that he would not pass that year, largely because of difficulty with the English course. He decided to leave school, find employment and continue his secondary studies on a part-time basis.

Tran's father then told Tran that, if he left school, he would have to leave the father's home.

Tran told the AAT, and the AAT accepted, that he would be subjected to physical violence if he left school but attempted to remain in his father's home.

Tran's former teacher told the AAT that Tran had set himself a very high standard, but had accurately assessed his poor prospects of passing year 11. The teacher said that, in her opinion, a failure would produce more problems for Tran than leaving school.

A psychiatrist with whom Tran consulted told the AAT that Tran's decision to leave school had been a mature choice between options; and that, if he had remained at school, he would have been exposed to intolerable pressure from his father.

A youth welfare worker expressed the opinion that Tran had left school because, as with many migrants with interrupted schooling, 'school had become a trauma rather than a positive learning experience'. She also told the AAT that she had found Tran, after leaving his father's home, living with his cousin without food and in obvious poverty.

'Other such exceptional circumstances'

The AAT agreed with the DSS that the phrase used in para. (a)(ii) of the definition of 'homeless person', 'other such exceptional circumstances', had to be read as a reference to circumstances of the same kind (*ejusdem generis*) as domestic violence or incestuous harassment.

That is, such exceptional circumstances would need to involve 'behaviour which is intrusive or invasive or threatening': Reasons, p.11. The DSS Benefits Policy Manual recorded examples which, the AAT said, were well within the class covered by the phrase.

These examples included criminal activity within the home, drug abuse, alcoholism, prostitution by the parents or other persons living in the home and extended irrational parental behaviour.

The AAT's decision

On the basis of this evidence, the AAT found that there were 'exceptional circumstances' within the definition of 'homeless person' in s.115 which made it unreasonable to expect Tran to live at his father's home.

His father's insistence that Tran remain at school was not an exceptional circumstance which would justify his leaving his father's home; but the threat of violence to Tran did amount to such an exceptional circumstance:

> 'In my view, no person should be subjected to the threat or the risk of violence whether it be in domestic circumstances or otherwise. I am satisfied that [Tran] genuinely believed that in the event that he refused to leave the family home he would have been assaulted by his father, in the circumstances that he has earlier described.
>
> In those circumstances it would be unreasonable to expect a person to live at a home where that risk or threat is apparent.'

(Reasons, p.12)

Formal decision

The AAT affirmed the SSAT's decision that Tran was eligible to receive benefit as a homeless person.

[P.H.]

Sickness benefit, late lodgment: sole or dominant cause

WESTON and SECRETARY TO DSS

(No. W90/160)

Decided: on 13 March 1991 by Deputy President P.W. Johnston.

Ms Weston applied for review of a decision of the SSAT affirming a DSS decision to reject a claim for sickness benefit on the ground that the claim had not been lodged within five weeks of the date on which the incapacity occurred. She also sought a recommendation from the Tribunal that a payment of an amount equivalent to sickness benefit be made in accordance with Finance Direction 21/3.

The facts

Ms Weston became incapacitated on 7 December 1989 when she injured her knee seriously while in Victoria. After being taken to hospital and informed that surgery would be required, Ms Weston telephoned the Department's Melbourne office on 12 December 1989 and enquired about making a claim for sickness benefit. When she mentioned that she was probably returning to Perth in the near future she was told that it would be better if she lodged her claim in Perth. There was no mention of time limits.

Upon returning to Perth on 24 December 1989, she tried to ring the Department to enquire further about making a claim. A recorded message led her to believe that the office was closed between Christmas and New Year.

On 4 January 1990 she rang the Department's Hotline. She was told that she would have to attend at a departmental office to fill in a form. Again she received no advice about the time limits for lodging a claim.

Since she was still troubled by her knee injury and finding it difficult to drive, she did not attend a DSS office until 23 January 1990. It was then that she realised that she was out of time to make a claim. She lodged a claim on 30 January 1990 and was advised that the claim was only payable from the date of lodgment and as she had been working since 12 January 1990 there was no benefit payable.

The legislation

Section 125(3) of the *Social Security Act* provides that sickness benefit is payable to a person from and including the 7th day after the day on which the person became incapacitated where their claim for benefit is lodged within 5 weeks after the date on which the person suffered incapacity.

Section 125(4) provides that whenever a claim for sickness benefit is not lodged within a period of 5 weeks as required by s.125(3), the benefit is payable from and including the day on which the claim was lodged unless the Secretary is satisfied that the sole or dominant cause of the failure to lodge the claim within the 5 week period was the said incapacity. Where the Secretary is so satisfied, benefit is payable from and including such date as the Secretary considers reasonable under the circumstances, not being a date earlier than 4 weeks before the date on which the claim was lodged.

Whether incapacity is sole or dominant cause

The SSAT had found that it was Ms Weston's lack of awareness of the time limit rather than her incapacity that was the 'sole and dominant cause' [sic]. The AAT said that the SSAT erred in treating the effects of the incapacitating injury and the applicant's unawareness of the time limit as mutually exclusive causes. The question of whether the incapacity was the sole or dominant cause of the failure to apply in time should not be

approached as a matter of any precise apportionment of causation. Accepting the sense of 'dominant' given in the *Shorter Oxford Dictionary* as 'governing' or 'most influential', the AAT found that the incapacity was the most influential factor in causing Ms Weston to delay submitting her claim.

