available to the Department to contact persons who had not returned their review notices, 'good governmental practice' would have required the Department to attempt to alert O'Connell to her failure to return the notice before proceeding to cancel the family allowance:

> 'Such an approach could have been justified in terms of good governmental practice as both a *rational* and *proportionate* response to the failure to receive a response to the queries about qualifying income level, measured against the finality of action to cancel, and even allowing for the fact that persons like the applicant took some time to realise the allowance was not being paid . . . In that way, there would also be a stronger basis for treating failure to respond as founding an inference that the qualifying income level for entitlement had been exceeded. As it was, the mere fact of non-reply, being open to several equivocal explanations, forms no *rational* basis for drawing the conclusion actually stated as the basis of the decision.'

(Reasons, para.30)

Effect of setting aside the DSS decision

After noting that O'Connell had remained qualified to receive family allowance during the period of cancellation, the AAT said that it proposed to set aside the cancellation of her family allowance.

However, the AAT noted that it appeared that its power to substitute a decision, that O'Connell should receive family allowance, was limited by s.183(5) of the *Social Security Act*.

This sub-section provides that, where application for review of a DSS decision is made to the SSAT more than 3 months after the applicant was given notice of the decision under review, and the SSAT sets aside the DSS decision, the decision of the SSAT takes effect from the date of the application for review. It seemed reasonable to assume, the AAT said, that the AAT would be subject to the same limitation if it chose to set aside the DSS decision.

In the present matter, the DSS had posted the notice of cancellation to O'Connell in January 1990, and she had lodged her application for review in September 1990.

However, the AAT said, the DSS could not claim to have given O'Connell notice of cancellation merely by posting a letter to her last known address. In this context, s.183(5) was different from s.163(2). Section 183(5) did not specify any authorised means of communication, while s.163(2) specified service by post, thereby attracting the operation of s.29 of the *Acts Interpretation Act*. This had the effect of deeming a s.163(2) notice to be properly given if sent by pre-paid post to the last known address.

By way of contrast, a notice for the purpose of s.183(5) would be given, the AAT said, by the 'actual giving of notice in a way that in the ordinary course of events will be communicated to the intended recipient': Reasons, para. 37. That being the case, the AAT said, it found that O'Connell was not given notice of cancellation more than 3 months before she applied to the SSAT; so that the AAT's decision could take effect from the date of the DSS decision to cancel O'Connell's family allowance.

Formal decision

The AAT set aside the SSAT decision not to pay O'Connell arrears of family allowance and the Secretary's decision to cancel O'Connell's family allowance and substituted a decision that family allowance was payable to O'Connell for the period 28 December 1989 to 12 August 1990.

[P.H.]

Income test: setting off losses

TOSSWILL and REPATRIATION COMMISSION

(No. 6513)

Decided: 10 December 1990 by I.R. Thompson, T.R. Russell and G.R. Taylor.

Tosswill sought review of a decision of a delegate of the Repatriation Commission, *inter alia*, to deduct losses, carried forward for taxation purposes, from Tosswill's income for subsequent years for the purpose of calculating his entitlement for a service pension.

Facts

In the 1981 and 1982 financial years, Tosswill incurred substantial losses in an accounting business. He carried those losses forward in subsequent taxation returns.

In 1986, Tosswill dissolved his business and commenced a new partnership. There was a substantial sum outstanding in relation to the overdraft of the former business and Tosswill had to raise further capital to buy into the new partnership. He borrowed from a bank sufficient funds to cover these two expenses plus some additional funds which were ultimately used for personal expenses.

Tosswill sought to set off his carried forward taxation losses from earlier years against his income for the purposes of the *Veterans' Entitlements Act* 1986 and to set off, against his income for service pension purposes, the interest paid on the bank loan raised in 1986.

Legislation

The definition of 'income' was contained in s.35(1) of the *Veterans' Entitlements Act* 1986, identical to the definition in s.3(1) of the *Social Security Act*:

> '"Income" in relation to any person means personal earnings, moneys, valuable consideration or profits whether of a capital nature or not, earned, derived or received by that person for his own use or benefit by any means from any source whatsoever, within or outside Australia, and includes a periodic payment or benefit by way of gift or allowance . . . '

Decision

The AAT first noted that the part of the loan raised and used for personal expenses was income for the purposes of the *Veterans' Entitlements Act*, on the principles discussed in *Gowans and Repatriation Commission* (1988) 42 *SSR* 535 and more recently affirmed in *Hill and Repatriation Commission* (noted in this issue of the *Reporter*).

The AAT noted that Tosswill's counsel, and to some extent the Commission's counsel, had relied on Tosswill's taxation returns for the relevant period.

The Tribunal repeated the warnings found in numerous previous decisions, including the High Court in *Read* (1988) 43 *SSR* 555 and the Full Federal Court in *Garvey* (1989) 53 *SSR* 711, where the courts drew a clear distinction between the definition of income for the purposes of income tax legislation and the definition of income in the *Social Security Act* (which is identical to the one in the *Veterans' Entitlements Act*).

The Tribunal said that, whilst for taxation purposes it was possible to carry forward taxation losses from previous years, for the purposes of the *Veterans' Entitlements Act* this approach was not permissible.

The Tribunal noted that it might be possible in a later year to set off prior years' revenue losses if in that later year the amount of the debt accruing from the previous years was actually paid by the pensioner. But, unless and until a prior accrued loss was actually paid by a pensioner, then the pensioner was in fact not in a more onerous position in terms of his capacity to support himself

made but for a misrepresentation and provided the power for the backdating by the Commission in this case.

