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

not payable to a person if the person is —

> 'confined in a psychiatric institution, whether by order of a court or otherwise, in consequence of having been charged with the commission of an offence . . .'

After the SSAT had rejected Shelley's appeal (in April 1989), the Queensland Mental Health Review Tribunal set aside the order for his detention under s.50(1)(a) of the *Mental Health Services Act*. The police then, on 30 June 1989, charged Shelley with the offence of threatening the life of Michael Ahern and he was released on bail.

The DSS advocate conceded that, during the period from December 1988 to June 1989, Shelley had been detained under s.50 of the *Mental Health Services Act*, and not 'in consequence of having been charged with the commission of an offence'. It followed that 167(3)(b)(ii) of the *Social Security Act* did not prevent payment to him of sickness benefit.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary for re-assessment in the light of the finding that Shelley's confinement in a psychiatric institution had not been in consequence of having been charged with the commission of an offence.

[P.H.]

Unemployment benefit: part-time student

RYDER and SECRETARY TO DSS (No. 5757)
Decided: 28 February 1990 by T.E. Barnett.

Clayton Ryder re-enrolled for 3 units in a Bachelor of Engineering course at the W.A. Institute of Technology (WAIT) in December 1985. He applied for and was granted unemployment benefit in February 1986, after indicating on his claim form that he was a part time student.

On 25 March 1986, Ryder enrolled for 3 additional units in the course. According to WAIT, this amounted to 16.75 hours of classes a week, and he was classified by WAIT as a full time student.

Ryder continued to receive unemployment benefit until August 1986, indicating on his applications for continuation of benefit that he was a part time student. In August 1986, the DSS investigated an anonymous telephone call, decided that Ryder had not been eligible for unemployment benefit, cancelled the benefit and decided to recover all payments since 3 March 1986 ($1839).

The legislation

At the time of the decision under review, the relevant legislation was s.107 [now numbered s.116] of the *Social Security Act*. (The current s.136, which disqualifies full time students from receiving unemployment benefit, was not then in force.)

According to s.107(1), a person would qualify for unemployment benefit if, *inter alia*, the person satisfied the Secretary that 'he was unemployed and was capable and willing to undertake [suitable] paid work' and that 'he had taken . . . reasonable steps to obtain such work.

The evidence

Ryder told the AAT that he had enrolled in the engineering course, under family pressure, in the 1985 academic year. He had failed 3 units. He then intended to abandon the course, but the Engineering Department at WAIT re-enrolled him in the 3 failed units. So he decided to complete those units while looking for employment. At the end of March 1986, he enrolled for 3 further units to improve his employment prospects.

Ryder said that he did not attend classes in the 3 units he was repeating, so that his class contact time was only 9 hours a week, even after enrolling for the 3 extra units. Accordingly, he had regarded himself as a part time student, even when enrolled for 6 units.

Throughout the first semester (March to June 1986), Ryder sought employment in the surveying and laboratory technician fields, in which he had skills and experience.

When he passed all 6 units in August 1986, he decided to commit himself to the course; and he enrolled for the second semester as a full time student and advised the DSS of his change of status.

The AAT's assessment

The AAT accepted Ryder's evidence and concluded that he had not deliberately supplied false or misleading information to the DSS, nor had he deliberately withheld information.

Although he had limited his attempts to obtain work, that limitation (to suveying or laboratory technician work) was reasonable, the AAT said.

As soon as Ryder had decided to commit himself to his studies, and was accepted as a full time student (on 13 August 1986), he ceased to be capable or willing to undertake paid work. As he had immediately notified the DSS and this had coincided with the cancellation of his benefit, there had been no overpayment.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with the direction that Ryder had been qualified for unemployment benefit between 2 March and 8 August 1986.

[P.H.]