jurisdiction to review the decision of the Director-General of Social Services taken under the *Social Services Act* 1947'. The Tribunal referred to ss.7, 13, 95, 99 and 99A of the *Social Services Act* and continued:

> It follows from these provisions that where the Director-General is satisfied that a child is in the custody, care and control of more than one person, then the Director-General should make a declaration under s.99A(2) and a direction under s.99A(3). This is a function which is cast upon the Director-General, not a function imposed upon the Family Court of Australia. And s.31 of the *Family Law Act*, which confers jurisdiction upon the Family Court of Australia, does not confer upon that Court any jurisdiction to review decisions of the Director-General of Social Services made under the *Social Services Act* 1947. Indeed, s.75(2) of the *Family Law Act* empowers the Family Court of Australia to take into account when assessing maintenance the quantum of child endowment being received by the parties. Accordingly, one of the matters which it has a duty to take into account is the quantum of child endowment paid pursuant to decisions of the Director-General of Social Services. It is not a review body of his decisions, it has a duty to take his decisions, or at least the results of his decisions, into account.
>
> On the other hand, the Administrative Appeals Tribunal which is a body established for reviewing on their merits decisions of an administrative nature under specified federal laws, has the function, and duty when called upon to do so by an application, to review the decisions of the Director-General made under the *Social Services Act*. The Tribunal not only is empowered to review the decisions of the Director-General but is called upon to exercise its powers upon the lodgement of an application for review, as has been done in this case. Such a review is not a 'matrimonial cause' as defined by s.4(1) of the *Family Law Act*.

(Reasons for Decision, pp.4–5)

The AAT concluded that it had 'jurisdiction to proceed with the matters in dispute in this review': Reasons for Decision, p.6.

Unemployment benefit: uneconomic farm

GUSE and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. Q81/9)

Decided: 27 November 1981 by T. R. Morling J; J. B. K. Williams and J. G. Billings.

In 1958 Colin Guse had acquired by ballot a Crown lease of 882 acres of poor quality land, on condition that he fence, clear and develop it as a farm.

In January 1978, when the farm was partly developed, Guse was granted unemployment benefit by the DSS. On 27 March 1980 the DSS decided to terminate payment of this benefit. The cancellation was explained to Guse in the following terms:

> Under section 7.108 of the Unemployment and Sickness Benefit Manual a primary producer must be able to scale down his own involvement in the activities on his property to the extent necessary to enable him to take full-time employment if employment is available.
>
> A field officer's visit indicates you are not doing this. Therefore your benefit has been terminated.

Following an unsuccessful appeal to an SSAT, Guse applied to an AAT for review of the decision to terminate.

Can a farmer be 'unemployed'

The qualifications for unemployment benefit are set out in s.107(1) of the *Social Services Act*:

> 107. (1) Subject to this part, a person . . . is qualified to receive an unemployment benefit in respect of a period . . . if, and only if,
>
> (a) [specifies minimum and maximum ages];
> (b) [specifies residence in Australia]; and
> (c) the person satisfies the Director-General that—
>
> (i) throughout the relevant period he was unemployed and was capable of undertaking, and was willing to undertake, paid work that, in the opinion of the Director-General, was suitable to be undertaken by the person; and
>
> (ii) he had taken, during the relevant period, reasonable steps to obtain such work.

Before the AAT the Department supported its decision on the basis that Guse was not 'unemployed' within s.107(1)(c)(i). (The DSS did not claim that Guse was incapable of working or unwilling to work or that he had failed to take reasonable steps to obtain work. He had, in fact, found a full-time job 12 months after termination.)

The DSS claimed that Guse was engaged in working and developing his property as a serious business undertaking. But the AAT found there was no evidence to support this claim. Guse had paid a contractor to clear some of his land, but (because of his shortage of capital) this was not completed; he ran 25–30 cattle on the property; and he had planted some crops. But Guse's 'farming activities were such as to occupy very little of his time amounting only to a few hours per week'. And the movement in Guse's bank account showed that the farm was a drain on, rather than a contribution to his finances.

