tor in a marriage relationship where joint ownership of a house and the financial considerations involved in leaving the matrimonial home often compel the parties to remain residing under the same roof despite matrimonial difference.
(Reasons, p.11).

This focus on the needs of the applicant was premised on the distinction drawn between provisions of the Act governing eligibility for benefit and those provisions governing the amount of pension. *De facto* relationships had been discussed in the context of the former provisions but not in regard to the latter according to the AAT. It was in *Lambe* (1981) 4 *SSR* 43 that the Federal Court had drawn this distinction. In *Lambe* it was said that the provisions dealing with rates of pension were concerned with the particular circumstances of the *qualifed* person. Thus need alone became of crucial significance.

The reasoning appears to be that while Lynam was qualified to receive unemployment benefit, because he was financially supported by Mrs W the relationship with her became a *de facto* one for the purposes of s.114.

Formal decision

The AAT affirmed the decision under review.

[Comment: The AAT did not refer to the decision in *Sturges* (1983) 13 *SSR* 133. In that case the same question fell for consideration under s.114 where the applicant lost her benefit having regard to the income of her *de facto* spouse. There the AAT drew no distinction between the eligibility provisions and the income test provisions. They referred to *Lambe* as requiring that all facets of the interpersonal relationship need to be taken into account. In *Sturges* a house was jointly owned, but an independent financial existence, separate social life and an absence of any sexual relationship precluded the AAT from regarding a *de facto* relationship as in existence. **BS**]

Supporting parent's benefit: 'supporting mother'

'W' and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. V82/374)

Decided: 21 June 1983 by R. Balmford.

Miss W obtained an order from the Victorian County Court in April 1981 allowing her to adopt J. This order was obtained under s.10(2) of the *Adoption of Children Act* 1964 (Vic.) which allows the Court to make an adoption order in favour of one person in 'exceptional circumstances'. The exceptional circumstances in this case were Miss W's training as a mothercraft nurse, her close attachment to J (J was born with a condition which affected her physical and intellectual development and Miss W worked at the hospital where J was born and had looked after her there) and her experience with intellectually handicapped people.

Miss W subsequently gave up work and applied for supporting parent's benefit. This claim was rejected on 1 June 1981 on the basis that she did not have a qualifying child within the meaning of the Act in her care, custody and control. An SSAT upheld her appeal but a delegate of the Dirctor-General affirmed the original decision to reject her claim on 3 August 1982. Miss W applied to the AAT for review of that decision.

'Supporting mother'

To qualify for supporting parent's benefit it is necessary to be a supporting father or a supporting mother under the Act. Section 83AAA(1) defines 'supporting mother'. It reads (so far as is relevant):

> 'supporting mother' means a woman (whether married or unmarried) who –
> (a) has the custody, care and control of a child, being a child who –
> (i) was born of that woman; or
> (ii) in the case of a woman who is a married woman living apart from her husband or a woman who has ceased to live with a man as his wife on a bona fide domestic basis although not legally married to him – was an adopted child of, or in the custody, care and control of, that woman on the relevant date ...

As Miss W had never married nor lived with a man as his wife the DSS claimed that her eligibility fell to be determined under paragraph (a)(i). As the child was not 'born of' her, her claim was rejected.

The AAT agreed with this conclusion. The Tribunal could not accept the applicant's argument that the effect of s.32(1) of the *Adoption of Children Act* (Vic) was to deem J to be a child born of Miss W. Section 32(1) reads in part:

> Subject to the Act and to the provisions of any other Act that expressly distinguishes in any way between adopted children and children other than adopted children, upon the making of an adoption order –
> (a) the adopted child becomes a child of the adopter or adopters, and the adopter or adopters become the parent or parents of the child, as if the child had been born to the adopter or adopters in lawful wedlock ...

It was clear, according to the AAT, that the definition of 'supporting mother' in the *Social Security Act* did distinguish between a child born of a woman and an adopted child. The ordinary grammatical sense should be given to the words in a statute except to avoid some inconsistency or absurdity. Paragraph (a)(i) in s.83AAA(1) referred to non-adopted children, paragraph (a)(ii) to adopted children. This created no inconsistency.

