recovery of public money. It cannot be said that the Department has, on this occasion, made its recovery a matter of paramount consideration. Indeed, it has allowed the overpayment to grow rather than to diminish and, in doing so, has placed Mr Coutts in a position where its repayment must appear a never-ending task.'

(Reasons, para. 23)

The AAT said that, taking all of these matters into account, it was prepared to exercise the discretion to waive half the amount of the overpayment made after 1986 on the basis that the DSS had adequate time to obtain information from Coutts' employer and to notify him of the amount of overpayment. Had the Tribunal not accorded greater weight to the recovery of public money, it would have waived recovery of all moneys received by Coutts after December 1986: by that time, the DSS had adequate time (some 5 months) to investigate the information supplied to it.

Formal decision

The AAT set aside the decision under review and substituted a decision that the sum of $1330.30 be recovered from Coutts.

[P.H.]

Assets test: disposition of property

GATES and SECRETARY to DSS (No. 5890)
Decided: 11 May 1990 by W.J.F. Purcell.

Mr and Mrs Gates asked the AAT to review a decision of the SSAT affirming a DSS decision to reject Mr Gates' claim for invalid pension and Mrs Gates' claim for age pension because their assets exceeded the allowable limit. The only issue was whether farm property and a business given to their son were caught by the disposal of assets provisions.

The facts

Mr Gates' family have been farmers for several generations and Mr Gates owned a 30-acre farm abutting residential suburbs of Adelaide which his son helped him work. He also owned a tractor business in partnership with his son. Mr Gates ceased taking an active role in these enterprises in early 1985 because of illness.

In July 1985, Mr and Mrs Gates transferred their interest in the tractor business to their son for no consideration.

Between March 1987 and May 1988, the farm was subdivided and sold, netting $342 572, from which the son purchased another farm.

Mr and Mrs Gates' son paid them $22 000 between October 1986 and November 1987 and allowed them to live rent-free in his Adelaide home after he moved to the new farm.

On 30 May 1988, Mr Gates applied for an invalid pension and Mrs Gates, who had turned 60 in September 1984, applied for an age pension. Both were assessed as qualified for the respective pensions but their claims were rejected on the basis of the assets test.

The legislation

Under s.6 of the *Social Security Act*, the value of property disposed of for no or inadequate consideration not more than 5 years before the person or their spouse qualified to receive a pension is included when applying the assets test.

There is a discretion not to include property disposed of during this period if, at the time of the disposal, it could not have reasonably been expected that the person or their spouse would become qualified for the pension: s.6(9)(b).

'Continuing farming family'

The Gates argued that they came within the 'continuing farming family' exception to the assets test accepted by the AAT, under which the proceeds of transactions such as theirs do not amount to assets because they were used to purchase another farm. However, reliance was placed upon cases that dealt with the financial hardship provisions and the AAT decided that this exception was not relevant to this review.

Disposed of property taken into account

As Mrs Gates qualified for age pension 10 months before the first disposition of property took place, s.6(9)(b) did not apply. It was not necessary for the AAT to canvass whether Mr Gates could have expected to become qualified for the invalid pension at the time of the first disposition of property. Accordingly the value of the disposed property had to be included when applying the assets test.

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Portability: foreseeable reason for leaving Australia?

PEPONAS and SECRETARY TO DSS (No. 5893)
Decided: 15 May 1990 by J. Handley, G. Brewer and D. Sutherland.

Maria Peponas applied for review of a DSS decision, affirmed by the SSAT, that she was not entitled to payments of pension from September 1988 as the wife of an invalid pensioner. Peponas, who was formerly a resident of Austalia, claimed she was entitled under s.62(1)(a) of the *Social Security Act*.

The legislation

Section 62 of the *Social Security Act* provides:

'Subject to this section, where:
(a) a person who was formerly an Australian resident again becomes an Australian resident;
(b) before the end of the period of 12 months commencing on the day on which the person again becomes an Australian resident, that person lodges a claim for a pension; and
(c) that person leaves Australia (whether before or after his claim is determined) before the expiration of that period,
any pension granted as a result of that claim is not payable in respect of any period during which the pensioner is outside Australia.'
(2) Where the Secretary is satisfied, in relation to a person referred to in paragraph (1)(a) who has been granted a pension as a result of the claim referred to in paragraph (1)(b), that the person's reason for leaving, or wishing to leave, Australia before the expiration of the period referred to in paragraph (1)(b) arose from circumstances that could not reasonably have been foreseen at the time of his return to, or his arrival in, Australia, the Secretary may decide that subsection (1) does not apply in relation to that pension.'

The facts

In December 1987, when Mr and Mrs Peponas were residing in Greece, Mr Peponas was notified that his wife was no longer entitled to receive a wife's pension while she was outside Australia, but if she returned she would be so entitled.

Peponas and her husband planned to return to Australia in February 1988, and Peponas told the AAT that they intended to reside here. Mr Peponas was unable to travel at this time due to illness, but Mrs Peponas came by herself and applied for a wife's pension which was rejected. When her husband ultimately arrived in May 1988, Mrs Peponas re-applied for a wife's pension which was granted.

In September 1988, Mr and Mrs Peponas returned to Greece because Mr Peponas' health had deteriorated. Mrs Peponas told the AAT that this deterioration was unexpected and she was required to go back with her husband in order to care for him. Mrs Peponas returned alone to Australia in April 1989 to appeal against the DSS decision to cancel her wife's pension.

