the difficulties being experienced by the applicant's daughter and son-in-law, I do not believe the facts to have established that jurisdiction could be, or should be, exercised under s.41 of the *Administrative Appeals Tribunal Act.*

The Tribunal refused to make any order under s.41 of the *Administrative Appeals Tribunal Act*, but directed that a preliminary conference be held in February 1983, when a request could be made for an early hearing of the review application.

Invalid pension: permanent incapacity

Di PALMA and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/232)

Decided: 2 December 1982 by A. N. Hall, A. Marsh and H. E. Hallowes.

Antonio di Palma was born in Italy in 1935 and migrated to Australia in 1959. He worked as a labourer until 1969 when a back injury forced him to give up his job, and he had not worked since.

In 1979 and 1980, two applications for invalid pension were rejected by the DSS. He asked the AAT to review the second rejection.

Di Palma told the Tribunal that he suffered constant pain and could not sit or stand for any length of time.

The AAT found that there was 'no detectable organic basis for the applicant's continuing complaints of pain in the back, neck and right leg'. However, none of the medical witnesses suggested that di Palma was malingering, and all apparently accepted that he genuinely experienced pain and that he was convinced of his own incapacity for work. He had, the AAT said, 'a functional abnormality for which there is no apparent organic cause'.

The Tribunal referred to *Sheely* (1982) 9 *SSR* 86 where the Tribunal had said that the incapacity for work referred to in ss.23 and 24 of the *Social Security Act* 'must result from a physical disability', whether that disability be physical or psychic . . . The concept of permanently incapacitated for work . . . is not unlimited and at its boundary there is a distinction between a person who is sick and a person who merely thinks he is sick'. The Tribunal continued (in this case):

> 29. The present case, in our view, is very close to the line referred to by the President . . .
>
> 30. If we felt that the applicant's perception of himself as an invalid was the product of a conscious and deliberate decision to present symptoms which would qualify him for an invalid pension, we would have no hesitation in rejecting his claim [cf. s.25(1)(c) of the *Social Security Act* 1947] . . .
> Whilst the applicant's symptomatology may defy any precise psychiatric description, we accept Dr Blashki's evidence that underlying the applicant's problems, there is a psychiatric disorder which characterises the applicant as sick in psychiatric terms. We find that the psychological pain from which the applicant suffers is real to him and that it is likely to continue indefinitely [cf. *Re Panke* (1981) 4 ALD 179]. Having regard to his psychological state we consider him to be effectively unemployable and likely to remain so. He is therefore, in our view, permanently incapacitated for work within the meaning of ss.23 and 24 of the *Social Security Act* 1947 and qualified to receive an invalid pension.

(Reasons for Decision, paras 30-31)

Formal decision

The AAT set aside the decision under review and granted di Palma an invalid pension from the date of his 1980 application.

GNOATO and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/167)

Decided: 24 December 1982 by J.O. Ballard

Alfredo Gnoato was born in Italy in 1930 and migrated to Australia in 1950. He suffered an injury to his back in 1969 but, with some breaks, worked on relatively light duties until about 1977 when he travelled to Italy.

On his return to Australia he was granted an invalid pension. The DSS reviewed this pension when Gnoata told it that he intended to return to Italy; and the DSS then cancelled his pension. Gnoato applied to the AAT for review of the cancellation.

The AAT found that Gnoato suffered mild hypertension which was not disabling and that his 1969 back injury had resolved. The Tribunal accepted that Gnoato genuinely believed that he was suffering a significant back problem and that he had become entrenched in the role of an invalid. However, the Tribunal found that Gnoato was capable of light work.

The Tribunal also decided that he had given up his job in 1977 to look after his ill wife.

After referring to *Sheely* (1982) 9 *SSR* 86 (where the AAT had said that an 'incapacity for work' must result from a medical disability rather than from a person's belief of illness), the AAT said:

> In my view, this case is indistinguishable from *Sheely*'s case. On these facts, the applicant's inability to work is caused by his fixation that he is unable to work together with, and quite understandably, an inability to leave his wife alone at home and I so find.

