were described by the Tribunal as 'assertions of two people who have not proved to be wholly truthful'.

The Tribunal found that while CN and K lived under one roof their's was a relationship in which CN lived with K as his wife on a *bona fide* domestic basis.

> While I am faced on the one hand with objective indicia which indicate the existence of a common household conducted as if the applicant and K were man and wife, albeit on unsatisfactory terms, I am on the other hand faced with the assertions of two persons who have not proved to be wholly truthful where their interests dictate that they should not tell the whole truth. So left in doubt, it would be open to find against the applicant, not on the basis of there being an onus of proof strictly so called, but rather on the basis that I have to be very careful before accepting the one sided evidence of the person whose interests are vitally affected and whose evidence can really only safely be accepted by making the subjective evaluation that the witness is a witness of truth. While it would be open to me to decide the case in this way, I have nevertheless come to the conclusion that on the whole of the evidence I must make the positive finding that the relationship between the applicant and K, while they lived and live together under one roof, is and was a relationship which must be found to be one in which she lives and lived with him as his wife on a bona fide domestic basis. I so find notwithstanding that the applicant and K may well have told the truth about their physical relationship and to some degree at least about their domestic arrangements. The facts are however that they live in the one house; that the house is in their common ownership; that it is one of two houses which they have selected, owned and shared since their relationship commenced; and that their household is completed by the presence of their child in respect of whose upkeep K makes a small contribution. It is also true that however deficient the relationship may be there is no suggestion that there is any breakdown in communication between the applicant and K.

Reasons for Decision, para. 43).

Recovery of overpayments

The Tribunal decided to act on the basis that the decision in *Matteo* (1982) 5 *SSR* 50 was correct; i.e., that the Tribunal does have jurisdiction to review the administrative decision to seek recovery in court and the administrative determination of the amount to be recovered (see this issue for the outcome of the Federal Court appeal against *Hangan* (1982) 7 *SSR* 71.)

The Tribunal found that the amount paid by way of supplementary assistance 'would not have been paid but for the false statement of the applicant with regard to rent' and was therefore recoverable.

The Tribunal found that the amount paid by way of supplementary assistance 'would not have been paid but for the false statement of the applicant with regard to rent' and was therefore recoverable.

The Tribunal found with regard to alleged overpayment of supporting mother's or supporting parent's benefit, that the only amount that was recoverable was that paid between January 1975 and March 1978. The applicant's 'failure or omission to comply with any part of this Act' (s.140(1)) entitling recovery was her failure to notify the DSS that she had commenced to live with a man as his wife on a *bona fide* domestic basis although not legally married to him (s.83AAG).

Formal decision

The AAT affirmed the decisions to cancel CN's benefit and to reject her 1981 application for benefit.

The Tribunal set aside the decision to seek recovery of $21 633.94 and remitted the matter for reconsideration with the direction that recovery be limited to the amounts paid as supplementary assistance and the benefit paid between 1 January 1975 and 31 March 1978.

Overpayment: recovery by deduction

WRIGHT and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. Q82/75)

Decided: 5 November 1982 by J. B. K. Williams.

Thelma Wright, who was a widow's pensioner, had been overpaid $482 as a result of an error by the DSS. The Department decided to recover this overpayment by deducting $5 a fortnight from her current pension.

Wright applied to the AAT for review of this decision.

The AAT pointed out that the decision of the DSS was based on s.140(2) of the Act:

> Notwithstanding anything contained in this Act (other than sub-section (3) of this section), where for any reason, an amount has been paid by way of pension, allowance, endowment or benefit which should not have been paid, and the person to whom that amount was paid is receiving, or entitled to receive, a pension, allowance or benefit under this Act (other than a funeral benefit under Part IVA), that amount may, if the Director-General in his discretion so determines, be deducted from that pension, allowance or benefit.

This section, the Tribunal said, allowed recovery if the overpayment had been made 'for any reason' and (in contrast to s.140(1)) was not restricted to overpayments due to some failure on the part of the recipient.

> Accordingly, it is my view that, the admitted fact that the overpayment in this case arose through departmental error or oversight, does not preclude the recovery of the amount by deduction from current entitlement under section 140(2).
>
> The decision to deduct is, however, a decretionary [*sic*] one reposed in the Director-General, a decretion [*sic*] which now falls for exercise by the Tribunal. Public monies which should not have been paid to the applicant have, in fact, been paid to her and I see no reason why a decretion [*sic*] in her favour not to recover from her should be exercised unless it be shown that hardship would otherwise be caused.