The AAT's considerations

The AAT found that Mrs Peponas literally fulfilled the conditions of s.62(1) and the only issue in dispute was whether the Secretary had failed to exercise properly the discretion in s.62(2). The Tribunal referred to the AAT decisions in *Dracup* (1985) 29 *SSR* 358 and *Munna* (1981) 4 *SSR* 41 and went on to consider whether Peponas' reasons for leaving Australia could not be foreseen at the time she came back.

The AAT noted that Peponas was obviously aware of her husband's ill health when she left Greece in February 1988 and that when Mr Peponas did come to Australia, his illness was such that he had to receive oxygen on the flight here. It noted Peponas' evidence that her husband's chronic obstructive airways disease had improved on his return to Greece, because of the better climate, and the Tribunal said that the converse was also presumably true: that his condition would deteriorate on his return to Australia. This, together with a medical report from Peponas' treating doctor which recommended against airline travel, led the Tribunal to conclude that deterioration in Mr Peponas' health was not unexpected. Indeed, the Tribunal went on to doubt whether there had been in fact any deterioration in Mr Peponas' health relying on the report of a doctor who had treated Mr Peponas in 1984 and 1988. The Tribunal conluded that there was no continuing connection between Peponas and Australia which would oblige the Australian taxpayer to support her (relying on *Munna*).

Formal decison

The Tribunal affirmed that the discretion in s62(2) should not be exercised in the applicant's favour.

[J.M.]

Reciprocal agreement with New Zealand

McCURDY and SECRETARY TO DSS
(No. 5989)
Decided: 22 June 1990 by D.W. Muller.

Mr McCurdy had been refused unemployment benefit in April 1989. The basis of the rejection was that, as a New Zealand citizen who had been absent from Australia for more than 2 months in the preceding 12 month period, he was precluded from receiving the benefit by Article 9 of the Reciprocal Social Security Agreement between Australia and New Zealand. He then appealed to the SSAT which affirmed the Department's decision and then asked the AAT to review the decision.

The facts

McCurdy first arrived in Australia in February 1985 with his family and purchased a home. He worked as an engineer with the Queensland Government on a contract basis until September 1985. He then formed his own engineering company and worked on the Expo site in Brisbane also on a contract basis until December 1988. Prior to the winding up of the Expo site, McCurdy travelled overseas to negotiate engineering contracts for his company. He was away for over 3 months until October 1988. He went overseas again in January and February 1989 on a part business, part pleasure trip with his wife. On his return he found difficulty obtaining employment and in March 1989 made a claim for unemployment benefit. He remained out of work until November 1989.

The AAT accepted that McCurdy had been an Australian resident continuously from early 1985 until the present. He had travelled overseas for business or recreation purposes and had lived in the house he had purchased with his family since his arrival from New Zealand. He became an Australian citizen in October 1989 (a fact that had no bearing on the outcome in this case).

The legislation

Section 116 of the *Social Security Act* sets out the basic qualifying criteria for unemployment benefit. The criteria include the requirement that the applicant be an Australian resident. But the DSS argued that article 9 of the Reciprocal Agreement between Australia and New Zealand disqualified the applicant. [Section 65 of the *Social Security Act* effectively incorporates the Agreement into the Act.]

Article 9 provides that citizens of one Party shall not be qualified to receive unemployment benefit from the other Party to the agreement unless that person has been in the territory of the Party from whom benefit is being claimed for a period of 6 months since their most recent arrival; satisfies that Party that they are permanently settling in that country; and satisfies the basic criteria for the benefit claimed.

However, paragraph 4 of Article 9 excludes from the application of the Article any person who has been a resident of either Party for 12 months immediately preceding the claim for unemployment benefit. Paragraph 5 states that a period of residence for the purposes of paragraph 4 shall include any periods of absence that do not exceed 2 months and that do not break continuity of residence.

Effect of the Agreement

The DSS argued that, because McCurdy had been absent for more than 2 months, paragraph 5 operated to prevent McCurdy claiming that he was excluded from the operation of the Article under paragraph 4.

The AAT disagreed with that argument, and commented:

> 'Paragraph 5 stipulates that periods of temporary absence by the person that do not exceed in the aggregate 2 calendar months shall be included for the purposes of calculating the period as an Australian resident for the purposes of paragraph 4. I read paragraph 5 as being an enabling provision in cases where there otherwise may be thought to be some ambiguity or doubt as to a person's status. I do not read it as a provision which is meant to disadvantage citizens of New Zealand. Paragraph 5 does not say that periods of temporary absence which aggregate more than 2 months shall not be included for the purposes of calculating the period as an Australian resident. Once the period of temporary absence aggregates more than 2 months then the person loses the advantage of what is meant to be a deeming provision. The question of whether a person has or has not been an Australian resident for a period of 12 months immediately preceding the date on which the person lodges the claim is a question of fact depending on the circumstances of the case.'

(Reasons, p.8)

The conclusion reached was that McCurdy had been an Australian resident for at least 12 months immediately preceding the date that he claimed unemployment benefit. As a result, Article 9 of the Reciprocal Agreement did not apply to him.

The AAT also commented that it did not agree with the conclusions reached in the case of *Thompson* (1990) 55 *SSR* 736, where the applicant had been held to be subject to Article 9 of the Reciprocal Agreement, although he had remained an