Reform

The AAT commented that:

> ... consideration could be given to amending the Act in order that an adopting single parent might, for the purposes of the Act be equated with a natural parent. Such an amendment would be consistent with the clear intention that adopting and natural parents should be so equated for all purposes which is manifested by the Victorian *Adoption of Children Act* and indeed by the corresponding Acts in all States and major Territories.

(Reasons, para.19)

Formal decision

The AAT affirmed the decision under review.

Income test

GREEN and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N82/49)

Decided: 27 June 1983 by C.E. Backhouse.

On 10 February 1982 Mr Green's invalid pension and Mrs Green's wife's pension were cancelled by the DSS. This was because Mrs Green refused to complete part of an Entitlement Review Form sent to her husband which required her to state her income. Mrs Green was in full-time employment and the evidence before the Tribunal showed that she financially supported her husband. The applicant applied to the AAT to review the cancellation.

The legislation

Section 29(2) of the Act provides that in assessing the rate of pension the income of a spouse should be taken into account. It reads:

> 29(2) For the purposes of this Part, unless the contrary intention appears, the income of a husband or wife shall –
> (a) except where they are living apart in pursuance of a separation agreement in writing or of a decree, judgment or order of a court; or
> (b) unless, for any special reason, in any particular case, the Director-General otherwise determines, be deemed to be half the total income of both.

Ante-nuptial agreement: a 'special reason'?

Mr Green and his wife had entered into an ante-nuptial agreement the day before their marriage in 1964. The agreement provided *inter alia* that there was to be no community of property between the parties, and that each would be liable for his or her own debts. It also gave Mrs Green exclusive rights in her property owned before, and that acquired after, the marriage. There was no obligation on Mrs Green to maintain her husband although there was such an obligation imposed on the applicant in relation to his wife.

It was argued by Mr Green that the existence of the agreement constituted a 'special reason' under s.29(2) as to why

his wife's income should not be taken into account in assessing the rate of pension. It was on this basis that she refused to fill out her part of the review form.

Ante-nuptial agreement: only one factor

The AAT was not impressed by that argument. Rather it took the view that the agreement was only one fact or circumstance to be considered in coming to a conclusion as to whether the Director-General should exercise his discretion under s.29(2)(b). It was not by itself a 'special reason' within that sub-section.

The Tribunal referred to *Williams* (1981) 4 *SSR* 39 where it was considered that financial hardship may constitute a 'special reason' under s.29(2)(b). The AAT could find no hardship in the present case and so concluded that no case had been made out for the operation of s.29(2)(b).

Formal decision

The AAT affirmed the decision under review.

SIEBEL and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/246)

Decided: 10 June 1983 by R. K. Todd.

The AAT *affirmed* a DSS decision to assess Werkus Siebel's income as $219 a fortnight, and to reduce his age pension accordingly.

Siebel's income came from a superannuation pension paid under the Commonwealth Superannuation Scheme. There had been an overpayment of superannuation and this was being recovered by withholding $10 each fortnight from Siebel's superannuation pension, so that Siebel was receiving only $209 a fortnight.

The AAT noted that 'income', for the purposes of the age pension income test, was defined as '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': s.18(1), *Social Security Act*.

In this case, the superannuation authorities had deducted, from payments due to Siebel, the amount of a cross-claim. In those circumstances, although the $10 a fortnight was not received by the applicant it was 'earned' by him ('accredited to [him] as remuneration', to quote Webster's Dictionary); and it was 'derived' by him ('credited with the right to receive a certain amount as income but debited with the amount of an alleged cross claim').

McMASTER and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q82/97)

Decided: 21 June 1983 by J.B.K. Williams, B.E. Fleming and J. Howell.

Stephanie McMaster was granted an invalid pension on 2 July 1970. At the time she was living with her husband and so in assessing the rate of her pension the income of her husband was taken into account.

On 7 March 1980 McMaster advised the DSS that she had separated from her husband and no longer resided with him. A reconciliation was attempted from 25 April 1980 but on 24 July 1980 the applicant informed the DSS that she had separated from her husband although she still resided with him. The DSS continued to take into account her husband's income in assessing the rate of her pension.

