but had no common social life. The children were now adults and only one of them remained in the house: she had children of her own and was receiving supporting parent's benefit.

The Tribunal referred to decisions in *Reid* (1981) 3 *SSR* 31; *McQuilty* (1982) 6 *SSR* 61; and *'A'* (1982) 8 *SSR* 79, where the AAT had said that it was a sufficient 'special reason' for disregarding a spouse's income, if a married couple were living separately under the one roof – that is, where the marriage had broken down.

However, the AAT said, the separation between O'Brien and her husband had ceased when he returned to her house:

> I am satisifed that the family was reintegrated by his return, and that he and the applicant both lived thereafter as integral members of the family . . . The scheme of the Act is such that it is not inequitable that section 29(2) should apply to the applicant and that she should be regarded as a married person for the purposes of Part III of the Act. She and her husband were living as part of the same family unit. The husband was qualified to receive, and did receive, unemployment benefits as a married man. It is certainly not inequitable that the total amount payable to them both under the Act should be the same as that payable to a happily married couple qualified for invalid pension and unemployment benefit respectively.

(Reasons, paras.13-4).

Recovery of overpayment: no hardship

Accordingly, there had been an overpayment to O'Brien between June 1977 and February 1979; and the Director-General had a discretion to recover that overpayment under s.140(1) or s.140(2). (In the present case, recovery was being sought under s.140(2) – by deductions from her pension.)

In exercising that discretion, 'one of the most important considerations' was the fact that public moneys had been paid to a person not entitled to receive them. But compassionate factors should also be considered. In the present case, recovery at the rate of $10 a fortnight would not cause hardship because the family unit until now had income from two invalid pensions (Reid and her husband), supporting parent's benefit and family allowances (Reid's daughter).

Formal decision

The AAT affirmed the decision under review.

Income test

TURNER and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/453)

Decided: 6 April 1984 by J.O. Ballard.

This was an appeal against a decision to seek recovery of an alleged overpayment of unemployment benefits under s.140(1) of the *Social Security Act*.

While on unemployment benefits, Turner had received a refund of his superannuation contributions from the Hospitals Superannuation Board. The payments included an interest component but the Superannuation Board was unable to tell Turner how much of the refund was interest. The DSS argued that all these moneys were income.

The legislation

Section 140(1) states that any payment of benefit, which would not have been made but for a failure or omission to comply with the *Social Security Act*, is recoverable in a court of competent jurisdiction from the person to whom the payment was made.

Section 130(1) of the Act requires a person in receipt of unemployment benefits to declare any income received to the DSS. Turned had not declared his superannuation refund as income.

The AAT's assessment

The Tribunal followed the decision in *Lawrie* (see this issue) and said refund of the applicant's superannuation contributions was not income as defined in s.106 of the Act but rather capital. The interest on these payments, the Tribunal said, was income.

The Tribunal said that clearly there had been no false statement or omission in relation to the refund of superannuation contributions as these were not income. In relation to the interest component, 'the applicant could not be expected to comply with a requirement to supply information as to the income component if his own superannuation board could not define it for him': Reasons, para 12.

Recovery in court would not be possible unless the sum to be recovered could be stated, and it was impossible here to separate out the interest component.

Formal decision

The Tribunal set aside the decision to recover.

HALDANE-STEVENSON and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/94)

Decided: 17 April 1984 by E. Smith.

James Haldane-Stevenson held an age pension, which was reduced on account of his income from a UK pension, investments and a retirement allowance. He asked the DSS to off-set the income by taking account of expenses which he had incurred in the writing of a book. He expected the book to be published and to produce income in several years time.

The DSS refused to off-set that expenditure and Haldane-Stevenson applied to the AAT for review of that decision.

Not all expenses may be deducted

The Tribunal pointed out that 'income' was defined in s.18(1) of the *Social Security Act* to include 'profits earned, derived or received'. In assessing those profits, one could deduct expenses incurred in making them.