(Reasons for Decision, para. 14).

Having concluded that Gnoato was not 85% incapacitated for work, the AAT criticised the initial grant of pension 'without due consideration been [sic] given to whether that incapacity was permanent ... [T]here is sound medical evidence for the proposition that the very grant of such an invalid pension encourages the person to whom it is granted to assume the invalid role': Reasons for Decision, para. 16.

Formal decision

The AAT affirmed the decision under review.

McGEARY and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/372)

Decided: 18 November 1982 by A.N. Hall

Thomas McGeary was born in 1946 and worked as a labourer until a back injury forced him to change jobs in 1974. He worked as a car stripper until 1979 when he was retrenched, and had not worked since then. His applications for invalid pension, in 1980 and 1981, were rejected by the DSS and he applied to the AAT for review of the second rejection.

The Tribunal found that McGeary's lower back condition was permanent and that he could not perform heavy physical work; but that light work was within his physical capacity.

The AAT also found that McGeary had 'poor personality resources', had 'difficulty in establishing close contact with anyone', and was severely depressed by his inability to find work (he had made 26 unsuccessful job applications)

and by the death of his infant son.

The Tribunal was told, by an employment officer at the Ballarat Job Centre (McGeary lived in the Ballarat district) that a disabled person like McGeary had a poor chance of obtaining work locally. The Tribunal was also told that McGeary and his wife were paying off their house in Ballarat (bought in 1980 for $17 000) and that moving to Melbourne would cause them financial hardship.

Measuring 85% incapacity

Turning to the qualifications for invalid pension, the AAT referred to *Panke* (1981) 2 *SSR* 9, and *Mihailov* (1982) 8 *SSR* 74, in which the Tribunal had emphasised that incapacity for work must take account, not only of physical and psychiatric conditions, but also of employment prospects. It was important, the AAT said, to distinguish between reduced employment prospects caused by incapacity and those which reflected depressed job opportunities or lack of genuine work motivation. The AAT continued:

> 33. The concept of 85% incapacity for work for the purposes of the Act is, I believe best understood in qualitative rather than quantitative terms. In my view what Parliament intended by s.23 of the Act was to avoid an overly rigid application of the requirement which s.24 otherwise involved, namely that to qualify for an invalid pension a person must be permanently and totally incapacitated for work (i.e. 100% incapacitated). Section 23 should be seen, as was said in *Re Panke*, as an amelioration of the otherwise stringent requirements of s.24 of the Act. By adopting a percentage of 85%, however, Parliament clearly indicated that a very substantial degree of incapacity for work needed to exist before a person could be "deemed" to be permanently incapacitated for work. In qualitative terms, therefore, I think that s.23 contemplates a person who is so substantially incapacitated for work as to be treated as if he were totally incapacitated (cf. the "odd lot" cases referred to in *Re Panke* – supra). The question is whether the person has effectively lost his ability to undertake suitable paid employment by reason of his physical and mental impairments and whether that incapacity is permanent in the sense of a condition that is likely to last indefinitely [cf. *Re Tiknaz and Director-General of Social Services* (1981) 4 ALN N44].

The Tribunal decided that McGeary could work as a car park attendant, security guard, storeman or car stripper if this work were available to him. On that basis he would not be qualified for invalid pension.

'Reasonably accessible' work

However, the Tribunal was satisfied that McGeary could not, because of his medical condition, attract an employer in Ballarat. While the economic downturn in the Ballarat district had contributed to this difficulty, the primary cause was his back injury history:

> I am satisfied, therefore, that by reason primarily of his medical condition, he is and has since the date on which he claimed on invalid pension, been unemployable in any work market reasonably accessible to him, namely in Ballarat and the surrounding districts.
> (Reasons for Decision, para. 39).