McMaster appealed to an SSAT which recommended that she be treated as a single pensioner and her husband's income be not taken into account as they were genuinely separated although living under the same roof. This was a 'special reason' for disregarding the husband's income as required by s.29(2) of the *Social Security Act*. A delegate of the Director-General affirmed the original decision on 18 March 1982 on the ground that no 'special reason' existed. McMaster then applied to the AAT for review of that decision.

'Special reason'

Section 29(2) of the Act provides:

> (2) For the purpose of this Part, unless the contrary intention appears, the income of a husband or wife shall –
>
> (a) except where they are living apart in pursuance of a separation agreement in writing or of a decree, judgment or order of a court; or
>
> (b) unless, for any special reason, in any particular case, the Director-General otherwise determines, be deemed to be half the total income of both.

In *Reid* (1981) 3 *SSR* 31 the AAT found that a 'special reason' existed within the meaning of s.29(2)(b) where it was satisfied that the parties were separated although living under the same roof. The Tribunal also referred to *A* (1982) 8 *SSR* 79 where it was said:

> In our opinion, when it is established that married persons are living apart, nothwithstanding that they are not doing so pursuant to a written agreement or court order, and that position is clearly established, then that is an appropriate case for the exercise of the discretion conferred by paragraph (b). The position is analagous to that dealt with in paragraph (a).

The question then turned to whether McMaster and her husband were separated. The AAT found that the marriage had completely broken down and that the applicant only remained in her husband's home by reason of economic necessity and concern for her children. Thus her husband's income should be disregarded in calculating the rate of her pension.

Formal decision

The AAT set aside the decision under review and remitted the matter to the DSS for recalculation and payment of the applicant's pension.

Overpayment: discretion to recover

'H' and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S82/91)

Decided: 30 June by E. Smith.

The applicant applied to the AAT for review of a decision by the DSS to recover an overpayment of her invalid pension by deductions from that pension under s.140(2) of the *Social Security Act*. The applicant had dutifully informed the Department from 1973 (when she was granted invalid pension) of increases in her husband's earnings until 1979 when she wrote to the DSS expressing her frustration as to the loss of part of her pension each time her husband's income increased, given the hardship she endured. This letter received no reply. It appeared that she had inferred tacit acceptance of her plea in that letter and so failed to notify the DSS of increases in her husband's earnings from that date, except when a review form was sent to her specifically requesting the information.

Exercise of discretion in s.140(2)

The AAT looked to the decisions of the Federal Court in *Hangan* (1983) 11 *SSR* 115 and *Hales* (1983) 13 *SSR* 136 for guidance in relation to the exercise of discretions to recover overpayments (even though those decisions related to the discretion in s.140(1)).

Section 140(2) gives the Director-General a wide discretion to determine whether he should take steps to recover an overpayment. In *Hales*, Sheppard J concluded that compassionate considerations are appropriate factors to take into account and agreed with the AAT in *Gee* (1982) 4 *SSR* 49 that the Director-General 'should have regard to the total circumstances of the case'. In *Hangan* it was made clear that notwithstanding that the debt remains owing, the discretion may be exercised so as not to seek recovery.

Real hardship: proper exercise of discretion

The AAT catalogued the causes of the applicant's incapacity together with the adjustments that incapacity had made to her daily life and concluded:

> there is real hardship in this case, both financial and emotional. This is not any ordinary case of misfortune: it is misfortune to a degree that must surely be rare indeed. When one adds in the applicant's impeccable record of advising pay increases in the years before 1980, her accepted honesty and the perhaps understandable, if mistaken, impression from the omission to reply to her 1979 letter, that the Department had responded to her plea, I am left in no doubt that the discretion under s.140(2) should not be exercised to enforce recovery of the overpayment by deduction of any amount from her ongoing pension . . .

(Reasons, para.20)

Formal decision

The AAT set aside the decision under review and remitted the matter to the DSS with the direction that no further amounts be deducted from the appli-