The AAT made the following decision:

> 14. Upon the evidence before us we have reached the firm view that the farm was not a viable economic enterprise and could not properly be described as a serious business undertaking. The applicant could not make the property an economic undertaking without substantial capital which was not available to him. He was using the farm house as a place of residence and such farming activities as were carried out thereon occupied only a little of his time and did not render him unavailable for full-time paid employment. We are satisfied that at relevant times he was making reasonable efforts to obtain employment in the limited fields open to him. He succeeded some 12 months after his benefit was terminated.
>
> 15. We are accordingly satisfied that, at the time of the decision to terminate the grant, he was 'unemployed' within the meaning of that term in s.107(1)(c)(i) and that he otherwise met the requirements of s.107(1). We are therefore of the opinion that the decision under review should be set aside.

After pointing out that unemployment benefit was payable fortnightly, following the fortnightly lodgment of income statements by the claimant, the AAT said that its decision could 'have a direct effect only on the fortnightly period either immediately preceding or following the date of the decision to terminate'. But the Tribunal would expect the DSS to consider Guse's eligibility for the 12 month period 'in the light of this decision': Reasons for Decision, para. 16.

Overpayment: discretion to deduct from pension

LIVESEY and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. N80/133)

Decided: 4 February 1982 by A. N. Hall.

Dorothy Livesey was granted an age pension in November 1973 at the maximum rate plus supplementary assistance (then $4 a week, increased in 1974 to $5 a week) towards her rent.

At about the same time, Livesey was granted a United Kingdom pension of £3.31 *a week but she did not notify the DSS of this income until 16 November 1978. (Section 30B(1) of the Social Services Act* obliges a pensioner to notify the DSS of the receipt of extra income.) It was not until then (five years after the grant of her age pension) that the DSS sent her an Entitlement Review Form, which Livesey completed and returned to the DSS.

The income test for supplementary assistance (set out in s.30A of the *Social Services Act*) is quite stringent and, if her UK pension had been taken into account by the DSS, she would have received no supplementary assistance or (depending on the current exchange rate) a very small payment.

The DSS continued to pay full supplementary assistance until March 1980, when it cancelled the assistance.

In April 1980 the DSS informed Livesey that there had been an overpayment which would be recovered by deductions from her age pension. (Section 140(2) of the *Social Services Act* gives the Director-General a discretion to deduct the amount of a payment which 'for any reason . . . should not have been paid' from any current pension, allowance or benefit.)

The DSS decided to recover 'overpayments' between 7 February 1974 (the date by which Livesey should, according to s.30B(1) of the Act, have notified the DSS

of her UK pension) and 18 January 1979 (the date by which, in the normal course of its administration, the DSS would have acted on the information given to it on 16 November 1978 and adjusted Livesey's supplementary assistance). The amount of overpayment was calculated as $1080, to be recovered by deduction of $10 a fortnight from Livesey's age pension.

The DSS did not seek to recover the overpayment between January 1979 and March 1980, taking the view that this overpayment was due to its own failure to act on the information supplied by Livesey.

Following an unsuccessful appeal to an SSAT Livesey applied to the AAT for review of this decision. (Shortly before the AAT hearing, the rate of deductions was reduced by the Director-General to $5 a fortnight.)

Overpayment: what was the 'effective cause'?

Section 140(2) of the *Social Services Act* gives a very wide power to recover overpayments made 'for any reason'. But the DSS had dealt with the recovery of the overpayment by calculating what amount could be recovered under s.140(1) of the Act. This sub-section authorizes recovery, 'in a court of competent jurisdiction', of any payment made 'in consequence of a false statement or representation, or . . . a failure or omission to comply with any provision of this Act', if the payment 'would not have been paid but for the false statement', omission etc.

The AAT agreed (as had the AAT in *Buhagiar*, 4 *SSR* 34) that this was the right approach:

> In any event, I do not consider, as a matter of discretion, that any more should be recovered from the applicant than would be recoverable if the overpayment were determined in accordance with the provisions of s.140(1) of the Act (cf. *Re Buhagiar*).

(Reasons for Decision, para. 18)

Approaching the overpayment on that basis, the critical question was: 'what was the effective cause of the overpayment?' Was it Livesey's failure to notify the DSS before November 1978? Was it the Department's failure to conduct any review of Livesey's pension for five years? [Similar questions, arising out of the Department's abandonment of regular pension reviews between 1975 and 1978, were considered by the AAT in *Gee*, 5 *SSR* 48; *Woodward*, 5 *SSR* 49; *Forbes*, 5 *SSR* 50; and *Matteo*, 5 *SSR* 50.]

