tunate and undesirable that that incomplete form should now be relied on as the basis of a claim for the recovery of an overpayment in a case where it is conceded that there was no attempt on the part of the applicant to mislead the department, and where the necessary information was in fact made available.

Hardship

The Tribunal found that recovery of the money would not have imposed hardship on Kaiser. But that was not conclusive. Other matters, including 'principles of consistency, fairness and administrative justice' (*Buhagiar* (1981) 4 *SSR* 34) were relevant to the decision to seek recovery under s.140(1).

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that no further action be taken to recover the overpayment of sickness benefit.

DOBROWOLSKI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W82/63)

Decided: 29 August 1983 by G.D. Clarkson

Ruby Dobrowolski suffered a stroke, which severely disabled her, in 1972. In May 1973 she applied for and was granted an age pension. In her application (completed by her son because of her disabilities) she revealed her husband's income from employment.

Over the next five years, the DSS did not review Dobrowolski's pension, nor did she notify the DSS of increases in her husband's income, as required by the *Social Security Act*. (It was accepted that, over this period, she was severely disabled and that the household's business affairs were handled by her husband who did not understand the English language well.)

In May 1978 the DSS reviewed the level of Dobrowolski's pension, found that her husband's income had increased and decided that there had been an overpayment of $4639, which it eventually proceeded to recover by deducting $30 a fortnight from her pension.

In May 1982, Dobrowolski suffered another stroke which paralyzed her completely. She entered a nursing home, whose fees exceeded the level of her pension by $50 a fortnight: the excess was paid by her husband. She then appealed to an SSAT against the decision to continue to deduct $30 a fortnight from her pension. Following the failure of this appeal, she sought review by the AAT.

Discretion to deduct from a current pension

The Tribunal said that the application for review was limited to seeking 'the exercise of the discretionary power [in s.140(2)] to waive the deduction of any further money from the appliant's pension': p.6. (Section 140(2) gives the Director-General a discretion to deduct, from a current pension, an amount of pension which should not have been paid, whatever the reason for the overpayment.)

This, the Tribunal said, was an appropriate case for exercising the discretion in favour of Dobrowolski. In coming to this conclusion, the AAT took account of the following factors:

(1) The fact that, from 1973 onwards, Dobrowolski had been physically incapable of fulfilling the statutory obligation to keep the DSS informed of changes in her husband's income. (The Tribunal rejected a DSS argument that those handling her affairs were under any obligation to supply the information: 'the intentions and circumstances of the applicant must be important considerations': Reasons, p. 9.)

(2) The significant effect which flowed from the DSS's failure between 1973 and 1978, to continue its annual reviews of age pensions: this failure 'contributed as much, if not more, to the building up of the overpayment as did the applicant's inability to give notice' of her husband's increased income: Reasons, p.11.

(3) The fact that Dobrowolski had savings of only $1400, the only reserves available to meet her living expenses if her husband's support was no longer available. Her husband's assets and income were irrelevant as he was not liable to repay the overpayment.

(4) The fact that nearly two-thirds of the overpayment had already been recovered before deductions were suspended pending the appeal and review process.

(5) The fact that continued deductions would disadvantage Dobrowolski's husband rather than her because he paid the difference between her pension and her living costs in the nursing home.

Formal decision

The AAT set aside the decision under review.

FLORIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/431)

Decided: 5 December 1983

Argiro Floris applied to the AAT for review of a DSS decision to recover from her (under s.140(1) of the *Social Security Act*) an overpayment of $1103 in invalid pension.

The legislation

Section 140(1) authorises the Director-General to recover an overpayment caused by a pensioner's failure to comply with the requirements of the Act: see *Kaiser*, in this issue of the *Reporter*.

Section 45(2) obliges a pensioner to report to the DSS, at regular intervals, any increases in income.

The overpayments

Floris had been granted an invalid pension in February 1979. She told the DSS that her husband was employed and stated the amount of his wages. The DSS checked with the husband's employer and used that information to calculate the level of Floris' pension.

Over the next two years, Mr Floris' wages varied considerably. When requested by the DSS, Mrs Floris informed them of the current level of her husband's income, and the DSS also obtained this information from the employer.

However, Mrs Floris did not report any of the increases in her husband's income (as required by s.45(2)), except when requested by the DSS. On the other hand, she did approach the DSS on two occasions to report reductions in that income. These approaches followed specific advice given to her by a social worker.

Neither Mrs nor Mr Floris could read English. Each of them had believed that the DSS was checking the husband's wages with his employer. In fact, the DSS had adjusted Mrs Floris' pension from time to time until October 1980 when it cancelled her pension because of a substantial increase in her husband's income.

The Tribunal found that the DSS based all its calculations of Mrs Floris' pension on information supplied by the employer. (The overpayments resulted from the Department's reliance on that information, which was later shown to be inadequate.) It was reasonable for Mrs Floris to assume that the DSS was following this course: both the correspondence from the DSS (which neither Mr or Mrs Floris could read) and the facts known to them would have led to this conclusion.

Recovery by the DSS – a matter of discretion

The Tribunal said that the overpayment would not have occurred if Mrs Floris had complied with s.45(2) of the Act and reported increases in her husband's income. Accordingly, the Director-General had a discretion to decide whether to recover the overpayment (as confirmed by the Federal Court in *Hales* (1983) 13 *SSR* 136).

