vate income consisted of rent (for a property let to his son) of $6 a week. However, throughout most of this period, Grasso had approximately $5000 invested on interest-bearing depsosit which was producing regular income for Grasso.

When the DSS discovered the existence of this income, it concluded that there had been an overpayment (initially calculated at $4650 but later calculated at $915); and the DSS decided to recover this overpayment by withholding $5 a week from Grasso's unemployment benefit. Grasso asked the AAT to review that decision.

The legislation

Section 114 of the *Social Security Act* provides that the rate of unemployment benefit payable to a person is to be adjusted by reference to the person's income.

Section 130(1) obliges a beneficiary to notify the DSS whenever the beneficiary's weekly income increases.

Section 140(1) provides that, where there has been an overpayment of unemployment benefit because of a failure to comply with any provision of the Act, the overpayment is recoverable in a court of competent jurisdiction from the person to whom the overpayment was made.

Section 140(2) gives to the Director-General a discretion to deduct from any current benefit an amount which has been overpaid by way of benefit, whatever the reason for that overpayment.

The cause of the overpayment

On behalf of Grasso, it was argued that the overpayment had resulted because of inactivity and error on the part of the DSS, combined with Grasso's cultural isolation – that is, his ignorance of the social security system and his poor English.

Grasso claimed that, when he had first been granted unemployment benefit in September 1980, he had told the DSS that he had received a redundancy payment of $5000 from GMH. Although Grasso had not repeated this disclosure when he applied for unemployment benefit in December 1980 and although he had consistently failed to reveal the income earned from the investment of that $5000, Grasso's counsel argued that the DSS should have realised that the redundancy payment was likely to be invested and should have followed up that matter.

However, the AAT pointed out that Grasso had neither revealed the existence of the $5000 to the DSS in December 1980 nor disclosed the income earned on that money. He had, therefore, failed to comply with s.130(1) of the Act and there was a basis for recovery of the overpayment under s.140(1).

So far as Grasso's cultural isolation was concerned, the AAT noted that he had answered many questions during the Tribunal hearing without the use of an interpreter; and that the rental income received by him from his son ($6 a week in 1980, $10 a week in 1984) corresponded to the maximum allowable income under s.114 of the *Social Security Act*. This may have been 'just purely a coincidence' or it may have indicated Grasso's understanding of the social security system.

Direct recovery

Although the original DSS decision had been to recover the overpayment by deductions from Grasso's current benefit, the AAT decided that, in the circumstances of this case, Grasso should be directed to make immediate repayment – that is, the recovery decision should be based on s.140(1) rather than s.140(2).

In coming to that conclusion, the AAT took account of the facts that Grasso had received public money to which he was not entitled, that he would not suffer financial hardship by being obliged to refund the overpayment, given that he had some $6000 in his bank accounts, that deductions from current benefit or pension was an uncertain means of recovering an overpayment and that the overpayment was contributing to Grasso's current income from investments:

> The overpayment has resulted, even if to a limited extent, in his receiving an income from derived interest. This being the case, it would not accord with 'principles of consistency, fairness and administrative justice' should he not repay to the Department the entire overpayment forthwith. This would disallow the applicant receiving further interest (and thereby 'income') from public moneys that he has invested. In effect it would prevent the applicant receiving further interest on money that he should never have had.

(Reasons, para. 59)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that Grasso repay to the Director-General the total amount overpaid forthwith.

Overpayment: evidence

LETTS and SECRETARY TO THE DEPARTMENT OF SOCIAL SECURITY (No. W84/41)

Decided: 20 December 1984 by J.D. Davies J.

Arthur Letts was granted an age pension sometime before 20 June 1977. On that date, the DSS granted an age pension to one 'Allan Ryan' who had given his address as 'C/- Midland PO' on his claim form.

In August 1981, Letts was convicted of an offence under s.29B of the *Crimes Act* 1914, of imposing upon the Commonwealth by an 'untrue representation . . . with a view to obtaining money'. Evidence was given at Letts' trial that the claim form in the name of 'Allan Ryan' and pension cheques endorsed by 'Allan Ryan' were in the handwriting of Letts. Evidence was also given at the trial by a clerk at the Midland Post Office that, over several months, a person known as Ryan had collected pension cheques; but this witness was unable to identify Letts as the person he knew as Ryan.

Following this conviction, the DSS decided that Letts had been overpaid $7008 (apparently the amount of age pension paid to 'Allan Ryan') and decided to recover this overpayment from Letts by withholding $8 a fortnight from his age pension. Letts asked the AAT to review that decision.

The legislation

Section 140(2) of the *Social Security Act* now gives to the Secretary a discretion to recover any overpayment of pension, whatever the reason from the overpayment, by deducting the amount of that overpayment from the payee's current pension.

Evidence of overpayment

The AAT said that Letts' conviction was 'evidence of the matters which must necessarily have been accepted by the jury in reaching its verdict.' In order for the jury to have found him guilty of imposition upon the Commonwealth, it must have accepted the testimony of the handwriting expert; and, accordingly, the verdict was evidence that Letts was the person who had filled in the application form seeking an age pension for Allan Ryan.