The possibility of wider job opportunities in Melbourne was not relevant because it was not reasonable to expect McGeary to move his family (a wife and three children) to Melbourne where housing costs were higher and when he had 'absolutely no assurance of finding work [there]': Reasons for Decision, para. 40.

Permanent incapacity

On the permanency of McGeary's incapacity, the Tribunal said:

> 41. As to the future, I find that the applicant's depressive state has been exacerbated by his inability to find work and that, so long as he remains unemployed, that depressive state is likely to continue. His back and neck problems are unlikely to improve. Those conditions may therefore be seen as lasting indefinitely. What the economic future for the Ballarat district may be is impossible for me to know. It is conceivable that with a dramatic increase in job opportunities in that area, the applicant's prospects of finding employment could improve. But how long it may be before such an improvement will occur I cannot say. The longer the applicant remains unemployed, the less are the prospects, in my view, of his re-entering the workforce. I therefore find that he is likely to remain unemployable for an indefinite period by reason primarily of his physical and mental condition, and that he is permanently incapacitated for work to the degree of not less than 85%. Accordingly he is and has at all material times been qualified for an invalid pension.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with the direction that McGeary be granted an invalid pension from the date of his second application.

VELLA and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/542)

Decided: 16 December 1982 by J.O. Ballard.

Joseph Vella was born in 1938. He suffered an unspecified injury in 1978 and applied for an invalid pension in 1980. That application was rejected by the DSS and Vella applied to the AAT for review.

The Tribunal concentrated on Vella's psychiatric condition; it made no reference to any organic or physical problems. The AAT accepted the opinion of Vella's psychiatrists that he was 85% incapacitated for work and that this condition would not improve. In accepting that opinion, the AAT discounted the view of a psychiatrist (Dr F) consulted by the DSS that Vella's incapacity, although genuine, amounted only to 25%.

Worker's compensation and invalid pension

The relationship between invalid pension and worker's compensation caused the Tribunal some difficulty.

Noting that Vella had claimed his invalid pension two months before his worker's compensation claim was settled, the Tribunal said that his application for a pension was barred before that settlement by s.25(1)(d) of the *Social Security Act*. This section says an invalid pension shall not be granted to a person who 'has an enforceable claim ... for adequate compensation in respect of his permanent incapacity' [This view derives some support from the AAT's observations in *Buhagiar*, (1981) 4 *SSR* 34, and *Markovic*, (1982) 5 *SSR* 48, and from remarks in the High Court decision of *Espagne* (1960) 105 CLR 569. However, it is difficult to see how a worker's compensation settlement in 1980 of $23 000 could be called 'adequate compensation' for the permanent incapacity of a person aged 42.].

The Tribunal was also worried that, once Vella had settled his worker's compensation claim for a lump sum, any invalid pension granted to Vella would not be reduced to take account of any part of the settlement which replaced future weekly payments of compensation. Section 46 of the *Social Security Act* provided that an invalid pension could be reduced only where the pensioner was in receipt of 'income'; and a lump sum settlement was not income. This, the AAT said, was 'an apparent anomaly'.

The Tribunal took the unusual (if not unprecedented) step of making its finding, that Vella was 85% permanently incapacitated, effective only from the date of its decision, not from the date of his application for invalid pension. [The Reasons for Decision offer no explanation for this approach; but we might infer that this was the Tribunal's way of dealing with the 'apparent anomaly': a case of rough justice?]

Tribunal criticises failure to call medical witness

The Tribunal was strongly critical of the failure of the DSS to call, as a witness, a Dr S. (a psychiatrist who had originally diagnosed Vella as a malingerer and upon whose opinion the DSS had based its rejection of Vella's invalid pension). The Deputy Crown Solicitor, who appeared for the DSS, told the AAT that they 'did not utilize this doctor in proceedings in which they were instructed'. The AAT said:

> It is most unsatisfactory for a situation to arise in which a benefit under the Social Security Act is denied on the advice of a medical practitioner who is not to be made available to give evidence to explain, and be cross-examined on, his findings. This is particularly so when the advice is that the applicant is malingering. On the evidence called before this Tribunal, and on my own observations of the applicant, that assertion was made without foundation and was wrong. I so find as a fact. Even if in this Tribunal the facts are found in the applicant's favour the applicant's claim has been delayed which, in its turn, could well have increased the applicant's

psychiatric problems. (Reasons for Decision, para. 3).