The AAT referred to two factors which were relevant to the exercise of this discretion:

(a) the Department's reliance on inadequate information from the employer; and

(b) the lack of means of Mrs Floris which would mean that the Director-General could not enforce payment of any judgment debt.

Taking those factors into account, the AAT said that recovery of the overpayment should not be pursued under s.140(1).

Possible recovery by deductions

The Tribunal also considered whether the DSS might recover the overpayment under s.140(2), in the event of her invalid pension being restored. (That sub-section authorises recovery of an overpayment by deduction from current payments of pension or benefit.) Given that her pension could only be restored if her husband's income fell, the Tribunal

said the DSS should not seek recovery by deductions from any pension, unless her son was still living at home contributing to the household income.

Formal decision

The AAT set aside the decusion under review and remitted the matter to the Director-General with a direction that the overpayment not be recovered under s.140(1).

JULIAN & JULIAN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/109-10)

Decided: 16 November 1983
by J.O. Ballard

The AAT *varied* a DSS decision to recover an overpayment of $754 from each of Mr and Mrs Julian.

The overpayment, of an invalid pension and a wife's pension, was caused by Mr Julian's failure to inform the DSS of worker's compensation payments received by him.

The AAT said that the overpayments were recoverable by the DSS under s.140(1) of the *Social Security Act* (which allows recovery of an overpayment caused by a pensioner's failure to comply with the requirements of the *Social Security Act*.

But several factors were relevant to the discretion contained in s.140(1):

(a) Public money had been paid which should not have been paid

(b) Mr Julian's failure to advise the DSS was due to misunderstanding between him and the Department, to Mr Julian's disability and to the poor information which he had on his compensation payments.

Taking those factors into account, the AAT decided that only half the overpayment should be recovered, to be repaid at the rate of no more than $10 a fortnight.

PAINTER and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S82/118)

Decided: 9 December 1983
by I.R. Thompson.

The AAT *affirmed* a DSS decision to recover an overpayment of $2955 of widow's pension, caused by the applicant's failure to inform the Department of interest on investments paid to her between 1976 and 1980.

The Tribunal said that the overpayment was recoverable under s.140(1) of the *Social Security Act* and that, on balance, there was no basis for exercising any discretion in favour of the applicant: she should have known that the DSS had relied on her for information about her investment income and any hardship involved in repayment would be outweighed by 'the paramount consideration that she [had] received an amount of public moneys to which she was not lawfully entitled'.

KARNEZIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S83/59)

Decided: 8 December 1983
by J.O. Ballard.

The AAT *varied* a DSS decision to recover an overpayment of unemployment benefit caused by the applicant understating his wife's income.

The DSS had initially attempted to recover the overpayment (of $1311) under s.140(1) of the *Social Security Act* as a lump sum. The AAT believed that recovery in this way, or by instalments, would cause unreasonable hardship to the applicant. However, as Karnezis had recently been granted an invalid pension, it was 'not unreasonable' to recover the overpayment under s.140(2) of the Act, by deductions of $10 a fortnight from that pension.

Special benefit

KAKOURAS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W82/76)

Decided: 21 December 1983 by R.K. Todd

Dimitrios Kakouras migrated to Australia in 1972, from Greece. He commenced working soon after his arrival and retired at the age of 65 in October 1979. As he had not been resident in Australia for 10 years he did not qualify for age pension. (See s.21(1) of the Act.)

Kakouras applied unsuccessfully for special benefit in November 1979. The applicant and his wife lived with and were supported by their son from October 1979 until early 1981, when the applicant and his wife returned to Greece to visit a sick relative. After his return to Australia in October 1981, he was granted special benefit apparently on the basis that a member of the Greek community, who had signed a maintenance guarantee in respect of Kakouras when he first came to Australia, had died.

The issue before the AAT was whether the discretion to grant special benefit should be exercised in favour of the applicant for the period from November 1979 to December 1981.

The legislation

Section 124(1) of the *Social Security Act* gives the Director-General a discretion to grant special benefit to a person who is not receiving a pension, is not qualified for another benefit and –

> (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 maintenance guarantee

Though not argued before the AAT, the DSS had apparently based its decision not to grant special benefit for the period in issue upon the existence of the maintenance guarantee.

The Tribunal referred to its decision in *Blackburn* (1982) 5 *SSR* 53 which had made it clear that eligibility for special benefit was to be considered in isolation from any maintenance guarantee. It further approved of the point made by the SSAT in the present case, that the guarantee could not have been enforced by the applicant.

Exercise of discretion: relevance of son's support

The Tribunal nevertheless decided that the discretion to grant the benefit should not be exercised. It was doubtful whether the discretion would have been exercised while the son supported the applicant (see *Takacs* (1982) 9 *SSR* 88). As to the period when the applicant was overseas, a grant would normally be made only where the trip was made from 'fairly extreme personal need'.

The AAT discussed the retrospective payment of special benefit:

> I do not subscribe to the view that retrospective payment of special benefit should be denied on the footing that an applicant therefore has after all survived the threatening situation in which he or she had been placed . . . For instance if, in a case where the discretion should clearly have been exercised but in fact was not, an applicant had managed somehow to borrow a sum or sums of money in order to survive, should he or she not be granted benefit retrospectively in order to discharge an obligation that ought never have had to be brought into existence? I should have thought that an affirmative answer would be demanded.

(Reasons, para. 8)

Formal decision

The Tribunal affirmed the decision under review.