(Reasons for Decision, pp.2–3)

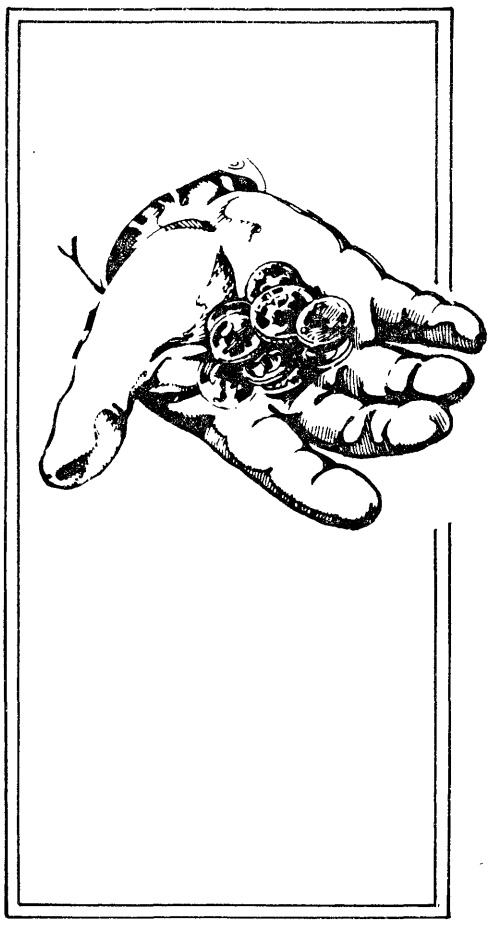
The Tribunal went on to assess Wright's financial position and decided that a deduction of $5 a fortnight would not impose hardship on her.

Formal decision

The AAT affirmed the decision under review.

[Comment: This decision should be contrasted with *Buhagiar*, (1981) 4 *SSR* 34, and *Livesey*, (1982) 6 *SSR* 62, where the Tribunal decided that, as a matter of discretion, an overpayment should not be recovered under s.140(2) unless it would also be recoverable under s.140(1)—that is, unless the overpayment was made as a result of some failure on the part of the recipient.

The Tribunal in *Wright* did not refer to those two earlier decisions.]



COUSINS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S81/80)

Decided: 19 November 1982 by R. K. Todd.

Lynnette Cousins had been overpaid $184.50 in family allowance between May and October 1979. This overpayment was solely a result of error by the DSS.

The DSS decided to recover the overpayment under s.140(2)—by deducting it from current instalments of family allowance payable to her. (See *Wright*, in this issue of the *Reporter*, for the text of s.140(2)).

On review of this decision, the Tribunal referred to *Forbes*, (1981) 5 *SSR* 50, and said:

> It is fair to say that as a general rule the discretion conferred by the terms of the sub-section to recover overpayments from current pension etc has not been applied where there would have been hardship to the recipient of the overpayment and where in addition there are no factors present in the conduct of the recipient that would fix on him or her some blame for the occurrence of the overpayment.

(Reasons for Decision, para. 6)

While the overpayment was due to an error on the part of the DSS, the Tribunal could not 'find that there would be undue hardship in requiring the repayment of the amount in dispute': Reasons for Decision, para. 7.

Formal decision

The AAT affirmed the decision under review.

[**Comment:** The Tribunal's reference to *Forbes* suggests that it was confused: that was a case of recovery under s.140(1), not s.140(2); and the Tribunal in *Forbes* put forward Departmental error and hardship as *alternative* grounds for preventing recovery. See also the comment on *Wright* in this issue of the *Reporter*.]

Overpayment: 'effective cause'

AUSTIN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/537)

Decided: 2 December 1982 by R. K. Todd.

Rhonda Austin was receiving child endowment for her two children. In April 1977, she and her children left Australia for the United States. It was clear that their absence from Australia was not temporary.

It was not disputed that, once Austin and her children left Australia, endowment ceased to be payable and she should have informed the DSS (*Social Security Act*, s.104(1), s.104A(b)). She did not inform the DSS and, consequently, continued to be paid endowment until her absence was discovered.