The AAT also said:

'I do not consider that an ineligible claim achieves eligibility because of an incorrect determination.'

(Reasons, p.7)

However, in this case s.58(1), which includes a power to cancel (and is identical to s.168(1) of the *Social Security Act*), provided 'express power to reverse wrongful determinations'.

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Compensation recovery: 'lump sum'

SECRETARY TO DSS and VAN DER MOLEN

(No. 6618)

Decided: 4 February 1991 by H.E. Hallowes.

The DSS decided that Mr Van Der Molen had been paid $2193.86 in sickness benefits over the period 1 January 1989 to 1 March 1989 which was recoverable by the Department because he had received a series of periodical payments by way of compensation in respect of that period.

This decision was set aside by the SSAT which substituted a decision that only sickness benefit paid during the 2 weeks beginning 8 September 1988 (the day after periodical payments ceased) was recoverable. The DSS sought review by the AAT of this SSAT decision.

The legislation

The principal issue in this case was whether s.153(2) or s.153(3) of the *Social Security Act* should be applied. This in turn depended on whether Mr Van Der Molen had received a lump sum compensation payment or a series of periodical compensation payments.

Under s.153(2) —

'Where (a) a person has received a lump sum payment by way of compensation . . . the Secretary may . . . determine that the person is liable to pay . . . the amount of pension paid to the person during the lump sum payment period . . .'

The 'lump sum payment period' is determined under s.152(2) and (3). Where the lump sum was paid pursuant to a settlement made on or after 9 February 1989, 50% of the sum is divided by average weekly earnings to determine the duration of the period. That period runs from the day on which the last periodical compensation payment was made, if such payments have been made in respect of the incapacity.

Under s.153(3) —

'Where (a) a person has received a series of periodical payments by way of compensation . . . the Secretary may . . . determine that the person is liable to pay . . . (d) the amount of pension paid to the person during [the period during which payments in the series of periodical payments were made] . . .'

For the purposes of all these provisions a 'pension' is defined in s.152(1) to include a sickness benefit.

A subsidiary issue involved the application of s.156 of the *Social Security Act* which permits the Secretary to treat whole or part of a compensation payment as not having been made 'if the Secretary considers it appropriate to do so in the special circumstances of the case'.

The facts

Mr Van Der Molen injured his back at work in May 1988. On legal and medical advice he resigned on 9 September 1988 after unsuccessfully attempting to return to work in June. Weekly compensation payments ceased on 7 September 1988.

A claim for sickness benefit was lodged on 13 September 1988 and granted from 12 September 1988.

In January 1989 Mr Van Der Molen lodged a claim for weekly payments of compensation under the *Accident Compensation Act* 1985 (Vic.). This claim was opposed on the basis that his injury was not caused by work. The hearing of this claim was listed before the Accident Compensation Tribunal on 18 September 1989.

Settlement negotiations resulted in the making of a consent award for 'weekly payments of compensation from 5 January 1989 until 1 March 1989 inclusive', which amounted to $2777.80. Mr Van Der Molen gave evidence to the AAT that he was advised to settle this claim to avoid jeopardising a potential lump sum claim for permanent impairment under s.98 of the *Accident Compensation Act*. He was not consulted as to the dates in the award and merely understood that he was to receive a 2-month period of compensation.

When Mr Van Der Molen went to collect his settlement moneys, he found that his employers had already paid $2039.06 to DSS. It was conceded by the Department that it had failed to comply with the correct notice procedures as required by Part XVII of the Act. DSS found itself in a position where the money turned up before it had a chance to issue the notices.

At the time of the AAT hearing, the Van Der Molens' only income was from social security payments. They experienced financial hardship in September 1989 but were back on an even keel after Mr Van Der Molen received $8546 pursuant to s.98 of the *Accident Compensation Act* in July 1990 in respect of his back injury.

Looking behind the award

The AAT first decided whether it could look behind the award in this case. It considered the AAT's decisions in *Cocks* (1989) 48 *SSR* 622 and *Littlejohn* (1989) 49 *SSR* 637 and the Federal Court's decision in *Littlejohn* (1989) 53 *SSR* 712, commenting in relation to the latter case that —

'It was noted in the Federal Court judgment . . . that although the Secretary and, on application for review, the Administrative Appeals Tribunal, could look behind the terms of a compensation award in order to determine whether there was in truth an identity of the incapacity for which the sickness benefit and compensation had been paid, the refusal of the tribunal in *Littlejohn* to undertake that course had not involved an error of law, the Tribunal's finding that there was no evidence to suggest that the compensation award was anything other than what it purported to be having been open to the Tribunal.'

(Reasons, para. 16)

In relation to the case before it, the AAT decided that —

'Despite the wording of the award, the evidence as to the circumstances surrounding this application satisfy me that this is an application in which the Tribunal should look behind the award.'

(Reasons, para. 27)

Lump sum or periodical payments?

The AAT quoted the following passage from the Federal Court's decision in *Banks* (1990) 56 *SSR* 762:

'A "lump sum" payment is simply one which includes a number of items. Where a payment by way of compensation consists of the aggregate of several amounts which could have been paid separately or at different times the payment is one of a lump sum.'

(Reasons, para. 22)

Reliance was also placed on the Federal Court's decision in *a' Beckett* (1990) 57 *SSR* 779.