only be away for a couple of months. What was foreseeable by her as a real possiblity must be assessed in terms of the factors present in her mind. We therefore think that the preconditions for the exercise of the discretion conferred by s.83AD(2) have been satisfied.

(Reasons for Decision, para. 29)

The AAT said that establishing these 'unforeseeable' reasons was not enough. Section 83AD(2) contained a discretion (to allow the pension to be paid overseas): should that discretion be exercised in this case? The Tribunal considered it should be exercised in Pasini's favour because of the combined effect of the following matters:

(i) The reasons for leaving themselves, as expressed in paragraph 29 above, were cogent indeed and in this particular case ought to be taken into account for this purpose.

(ii) The appliant lived in Australia for 14 years, perhaps one third of her adult life, bearing all of her five children here, and becoming an Australian citizen.

(iii) The applicant's husband lived and worked in Australia for over 20 years.

(iv) Had the applicant and her husband known what social security benefits were payable in Australia when he faced his incapacitating illness, they could have stayed in Australia and would have received lifelong, continuous protection thereby, but unhappily they did not know of this.

(v) The applicant, now aged 57, is not entitled to any social security benefits in Italy, and appears to be in a parlous financial situation.

(vi) The applicant did stay in Australia for almost nine months.

(Reasons for Decision, para. 31)

Further, the incorrect advice given to Pasini on 25 October 'cannot be left out of account in relation to the exercise of the discretion': Reasons for Decision, para. 31. (The Tribunal pointed out that the DSS office, where Pasini was given this advice, had been in possession of the Minister's 8 October letter for at least six days before Pasini was told that she could leave without losing her pension. Apparently it had not been placed on Pasini's file and so the DSS social worker was unaware of it.)

The formal decision

The AAT set aside the decision under review and returned the matter to the Director-General. The Director-General was directed to reconsider the matter on the basis that Pasini's early departure from Australia did not prevent payment of her pension overseas.

Invalid pension: permanent incapacity

MARKOVSKI and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/82)

Decided: 26 March 1982 by J. O. Ballard.

Trajan Markovski was born in Yugoslavia in 1944 where he attended school for four years. In 1969 he migrated to Australia and worked as a labourer until he was injured in a car accident in 1977. He claimed an invalid pension in 1979 but this claim was rejected.

In the middle of 1980 his claim for damages (arising out of the accident) was settled for $55 000. In August 1980 he again claimed an invalid pension and was again rejected by the DSS. He applied to the AAT for review of this decision.

The evidence—medical and non-medical

This case involved conflicting medical opinion, and the assessment of several non-medical factors—minimal education, low job skills and poor command of the English language.

The medical evidence showed that Markovski had suffered injuries to his hip and legs and that he had lost some movement. An orthopaedic surgeon consulted by the DSS said Markovski was fit for light work or sedentary work: he was, at most, 40% incapacitated for work.

(This assessment was based exclusively on medical factors. The AAT agreed that the medical practitioner 'should not take into account factors outside his speciality in making his assessment of the degree of the applicant's disability . . . It is for the [DSS] to take into account non-medical factors which affect the applicant's ability to work': Reasons for Decision, para. 15.)

However, Markovski's medical advisers were more pessimistic about his medical impairment and did not agree that he was only 40% incapacitated. One general surgeon, who had treated him for four years, said that he would 'never return to manual work and the disability was likely to be permanent'. The AAT accepted this view.

The Tribunal also heard evidence from a CES officer that Markovski would be very difficult to place in a job because of his lack of English and basic education, his disabilities and his five years out of employment.

The AAT's assessment

The AAT concluded (on the basis of all the medical evidence as well as Markovski's lack of education, skills and English language) that Markovski was at least 85% incapacitated for work. There was no dispute that Markovski's incapacity was permanent.

The formal decision

The AAT set aside the decision under review and decided that Markovski be granted an invalid pension from 16 August 1980.

IMPELLIZZERI and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/78)

Decided: 1 April 1982 by G. D. Clarkson.