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with the directions that Vella was entitled to sickness benefit between the settlement of his compensation claim and this decision; and entitled to invalid pension from the date of this decision.

BARUN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/501)

Decided: 2 December 1982 by A. N. Hall, A. Marsh and H. E. Hallowes.

The Tribunal *set aside* a DSS cancellation of this 34-year-old former labourer's invalid pension. The applicant had a mild back disability complicated by a depression illness. Because of employer resistance, he 'was an almost impossible employment prospect'.

ANDRIANOPOULOS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/52)

Decided: 24 November 1982 by A. N. Hall.

The AAT *affirmed* a DSS refusal to grant invalid pension to a 50-year-old labourer after concluding that he suffered a 'conversion hysterical syndrome' which was only moderately disabling. (The Tribunal commented on the serious problems in invalid pension cases where the applicant was unrepresented and did not speak English.)

INGLESE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/444)

Decided: 13 December 1982 by R. K. Todd.

The Tribunal *set aside* a DSS refusal to grant invalid pension to a 49-year-old former tailor whose back condition prevented him working at that job, and who had no other work skills.

MERRIFIELD and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/158)

Decided: 12 November 1982 by A. N. Hall.

The Tribunal *set aside* a DSS cancellation of invalid pension held by this 45-year-old labourer who suffered a severely disabling rectal abscess, which would not improve unless he lost weight. The Tribunal concluded that the prospects of Merrifield losing weight were so remote that his condition had to be regarded as permanent.

HUSEYIN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/63)

Decided: 8 November 1982 by R. K. Todd.

The Tribunal *affirmed* a DSS refusal of invalid pension to a 26-year-old woman, after concluding that she suffered only a 'neurotic depressive illness' based on her unsound belief that she could not bear children. This illness could not be described as permanent.

SMEDLEY and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. A82/27)

Decided: 17 December 1982 by E. Smith.

The Tribunal *set aside* a DSS cancellation of invalid pension held by a 39-year-old former draftsman whose deteriorating eyesight prevented him doing clerical or close work and who could not, because of an industrial injury, perform physical work.

McDONALD and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/69)

Decided: 19 November 1982 by R. K. Todd, D. J. Howell and M. J. Cusack.

The Tribunal *affirmed* a DSS cancellation of invalid pension held by a 32-year-old mother of four children, after concluding that her main disability was a personality disorder which was a product of immaturity.

COBAN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/40)

Decided: 14 December 1982 by J.O. Ballard

The Tribunal *affirmed* a DSS refusal of invalid pension to a 42-year-old woman who suffered a hernia and a psychiatric disability. Together these amounted to an 85% incapacity, but she had refused to undergo an operation which would probably reduce her incapacity. Therefore, her incapacity was not permanent.

GRAHAM and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q81/160)

Decided: 23 November 1982 by J. B. K. Williams.

The Tribunal *affirmed* a DSS refusal to grant invalid pension to a 61-year-old former postal clerk who had been forced to retire after Australia Post had assessed him as 10% incapacitated for work. The Tribunal disagreed with that assessment.

WADE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/426)

Decided: 18 November 1982 by A.N. Hall

The Tribunal *affirmed* a DSS refusal to grant invalid pension to a 32-year-old labourer, after deciding that he had not shown that he had lost his ability to attract an employer.

POPIC and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/72)

Decided: 25 November 1982 by A. N. Hall, H. E. Hallowes, A. Garlick.

