person was able to exercise over his inability to earn a sufficient livelihood must be a relevant consideration.

The AAT also approved the minority view expressed by Davies J in *Watts* (1984) 21 *SSR* 237, to the effect that special benefit should not be seen as a means of helping farmers to survive difficult conditions when other means were available, such as borrowing money.

The AAT concluded as follows:

> 27. On the facts of this matter the applicant entered into the share-farming agreement with his father as a matter of choice. He has persisted in continuing to farm for some 10 years under that agreement notwithstanding that on his evidence he discovered that he could not make a living under that agreement. It is not the purpose of s.124 of the Act to provide public support to a person who makes such a choice notwithstanding the obvious attraction to the applicant of engaging in farming as a means to a livelihood and notwithstanding his expectation of ownership of the farm when his father died.

Formal decision

The AAT affirmed the decision under review.

BAHUNEK and SECRETARY TO THE DSS
(No. V84/46)

Decided: 31 January 1985 by J.R. Dwyer.

Mirko Bahunek migrated to Australia in 1979, when he was 67 years of age. Before his migration, his daughter signed a maintenance agreement under the *Migration Regulations*, in which she undertook to be responsible for Bahunek's maintenance.

After his arrival in Australia, Bahunek lived with and was supported by his daughter and son-in-law until September 1982. He then applied for special benefit because his son-in-law had refused to maintain him. In January 1983, Bahunek's son-in-law lost his employment. Nevertheless, in March 1983, the DSS rejected Bahunek's application for special benefit on the basis that his daughter's wages

of $529 a fortnight prevented Bahunek qualifying.

Bahunek asked the AAT to review that decision. When the matter came before the Tribunal, the DSS said that, because of new departmental guidelines, it had decided to grant Bahunek a special benefit equivalent to one third of the standard rate of unemployment benefit.

The legislation

Section 124(1) of the *Social Security Act* gives the secretary a discretion to grant a special benefit to a person who is 'unable to earn a sufficient livelihood'.

The maintenance guarantee

The AAT confirmed that the fact that Bahunek's daughter had signed the maintenance guarantee did not prevent Bahunek from qualifying for special benefit, as had been decided in *Blackburn* (1982) 5 *SSR* 53, *Sakaci* (1984) 20 *SSR* 221 and *Macapagal* (1984) 21 *SSR* 236.

'Unable to earn'

The Tribunal said that, given Bahunek's age (he was presently 72) and the fact that he had not worked since 1979, it was satisfied that he was unable to earn a sufficient livelihood and that, accordingly, he satisfied the eligibility requirements of s.124(1).

The discretion

The AAT noted that Bahunek's daughter was providing him with board and lodging. In *Sakaci* the Tribunal had said that the discretion to grant special benefit should not be exercised where a person was receiving some basic support from a relative.

However, as the AAT pointed out, that view had been rejected in *Macapagal*, where the Tribunal had decided that a reduced special benefit should be paid to a person who was receiving board and lodging from relatives, thus 'giving the applicant a measure of independence': Reasons, para. 14.

Moreover, the DSS had now adopted guidelines which reflected the approach in *Macapagal*. There was no reason, the AAT said, 'not to follow the newly implemented departmental guidelines in this case': Reasons, para. 17.

Formal decision

The AAT affirmed the decision under review as varied by the Secretary.

Income test: age pension

ARTWINSKA and SECRETARY TO DSS
(No. N84/365)

Decided: 5 March 1985 by J.O. Ballard, D.J. Howell and J.H. McClintock.

Edwarda Artwinska was born in Poland on a date not identified by the AAT, but clearly no later than 1920. When Poland was invaded by Germany in 1939, she an her family were confined in concentration camps, where 26 members of her familiy were murdered by their captors. Artwinska survived 6 years in captivity but was left in very poor health and completely destitute: all her property and all her family's property had been expropriated and was irrecoverable.

In 1958, Artwinska migrated to Australia; and in 1963 she was awarded a pension under a West German statute, the *Federal Restitution Act*, which had been enacted to provide compensation to people who had suffered injustice and persecution 'under the national-socialist tyranny'. This statute provided that compensation was payable to victims of the persecution who had 'suffered damage to life, body, health, freedom, property, wealth, his employment or economic livelihood': s.1(1); and to the next-of-kin of those victims: s.1(3)(i). The statute provided that a person entitled to compensation could 'elect to receive a pension instead of a capital compensation':

s.81.

At some (unidentified) time after her migration to Australia, Artwinska was granted an age pension. Subsequently, the DSS decided that her German restitution pension was 'income' under the *Social Security Act* and that this income disqualified her from fringe benefits. Artwinska asked the AAT to review that decision.

The legislation

Section 83CA of the *Social Security Act* provides that a 'prescribed person' (ie. a person not eligible for fringe benefits) was a person whose annual rate of income exceeded, in the case of a single person, $2808.

Section 6 of the Act defines 'income' as meaning –

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, within or outside Australia, and includes any periodical payment or benefit by way of gift or allowance from a person . . . but does not include –

. . .

(cc) insurance or compensation payments made by reason of the loss of, or damage to, buildings, plant or personal effects;

The para. (cc) exemption

The Tribunal said that there was no doubt that part of Artwinska's pension fell within exemption (cc) in the s.6 definition of 'income', because some part of the pension related to Artwinska's loss of property. But that exemption would only apply to part of the pension.

Not 'income' but 'capital'

However, the AAT said, it was not necessary to resort to para. (cc) to decide that Artwinska's pension was not 'income' under the Act. Although Artwinska was receiving restitution by 'periodical payments rather than, as it could have been, by one capital payment', this was not conclusive.

