they calculated that Miller would receive 26 fortnightly payments of her superannuation pension amounting to $17 589 and also took into account the amount she received as arrears of this pension giving an estimated taxable income of $20 873.88. (At the time of the AAT hearing her 1988/89 assessment was available and showed an income of $20 818.)

The AAT concluded that the DSS had correctly applied the legislation, even though this led to a reduction in fortnightly FAS from $144 between July and December 1988 to $18.76 and Miller's financial circumstances had remained constant over the period.

The AAT noted that some attempt had been made in the legislation to deal with such anomalies: s.74B(3) of the *Social Security Act* effectively provides that, if a person's taxable income drops or is likely to drop 25% in a subsequent year, then that year's income can be used to calculate eligiblilty for FAS.

However, this provision did not assist Miller. The only way it could have helped her would have been if the lump sum was included in the 1987/88 tax year rather than the 1988/89 year. The AAT said that if taxable income had not been defined as the amount shown in a person's income tax assessment, it would have included the arrears of pension in Miller's 1987/88 tax year, as it represented payment due in that year and it was 'derived' in that year.

The Tribunal drew attention to the criticisms of the amendments to FAS in *Meadows* (1989) 52 *SSR* 693 and concluded:

> 'If the legislation is to be reviewed as a result of the decison in *Meadows*, I would urge those who carry out the review to take into account the present circumstances. The 25% rule is not a satisfactory basis for the exercise of discretion. It is, in itself, inflexible.'

Formal decision

The AAT affirmed the decision under review.

[J.M.]

Residence in Australia

SEGEDIN and SECRETARY TO DSS
(No. 5714)
Decided: 22 February 1990 by B J McMahon.

Kate Segedin's husband was granted an age pension in 1975. He returned to Yugoslavia in 1975 and married Segedin there in 1977. In 1982 they both returned to Australia for two months. Segedin applied for a wife's pension then, but her application was refused on the ground that she was not residing in Australia.

Segedin's husband continued to receive the age pension paid at the standard (single) rate. They returned to Australia in May 1985 and Segedin reapplied for a wife's pension. This was granted relying on her statement that she was residing in Australia.

In April 1986, Segedin applied to have the wife's pension paid in Yugoslavia as she intended to return there. At this point her pension status was reviewed, and her wife's pension cancelled and the DSS determined that her pension should never have been granted.

The legislation

Section 31(1) of the *Social Security Act* provided that a woman who was not herself and age or invalid pensioner, but was married to an age or invalid pensioner, and 'who is residing in, and is physically present in' Australia on the date on which she lodges a claim for a wife's pension, was qualified to receive a wife's pension.

Residence in Australia

The Tribunal relied on the Federal Court decision of *Hafza* (1985) 26 *SSR* 321, which had considered the meaning of 'residence'. There Wilcox J had said residence had two elements — 'physical presence in a particular place and the intention to treat that place as home: at least for the time being, not necessarily forever'. The Court had further noted that once a home is established in a particular place, absence from that place does not necessarily mean a person ceases to be resident there though whether he or she does so depends on intention.

In applying *Hafza*, the AAT concluded that Segedin was not a resident of Australia when she applied for the wife's pension. When Segedin applied for wife's pension in 1982, she had stated that she and her husband owned their own home in Yugoslavia and they would be staying in Australia with relatives. In 1985, at the time of the second application, she and her husband were staying at the same address and she had stated that they were not paying rent, but were contributing to household expenses. This, together with the fact that their first visit was for two months and their second for 11 months, indicated that they had merely a temporary connection with the Australian address.

Further, Segedin's passport indicated that she had entered Australia in 1985 on a visitor's visa which was edorsed 'employment prohibited' and had made no application to become a permanent resident as at April 1986. Segedin had also come to Australia in 1985 on a return ticket and, if she had stayed in Australia beyond April 1986, she would have had to pay an extra $3000 for her airfare.

The Tribunal concluded that Segedin was not a resident of Australia when she applied for the wife's pension.

Formal decision

The Tribunal affirmed the decision under review.

[J.M.]

Age pension: portability

SCHRODERS and SECRETARY TO DSS
(No. 5704)
Decided: 6 December 1988 by R.A. Hayes.

(Written reasons provided 16 February 1990)

Constanta and Gerarda Schroders appealed against a DSS decision to cancel their age pensions from 27 November 1986 on the ground that they had left Australia before the expiration of the 12-month period provided in the then s.83AD [see now s.62] of the *Social Security Act*. If the Schroders had stayed in Australia until 1 June 1987, they would have been eligible to have their pensions paid overseas.

The SSAT had recommended that the Schroders' pensions be restored, but the DSS had rejected this recommendation and affirmed the original decision.

The legislation

Section 83AD(1) provides that, where a former resident returns to Australia, claims a pension and leaves Australia within 12 month's of the person's return, then any pension granted as a result of the claim is not payable while the person is outside Australia.