Cristofaro Impellizzeri was born in Italy in 1936 where he had two years of schooling. He migrated to Australia in 1964 where he worked as a bricklayer and then as a self-employed mosaic tile layer. In 1978 he suffered a back injury while working and, despite an operation in 1980, he had not worked since then.

In June 1980 he applied to the DSS for an invalid pension. After this application was rejected he applied to the AAT for review of the rejection.

The evidence—physical, psychological and social

Impellizzeri's case involved three elements: physical impairment resulting from his spinal injury; a psychological reaction to that injury; and social (non-medical) factors.

The medical element (both physical and psychological) raised a sharp conflict of opinion between Impellizzeri's medical advisers and those consulted by the DSS.

For example, an orthopaedic surgeon consulted by the DSS said there were no clinical signs of 'severe continuing disability'; that Impellizzeri was fit at least for sedentary work; and that his back condition would not prevent him from standing.

But Impellizzeri's own surgeon said that 'all spinal movements are painfully restricted [and] he has a permanent incapacity of not less than 85%'. He could not imagine any work, for which Impellizzeri was suited by education, training and experience, which he could do.

Another surgeon said that Impellizzeri's physical disability was 50%-60%; and that social factors (which he could not evaluate) could prevent Impellizzeri from gaining any useful employment.

Again, a psychiatrist consulted by the DSS said 'there was no psychiatric condition interfering with the applicant's ability to work'. But a psychiatrist who had treated Impellizzeri said he had an extremely negative psychological reaction to his injury. His psychological reaction to back pain was as important as the physical disability and their combined effect was to make him 'well over 80% incapacitated'.

The AAT's assessment

The AAT decided to accept the substance of the opinions of Impellizzeri's own doctors, partly because all of them had 'the great advantage of being able to converse with the applicant in Italian' and partly because of their longer association with Impellizzeri: Reasons for Decision, p.7.

The AAT decided that Impellizzeri had 'a substantial and continuing impairment of bodily function' and suffered severe depression. This condition was permanent.

Could this condition be described as an incapacity for work? The AAT had said in *Panke* (2 *SSR* 9) that incapacity for work meant loss of capacity to earn a wage. Applying this to a self-employed person, the AAT had to decide whether the impairment had resulted in Impellizzeri's 'inability to attract paying customers such as the

building contractors or householders . . . as well as an incapacity to attract an employer': Reasons for Decision, p.8.

The AAT concluded that Impellizzeri could not sell his labour and skills in the building industry (because of its heavy manual character) nor could he work at a sedentary job in a factory (because he could not stand or sit for long periods). If these types of manual labour were excluded, his work experience and skills were 'practically useless'. He could not cope with any job which involved any clerical duties because he was barely literate in Italian and illiterate in English.

In short, Impellizzeri was 'practically unemployable' because of the very limited fields of employment open to him and his physical and psychiatric problems which affected him more than they would a 'literate and well adjusted person completely absorbed in the Australian community': Reasons for Decision,p.10.

The formal decision

The AAT set aside the decision under review and returned the matter to the Director-General with the direction that invalid pension be granted.

CIMINO and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. N81/138)

Decided: 14 April 1982 by R. K. Todd.

[This was a relatively straightforward case: the Tribunal did not have to reconcile conflicting medical opinion or integrate physical and psychiatric diagnoses. But the case did raise some interesting questions about the ability of the applicant to compete for (and hold) a job in the labour market—about his 'employability'.]

Antonio Cimino had been born in Sicily in 1926, left school at seven or eight to work as a bricklayer's assistant, then worked in a bakery and migrated to Australia in the early 1950's. In Australia he worked as a labourer, except for six years (1962–68) when he ran his own delicatessen business.

In 1974 he strained his back while working. He ran a cake shop in partnership with another man in 1974–75 but he withdrew because he could not bear his share of the work. In 1978 he settled a claim for workers compensation for $21 000. Apart from a two-week job in 1981, he had not worked since 1975.

