

pension. When that claim was rejected by the DSS, Orak appealed to the SSAT which affirmed the rejection. She then asked the AAT to review that decision.

The legislation

Orak's eligibility for invalid pension depended on s.28 of the *Social Security Act*, which provided that a person who was 'permanently incapacitated for work' and met age and residence requirements, was qualified to receive an invalid pension.

According to s.27 of the Act, a person is to be treated as permanently incapacitated for work if the person is at least 85% permanently incapacitated for work and at least 50% of that permanent incapacity 'is directly caused by a permanent physical or mental impairment of the person'.

The evidence

Orak had migrated to Australia from Turkey in 1981. After her arrival in Australia, she had attempted to work as a machinist but her limited work skills and lack of English had prevented her from performing this work satisfactorily.

In 1983, Orak was involved in a motor car accident and, since that time, she had experienced pain to her lower back and right leg, and severe headaches. In 1985, Orak broke her right wrist, which had left her with very little strength in her right hand. In addition, Orak suffered from depression.

Orak had practically no understanding of the English language, had received only minimal education and had very limited work experience.

The Tribunal's assessment

The Tribunal was presented with a variety of medical opinions — one orthopaedic surgeon said that Orak was 85% incapacitated for work because of her physical disabilities and her age and poor English; another orthopaedic surgeon said that Orak's disability was 'not too severe'; a third orthopaedic surgeon said that her back condition could only be helped by a laminectomy; and a psychiatrist said that, from the psychological perspective, Orak had a 'trivial incapacity for work'.

The AAT accepted that Orak had a degenerative disease of the spine, some disability in the wrist, mild depression and anxiety and tension which caused periods of crying and headaches. It was satisfied that Orak was unfit for work which involved sitting, standing or walking for prolonged periods or bending or lifting.

These matters, the AAT said, were 'all disadvantages in the labour market'. But other factors which affected Orak's capacity for work were her complete lack of work experience, her lack of English and her age. Although she had permanent physical impairments and a slight degree of mental impairment,

> 'these factors constitute only a minor part of her total incapacity for work. Accordingly we cannot be satisfied that at least 50% of Mrs Orak's permanent incapacity is caused by a permanent physical or mental impairment. We therefore decide that Mrs Orak is not qualified for invalid pension.'

(Reasons, para. 29)

A gap in the legislation?

The AAT concluded by observing that there appeared to be no form of income support for which Orak could qualify. She was too young for age pension; sickness benefit was not available because her incapacity for work was not temporary; she could not qualify for unemployment benefit (because she was incapable of working); and she could only qualify for special benefit if she registered as unemployed with the Commonwealth Employment Service — registration which was hardly consistent with her unfitness for work.

'This', the AAT said, 'may require consideration by Parliament': Reasons, para. 30.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Invalid pension: impairment

KIBAR and SECRETARY TO DSS (No. 5628)
Decided: 19 January 1990 by J.R. Dwyer.

Mursel Kibar migrated to Australia from Turkey in 1980, when he was 26 years of age. He worked for more than 3 years in several factory jobs, but, in November 1983, he developed severe low back pain and was obliged to stop working. In February 1984, this was diagnosed as a lumbar vertebral column strain, with a poor prognosis.

Between 1986 and 1988, Kibar travelled to Turkey, partly because his mother was ill and partly because he hoped to obtain treatment for his back there. In March 1988, Kibar lodged a claim for invalid pension and, when this claim was rejected by the DSS, he asked the AAT to review that rejection.

The legislation

Section 28 of the *Social Security Act* provides that a person who meets age and residence requirements and is permanently incapacitated for work is qualified to receive an invalid pension.

Section 27 provides that a person is permanently incapacitated for work if the person is at least 85% permanently incapacitated and at least 50% of that permanent incapacity 'is directly caused by a permanent physical or mental impairment of the person'.

The evidence

An orthopaedic surgeon told the Tribunal that Kibar had injured his lumbar spine and now suffered from a nerve root canal stenosis. This had left him unable to perform work which required bending, lifting, or long periods of standing or sitting. However, he was able to perform light duties but this would be limited by his language and education levels.

Kibar's general practitioner told the Tribunal that Kibar suffered from depression because of the chronic pain which he experienced and that, in his opinion, Kibar had no capacity for work.

Kibar's work experience had been limited to unskilled physical work and his command of the English language was poor.

The Tribunal's assessment

The AAT decided that Kibar was at least 85% permanently incapacitated for work, in the sense that he did not have the capacity to attract an employer; and that this incapacity was likely to persist for the foreseeable future. The AAT noted that specialists had expressed the opinion in 1984 and 1985 that an operation to Kibar's spine might improve his condition; but the AAT said that Kibar's reluctance to undergo such an operation was not unrealistic or unreasonable.

The AAT then considered whether at least 50% of Kibar's incapacity for work was directly caused by a permanent physical or mental impairment:

> 'I find that what makes the difference between Mr Kibar being in or out of the work force is his back problem. Even without English language skills or any work training Mr Kibar was twice able to find a factory job in a very