

there had been no opportunity to argue before the Tribunal whether he would be able to undertake such courses.

The Federal Court did not accept this submission:

'...the majority made it clear that the applicant had a sufficient capacity to carry out remunerated employment and to obtain that employment to preclude his satisfying the requirement of 85 per cent incapacity for work. The majority said that, although the market in which the applicant could be expected to sell his labour had been narrowed by his medical condition, a certain lack of fluency

in spoken English and his limited English literacy, nevertheless, there was a work market still open to him to exploit if he wished to do so.

The majority went on to find that the applicant's capacity for work would be enhanced by his undertaking a course or courses of study. This additional finding does not detract from the clear finding of fact made by the majority as to the applicant's existing capacity for work.'

(Reasons, pp.11-12)

Lack of evidence

The applicant also submitted that the Tribunal had not identified the labour market that was open to him. He also

argued that the majority took into account factual circumstances of which there was little, if any, evidence. The Court did not perceive any errors in the approach of the AAT:

'...When, as in this case, an applicant has not actively sought employment, there may be little that the Tribunal can do save rely on its general knowledge of the employment market and its view of the applicant's employability, having regard to his medical condition, his training, his skills, his personality and like matters...'

(Reasons, p.12)

Formal Decision

The Federal Court dismissed the appeal.

Income test: Public Trustee

FLANNERY v SECRETARY TO DSS Federal Court of Australia

Decided: 7 December 1987 by
Sweeney, Keely and Jenkinson JJ.

This was an appeal against the decision of the AAT in *Flannery* (24 December 1986). The AAT had decided that money received by the Public Trustee, on behalf of an infirm person, should be treated as income received by the person for her own benefit and so within the definition of 'income' under the *Social Security Act*.

Special benefit

It was not disputed that Flannery qualified for special benefit. The rate of that benefit, according to s.114(1) of the *Social Security Act*, was to be calculated by reference to his income and the income of his wife. At the time of the decision under review, s.106 defined 'income' to mean -

'any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for his own use or benefit by any means from any source whatsoever . . . and includes any periodical payment or benefit by way of gift or allowance . . .'

'Profits . . . derived'

Flannery lived in a *de facto* relationship with a woman, S, who was an 'infirm person' under the *Public Trustee Act 1958* (Vic.), and for whom he provided daily care. The 'general care, protection and management' of her property, including a fund of around \$50 000, was in the hands of the Public Trustee; and S had no control over her property.

The *Public Trustee Act* provided that the Public Trustee could invest money held by him for any person. The investments were to be in a 'common fund'; and the Public Trustee was obliged to allocate the returns on those investments to the account of each person for whom the Public Trustee held money, 'at such times and intervals as the Public Trustee

determines': s.57(2). This allocation took place every 6 months, and the amounts allocated were immediately reinvested in the common fund.

The Federal Court said that the allocation of this interest to S's account amounted to 'a derivation by her of profits, and for her own benefit, in the sense contemplated by the definition of "income"'. Jenkinson J. noted that S could not accept payment of the amount of interest and that the money credited to her account was immediately invested in the common fund. Jenkinson J. continued:

'But the indebtedness, evidenced in the books of the Public Trustee, in that amount of interest to the protected person is at the moment of allocation her property, in my opinion. The Public Trustee holds no interest in her property, not even the bare legal estate of trustee. His custody of her property is the custody of a bailiff or a statutory agent . . . At the moment of allocation of interest, pursuant to s.57(2), there was in my opinion a derivation of profits by the protected person for her own benefit, which brings the amount of interest allocated within the defined meaning of income . . . It was derived for her own benefit notwithstanding her legal incapacity to deal with it personally, in my opinion.'

(Judgment, p.10)

Repatriation pension

The AAT had also considered the position of a pension payable to S under the *Repatriation Act 1920* (Cth), but being paid to the Public Trustee. It had decided, on the basis of advice from the parties, that this pension had been expressly excluded from the definition of 'income' in s.106 of the *Social Security Act* up to 10 September 1984; but that it had not been excluded after that date.

The Federal Court said that the AAT had been in error on this point: the s.106 definition of 'income' had

excluded a repatriation pension throughout the relevant period; and, therefore, S's repatriation pension could not affect the rate of special benefit payable to Flannery.

Carer's pension

Flannery had also applied for a carer's pension, which the AAT had said would have been payable but for the level of S's income (defined in similar terms in s.6(1) of the *Social Security Act*). The AAT said that this income consisted, not only of the interest payments credited to her account by the Public Trustee, but also of the repatriation pension.

The Federal Court agreed that S's income would affect the level of carer's pension payable to Flannery. It also agreed that the interest allocated to her account and the repatriation pension were 'income', as defined in s.6(1). (At no time during the relevant period did the s.6(1) definition of 'income' exclude a repatriation pension.)

However, the Court went on to say that, apart from the income question, Flannery could not have qualified for a carer's pension. At the relevant time, s.33(1) provided that this pension was payable to a person who cared for a relative, in their home, if the relative was a severely disabled age or invalid pensioner.

Although Flannery would have qualified for an invalid pension, the level of her income prevented payment of any pension to her. The term 'invalid pensioner' was defined in the Act to mean 'a person in receipt of a pension under Part III'. Accordingly, the Federal Court said, she was not an invalid pensioner.

Formal decision

The Federal Court varied the decision of the AAT by excluding S's repatriation pension from the calculation of the rate of Flannery's special benefit throughout the period under review.