Rather, it was important to look to 'the character of what the payments replaced', as the Federal Court had said in 2 income tax cases, *Slaven* (1984) 52 ALR 81 and *Tinkler* (1979) 29 ALR 663.

The AAT said that the pension was a 'periodical payment' within s.6 but was not a gift or an allowance and so did not come within the second part of the definition of 'income'. Nor did the pension come within the first part of that definition, which added little to the ordinary meaning of the word 'income'.

Looking at the evidence of Artwinska's losses in Poland and the provisions of the German *Federal Restitution Act*, the AAT said, most of that pension was 'a restitution of a capital nature and not income within the definition.' The pension was restitution for the extraordinary suffering inflicted on Artwinska and for the utter destruction of the whole quality of her life as a result of her treatment at the hands of the Nazi persecution. Only a small part of the compensation (and the pension) was restitution for loss of income and that element should 'be disregarded in assessing the overall character of the loss for which restitution is given': Reasons, para. 25.

Accordingly, the AAT said, 'it was proper to treat the whole payment as capital [and] the respondent [had] fallen into error by persisting in naming the payments made to the applicant and others like her as a pension': Reasons, para. 26.

Formal decision

The AAT set aside the decision under review and decided that none of the pension payments paid to her under the German *Federal Restitution Act* was to be taken into account in assessing her entitlement to a pension under the *Social Security Act*.

WOOD and SECRETARY TO THE DSS (No. N84/247)

Decided: 19 December by A.P. Renouf.

The AAT *affirmed* a DSS decision to include Wood's totally and permanently incapacitated (repatriation) pension (TPI pension) in his income when calculating the rate of age pension payable to Wood under the *Social Security Act*.

Wood had argued that the definition of 'income' in s.18 of the *Social Security Act* excluded his TPI pension as 'a benefit under a law of the Commonwealth . . . relating to the provision of pharmaceutical, dental or hospital benefits, or of medical or dental services': s.18(f).

But the AAT said that the TPI pension amounted to compensation for loss of earning capacity', as the Federal Court had decided in *Repatriation Commission* v *Bowman* (1981) 38 ALR 650. Accordingly, it followed that the TPI pension did not fall within the exception established by s.18(f), and it 'must be regarded as "income" within the meaning of the Act': Reasons, para. 8.

PAULA and SECRETARY TO DSS (No. V84/203)

Decided: 22 February 1985 by J.R. Dwyer.

The AAT *affirmed* a DSS decision to reduce the age pension of a 72-year-old pensioner because of her income from building society, bank and mortgage investments and from government superannuation.

The AAT rejected a series of objections raised by Paula to the DSS decision: that the term 'income' in the *Social Security Act* had the same meaning as in the *Income Tax Assessment Act*; that the DSS should have allowed deductions from her gross income for various living expenses and income tax; and that the applicaton to her of the income test caused her hardship.

The AAT pointed out that 'income' had quite different meanings in the *Social Security Act* and the *Income Tax Assessment Act*. The *Social Security Act* did not permit expenses to be set off against income, but income tax law did. That point had been made in many AAT decisions, including *Shafer* (1983) 16 *SSR* 159, *Sheppard* (1983) 13 *SSR* 127 and *Szuts* (1983) 13 *SSR* 128.

Accordingly, the expenses associated with Paula's investment income could not be set off against her income. Further, the full amount of her superannuation payments (without any allowance for the income tax deducted from those payments) should be treated as income – the full amount was 'income . . . earned [or] derived' by her, as the AAT had said in *Siebel* (1983) 14 *SSR* 142 and *Smith & Smith* (1982) 9 *SSR* 89.

Finally, the AAT said, there was no authority in the *Social Security Act* for deducting Paula's living expenses from her income nor did the Secretary have any discretion to increase Paula's pension on account of hardship.

MARSDEN and MARSDEN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q84/179)

Decided: 8 February 1985 by J.A. Kiosoglous.

Mr and Mrs Marsden were age pensioners. They purchased debentures, valued at $10 000, in each of two companies. The interest on these debentures produced gross income of $3525 a year and the DSS decided that that amount should be treated as their income for the purpose of fixing the levels of their age pensions.

Mr and Mrs Marsden asked the AAT to review that decision on the ground that premiums of $700, which they had paid when purchasing the debentures, should be deducted from their gross income on those debentures.

The legislation

Section 28(2) of the *Social Security Act* provides that the annual rate of an age pension is to be calculated after taking account of the annual rate of the pensioner's income.

At the time when the decision under review was made, s.18 defined 'income' as meaning –

> in relation to a person . . . 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 . . .

(This definition now appears in s.6 of the *Social Security Act*)

Income tax principles not relevant

The tribunal pointed out that the approach adopted in the *Income Tax Assessment Act* 1936 (which allowed a tax payer to deduct from her or his income any expenses incurred in gaining that income) did not apply to the calculation of income for the purposes of the *Social Security Act*. That point had been made in several decisions of the AAT, including *Szuts* (1983) 13 *SSR* 128, and *Haldane-Stevenson* (1984) 19 *SSR* 205.

The AAT said that Mr and Mrs Marsden might make a capital loss on the debentures (because they had cost $20 700 and had a face value of only $20 000):

> The fact remains however that the applicants are receiving $3525 interest per annum on their capital investment. Their 'loss', if one could use the word in the loose sense, assuming upon redemption of the stock certificates the applicants will lose the 'premium' paid to purchase the stock certificates, has not been realised as yet at any rate.

(Reasons, para. 23)

Formal decision

The AAT affirmed the decison under review.