But expenses incurred on one enterprise could not be off-set against other income. In particular, the approach developed under the *Income Tax Assessment Act* 1936 (Cth) was not relevant to the calculation of income under s.18(1) of the *Social Security Act*. On this point, the AAT followed that the decisions in *Sheppard* (1983) 13 *SSR* 127; *Szuts* (1983) 13 *SSR* 128 and *Shafer* (1983) 16 *SSR* 159.

Formal decision

The AAT affirmed the decision under review.

LAWRIE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/450)

Decided: 4 April 1984 by J.O. Ballard.

Marjorie Lawrie retired from Telecom Australia (around July 1983) and was granted a widow's pension by the DSS. At the time of her retirement she was granted 'interim superannuation benefits' of $150 per fortnight, pending settlement of her superannuation entitlements.

The DSS decided that those payments were income and that her widow's pension should be reduced accordingly. Lawrie applied to the AAT for review of that decision.

After this application was lodged, her former employer decided that she was entitled to a lump sum superannuation payment of $11 804, from which $2357 ('the interim lump sum already paid to you') was deducted, leaving a payment of $9447.

Income or capital?

Section 18 of the *Social Security Act* defines 'income' as meaning 'any personal earnings, moneys, valuable consideration or profits earned, derived or received by [a] person for his own use or benefit by any means from any source whatsoever . . .'

The Tribunal said that the standard distinction between income and capital receipts was not obliterated by s.18 of the Act: 'If the legislature had intended this result in a beneficial or remedial Act one would have expected this to be stated in express terms': Reasons, para. 6. The Tribunal continued:

> As I see it, the word 'moneys' must be construed as being related to personal earnings, involving periodical payments, or with valuable consideration or profits earned for services or benefits earned. Such construction is consistent [with] the reference to 'periodical' payment or benefit by way of gift or allowance later in the definition. I do not think the definition of income was intended by Parliament to cover capital pay-

ments. In my opinion the interim payments made to the applicant as advances out of her total lump sum superannuation benefit is a capital payment and not income for the purposes of the definition of that word in section 18 of the Act.

(Reasons, para. 8.)

Formal decision

The AAT set aside the decision under review, and decided that the rate of pension paid to Lawrie should be adjusted on the basis that the payments of superannuation received by Lawrie were not 'income'.

Invalid pension: permanent incapacity

ALCHIN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q82/179)

Decided: 21 March 1984 by A.N. Hall.

The AAT *set aside* a DSS decision cancelling an invalid pension held by James Alchin, a 54-year-old former farm labourer, who had not worked since 1975.

The Tribunal accepted medical evidence that, although Alchin's orthopaedic disability was not severe, the psychological impact of that disability had been serious and had permanently incapacitated him for work. The AAT said:

> [A]s the Tribunal has said repeatedly, one cannot isolate a human being into sections; one cannot see a back problem in isolation from the impact that that back problem has on the whole man. One must therefore make an assessment in each case as best one can of the organic and psychological disabilities from which the person suffers, and endeavour to reach an assessment of what those physical and mental impairments mean to the particular person whose application for a pension is under consideration [cf. *Panke* (1981) 2 *SSR* 9].

Reasons, para. 7).

The Tribunal made some critical comments on the fact that, when Alchin's invalid pension was cancelled, the DSS paid him a sickness benefit.

> The sickness benefit, of course, was intended to be a benefit in respect of temporary periods of total incapacity and is not intended within the scheme of the Act as a long-term maintenance provision for a person who is carrying permanent disabilities . . .
>
> [O]ne cannot help saying that had the Department seriously considered that the applicant did have a capacity to work at the time when his invalid pension was cancelled, then he should have been put on unemployment benefit rather than on a sickness benefit. He would then have been in a position to have tested his capacity for work.

(Reasons, para. 17).

BONELLO and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/483)

Decided: 9 April 1984 by B.J. McMahon.

The AAT *set aside* a DSS decision to cancel the invalid pension of a 43-year-old man who had been employed in heavy labouring, forklift driving and crane driving. He had injured himself at work in 1968 and suffered from back problems with a psychological overlay.

