vision 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.

Was the DSS notified? A dispute over the facts

The DSS alleged that Costello had not notified the Department of increases in her income from 5 October 1974 till 26 August 1979.

Costello, on the other hand, called the Clerk of Petty Sessions at Inverell. He stated that, while he occupied the position from July 1976 until 1979, he had frequent communication (probably every three or four months) with the DSS in Armidale on the question of Costello's current salary. The preceding Clerk of Petty Sessions also stated in a statutory declaration that he was contacted by the DSS in Armidale on one occasion. The Tribunal concluded that this was before July 1976.

The DSS had no record of these 'phone conversations and suggested they may have been made by someone posing as a DSS officer. The Tribunal found the conflicting evidence somewhat puzzling but was persuaded that the telephone conversations did occur and found as fact that the DSS was notified of Mrs Costello's wages once prior to July 1976 and a number of times between July 1976 and August 1979.

The Tribunal said that, given that the dates of these 'phone conversations were unknown, it was impossible to say if they constituted compliance by Costello with the notification provisions in s.45 of the Act, although it was possible they coincided with her quarterly wage adjustments.

The Tribunal, referring to *Babler* (1982) 7 *SSR* 71, noted that *mens rea* was not a necessary element of an offence under s.45 and, although Mrs Costello was probably never clearly aware of her obligation, it found that she did fail to notify the DSS of increases in her income on or around 5 October 1974, and 'on the probabilities', there were subsequent omissions between 5 October 1974 and August 1979, when other increases in her wage occurred.

The 'effective cause' of overpayment

The question remained, was this failure the effective cause. (see *Re Matteo* (1982) 5 *SSR* 50). The Tribunal found that the DSS failure to undertake annual reviews was a contributing factor to the overpayment. Secondly, the Tribunal found that, despite abandoning annual reviews and knowing that Costello was in regular employment, 'no attention appears to have been given, at the time when increases in the basic rate of pension occurred, to the question of whether Mrs Costello's wages had also increased ... These factors, in my view, indicate that the overpayment ... would probably not have occurred (or at least, would not have been as great) if annual reviews had occurred': Reasons for Decision, para.24.

The Tribunal referred to a series of previous decisions on the question of how much of the overpayment should be attributed to the applicant's failure to comply with s.45 (see *Gee* (1981) 2 *SSR* 11, *Matteo* (1982) 5 *SSR* 50, *Babler* (1982) 7 *SSR* 71, *Parr* (1982) 9 *SSR* 90). It concluded 'that the applicant's failure to notify increases in her income from time to time as they occurred was the effective cause of overpayment of pension until the date when information was first provided on her behalf to the Department by [the Clerk of Petty Sessions] prior to July 1976': Reasons for Decision, para.26. The date when this happened was taken to be 31 July 1976:

> [A]ny overpayment which occurred after that was due to Departmental error in not following up the information ... Any technical failure on the part of the applicant thereafter to comply with the requirements of s.45 was not, in my view, the effective cause of the overpayment to her.
>
> (Reasons for Decision, para.26).

Thus the demand for recovery should be limited to that overpayment which occurred between 5 October 1974 and 31 July 1976. The Tribunal stated that the actual amount should be calculated in accordance with the Federal Court decision in *Harris* (see this issue of the *Reporter*).

Financial hardship

The applicant argued she should be relieved from repaying any overpayment on the grounds of financial hardship. She pointed to the length of time it took the DSS to notify her of the overpayment, her husband's recent death and consequent funeral expenses, and her own and her husband's medical expenses. The Tribunal, in turn, noted that her home was not subject to mortgage, that she was entitled to a lump sum retirement benefit of between $12 000 and $15 000 and that she was eligible for the age pension. Consequently, it decided not to vary its original decision.

Formal decision

The AAT set aside the decision under review and remitted the matter for reconsideration with the direction that recovery be limited to the overpayment which occurred between 5 October 1974 and 31 July 1976.

Age pension: residence

CIARDULLO and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. V82/239)

Decided: 17 December 1982 by A.N. Hall

Iolanda Ciardullo migrated from Italy to Australia in 1968 (when she was 52) to join her husband, who had been here since 1952.

In 1973, when he reached 65 years of age, Mr Ciardullo was granted an age pension and Mrs Ciardullo was granted a wife's pension. They then returned to Italy, where they continued to recieve their pensions (under the portability provision of the *Social Services Act*).

In 1976, Mrs Ciardullo was granted an age pension in her own right when she reached 60 years of age. In 1979 Mr Ciardullo died; and Mrs Ciardullo continued to receive an age pension until 1981 when the DSS told her that she had been granted an age pension in error, that she had been overpaid $5637.40 (which the DSS did not seek to recover) and that her pension was cancelled.

Mrs Ciardullo applied to the AAT for review of this decision.

The AAT pointed out that, in order to qualify for an age pension, a person must meet the age requirements in s.21(1)(a) and the residence requirements in s.21(1)(b) of the *Social Security Act*; that is, pension is only payable to a woman who has reached 60 years of age and who:

> is residing in, and is physically present in, Australia on the date on which he lodges his claim for a pension and has at any time been continuously resident in Australia for a period of not less than ten years ...

