considerable thought, I am inclined to the view that it is not.'
(Reasons, para.10)

The AAT explained that the word 'suspend' was used in other provisions of the Act - ss.46, 48A(1), 105QA, and 131(1) - but it had not been used in s.103(1):

'One must, therefore, assume that it was the intention of the legislature that the phrase "cease to be payable" had some meaning other than "suspend". If it was intended to mean "suspend" it would have been clearer if that term had been employed in s.103 or provision made in a separate section of the Act for the suspension of family allowance for student children until such time as the Director-General was advised that they remained qualified. The word "cease" is defined in the *Shorter Oxford English Dictionary* at p.301 of volume 1 as being "to stop; to give over; to discontinue; to pass away".'
(Reasons, Para.12)

'Special circumstances'?

The AAT went on to conclude that there were, in the present case no 'special circumstances' to justify backpayment of the allowance. The most that could be said was that Seccull had not been aware of her entitlement to the allowance. The fact that the notification from the DSS did not reach Seccull could not be attributed to any fault on the part of the DSS, which had sent the notification to her last known address. In concluding that these facts did not amount to 'special circumstances' the AAT relied upon the earlier decision in *Manzini* (1983) 14 *SSR* 138.

Formal decision

The AAT affirmed the decision under review.

'Annual rate of income': which period?

RUGGERI and SECRETARY TO DSS (No. V83/322)

Decided: 10 October 1985 by R.Balmford.

Maria Ruggeri had been granted an invalid pension from December 1977. The level of her pension was fixed by taking into account half her husband's weekly income of $192. Over the next 4 years, the DSS adjusted the level of Ruggeri's pension to take account of changes in her husband's income as notified to the DSS by Ruggeri.

However, in 1981 the DSS discovered that Ruggeri had understated her husband's income (there was no suggestion that she had intended to deceive the DSS). The DSS then recalculated Ruggeri's 'annual rate of income' over the preceding four years, using 'pension years' as the basis of the calculation; and, on the basis of those annual rates of income, the DSS calculated that there had been an overpayment to Ruggeri of $1889, which the DSS decided Ruggeri should repay. Ruggeri asked the AAT to review that decision.

The legislation

Section 28(2) of the *Social Security Act* provides that the annual rate of an invalid pension is to be calculated by reference to the pensioner's 'annual rate of income'. According to s.29(2) a pensioner's income includes half the income of the pensioner's husband or wife.

Section 140(1) provides that any overpayment of pension, which has been made as a result of the pensioner's failure to comply with any provision of the *Social Security Act*, is recoverable from the pensioner. Section 45(2) obliges a pensioner to notify the DSS of increases in her or his average weekly income.

'Annual rate of income' - which year?

Ruggeri's main argument before the AAT was that the periods over which her 'annual rate of income' was calculated should have been the income tax years (that is, the years beginning on 1 July) and not the 'pension year' adopted by the DSS (that is, the years beginning on the date when her pension had been granted and each anniversary of that date). It appeared that, if income tax years (rather than pension years) were adopted as the basis of calculation, the amount of the overpayment would be reduced by $204.

The AAT referred to the High Court decision in *Harris* (1985) 24 *SSR* 294. The Tribunal said that there were two 'essential principles' which could be extracted from the judgment of the majority in *Harris*: first, that the circumstances of the case must determine what is a fair method of ascertaining a person's current annual rate of income; and, secondly, where a person's annual rate of income was being determined after the event with the benefit of hindsight, it was appropriate to take a broad view.

The AAT said that the High Court had not endorsed any particular period (whether pension year, income tax year, calendar year or other year) as the universally correct period over which to calculate a person's 'annual rate of income'. The AAT said that in *Harris* the High Court had endorsed the adoption of the year which began when Mrs Harris commenced to receive additional income. Although that period had been appropriate to the facts of *Harris*, there was, the AAT said, 'nothing in the circumstances of Mrs Ruggeri which indicates a similarly appropriate specific period': Reasons, para 22. The AAT thought that, in the present case, there were two possible periods over which Ruggeri's annual rate of income could be calculated: these were the financial year and the pension year.