Cimino was granted an invalid pension in January 1978 but the DSS cancelled the pension in September 1981. He applied to the AAT for review of that decision.

The medical evidence

In the words of the AAT, 'the medical evidence [was] all one way'. Cimino had a series of disabilities compounded by 'a depressive state reflecting simply that there was something in his general condition of health to be depressed about'.

He had degenerative changes in his spine and the medical evidence was unanimous that he was fit only for light duties. He also had high blood pressure, an enlarged heart, stomach problems, dizziness, headaches, a hernia and difficulty in sleeping.

Was the applicant 'employable'?

There was, however, a strong prospect that he could obtain work involving light duties (assuming it were available) because he would present well to a potential employer. 'But', said the Tribunal, 'what work could be contemplated is something that has to be related to his background, his experience and training': Reasons for Decision, para. 20. The Tribunal observed that Cimino was clearly unsuited for clerical duties—he was illiterate in Italian, let alone English and his general health was inconsistent with even that type of work. Of Cimino's prospects of doing other light work, the Tribunal said:

> [W]hile it could be conceded that he could obtain light work if he concealed his condition, because he presents well as a person, I feel satisfied that he could not perform any work that he might so obtain, and that if he obtained jobs by good presentation at the point of application he would be repeatedly found out as a man whose health would prevent him standing up to the work. Further it cannot be valid to test his situation by considering his employability on the basis of concealment of his disabilities from the prospective employer.
>
> . . . I cannot overlook the workers compensation implications for an employer who takes on a man with an injury made the subject of a successful compensation claim and with subsequent added problems. The employer is not involved in direct payments of the claims, but there are other implications for him in the terms of disruption of his workforce, and of his relationship with the insurer, that have to be taken into account.

(Reasons for Decision, paras 24–5)

The Tribunal concluded that Cimino was permanently and wholly incapacitated for work.

The formal decision

The Tribunal set aside the decision under review and remitted the matter to the Director-General for reconsideration with a direction that the applicant was entitled to invalid pension from the date of the cancellation.

ANDREOPOULOS and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/100)

Decided: 30 April 1980 by R. K. Todd.

George Andreopoulos was born in Greece in 1928, left school at the age of 11 and migrated to Australia in 1971. He could not speak or write English. In Australia he worked in a factory (in unskilled labouring) until April 1979 when he strained his back lifting a heavy box. He had not worked since then.

He claimed an invalid pension in August 1980 and, after the DSS refused to grant an invalid pension, he applied to the AAT for review of this decision.

(At the time of the AAT hearing, Andreopoulos' wife was receiving an invalid pension. His four children had been affected by a range of health and social problems.)

Physical and psychiatric disabilities

Andreopoulos complained of pain in his back and legs, inability to stand or sit for extended periods, difficulty in walking and inability to bend down.

Evidence was given by a neurosurgeon and a general surgeon that Andreopoulos had a degenerative condition in his spine and he could not perform heavy physical work. (An orthopaedic surgeon, consulted by the DSS, confirmed that Andreopoulos could not perform heavy physical labour.)

A psychiatrist, Dr K, said that, although Andreopoulos was technically fit for light work, he was 'permanently unemployable . . . in view of the fact that he is a very small man, hardly more than illiterate, and has no skills other than labouring'.

Dr K described the basis of Andreopoulos' problem:

> This man really presents the not uncommon situation of a migrant worker from a peasant environment, who suffers a minor injury in the course of his work, becomes incapacitated by that with presumably an element of functional overlay, and it seems that probably the majority of people (especially those in his age group) do not return to an effective working life.

That evidence was contradicted by a psychiatrist consulted by the DSS; but the AAT preferred the evidence of Andreopoulos' doctors. The Tribunal observed that Andreopoulos had never worked except as a labourer, that he had no faith in his work capacity and that, because of his attitude, motivation and physique, he would have difficulty in selling his labour. (Andreopoulos was described as having a 'quite tiny physique'.) The AAT said:

> The kinds of work for which I think he could be said to be fit are certainly kinds of work that could be performed by a junior at the appropriate rates of pay. I cannot conceive that an employer would prefer the applicant if he had a choice between the applicant, with his worker's compensation history and his overtly expressed disabilities, on the one hand, and such a junior on the other. In my opinion the applicant retains very little capacity for work indeed and certainly the degree of his incapacity for work is not less than 85 per cent.