The Tribunal *affirmed* a DSS refusal of invalid pension to a labourer who had a moderate disability in one knee but who did not produce any psychiatric evidence to support his claims of other pains for which there was no organic basis.

MAZZARELLA and DIRECTOR-GENERAL OF SOCIAL SECURITY

Decided: 29 November 1982 by A. N. Hall.

The Tribunal *affirmed* a DSS refusal of invalid pension to a 39-year-old former labourer who was capable of light work (despite neck and shoulder disabilities) but who had not 'tested his ability to find work sufficiently'.

PANAGOPOULOS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/93)

Decided: 19 November 1982 by R. K. Todd, D. J. Howell, M. J. Cusack.

The Tribunal *set aside* a DSS refusal to grant invalid pension to a 42-year-old former carpenter who was suffering from cervical disc protrustion, complicated by a psychological or functional problem.

AL-JAROUDI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/69)

Decided: 1 December 1982 by W. Prentice.

The Tribunal *affirmed* a DSS cancellation of invalid pension held by this 48-year-old man, after concluding that he had exaggerated his symptoms and concealed the fact (betrayed by his muscle development and calloused hands) that he was still doing 'a considerable amount of physical work'.

KARPETIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/493)

Decided: 30 November 1982 by J. O. Ballard.

The Tribunal *affirmed* a DSS refual to grant invalid pension to a 40-year-old house painter, after concluding that he was consciously exaggerating his moderate back disability.

PANAGIOTIDIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/180)

Decided: 15 November 1982 by G. D. Clarkson.
The Tribunal *affirmed* a DSS refusal to grant invalid pension to a 46-year-old former process worker and mother of four children after accepting medical opinion that she was consciously exaggering her shoulder disability.

Federal Court decisions

DIRECTOR-GENERAL OF SOCIAL SERVICES v HANGAN

Federal Court of Australia
Decided: 17 December 1982 by Fox, Toohey and Fitzgerald JJ.

This was an appeal from the decision of the AAT in *Hangan* (1982) 7 *SSR* 71, where the Tribunal had decided that the Director-General could not recover from Hangan overpayments of child endowment.

The recovery was based on s.140(1) of the *Social Security Act*, which provides that if endowment has been paid 'in consequence of a failure or omission to comply with any provision of this Act', and that payment would not have been paid but for the ... failure or omission', the amount paid is 'recoverable ... as a debt due to the Commonwealth'.

It was common ground before the Tribunal that Hangan had failed to notify the DSS (as she was required by s.104A, of her children's absence from Australia, and that she should not have been paid endowment while her children were overseas (for some six years). However, the AAT found that the DSS had been given enough information to alert it to the absence of the children and that the 'effective cause' of the overpayment 'was the department's failure to review when learning of the applicant's circumstances'.

This approach was based on a series of AAT decisions (for example, *Matteo*, 5 *SSR* 50 and *Forbes*, 5 *SSR* 50) that an overpayment was only recoverable under s.140(1) if the 'failure or omission by a person to comply with the provision of the Act [was] the effective and not merely a contributory cause of the overpayment'.

This appeal was brought under s.44 of the *Administrative Appeals Tribunal Act* which allows a party before the AAT to appeal to the Federal Court, 'on a question of law', from a decision of the Tribunal.

In this appeal, the Director-General raised two questions of law.

1. Jurisdiction to review s.140(1) recovery

The Director-General first argued that the AAT had no jurisdiction in this matter, because recover of an overpayment under s.140(1) did not involve a 'decision' by the Director-General: 'recoverability springs from the circumstances set out in the sub-section; it is a self operating provision' (Toohey J, pp.9-10). And an essential pre-requisite of the AAT's review jurisdiction was a 'decision' of the Director-General (see Part XXIVA of the *Administrative Appeals Tribunal Act*, now repealed and replaced by s.15A of the *Social Security Act*: (1981) 2 *SSR* 19).

The Court rejected this argument.

