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.]

WAKELING and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q83/68)

Decided: 13 April 1984 by J.B.K. Williams.

The AAT *affirmed* a decision of the DSS to cancel an invalid pension held by a 53-year-old former crane driver.

The Tribunal found, on the medical evidence, that Wakeling suffered from a heart condition which made it unsafe for him to engage in heavy physical work. But he could perform moderate physical work. This would have to be unskilled work (because of Wakeling's limited education and work experience). Any difficulty that Wakeling would have in finding this type of work would, the AAT said, 'be attributable to depressed job opportunities rather than to his physical incapacity . The *Social Security Act* makes provision for other benefits to cater for that situation': Reasons, p.12.

The Tribunal stressed that it thought that Wakeling's loss of confidence in his capacity to work was irrelevant. It was critical, the AAT said, that medical disability 'be of such significance that the incapacity can be said to arise or result from the medical condition. If it were not so the term "invalid pension" would not be appropriate': Reasons, p.12.

BATZINAS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/569)

Decided: 18 May 1984 by A.N. Hall.

The AAT *set aside* a DSS decision to refuse an invalid pension to a 47-year-old former labourer who suffered from neck and back pains which had little or no organic basis. The Tribunal described the applicant as a 'mental invalid' who

> is not simply presenting a pattern of symptoms which lack reality so far as he is concerned but . . . whether the cause of those symptoms be organic or psychological, the applicant does experience incapacitating symptoms of pain and discomfort which render him incapable of undertaking paid work of the kind that would otherwise be within his physical capabilities having regard to his previous work experience and education . . . Mr. Batzinas believes that his back requires an operation and that without the operation (which he is not prepared to undergo) he is unable to work. He has the symptoms to justify that belief. In our view, regrettable though it may be, those symptoms have become such an entrenched part of the applicant's psychological makeup that the consequential incapacity for work from which the applicant suffers is likely to persist indefinitely.

(Reasons, para. 33).

SANDERSON and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/519)

Decided: 15 May 1984 by E. Smith.

The Tribunal *set aside* a DSS decision to refuse an invalid pension to a 50-year-old former plant operator who had suffered neck and shoulder injuries at work.

The applicant had little formal education. He also had lost some motivation to work. Medical evidence suggested that he could engage in light work if available locally. The AAT commented:

> . . . the question comes down to whether the residual capacity for employment which the applicant has is such as to make it a practical proposition for him to attract an employer who is prepared to engage and to remunerate him. In other words, is he virtually unemployable . . . ? The applicant's case is certainly not as strong as the applicant's in *Alchin* [noted in this *Reporter*] or *Fliedner* (1984) 17 *SSR* 177; . . . However, considering the applicant's age and lack of education and training, and although this must be regarded as a borderline case, I am persuaded that the deprivation of his livelihood as a plant operator is the key to his total situation and it would be unrealistic to find against him, on the basis of the unlikely possibility that he might, perhaps if he moved to some other place, find employment as a shop assistant, storeman or yardman.

(Reasons, para. 33).

The AAT also decided and handed down Reasons for Decision, in the following invalid pension cases. On our reading, none of these raised any issue of principle but depended solely on the assessment of evidence as to the applicant's impairment, work experience and skills.

DSS decision set aside

Ayling (Q82/93) 3.5.84
Bounassif (N82/121) 5.4.84
Denford (N83/177) 16.4.84
Lymberopoulos (N83/219) 26.4.84
Nikolakopoulos (N83/59) 5.4.84
Harbridge (N83/386) 14.5.84
Rahme (N83/326) 14.5.84

DSS decision affirmed

Pargovski (N83/66) 16.4.84
Leidinger (N83/573) 14.5.84

Administration

FREEDOM OF INFORMATION IN SOCIAL SECURITY: APPEALS*

In the last issue of the *Reporter* we examined the procedures employed by the DSS to process requests under the *Freedom of Information Act* (*FOI Act*). In this issue we look at the avenues of appeal open to a person who is dissatisifed with the Department's response to such a request.

Internal review

The first step in appealing against a decision made under the *FOI Act* is to seek internal review of that decision.

The *FOI Act* sets out the decisions for which internal review may be sought. They are decisions relating to: the provision of access to a document and charges the applicant is liable to pay: s.54(1); and a refusal to amend a personal record: s.51(1) with s.54(1).

Internal reviews are conducted by a departmental officer other than the one who made the original decision. In practice the officer who conducts the review will be the immediately senior officer to the first officer. The review is conducted as if the request is being considered for the first time.

Applicants have 28 days (or such further period as the Department allows) from the date of receipt of the original decision to request an internal review. The Department takes the view that only in special circumstances should extra time be refused.

(A decision made under s.41(3) to release medical documents indirectly is *not* subject to internal review, as the power to make such a decision rests with the principal officer of an agency (refer to opening words of s.54).)

Reasons must be supplied for a decision made at internal review to refuse access or to refuse a request to amend a personal record.

Appeal to the AAT

Sections 55 and 56 of the *FOI Act* allow appeals to the Administrative Appeals Tribunal from the following decisions:

- any internal review decision;
- a decision refusing to allow a further period in which to request internal review;
- any decision made by the Minister or Director-General personally;
- a decision relating to charges;
- the failure of the Department to respond to a request for access or amendment of personal records within the legal time limits;
- the failure of the Department or Minister to reply to a request for internal review within 14 days;
- a decision to release documents relating to the business, professional or financial affairs of a person or organisation where that person has opposed release (refer s.27); and
- a decision to release documents received from or containing information about a State where the State has opposed release (refer s.26A).

In addition, the applicant may ask the AAT to review the statement of reasons given by the decision-maker where the

*This outline is based in part on material supplied by the NSW Freedom of Information Unit of the DSS.