The AAT said there was every reason to believe that, if the pension had been reviewed annually, the DSS would have learnt of Livesey's UK pension earlier. But, said the AAT, it was Livesey's responsibility under s.30B(1) to notify the receipt of the UK pension:

> The Department had no means of knowledge of the fact unless she told them (cf. *Re Harris*). She hd no reason to assume that the Department was aware of the fact (cf. *Re Forbes*). It was not as if she had told the Department in 1974 and the Department had failed to act on the advice (cf. *Re Buhagiar*). I am satisfied therefore that the applicant's default was the effective cause of the overpayment and that there was an amount of pension (namely an allowance by way of supplementary assistance) which should not have been paid to her and which is properly recoverable under s.140(2) of the Act.

(Reasons for Decision, para. 14)

The AAT decided that the overpayment 'ceased to be "in consequence of" the applicant's default when her notification of 16 November was received, by the Department (namely 22 November 1978)', rather than the date by which the DSS claimed it would normally have reacted to that notification (19 January 1979).

The AAT concluded by varying the decision under review and directing 'that the amount of overpayment be recalculated on the basis that a recoverable overpayment of supplementary assistance did not commence to accrue until 7 February 1974 and that it ceased to accrue on 22 November 1978': Reasons for Decision, para. 19.

PEAKE and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/8)

Decided: 23 February 1982 by G. D. Clarkson.

In this case Dorothy Peake, who had been granted a widow's pension in January 1973, sought a review of a decision that she had been overpaid by $5505.10, which the DSS proposed to recover by deducting $40 a fortnight from her pension.

Peake had worked as a part-time cook between 1973 and 1979. She had notified the DSS of her income from this job in January 1973 and February 1974 (when the income was $36.91 a week). The DSS then suspended its regular pension reviews until 1979, when it sent Peake a review form. She completed and returned this, revealing a current weekly income of $93.57.

[On this evidence, Peake could have argued that 'the effective cause' of the overpayments between 1974 and 1979 was the DSS's failure to review her pension (and income)—see *Forbes*, 5 *SSR* 50; and compare *Matteo*, 5 *SSR* 50; and she could have argued that, as recovery under s.140(1) would not be possible, because her failure or omission was not 'the effective cause', so the discretion to recover by deductions under s.140(2) should not be used—see *Buhagiar*, 4 *SSR* 34; and *Livesey*, in this issue of the *Reporter*. But these arguments were not raised before, or by, the AAT.]

The only issue raised before the AAT was whether the rate of repayment (fortnightly deductions of $40 from Peake's pension) was too high; should the discretion in s.140(2) be used to fix a lower rate of deduction?

The Tribunal considered Peake's income and her expenses. The weekly income amounted to $169.45 (from wages, pension and board paid by a son). She calculated her expenses at $178 a week. The AAT thought that the estimate of expenses could not be completely accurate but admitted that a woman trying 'to provide a home for two sons would find any deducation from an income of about $170 a hardship. The problem is to decide what degree of hardship should be imposed at the present time': Reasons for Decision, p.4.

The decision about 'what degree of hardship' the AAT would impose should be made, the Tribunal said, by reference to existing facts. These facts included the fact, accepted by the AAT, that her income was 'fully committed in maintaining herself and her children and repaying the mortgage on the house'. The Tribunal arrived at the following result (by a process of reasoning which was not spelt out in its reasons, except for its reference to imposing some 'degree of hardship'):

> Having regard to all the present circumstances and the fact that the department concedes that there was no misrepresentation by the applicant I think the amount of the fortnightly deductions should be reduced to $20 per fortnight. The applicant should understand that just as she may apply to the department to accept smaller instalments if her circumstances worsen so the department may decide to increase the amount of the deductions if her circumstances change for the better.

(Reasons for Decision, p.5)

AAT appeals

The following statistics have been compiled from information supplied by the Department of Social Security:

	Nov. 1981	Dec. 1981	Jan. 1982	Feb. 1982
Applications for review lodged	68	49	42	54
Decided by AAT	9	10	5	7
Withdrawn by applicant	10	9	1	1
Conceded	7	6	2	14
No jurisdiction	1	0	1	1
Awaiting decision at end of month	480	504	537	568
Medical appeals	48	27	33	36
Other appeals	20	22	9	18
ACT	0	02	0	0
NSW	12	8	5	5
NT			0	1
Qld	28	11	13	26
SA	3	5	5	0
Tas.	3	5	1	1
Vic.	21	14	9	2
WA	1	4	0	1

contd. from p.64.