At no stage had Mrs Ciardullo met these requirements: she had not been continuously resident in Australia for ten

years, nor had she resided in and been physically present in Australia since the date when she reached 60 years of age.

There was no discretion in the Director-General to waive the residential requirements of the Act on humanitarian or hardship grounds:

> 12. Thus, it seems to me that the applicant, having resided in Australia for only 5½ years, having returned to reside in Italy with her husband in November 1973 and her husband having since died, has no continuing entitlement to look to the Australian Government for social welfare support in accordance with the provisions of the *Social Services Act* 1947.

Formal decision

The AAT affirmed the decision under review.

Unemployment benefit: farmer

VAVARIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/514)

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

Vavaris and his wife had, since 1973, owned a 34 acre property in Robinvale on which he grew grapes. Vavaris applied for unemployment benefits on 16 June 1981, stating that he had last worked on 15 April 1981. His claim was rejected on 1 July 1981 on the ground that he was employed as a primary producer. He appealed to the AAT, which also considered his eligibility for special benefit.

The legislation

Section 107(1) of the *Social Security Act* provides that a person is qualified to receive unemployment benefit if the person passes the age and residence tests and if—

> (c) the person satisfies the Director-General that—
>
> (i) throughout the relevant period he was unemployed and was capable of undertaking, and was willing to undertake, paid work that, in the opinion of the Director-General, was suitable to be undertaken by the person; and
>
> (ii) he had taken, during the relevant period, reasonable steps to obtain such work.

Section 124(1) of the Act provides that the Director-General may, in his discretion, grant a special benefit to a person not receiving a pension under the Act and not qualified for unemployment or sickness benefit,—

> (c) with respect to whom 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).

The evidence

The Reasons for Decision contain a detailed discussion of the annual demands of viticulture. The applicant claimed that he did not need to work his block except at weekends. He said that since he had moved to the property he had done various jobs off his property—electrical work and casual picking; he had worked in a wrecking yard in Wollongong for seven months in 1977, and had registered with the CES in November 1976. The CES stated he had been placed in seasonal employment on four occasions, the last being in March 1981. The applicant stated that he and his wife had also obtained some picking work in 1982, not through the CES. Vavaris stated in the last two years he had seen some 14 people in order to obtain work. He stated that it was widely known in the Robinvale area that he was looking for permanent work.

The applicant had received unemployment benefit for a total of approximately two years since 1973. In February 1981 he had his unemployment benefits stopped because he had obtained work as a picker. He said that since June 1981 he had borrowed $3800 from his sons-in-law and now owed $8400 to friends and $6000 to a bank.

The applicant stated that he still owned a house in Wollongong, which was unencumbered. He maintained it could not be rented as it had to remain available for use by his daughters, and it would not be sold, as it was to be a dowry for his children.

Evidence was given by a viticultural extension officer from the Department of Agriculture. He stated that the applicant could have produced his 1981–82 crop with only two days work a week, excluding the picking season. To pick the 16 tonnes of wet sultanas and 22 tonnes of wine grapes would have taken the applicant and his wife alone a week, without any of the operations associated with picking. However, a person's rate of picking was extremely variable depending on motivation, denseness of vines, etc.

'Unemployed' or 'underemployed'

The Tribunal assumed, without deciding the issues, that the applicant was at the relevant times capable of undertaking and willing to undertake paid work within the meaning of s.107(1)(c)(i) of the Act, and had in all the circumstances taken reasonable steps to obtain such work (s.107(1)(c)(i)). The difficult question was whether he was 'unemployed' within s.107(1)(c)(i).

The Tribunal found that the applicant intended that his operations on the property should be operated as a business with a view to making a profit to give himself and his family a livelihood. The Tribunal reached this view from the fact that the operation could be characterised as a business venture, given the long term nature of agricultural undertakings; that the applicant had already undertaken a deal of work on the property; that real production had increased in size over the years; and that there was a likelihood, if not next season, then the one after, that the applicant would make a profit.

The Tribunal stated that the applicant had been 'employed' 'in any ordinary sense of the word'—in building up his block to the point where it provided him and his family with a livelihood. He may have been 'underemployed' in the sense that he chose to limit the amount of time he spent in building up the block so that he had around 40 hours a week available for other activities, but this did not make him 'unemployed' within the meaning of the Act. the Tribunal explained its view:

> 31. A wide variety of business activities may involve, in their initial stages, the devotion of less effective time to dealing with customers than the operator of the business would have wished. The briefless barrister may wait anxiously in his chambers for the call from a solicitor, or may even occasionally pass hopefully through the office of his Clerk for fear that he may have been forgotten. But this barrister, like the person who opens a small shop and waits for customers, is occupied, and is underemployed, not unemployed, when simply remaining available at his post so that he is on hand when the call to action comes.
>
> 32. The primary producer on the other hand does not when physically unoccupied wait for customers. He may wait for livestock to grow, in which case he is likely to have his time occupied, to a greater or less degree, in attending to that stock. Where he waits for crops to grow or for vines to come into leaf, to form buds and then to fruit, it is tempting to think that his employment is suspended and that he is in fact unemployed. I do not consider that this is so . . .

This view, the Tribunal said, was supported by the earlier decision in *Te Velde* (1981) 3 *SSR* 23.

Special benefits

This did not mean that a primary producer