Balancing convenience, fairness and consistency

In favour of the financial year was its 'considerable significance for the administration of the financial affairs of all people who are required by the provisions of the taxation legislation to lodge taxation returns': Reasons, para. 23. It was, the AAT said, common for pensioners or beneficiaries to supply information to the DSS by providing copies of group certificates or of income tax returns.

On the other hand, the DSS argued that its general practice was to adopt the pension year in its calculations of an 'annual rate of income' and that the interests of consistency in administration strongly supported using this period in the present case. The DSS relied upon a Federal Court decision in *Nevistic* v *Minister of Immigration* (1981) 34 ALR 639 which had stressed 'the desirability of consistency in the making of decisions affecting rights, opportunities and obligations under Court had also said that 'the desire for consistency should not be permitted to submerge the ideal of justice in the individual case.'

The AAT noted that the difference between using the pension year and using the financial year was $204 - an amount which was not trivial but, in the present context, not substantial. The fact that calculations on a financial year basis produced a smaller amount of overpayment in the present case did not make it a 'more fair' method of calculation:

'. . . I do not think that it can properly be said that, in the administration of social welfare legislation, fairness must always require a decision which favours the recipient of welfare as against the administering department. Fairness is, as the High Court made clear in *Harris*, a matter to be decided according to the circumstances of the particular case.'
(Reasons, para. 34)

The Tribunal said that its own 'tentative view' was that there was a great deal to be said for averaging over a financial year. This was -

'based on a general feeling that it was desirable that financial matters should be related to a financial year because so many of them are; and on the fact that financial information, of the kind required by the Department in these cases, has normally been prepared in relation to a financial year, and is readily available in that form.'
(Reasons, para. 33)

However, the Tribunal concluded that there was, in the present case, no reason for concluding that one method of calculating Ruggeri's annual rate of income was, as between her and the DSS, more fair than the other. Accordingly, the AAT accepted the DSS argument that the matter be resolved in accordance with the principle of administrative consistency and Ruggeri's annual rate of income calculated on the basis of the pension year.

Checking the DSS calculations

The AAT noted that there was some dispute between Ruggeri and the DSS as to whether the Department's calculations were arithmetically correct. The Tribunal said that it was not in a position to make any finding as to the accuracy of the calculations. Accordingly the AAT, 'with some reluctance', accepted that the calculations were correct but reserved the right

for Ruggeri to apply, within 30 days of its decision, for a variation of that decision on the ground that the calculations could be shown to be incorrect. The Tribunal recommended that, if the matter were to be reopened on that basis, Ruggeri should obtain legal aid to assist her in challenging the calculations.

Formal decision

The AAT affirmed the decision under review.

BLANUSA and SECRETARY TO DSS (No.V84/474)

Decided: 17 October 1985 by H.E.Hallowes.

Radivoj Blanusa was granted an invalid pension, and Lija Blanusa a wife's pension, in December 1983, with effect from February 1983. The rates of their pensions were set by taking account of income from the wife's employment and a small amount of bank interest. Following changes in the level of their income, the DSS re-assessed their 'annual rate of income' in February, August and September 1984 and adjusted the level of their pensions. Mr and Mrs Blanusa asked the AAT to review the 2 adjustments made in August and September 1984.

Net or gross income?

The first argument raised by the Blanusas was that, in reducing their pensions under s.28(2) of the *Social Security Act*, by reference to their 'annual rate of income', the DSS should have taken account of Mrs Blanusa's net income after tax. The AAT rejected this argument, referring to earlier decisions in *Williams* (1981) 4 *SSR* 39 and *Paula* (1985) 24 *SSR* 288, where it had been decided that the reference to 'annual rate of income' was to 'gross income' and not 'net income'.