(Reasons for Decision, para. 10)

This incapacity was, the Tribunal said, permanent.

The formal decision

The Tribunal set aside the decision under review and decided that the applicant be granted invalid pension from 8 August 1980.

TSIMIKLIS and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/71)

Decided: 27 April 1982 by R. K. Todd.

John Tsimiklis was born in Greece in 1935. He migrated to Australia in 1959 and worked in a succession of unskilled factory jobs until February 1978 when he aggravated an earlier back injury. Apart from a two week period, he had not worked since then.

He applied to the DSS for an invalid pension. After his application was rejected, he sought review by the AAT of the DSS decision.

The medical evidence before the Tribunal established that Tsimiklis' physical disability was not severe: he was physically capable of light to moderate work. He told the AAT of a range of symptoms (headaches, dizziness, and pain in his ears, chest, stomach, spine, shoulder and arm) for which there was no physical explanation. But his treating psychiatrist said these symptoms were the result of a genuine and severe

functional disorder which totally incapacitated Tsimiklis for work.

Another psychiatrist, who had examined Tsimiklis on behalf of the DSS, described him as malingering—consciously inventing his symptoms. However, the AAT rejected that diagnosis and found that Tsimiklis had 'descended into so depressed a state that he genuinely believes that he suffers from all the conditions which he described': Reasons for decision, para. 13.

To assess Tsimiklis' incapacity for work (in terms of ss.23 and 24 of the *Social Services Act*) the AAT took account of 'his total physical and mental condition and the circumstances of his age, work history and level of education'; and it also took account of evidence given by an officer of the Commonwealth Employment Service that his employment prospects were poor—not so much because of his age and 'lack of English', but because his back injury and his absence from the work force since 1978 would make finding employment very difficult: Reasons for Decision, para. 14.

The AAT concluded that Tsimiklis was an 'extremely poor employment prospect'; that his 'ability to cope with his life, in particular in a work situation, is virtually completely gone'; that he was 'wholly incapacitated for work'; and that he should not be required to undergo rehabilitation: Reasons for Decision, para. 16.

The formal decision

The AAT set aside the decision under review and granted Tsimiklis an invalid pension in accordance with his application.

Overpayment: what was the 'effective cause'?

BABLER and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. A81/5)

Decided: 17 March 1982 by A. N. Hall.

In December 1973, Theresa Babler was granted an age pension, at the reduced rate of $15.70 a fortnight. (She had disclosed to the DSS that her husband was employed and being paid $95 a week.)

When notified of the grant of pension, Babler was told that she should report, to the DSS, any increase in her husband's income (as required by s.45(3) of the *Social Services Act*). Her husband's income did increase within four months (and regularly after that). But she did not notify the DSS of these increases.

In November 1974 the DSS abandoned its pensions entitlement review programme. Under this programme the DSS had reviewed all pensions once a year. This programme was restored at the beginning of 1978, by which time cost-of-living adjustments had increased her fortnightly pension to $72.60. The DSS wrote to Babler in March 1978 asking her if her husband's income had varied. She truthfully answered that his income was now $174 a week. On the basis of this information, the DSS reduced her fortnightly pension to $31.60.

The DSS then collected full details of her husband's income over the preceding four years and calculated that she had been overpaid $4714.70.

In July 1979 Babler's pension was cancelled because of a further rise in her husband's income. The DSS then requested that Babler refund the amount of the overpayment.

After an appeal to an SSAT, she applied to the AAT for review of this decision.