Toohey J listed the 'decision' which the Director-General had made in this matter, in the context of s.140(1):

> It was a decision that endowment that had been paid was not payable, that it had been paid in consequence of a failure or omission to comply with s.104A, that it would not otherwise have been paid, that it was recoverable and that it should be recovered. Hence Mrs. Hangan was entitled to seek a review of the Director-General's decision by the Administrative Appeals Tribunal. (p.12).

2. Does recovery depend upon finding the 'effective cause' of overpayment?

The Director-General then argued that the AAT was mistaken in deciding that recovery under s.140(1) was only possible if Hangan's failure or omission had been the 'effective cause' not merely a contributing cause, of the overpayment.

The Federal Court accepted that argument. Toohey J referred to two decisions on the meaning of s.26(d) of the *Income Tax Assessment Act*. That provision taxes 5% of any amount 'paid in a lump sum in consequence of retirement'. The High Court had decided that this provision did not require that retirement be the dominant cause of the payment, only that 'the payment follows as an effect or result of the retirement' (*Reseck* (1975) 133 *CLR* 45, 51). A similar approach was taken by the Federal Court in *McIntosh* (1979) 25 *ALR* 557.

The words 'but for' in s.140(1) were (Toohey J said) 'a corollary of the words "in consequence of" and serve to explain those words' (p.15). It followed that the AAT should have asked itself, not whether Hangan's failure to comply with s.104A was the effective cause of the overpayment, but –

> whether any of the payments of child endowment made to Mrs. Hangan between 1972 and 1978 were made as a result of any failure on her part to comply with s.104A and whether any of those payments would have been made had there not been such a failure. (Toohey J, p.15).

The result of the appeal

Each member of the Court was strongly critical of the actions of the DSS. For example, Fox J said 'Mrs Hangan has been sufficiently harassed, due to the patently crude and inefficient handling of her case by the Department'.

Fitzgerald J would have dismissed the Director-General's appeal (even though he agreed that the AAT had made an error on a question of law) because no evidence had been placed before the AAT to establish that compliance by Hangan with s.104A would have led to her endowment being stopped.

But Fox and Toohey JJ declared that the AAT had jurisdiction to review the Director-General's decision to recover overpayment and repeated the interpretation of s.140(1) quoted above.

Toohey J said it was 'for the Director-General to consider whether he should take any further steps in the matter. In the circumstances, it would be quite inappropriate for him to do so' (p.21).

DIRECTOR-GENERAL OF SOCIAL SECURITY v HARRIS

Federal Court of Australia
Decided: 8 November 1982 by Fox, Northrop and Ellicott JJ.

This was an appeal to the Federal Court, under s.44 of the *Administrative Appeals Tribundl Act*, against the AAT's decision in Harris: see (1981) 3 *SSR* 22.

The difficult problem in this case is caused by the simple fact that many pensioners have private income which fluctuates: is that fluctuating income to be averaged? Or should it be left in 'peaks' and 'troughs', and have a fluctuating effect on the pension payable to the pensioner?

The Tribunal had decided that, in calculating the amount of age pension payable to Harris (and the effect of any private income on that pension), the DSS had to work on a 'pension year': to examine, on each anniversary of the original grant of pension, the amount of private income received over the previous 12 months, and then to fix the appropriate amount of pension payable for that (previous) period.This result, the Tribunal said, was based on the terms of s.28 of the *Social Security Act* which fixed the maximum rate of pension at an annual sum and directed that the 'annual rate' of pension be reduced by taking account of 'the annual rate of [private] income'.

By a majority (Fox and Northrop JJ), the Federal Court allowed the Director-General's appeal and adopted a different approach to the calculation of the rate of pensions. However, the majority judgments are obscure; and what follows is only an estimate (perhaps intelligent) of their effect. (By contrast, the dissenting judgment of Ellicott J is a model of clarity.)

It seems that both Fox and Northrop regarded s.45 as critical. This section obliged a pensioner to notify the DSS when-