The Tribunal concluded:

> The applicant has been out of the work force since at least 1972. In the early part of the past 15 year period, he had some employment, but, for all practical purposes, he has been unemployed for over 11 years. He, himself, complains of constant pain in his back and believes (genuinely in the opinion of the Tribunal) that he is unable to work, although he would like to be able to do some work in order to earn some money. He is not an educated man. His literacy skills are minimal. His English is patchy. He has worked principally in heavy industries, where light work is simply not available. He has been rejected twice for rehabilitation purposes.
>
> How can one say he has an ability to attract an employer in those circumstances? How can anyone say he is able to find and hold a job in the present market; [cf. *Howard* (1983) 13 *SSR* 134.] How could one disagree with the proposition that it is the totality of his disabilities, physical and psychological, which make the difference between his working and his not working? Merely to ask these questions is to answer them, having regard to the evidence reviewed above. Accordingly, the Tribunal must conclude that the applicant is permanently incapacitated for work.

(Reasons, p. 10.)

ZAMMIT and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/130)

Decided: 13 April 1984 by R.K. Todd.

The Tribunal *set aside* a DSS decision to cancel the invalid pension of a 51-year-old former waterside worker, who had suffered an injury to his foot while working. While this injury still enabled him to do light sedentary work, he could not engage in heavy physical labour. This led to him losing his job as a waterside worker.

The Tribunal said that Zammit's physical capacity for light work did not answer the central question in this review. It referred to the decision in *Howard* (1983) 13 *SSR* 134 where the AAT had pointed out that

> a person who is 'moderately incapacitated' or 'severely incapacitated' in an orthopaedic sense may be 'permanently incapacitated for work' in the sense that he he is unable, because of his disabilities, to obtain remunerated employment. Decisions of the Tribunal have endeavoured to make it clear that the '85 percent' to which s.23 refers is not a degree of orthopaedic disability. Section 23 is an ameliorating provision, that is to say it enables the grant of a pension to a person who, for practical purposes, is permanently incapacitated for work notwithstanding that that person may be able to obtain some part-time remunerated employment.

The AAT adopted the submission of counsel for the applicant:

> This is a case in which the applicant possesses a theoretical or physical capacity for work but of whom it must be said it is more probable than not that he could not exploit that capacity and obtain remunerative employment. The applicant adduced evidence of his disability and of his unsuccessful attempts to find work; the Director-General with all the resources open to it adduced no evidence of any actual work available to the applicant. In the light of all the evidence any conclusion that he could find suitable employment is mere conjecture. Further, the applicant was originally granted a pension and there is no evidence that his condition has since improved; on the contrary, as the applicant has been absent from the workforce for six years it may in fact be worse . . .

(Reasons, para. 15.)

MANDALAKOUDIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/427)

Decided: 11 April 1984 by B.J. McMahon, M.J. McLelland, and I. Prowse.

The AAT *set aside* a DSS decision to cancel the invalid pension of a 44-year-old former cook, who suffered from back pains.

The applicant had an entrenched perception of himself as an invalid which constituted a psychological condition destroying his capacity for work (see *Vranesic* (1982) 10 *SSR* 95).

During its Reasons for Decision, the AAT responded to an argument that the DSS carried the burden of proving that Mandalakoudis was no longer permanently incapacitated. The AAT said:

> Whether the principles of interpretation that have been applied to other Acts should be applied to the *Social Security Act* is open to some doubt. In *Dragojlovic* v *Director-General of Social Security* [(1984) 18 *SSR* 187] Smithers J pointed out at page 19: 'The Act is named the *Social Services Act*. Its purpose is a social purpose. It is to be interpreted accordingly.' Without further exploration of the principles and consequences it would be dangerous automatically to import into the construction of the *Social Security Act* concepts that are commonly applied to statutes giving rise to claims inter partes and creating by law a liability to compensate.
>
> However, we do not find it necessary to decide the question in the current application. It would become relevant only if we were in some doubt as to whether the applicant (or for that matter the respondent) had established that he was permanently incapacitated for work.

(Reasons, p.10).

[On this question of onus of proof in invalid pension reviews, see the Federal Court decision in *McDonald* (1984) 18 *SSR* 188.]