Her unawareness of the time limit was a contributory cause to her failure, but that was due in part to departmental default in misinforming her and failing to alert her to the time limit. The relevance of administrative default in assessing whether the incapacity was the sole or dominant cause of late lodgment was explained as follows:

> 'Thus if someone in the applicant's situation had been informed of the need to lodge within time, an injury which made it difficult but not impossible to travel could not be said to be the sole or dominant cause. But where the claimant is left in ignorance of the need to lodge promptly, either in person or through an alternative means such as the post or by a friend, an incapacitating injury, if of sufficient magnitude, may be so regarded because its effect should be measured relatively to the perceived urgency or lack of it.'

Formal decision

The AAT set aside the decision under review and substituted a decision that sickness benefit should be payable from the earliest allowable date. Since under s.125(4)(a) this could not be earlier than 27 December 1989, the AAT considered the question of whether to recommend an *ex gratia* payment in accordance with Finance Direction 21/3.

***Ex gratia* payment under Finance Direction 21/3**

A delegate of the DSS had considered the SSAT's recommendation for an *ex gratia* payment and decided that there was no case for such a payment because Ms Weston had failed to act promptly upon the advice given by the Hotline that she should go to a departmental office and make a claim.

The AAT approved of the guidelines relating to such payments set out in Chapter 35 of the Department's Benefits Manual, but found that they had been misapplied.

The advice given on the Hotline was not the only instance of incomplete or misleading advice by the Department to the applicant. Furthermore, the question of whether the applicant contributed by her slowness to act to the situation did not exclude negligence on the part of the Department, but should lead to an apportionment when assessing the amount of the *ex gratia* payment.

The AAT recommended that the Department reconsider its decision not to make an *ex gratia* payment of the whole or a substantial part of an amount equivalent to sickness benefit for the period prior to 26 December 1989.

[P.O'C.]

Australian resident

OPITZ and REPATRIATION COMMISSION

(No. N89/753)

Decided: 27 July 1990 by C.J. Bannon.

Mr Opitz sought review by the AAT of decisions by the Repatriation Commission cancelling his service pension and demanding repayment of $13 540.84, the entire amount of service pension paid to him over the 2 years since he lodged his claim. These decisions were apparently based on a finding that Mr Opitz was not and had not been an Australian resident.

The legislation

Under s.43(4) of the *Veterans' Entitlements Act* 1986:

> 'A veteran is not eligible to lodge a claim for service pension unless the veteran is an Australian resident and is in Australia.'

'Australian resident' is defined in s.35(1) (which is identical to the definition in s.3(1) of the *Social Security Act*) to mean:

> 'A person who resides in Australia and who is (a) an Australian citizen . . .'

The evidence

Mr Opitz was an Australian citizen and had family, including grandchildren, in Australia. He was divorced from his first wife. In 1983 he entered into a *de facto* relationship with a Philippino woman, whom he married in 1985; and he then lived in the Philippines with her and her son for some years.

On 26 July 1986, Mr Opitz returned to Australia. He was arrested at the airport, subsequently charged with offences committed between 1979 and 1981, and was kept in custody for 2 to 3 weeks until bail was arranged.

On 19 August 1986, Mr Opitz lodged a claim for service pension. In a statement lodged with the claim he said:

'I will be residing permanently in Australia. My wife and child are still living in the Philippines and will be joining me in the not too distant future approximately 6-12 months . . . '

Service pension was granted.

Mr Opitz pleaded guilty to the 1979-81 charges and on 29 October 1986 was sentenced to 15 months gaol with a 6 months non-parole period. Before sentencing he gave evidence that his primary reason for returning to Australia was for medical attention and that he intended staying 4 to 6 weeks.

On 17 February 1987, Mr Opitz was released from prison and returned to the Philippines in March 1987. His service pension was cancelled from 11 August 1986 by a decision made on 27 July 1988. In addition, repayment of pension paid for the period 19 August 1986 to 10 August 1988 was demanded.

At the hearing before the AAT, a written statement was tendered in which Mr Opitz asserted that he intended to return to Australia, but lacked the necessary funds.

Two unsuccessful attempts were made by the AAT to obtain telephone evidence from Mr Opitz from Manila, the first attempt being thwarted by an earthquake. The AAT refused to adjourn to make further attempts to contact him. In so refusing, the Tribunal commented that:

> 'Oral statements by telephone are of extremely limited value when the demeanour of the witness cannot be observed, and there is an issue as to his credit.'

(Reasons, p.5)

Not residing in Australia

The AAT applied the Federal Court decision in *Hafza* (1985) 26 *SSR* 321, in which Wilcox J said:

> 'As a general concept residence includes two elements: physical presence in a particular place and the intention to treat the place as home, at least for the time being, not necessarily forever.'

(Reasons, p.6)

The AAT also commented that:

> 'A person may, of course, have more than one residence, and may even be a resident against his will when he prefers some other place as his permanent residence.'

(Reasons, p.6)

Relying on Mr Opitz's sworn evidence to the criminal court, which the AAT had no doubt should be preferred to his contrary assertions in unsworn documents and statements, it was concluded that:

> 'He was not in Australia as a resident, but simply as a visitor when he lodged his claim.'

(Reasons, pp.6-7)

Backdating the decision

Section 58(2) of the *Veterans' Entitlements Act* (which is practically identical to s.168(2) of the *Social Security Act*) permitted backdating of a decision where payment would not have been