The legislation

The DSS's right to recover this payment depended on s.140(1) of the *Social Services Act*:

> 140.(1) Where, in consequence of a false statement or representation, or in consequence of a failure or omission to comply with any provision of this Act, an amount has been paid by way of pension, allowance, endowment or benefit which would not have been paid but for the false statement or representation, failure or omission, the amount so paid shall be recoverable in a court of competent jurisdiction from the person to whom, or on whose account, the amount was paid, or from the estate of that person, as a debt due to the Commonwealth.

Jurisdiction

The Tribunal agreed with the AAT decision in *Matteo* 5 *SSR* 50 that it had jurisdiction to review a DSS decision to demand repayment under s.140(1), and adopted the reasons given in that decision.

Intention

The main argument presented on behalf of Babler (by her son, who appeared for her) was that she had not realised that she was obliged to report changes in her husband's income, that she had not positively misled the DSS and that, therefore, there could be no recovery under s.140(1).

The AAT accepted that her failure to report increases was probably due to her poor English and her failure to understand her obligations under the Act. But the obligation imposed by s.45(3) was an absolute one and it was clear that Babler had not complied with that provision. The AAT said:

> In principle, however, ignorance of the law cannot be a sufficient excuse. Whilst there may be circumstances in which the assumption on which the sub-section is built may be open to quetion (namely, that a pensioner will always be in a position to know what is the income of his or her spouse—cf. *Woodward* [5 *SSR* 49] and will always have the mental or physical capacity to comply), Parliament has nevertheless seen fit to impose the obligation on the pensioner and to do so in unqualified terms.

(Reasons for Decision, para. 15)

Accordingly, intention was not relevant and one of the conditions for recovery under s.140(1) (namely failure to comply with s.45(3)) was satisfied.

'Effective cause' of the overpayment

The argument with the most substance was identical to the argument raised in *Gee*, 5 *SSR* 48; *Woodward*, 5 *SSR* 49; *Forbes*, 5 *SSR* 50; *Matteo*, 5 *SSR* 50; and *Livesey*, 6 *SSR* 62.

This was that the DSS had been placed on notice in December 1973, that Babler's husband had an income and that the DSS had contributed to the overpayment by not reviewing her pension between 1974 and 1978.

The AAT adopted the view expressed in *Matteo*, 5 *SSR* 50, that an overpayment was recoverable under s.140(1) if the pensioner's failure or omission to comply with the Act was 'the effective and not merely a contributory cause of the overpayment'.

The AAT was satisfied that, if the DSS 'had not abandoned the sound administrative practice of periodically reviewing the applicant's pension entitlement', she probably would not now be faced with the demand for repayment of $4714. The DSS's action '[set the scene] for an overpayment to occur if an applicant, for any reason, failed to notify a relevant increase in income': Reasons for Decision, para. 22.

But, adopting what was said in *Matteo*, the AAT doubted that the DSS's failure to review Babler's pension superseded the applicant's failure or omission as the effective cause of the overpayment.

The AAT pointed out that in *Forbes*, 5 *SSR* 50 (where the AAT had found against the DSS), there had been an established pattern of adjustments to a pension, based on periodic DSS reviews. (This, presumably, strengthened the argument that the abandonment of those reviews was the effective cause of the overpayment.) But Babler's situation was different, said the AAT:

> In the present case, by contrast there was no established review pattern and there was nothing in the Department's conduct to convey to the applicant that her husband's income was under independent review.

(Reasons for Decision, para. 24)

The AAT concluded by finding (although the question was 'one of considerable difficulty') that Babler's failure to notify increases in her husband's income remained the effective cause of the overpayment. Further, there were no special circumstances of hardship which would justify waiving or reducing the overpayment.

The formal decision

The AAT affirmed the decision under review.

HANGAN and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. Q81/43)

Decided: 5 April 1982 by J. B. K. Williams, C. C. H. Thompson and I. Prowse.

Kathleen Hangan was the mother of four children (born between 1962 and 1969), for whom the DSS was paying child endowment. In July 1972, she and her children left Australia to join her husband who was working in Indonesia.

In July 1973, Hangan returned to Australia and notified the DSS that she and her children had been overseas for 12 months and would be returning overseas for a