'Annual rate of income' - choosing the right period

The next question (and the question on which the AAT concentrated) related to the selection of the period over which the Blanusas' 'annual rate of income' should be calculated.

It appeared that, when their pensions were first granted (with retrospective effect), the DSS averaged their income over a period of 41 weeks. When their pensions were reviewed in January 1984, the DSS looked only at their income for a period of 1 week. The review of August 1984 was based on their total income over the 52 weeks which ended on 30 June 1984. And the review of September 1984 used their income over the preceding 13 weeks. There was of course considerable overlap between many of these periods.

(The DSS file also revealed that another review was made of the Blanusas' pensions in October 1984 when a 30-week period, overlapping with other periods, was used as the basis of calculating their 'annual rate of income'.)

The AAT referred to the decision of the High Court in *Harris* (1985) 24 *SSR* 294 and said that the period over which a pensioner's fluctuating income should be averaged depended 'on the source of the income, the regularity with which it is received and its likely continuance': Reasons, para 17.

Because the AAT was dealing with the 'annual rate of pension' which was paid in fortnightly instalments, the AAT said that it might -

> 'be appropriate that the period used over which to strike a rate of pension should be some period which divides into the 52 weeks of the year. Whether it is appropriate to use a period of 52 weeks, 26 weeks or 13 weeks will depend on the factors as expressed by the High Court.'

(Reasons, para.18)

Section 45(2), the AAT said, suggested that an 8-week period might be used as the period over which fluctuating income could be averaged - because that section obliges the pensioner to report to the DSS whenever 'in any period of 8 consecutive weeks, the average weekly rate of [income] is higher than the average weekly rate of [income] last specified by him'. This requirement, the AAT said, could create 'inordinate difficulties for a pensioner and an administrative nightmare for the Department', because it could lock pensioners into weekly notifications to the DSS:

> 'Returns at regular intervals, possibly corresponding with CPI adjustments to pension rate, would lessen both the administrative burden on the respondent and relieve pensioners of the strong possibility of finding themselves in an 'overpaid' situation with the consequential implications of the provisions of s.140 of the Act.'

(Reasons, para.22)

The AAT said that, at the time of initial grant of a pension, 'it would appear appropriate to look at the latest 52 weeks to ascertain the sources of income for a pensioner and to determine whether they were likely to be ongoing and remain at the current level.' However, when it came to subsequent reviews of the pension, it would be 'appropriate to look at a more immediate period of weeks rather than a 52 week period to ascertain what income maintenance is needed': Reasons, paras 24, 25.

Another factor which should be taken into account was the very important consideration of 'the desirability of consistency in the making of decisions affecting rights, opportunities and obligations under the law', as it had been put in *Nevistic* v *Minister of Immigration* (1981) 34 ALR 639. That consistency was important, not only as between different applicants, but also when different decisions were being made affecting the rights of one applicant. This meant that the DSS should, when conducting review of a pensioner's income and pension, 'use a consistent period over which to ascertain the annual rate of income from each source on those occasions when it was necessary to do so': Reasons, para.26

In the present case, 'a more accurate reflection of Mrs Blanusa's projected earnings for the ensuing pension period would have been obtained by averaging her earnings over a 13 weeks period', the AAT said. However, the AAT pointed out that the Blanusas had not been disadvantaged by the calculations made by the DSS. This was partly because some of Mrs Blanusa's income had not been taken into account in the review of September 1984 and partly because the 52 week period used in August 1984 had included a number of weeks when her income was considerably lower than her current income. Strictly speaking, those calculations (in August and September 1984) might have caused an overpayment to be made to the Blanusas; and if their annual rate of income was now to be recalculated (using all Mrs Blanusa's income over a 13 week period), this would probably establish an overpayment:

> 'For this to be the result of their request for a review and to require them to pay back moneys to the respondent after the confusing manner with which these applicants have been dealt leads me to the conclusion that the preferable decision in this application is to affirm the decision under review.'

(Reasons, para.28)

Formal decision

The AAT affirmed the decision under review.