The DSS then cancelled the endowment and decided to recover the overpayment of child endowment under s.140(1)—see *Wright* in this issue of the *Reporter*.

On review of the decision to recover the overpayment, the AAT said it was plain enough that Austin's failure to inform the DSS of her children's departure had caused an overpayment. The DSS decision to recover under s.140(1) was therefore correct.

Wright had argued that she regarded 'the money as being recoverable from her ex-husband'; but this was not something which the AAT could take into account:

> It was the applicant who applied for child endowment in the first place and who received it and in those circumstances any dispute between the applicant and her ex-husband as to the disposal of the money after it was paid is not a matter that the Tribunal can do anything about. Further, of course, the applicant's queries as to what she can do to obtain support from her ex-husband relate to matters which are a long way beyond the reach of the Tribunal.

(Reasons for Decision, para. 8)

Formal decision

The AAT affirmed the decision under review.

VLAHADAMES and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/449)

Decided: 20 December 1982 by R. K. Todd.

The DSS had decided that James Vlahadames had been overpaid $434 representing two unemployment benefit cheques sent to him on 3 October and 17 October 1977. The DSS claimed that Vlahadames was not qualified to receive these payments because he was, at the time, employed.

The DSS had decided to recover the overpayment under s.140(1) of the *Social Security Act*, the terms of which are set out in *Costello* (in this issue of the *Reporter*).

Vlahadames applied to the AAT for review of this decision, denying that he had received the two cheques and denying that, at the relevant time, he had been employed.

Would the available evidence prove an overpayment?

The Tribunal confirmed 'that it had jurisdiction to review an administrative decision to seek recovery in a court and the administrative determination of the amount sought to be recovered'. It was for the Tribunal to consider whether, on the available evidence, the Department could prove to a court that there had been an overpayment: Reasons for Decision, para. 2.

Looking only at the question whether Vlahadames had received the cheques, the Tribunal said that his bank records showed no trace of the two cheques, and there was no evidence that the cheques had been cleared by the DSS's bank.

Therefore, it was 'unlikely that the [Department] will be able to discharge the onus of proof in respect of the first allegation, namely that the applicant received the two cheques': Reasons for Decision, para. 4.

Formal decision

The AAT set aside the decision under review and remitted the matter to the AAT with a recommendation that the recovery 'be not proceeded with'.

COSTELLO and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N81/103)

Decided: 20 September 1982 by A.N. Hall.

This was an appeal against a DSS decision to recover under s.140(1) of the *Social Security Act*, an overpayment of $3598.90. The DSS alleged this had been overpaid because of Norma Costello's failure to notify increases in her income between 17 October 1974 and 30 August 1979.

Costello applied for a wife's pension in August 1971, when her husband was in receipt of an invalid pension. In February 1977, when Costello turned 60, she was transferred to an age pension. At all material times she had been employed as a cleaner at the Inverell Court of Petty Sessions, till she retired in 1982.

The fact of her employment had been disclosed to the DSS on her husband's application for an invalid pension and on her own application for a wife's pension. The Costellos had received DSS review forms regularly until March 1974 and on each occasion disclosed correctly Mrs Costello's wage. Her pension had been adjusted accordingly prospectively not retrospectively.

The DSS suspended its practice of sending review forms during 1974 and Costello did not receive another until August 1979. The Department concluded that there had been an overpayment, commencing on 5 October 1974, when the applicant should have notified the DSS of her increase in salary as required by s.45. This $3598.90, the DSS said, was recoverable under s.140(1) but would be deducted from her pension under s.140(2). Costello appealed to the AAT.

Legislation

The present s.45(2) of the *Social Security Act* requires a pensioner to notify the DSS if, in any period of eight consecutive weeks, her average weekly private income exceeds $34.50 or exceeds her average weekly income last notified to the DSS. Such notification is to be made within 14 days of the expiry of the eight week period.

In other words the applicant had ten weeks to notify the DSS of an increase in wages, first occurring on 20 September 1974, and there would have been a series of occasions between October 1974 and August 1979 when a similar obligation arose.

Section 140(1) provides:

> Where, in consequence of a false statement or representation, or in consequence of a failure or omission to comply with any pro-