However, s.83AD(2) gives the Secretary a discretion to dispense with s.83AD(1) where the person's reason for leaving Australia 'arose from circumstances that could not reasonably have been foreseen at the time of his return to, or his arrival in, Australia'.

The facts

The Schroders had lived in Australia for 27 years and had become Australian citizens. In 1980 they returned to the Netherlands and in 1982 relinquished their Australian citizenship. They returned to Australia in June 1986 to claim age pension. When informed of the 12 month residency requirement, they told the DSS that they did not know whether they could stay that long but they were willing to try. They were granted an age pension.

According to DSS documents, the Schroders had stated on 12 June 1986 that they had been living in Holland for the previous five years, and were unsure how long they would be able to stay in Australia, given that they did not have the money to set up permanent residence and were staying with their daughter.

The Schroders left Australia for the Netherlands on 31 August 1986 and stated in a letter from there that they had not been aware of the 12-month residency requirement when they came back to Australia and 'had made insufficient provisions to cover costs of keeping our personal belongings in a safe place'. This letter also described the attempts they had made in the Netherlands to find out about the criteria they needed to satisfy in order to be eligible for a pension which could be paid overseas. They were never told of the 12 month residency requirement but the AAT emphasised that they did not allege they had been misled.

'Residing in Australia'?

The AAT said that it doubted whether the Schroders were in fact eligible for age pensions when they were granted. It noted that, at that time, an applicant for age pension had to be 'residing in' Australia when he or she applied for a pension (the former s.21). The AAT said:

> 'The concept of residence requires an intention to treat Australia as home, at least for the time being. The applicants . . . had come to Australia not with the intention of making it their home for the time being, but to get the pension. It was only after they were informed, at the time of making their claim, that they had to stay for twelve months in order to secure payment to them in the Netherlands on their return, that they made an attempt to organise their affairs so that their stay could be prolonged for as long as possible.'

(Reasons, p.7)

Foreseeable reason for leaving?

However, the Tribunal stated that the question in issue was whether the discretion in s.83AD(2) should be exercised. Noting that the Schroders had no intention of staying for 12 months when they arrived, it was difficult to see how they could fit in with the legislative requirements. It noted that the factors the Schroders drew attention to as being unforeseeable (the lack of suitable accommodation and their failure to make the necessary financial arrangements for a long term stay) were 'well and truly in existence at the time of their arrival in this country'.

Three other events were argued to be unforeseen by the Schroders. Mr Schroder had submitted a novel to his publisher in the Netherlands and in 1986 was writing a second one. He received an urgent call from his editor asking to return to the Netherlands and consult on the manuscript. The AAT found 'that this was not unforeseeable, as it is commonplace in the world of writing and publishing that writers might be called on by publishers and editors to participate in revision of a manuscript prior to its ultimate publication'.

Secondly, Mrs Schroders' sister had recuperated from open heart surgery prior to their departure, but while they were in Australia they heard she had gone back to hospital. According to the AAT, 'the deterioration in the health of a relative who has been seriously ill is not an unforeseeable event'.

Thirdly, the Schroders' daughter with whom they were staying announced that she was going to remarry and their continued presence after her remarriage might be unwelcome. In the AAT's view, 'if one's plans involve accommodation by relatives it is foreseeable that the circumstances of those relatives might change, necessitating reaccommodation elsewhere'.

There were other reasons raised by the Schroders for their premature return to the Netherlands not described by the AAT, and the Tribunal concluded that each was foreseeable.

> '[V]iewing the circumstances as a whole, it was foreseeable when the Applicants arrive in Australia that they might have to return to the Netherlands before the expiration of twelve months for a combination of reason, of the kind which arose here'.

(Reasons, p.10)

Formal decision

The Tribunal affirmed the decision under review.

[J.M.]

Sickness benefit: applicant confined to psychiatric institution

SHELLEY and SECRETARY TO DSS
(No. 5768)
Decided: 2 March 1990 by D.W. Muller.

In August 1987, an order was made against Paul Shelley under s.50(1)(a) of the *Mental Health Services Act* 1974 (Qld). This order had the effect of confining Shelley to a psychiatric hospital 'in the interests of the patient's health or safety or for the protection of other persons'.

Shelley was then detained in a psychiatric hospital. In January 1988, Shelley escaped from the psychiatric hospital.

On 10 December 1988, Shelley was arrested by Queensland police officers in the precincts of the home of Premier Ahern. No charges were laid against Shelley, but he was taken to the Security Patients Hospital at Wacol, because of the outstanding order under s.50(1)(a) of the *Mental Health Services Act*.

Shelley then applied to the DSS for sickness benefit, but the DSS rejected his application under s.167(3) of the *Social Security Act*. Following an unsuccessful appeal to the SSAT, Shelley applied to the AAT for review of that decision.

'Charged with . . . an offence'

Section 167(3)(b)(ii) of the *Social Security Act* provides that a benefit is