Literal interpretation rejected

The AAT agreed that, on the literal interpretation of the Act advanced by the DSS, s.74B(3) would be applied to the 1989/90 estimated combined income. This would mean that Clear's claim was properly rejected because their 1989/90 income fell $620 short of being 25% less than the combined income in 1987/88, the base year.

This was not an outcome that the AAT found acceptable, especially because the AAT said Clear would have qualified for FAS if her claim had been lodged prior to 30 June 1989.

Reference was made to the relevant second reading speech and to the DSS submission to the AAT that the number of FAS recipients had increased by more than 25% since the change from a four weekly to an annual income test. The AAT stated:

> 'It seems to me that if it is intended that the amendments to the legislation are designed to assist a wider number of recipients, the result in the case of the applicant is unreasonable if the words are given their literal meaning. . . . I am not convinced that the legislation is designed to produce the result that in 1989 the applicant in her circumstances is not entitled to benefit.'

(Reasons, p.8)

Formal decision

The AAT set aside the decision under review and remitted it with a direction that Clear was qualified to receive FAS from 29 August until 31 December 1989.

[D.M.]

[**Editorial comment:** The AAT seemed to overlook that, as Clear's partner was apparently on unemployment benefit up until 30 June 1989, a FAS claim lodged before that date would have been rejected because of s.73(1)(a)(i) of the *Social Security Act*.]

Special Benefit: New Zealand immigrant

WILLIAMS and SECRETARY TO DSS
(No. 6287)

Decided: 12 October 1990 by P. Gerber.

John Williams arrived in Australia from New Zealand on 13 October 1989, having recently lost his employment when his employer went out of business. He had been advised by his brother-in-law, living in Wollongong, that there was work available at the latter's place of work. On arrival, Williams was advised that there were no longer any such vacancies. The $500 with which he had arrived was spent within a week on transport, rent and clothes for interviews.

Not eligible for unemployment benefit

Williams applied for unemployment benefit on 24 October 1989. His claim was rejected – correctly, the AAT found – under sub-para 2(a) of Article 9 of the reciprocal agreement between Australia and New Zealand (see Schedule 3 of the *Social Security Act*). That provision imposes a requirement that a New Zealand resident, in order to qualify for unemployment benefit, must have been continuously present 'for not less than 6 months since the date of his or her most recent arrival in Australia'.

Special benefit

Having been rejected for unemployment benefit, Williams applied for special benefit under s.129 of the *Social Security Act*. The claim was rejected in reliance on a policy guideline set out in para. 24-802 of the Benefits Manual which stated that:

> 'A New Zealand citizen moving to Australia should have ensured that he or she had enough funds or have made adequate provision for his or her own support within the first six months in Australia.'

The policy basis for this instruction was that New Zealanders should not be able to receive through special benefit what they could not gain, because of the Reciprocal Agreement, through unemployment benefit.

The DSS also found that, although Williams was suffering severe financial hardship, his hardship was not due to unforeseen circumstances. He had arrived in Australia without sufficient funds nor an offer of employment. His claim therefore did not satisfy s.129(1)(c) of the Act.

Status of the guideline

The AAT endorsed the view of the SSAT that the Benefits Manual had no statutory basis; and, where it was in direct conflict with the express language of the Act, the former must give way. A claim could be rejected only where it fell outside the provisions of s.129, not where it fell outside the categories in the Benefits Manual.

Formal decision

The Tribunal affirmed the decision under review, being a decision of the SSAT which had set aside the rejection of Williams' claim for special benefit.

[P.O'C.]

Carer's pension: 'a home'

KINSEY and SECRETARY TO DSS
(No. 6310)

Decided: 19 October 1990 by B.M. Forrest.

This matter was remitted to the AAT by the Federal Court to determine whether Kinsey's daughter's flat was a home of Kinsey and her daughter for the purposes of s.39(1) of the *Social Security Act*. (For the Federal Court decision, see *Kinsey* (1990) 56 *SSR* 763.)

Background

Kinsey's daughter, who suffered from a severe mental illness, had lived with her husband and child in Kinsey's house, where Kinsey provided daily care for her. In May 1988, Kinsey's daughter, the daughter's husband and her child moved into a unit on an adjacent block of land, which was on a separate title from Kinsey's house. Kinsey continued to provide care for her daughter and her daughters' child as well as for her own husband (who was also disabled) dividing her time between her own house and her daughter's unit.

The DSS then decided that Kinsey could no longer qualify for carer's pension because she was not providing care to her daughter 'in a home of the person and of the other person' as required by s.39(1). On appeal, the Federal Court ruled that the AAT was correct in deciding that Kinsey's house and her daughter's flat could not constitute the one home. But the Federal Court remitted the matter to the AAT to decide whether the flat, by itself, was a home of Kinsey and her daughter.

The meaning of 'home'

The Tribunal noted that the Act did not use expressions such as 'the home', 'same home', 'principal home' or 'permanent home'. It used the term 'a home'. There was nothing in the Act or in the concept of 'home' that precluded a person from having more than one home. The matter was a question of fact, and the AAT considered the amount of time spent by Kinsey in the flat and whether the flat was a separate household as relevant but not determinative. 'What has to be considered', said the AAT, 'is whether of itself it is also a home of the applicant.'

The DSS argued that the flat was more like a place of work for Kinsey. It was argued that a home cannot be a place where one lives intermittently. The motive of Kinsey, suggested the