In addition, the AAT said, s.33 of the *AAT Act* 1975 provided that the Tribunal was not bound by the ordinary rules of evidence; and it could take into account as evidence in this review the transcript of the evidence given at Letts' trial. While that transcript showed that the postal clerk was unable to identify Letts as the person whom he knew as Ryan, the evidence of the handwriting expert positively identified the signatures on 'Allan Ryan's' pension cheques as in the handwriting of Letts. The AAT concluded:

> I am therefore satisfied that the applicant both sought an age pension in the name of Allan Ryan and received the pension cheques addressed to Mr Allan Ryan. What use the applicant made of those moneys is not disclosed by the evidence before me. However, I am satisfied that he received those moneys. For the purpose of s.140(2), it is sufficient that my satisfaction is satisfaction on the balance of probabilities, though taking into account the serious nature of the allegation made against the applicant . . . Taking into account the nature of the allegation, I am satisfied that the applicant claimed and received payments by way of age pension totalling in all, $7007.90 to which he was not entitled.

(Reasons, pp.4-5)

Double punishment?

The AAT then dealt with an argument that to allow recovery by the DSS would be to impose double punishment on Letts (who had served 8 months imprisonment for his offence):

> There is, however, no evidence before me that the learned trial Judge imposed a sentence upon the view that the applicant would not have to repay the moneys which he improperly received. No doubt the prosecution could have asked for an order of reparation, but the prosecution did not do so. The failure on the part of the prosecution to take that step did not bind the Secretary to the Department of Social Security who was entitled to exercise his power under s.140(2). I see no element of double punishment in his so acting.

The discretion to recover

The AAT then examined the financial circumstances of Letts, after observing that recovery should not be pursued if that recovery prevented Letts 'from maintaining a sufficient standard of living'. The evidence before the AAT showed that, of Letts income of $88 a week, he had regular expenses of $70 a week. This evidence, the AAT said, showed a clear margin of income over expenditure and that the deduction of $8 a fortnight from Letts' pension was 'a fair and reasonable deduction'.

Formal decision

The AAT affirmed the decision under review.

RIMMER and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. A83/122)

Decided: 11 October 1984 by J.O. Ballard.

The AAT *set aside* a DSS decision to recover from Rimmer an alleged overpayment of $135.48.

The DSS claimed that Rimmer had cashed one of his fortnightly sickness benefit cheques, after he had claimed to have lost the cheque and had been issued with a replacement cheque. Rimmer denied having cashed that cheque; but he had been convicted, in the Canberra Court of Petty Sessions, of the offence of imposition upon the Commonwealth.

The AAT heard evidence from a hand writing expert to the effect that the endorsement on the cheque in question was not Rimmer's. The Tribunal also noted that admissions made by Rimmer to the police could have been affected by the fact that, at that time, he was undergoing a course of methadone treatment which affected his memory. The Tribunal concluded that Rimmer had not cashed the cheque which he had claimed to have lost and decided that there had been no overpayment.

[Note: in *Rimmer* (1984) 20 *SSR* 224 the Tribunal had decided that the evidence of Rimmer's conviction on the offence of imposition upon the Commonwealth was only prima facie evidence that he had negotiated the cheque in question – it was not conclusive evidence.]

PEPI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q83/108)

Decided: 27 November 1984 by J.B. K. Williams.

Mario Pepi was injured in an industrial accident in March 1976. He received worker's compensation payments until March 1978 and, in June 1978, he was granted sickness benefit. In August 1979 Pepi was granted an invalid pension, which continued until March 1980.

Throughout the period from June 1978 to March 1980, Pepi's wife was in full-time employment. However, throughout that period, he did not inform the DSS that either his wife or he was in employment or receiving wages; indeed, several entitlement review forms lodged during this period and apparently signed by Pepi asserted that his wife was not in employment and not receiving wages.

When the DSS discovered that Pepi and his wife had worked during this period, it decided that there had been overpayments of sickness benefit and invalid pension and sought to recover $8075 from him under s.140(1) of the *Social Security Act*. Pepi asked the AAT to review that decision.

The legislation

Section 140(1) provides that, where there has been an overpayment of pension or benefit in consequence of a false statement or of a failure to comply with the *Social Security Act*, an overpayment which would not have been made but for the false statement or omission, that overpayment can be recovered from the person to whom the overpayment was made.

Must the recipient know of the overpayment?

Pepi claimed that, during the period from June 1978 to March 1980, his wife had taken responsibility for family business affairs and he had not known that entitlement forms lodged in his name contained false information. He also claimed that he had not realised that he was being paid sickness benefit – he had assumed that fortnightly payments which began in June 1978 were a continuation of his worker's compensation entitlement.

The AAT said that it was not necessary to decide whether Pepi's claims represented the truth. Even if Pepi had not been aware that he was not receiving his sickness benefit and invalid pension on the basis of false or misleading statements, the overpayments would still be recoverable. Recovery under s.140(1) should be contrasted with prosecution for a criminal offence:

> It appears to me that s.140(1) is not confined in its operation to those cases in which a criminal offence of making a false or misleading statement may be established. Section 140(1) does not, in literal terms, make reference to the author of the false statement or representation, nor does it connect the person to whom, or on whose account, money is paid in consequence of the false statement or representation with the author of that statement. The policy underlying the sub-section appears to me to be the protection of revenue against unjustified payments out of public funds made in consequence of false information supplied to the administering Department.

(Reasons, pp. 7-8)

In the present case, the AAT said, there was no doubt that false statements had been made to the DSS, at least by Pepi's agent (his wife), that those statements had led to payments which would not otherwise have been made and that Pepi had benefited from those payments. In the circumstances, the requirements of s.140(1) were satisfied. Turning to Pepi's claim that he had believed he could work while receiving invalid pension, the AAT said that this was, at best, 'a mistake of law which . . . affords no answer in circumstances': Reasons, p. 11.

Formal decision

The AAT affirmed the decision under review.