Upon Dalziell conceding that this was an 'accruing return investment' within the meaning of s.12B(1) [see now s.3(1)] of the *Social Security Act*, the AAT decided that a rate of return in respect of this investment had been correctly taken into account in reducing the rate of unemployment benefit payable to him and affirmed the decision under review.

The AAT described Dalziell's arguments about the unfairness of the investment income rules as 'worthy of consideration in connection with any proposed changes in the relevant legislation'. It had been submitted on behalf of Dalziell that his roll-over bond should not be taken into account as continuing income, because it was intended for use upon retirement and not for immediate financial gain. The current legislation was discriminatory, unfair and inconsistent with the constant reminders to the public to prepare for old age by preserving eligible termination payments, it was submitted.

[D.M.]

Income test: pension payable only in India

MENON and REPATRIATION COMMISSION
(No. 6098)
Decided: 1 August 1990 by I.R. Thompson.

Mr Menon had resided in Australia in 1969. He was eligible for a service pension under the *Veterans' Entitlements Act*.

In calculating the rate of his service pension, the Repatriation Commission treated as 'income' a retirement pension granted to Menon by the Government of India.

Menon asked the AAT to review that decision.

The legislation

Section 35(1) of the *Veterans' Entitlements Act* defines 'income' in terms which are substantially identical to the definition in s.3(1) of the *Social Security Act* – as moneys –

> 'earned derived or received by [a] person for his or her own use or benefit by any means from any source whatsoever, within or outside Australia . . .'

Pension not available in Australia

Menon's Indian pension was payable in Indian rupees into his bank account in India. The funds in that account could not be transferred out of India nor could they be converted into any other currency. The Indian Government had prohibited the use of the moneys in the applicant's bank account for purchasing goods to be taken out of India or for the purchase of services in India by Menon.

Menon told the AAT that it was not feasible for him to travel regularly to India because of the cost of fares and the poor health of his wife; and this latter factor had removed any prospect of them residing in India.

Pension 'derived . . . outside Australia'

The AAT noted that a similar pension had been considered by the Tribunal in *Hoogewerf* (1988) 45 *SSR* 577. In that case, the Tribunal had decided that, because there was only a remote prospect of the applicant having the use of an Indian pension, no income should be treated as derived from the pension.

However, in the present case the AAT said that it was obliged, because of the Federal Court's decision in *Rose* (1990) 54 *SSR* 727, to treat the Indian pension as derived by Menon upon its payment into his Indian bank account.

The AAT noted that, in *Rose*, the Federal Court had said that pension payments made to a person in the German Democratic Republic were moneys 'received' by that person and that it was not to the point that the moneys were received outside Australia; nor did the construction and application of the definition of 'income' depend on the fact that a person might choose to live in Australia or in another country.

The AAT said that it regretted that it was obliged to conclude that Menon's Indian pension had the effect of reducing his service pension, because this –

> 'defeats what would appear to be the purpose of taking a pensioner's other income into account in determining the rate of his pension, that is to say that the rate of the pension should be related to his needs. If payments are made to him in another country and neither the money nor money's worth can be transferred to Australia and he cannot reasonably be expected to travel to the other country to reside for a period each year to utilise those moneys for his support, his needs are not in fact reduced in any way by the receipt or derivation of those moneys in that other country.'

(Reasons, para.13)

This was a situation, the AAT observed, calling for urgent consideration of possible amendment of the *Veterans' Entitlements Act* and the *Social Security Act* in order to prevent hardship to pensioners who were in the applicant's situation.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Investment income: entry and management fees

HAWLEY and REPATRIATION COMMISSION
(No. N89/1021)
Decided: 13 June 1990 by C.J. Bannon, T.R. Russell and J. Maher.

Bruce Hawley held a service pension under the *Veterans' Entitlements Act*. The Repatriation Commission calculated the rate of that pension by reference to his income from a managed investment fund, but refused to deduct certain fees paid by Hawley to the managers of the fund.

Hawley asked the AAT to review that decision.

The legislation

The AAT referred to s.37H of the *Veterans' Entitlements Act*, which allowed for the deduction, from investment returns, of entry or establishment fees paid to an investment fund after 9 September 1988.

[The equivalent provision in the *Social Security Act* is s.12K, considered in *Bate*, noted in this issue of the *Reporter*.]

Management fees

The fund in question charged a quarterly management fee, at 2% per annum, of the value of the investment. The AAT decided that any management fees paid to the fund should be allowed as a proper deduction against the income from the investment fund, regardless of when those fees were paid.

Establishment fees

Once s.37H came into operation on 9 September 1988, reasonable entry fees paid to the fund after that date would be deductible from the return on the investment.

But, prior to that date, the AAT said, the establishment fee (of 4% of the amount invested) paid by Hawley to the fund was 'of a capital nature' and not available as a deduction against the return on the investment. This view was adopted by analogy with the approach taken under income tax law.