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-

cant's pension in respect of the overpayment made to the applicant.

HOUGHTON and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/455)

Decided: 12 July 1983 by R. Balmford.

Adrienne Houghton applied to the AAT for review of a DSS decision to recover from her (under s.140(1) of the Act) an overpayment of $540.80 in supporting parent's benefit and supplementary assistance.

The facts

Houghton had not notified the DSS of increased income while she was in receipt of the benefit. She had notified them *prior* to commencing two periods of employment but the DSS made no further inquiries. As to a third period she did not notify the department as she had ascertained from them how much she could earn in a year without affecting her pension and she did not expect to exceed that amount.

The applicant had failed to comply with s.65B of the Act. That section provides that increased income should be notified to the DSS within a specified period *after* its receipt. As Houghton notified prior to her employment the DSS procedures had not been triggered to inquire as to the amount that she had earned.

Discretion to recover

The AAT referred to the Federal Court decisions of *Hangan* (1983) 11 *SSR* 115 and *Hales* (1983) 13 *SSR* 136. Those cases made it clear that a discretion not to recover existed in s.140(1), having regard to 'the total circumstances of the case'. The AAT considered that this case was a fit one for the exercise of that discretion.

> Mrs Houghton has three children, two at school and the baby. Her *de facto* husband is receiving unemployment benefit, and they are tenants of the Housing Commission. Her failure to comply with the Act was in two cases of an extremely technical nature, in that her notification was given before, instead of within, the prescribed period. The department's failure to act on that notification by requiring details of her earnings, as sub-section 65B(1) seems to expect, was the effective cause of any resulting overpayments in those two cases. Further, that failure led her to assume that she would earn no more than her permitted income, and, incorrectly, that she therefore need not advise the department of her third period of employment.

(Reasons, para.21)

Formal decision

The Tribunal set aside the decision under review with the direction that no further action be taken for recovery.

ROE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S82/108)

Decided: 5 July 1983 by R. Balmford.

Ada Roe applied to the AAT for review of a DSS decision to recover from her an overpayment of $3490.30 in age pension. Recovery was claimed under s.140(2) of the *Social Security Act* by deductions of $20 per fortnight.

Section 140(2) provides:

> (2) . . . 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 . . . that amount may, if the Director-General in his discretion so determines, be deducted from that pension, allowance or benefit.

The applicant had failed to notify the DSS of increases in her husband's income over the period from August 1977 to March 1979. This was in part due to the department suspending its practice of conducting annual reviews, however, the AAT appeared to have some doubt as to the applicant's lack of awareness as to her obligations under the Act.

While *Babler* (1982) 7 *SSR* 72 showed that s.140 imposed a positive duty on the claimant, *Buhagiar* (1981) 4 *SSR* 34 also demonstrated the need to exercise the discretion to recover in s.140(2) in accordance with principles of 'consistency, fairness and administrative justice'.

In the light of these principles the Tribunal concluded that the decision to recover was correct. However, due to some evidence of hardship on the part of the applicant, it reduced the deductions to $10 per fortnight.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General for reconsideration with the direction that the overpayment be recovered by deductions of $10 per fortnight from any pension received by the applicant.

Special benefit

CONROY and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/192)

Decided: 1 June 1983 by R. Balmford.

Brian Conroy, and five other men, applied to the DSS for special benefit. Following rejection of their applications, they asked the AAT to review the DSS decisions.

Conroy (and the five others) were members of an informal group called 'Mother of God Brothers', which was in the process of being formally recognised by the Catholic Church. The function of the group was to run a home for intellectually handicapped men: the members of the group lived with the handicapped men as one community, providing 'the continuous loving presence of a normal family, rather than the usual institutional situation where the staff come on and off duty at fixed times'. It was clear that the applicants' time was fully taken up in helping and caring for the handicapped men.

The only regular source of funds for the community was invalid pensions paid to the handicapped men. The applications for special benefit were supported by several arguments—for example, that this would support the positive work of the group, break down barriers within the home, and avoid the substantial expense to the government involved in placing the handicapped men in institutions.

The legislation

Section 124(1) gives to the Director-General a discretion to grant a special benefit to a person not receiving a pension and not qualified for unemployment or sickness benefit, if the Director-General

> is satisfied that, by reason of age, physical or mental disability or domestic circumstances, or for any other reason, that person is unable to earn a sufficient livelihood for himself and his dependants (if any).

'Unable to earn a sufficient livelihood'

The Tribunal said that 'domestic circumstances' covered the circumstances of the applicants who lived in a household (despite the fact that its members were not related to each other): Reasons, para. 19.

Again, although the applicants 'received' a livelihood which could be described as sufficient (they received board, lodging and pocket money from their community's resources) they could not be said to be earning that livelihood—the livelihood was received by them

> not . . . *in return* for their work with the handicapped men in their community, but as *a component part* of that work. This is because it is inherent in the whole concept of the community at Guadalope House that the members, whether handicapped or not, live together, as equally as possible, effectively as members of one family. Thus the fact that the helpers receive board, lodging and pocket money from the community's resources, is one of the factors equating their situation with that of the handicapped men.

(Reasons, para. 21)

Accordingly, the AAT was satisfied that the applicants were, 'by reason of their domestic circumstances, unable to earn a sufficient livelihood', and qualified to receive special benefit.

The discretion to pay special benefit

However, the Tribunal decided that the discretion which s.124(1) confers should not be exercised in the applicants' favour. The applicants, although unable to earn, were receiving a sufficient livelihood. The AAT adopted observations made in *Takacs* (1982) 2 *SSR* 88, 'I do not see how it can be said that a person who is, in fact, being maintained . . . at an adequate if straitened level, can be said to be lacking a sufficient livelihood'.

The AAT also referred to the Tribunal's statement in *Te Velde* (1981) 3 *SSR* 23, that 'the degree of control which the person is able to exercise over . . . his inability to