plain that SAS allowance was intended as a 'top-up' allowance: it could not have been intended to provide for the full support of any recipient. Nor was there any indication that the scheme had been intended as an alternative to special benefit. Accordingly, the receipt of this allowance by MT and NT did not prevent the exercise in their favour of the discretion to pay special benefit.

The AAT also said that the payment of allowances by the NSW YACS Department to the hostel where KM and JT lived did not prevent the favourable exercise of the discretion to pay special benefit:

> 'they had been rendered totally dependent, because they had no resources of their own, on what has to be seen as a form of charity. Its characterization as such is no less so because the organization that dispensed the charity ultimately had recourse to State funds.'

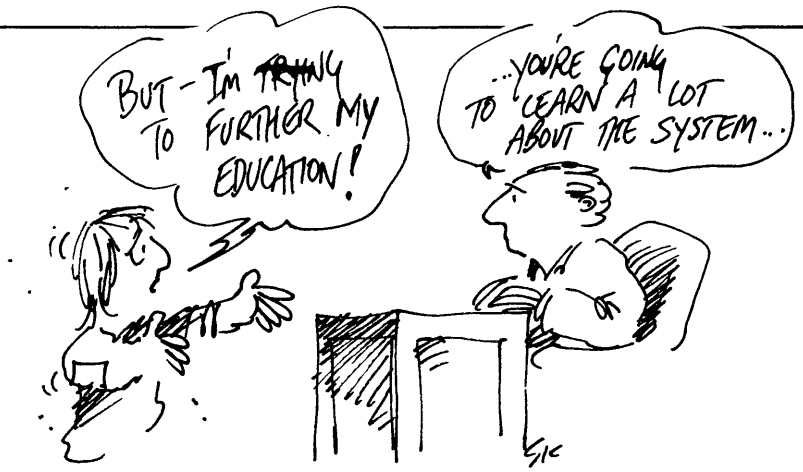
(Reasons, para.16)

The AAT accepted that, when special benefit was paid to KM and JT, the hostel would expect to receive from them 20% of any payments which they received, including any backpayments.

Speaking generally, the AAT said that any doubt as to the exercise of the discretion should be resolved in favour of these applicants:

> 'In daunting circumstances, each of them has chartered a course for himself or herself that determinedly seeks the completion of his or her formal education and the obtaining of the highest secondary qualification obtainable. Were they to be denied this chance because they were desperately poor and because they had lost entirely the protection and support of any kind of family relationship? The consequences for teenage children left abandoned are too well known to be able to be ignored. To fail to support determined young people like the 4 before us would be to fail those whose development will most contribute to society and for whom the community as a whole has the greatest responsibility. They are examples of those who have not given up in the face of adversity and they are examples to other who might.'

(Reasons, para.19)



The rate of special benefit

The AAT said that, in determining the rate of benefit to be paid to the applicants, the SAS allowances received by MT and NT should be treated as income received in 52 equal weekly instalments - not as income received in the week when the allowances were paid.

However, the payments received by KM and JT from the hostel where they lived should not be treated as income so as to reduce the rate of their special benefit because those payments were expressly excluded from the definition of 'income' in s.106(1) of the *Social Security Act*: para.(ca) of that definition expressly excluded 'the value of emergency relief or like assistance' from such income.

The period for payment

The AAT decided that each of the applicants, apart from NT, should be paid special benefit from the date of her or his claim. NT's benefit should be paid from the date when she had first attempted to lodge her claim - 21 February 1985 - there being an express discretion in s.127 to determine the date from which special benefit was to be paid.

The AAT decided that MT could only be paid benefit up to the time when she went back to living with her mother:

> '[I]t would be hard to conceive the circumstances in which special benefit could be paid to a person being maintained at home. We recognize how precarious her situation may be, but only the future can tell whether the discretion should again be exercised in her favour.'

(Reasons, para.20)

Formal decision

The AAT set aside the decisions under review and substituted decisions that each of the applicants be paid special benefit from the date of her or his claim; subject to NT's benefit being paid from 21 February 1985, and MT's benefit ceasing on 15 November 1985.

Unemployment benefit: power to backdate

KAY and SECRETARY TO DSS (No.T85/35)
Decided: 24 February 1986 by R.C. Jennings.

Timothy Kay had been granted unemployment benefit in January 1984 which continued until October 1984. During this period, Kay moved from Tasmania to Queensland and returned to Tasmania on 2 occasions. The last payment of unemployment benefit made to him was for the period ending 10 october 1984.

In October 1984, when he was living in Queensland, Kay became seriously ill and was advised to return to his family home in Tasmania, which he did on 20 October 1984.

Over the next 3 months, Kay lodged a series of applications for unemployment and sickness benefit. He lodged a new claim for unemployment benefit on 7 November (at a time when he was still bed-ridden), which the DSS did not act upon; a claim for sickness benefit on 3 December 1984, which the DSS granted for the period from 11 October to 13 December inclusive; and a claim for unemployment benefit on 22 January 1985, which the DSS granted as from that date. However, the DSS refused to pay either sickness or unemployment benefit for the period between 14 December 1984 and 21 January 1985 and Kay asked the AAT to review that refusal.

The legislation

At the time of the decision under review, s.145 of the *Social Security Act* gave the Secretary a discretion to treat a claim for a pension, allowance, benefit or other payment lodged by a person as a claim for another more appropriate pension, allowance or benefit. As from 5 September 1985, this provision was replaced by s.135TB(5), which is in substantially same terms.

Section 119(1) provides that unemployment benefit is payable from 7 days after lodging an application for that benefit. But s.119(1A) provides that the Secretary shall shorten this 'waiting period' (so as to allow payment of unemployment benefit from the date of a claim) where the claimant was unemployed for one or more days before lodging the claim and met the qualifications for unemployment benefit during that period.

The legislation

Section 28(2) of the *Social Security Act* provides that the annual rate of pension payable to an age pensioner is to be reduced by reference to the pensioner's annual rate of income.

Section 6(1) defines 'income' as meaning -

> 'Any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for the person's own use or benefit by any means from any source whatsoever . . .'

Net income

The AAT referred to the decision of the Full Federal Court in *Haldane-Stevenson* (1985) 26 *SSR* 323, where the court had observed that the *Social Security Act* was concerned with net income, so that expenses incurred in producing income should be deducted from that income when applying the pension income test.

However, the AAT said, *Haldane-Stevenson* had suggested -

> 'two limitations which must be made when calculating net income from gross income. The first is that the proposed deductions are not to be permitted unless there is income "with which they are associated" . . .
>
> Secondly . . . the proposed deductions must arise in the same period during which the gross income sought to be reduced arose.'

(Reasons, p.8)

In the present case, the AAT said, these two limitations prevented Mr and Mrs Crosby from deducting the payments of trading debts from their receipt of interest payments on the sale of the business. The trading debts had been incurred when carrying on the business but there was now no income from that source:

> 'In my view there is no sufficient association between debts incurred in the carrying on of the business which has been sold and the interest received on capital owing in respect of the sale of the capital assets of that business.'

(Reasons, p.8)

Furthermore, the AAT said, the trading debts had arisen before the sale of the business 'and the interest is now payable in respect to later periods': Reasons, p.8.

The AAT acknowledged that Mr and Mrs Crosby had been placed in a very difficult position: almost all of the instalment payments of the outstanding purchase price and interest was being used to repay the trading debts so that they had practically no financial resources. Notwithstanding that they had consulted a solicitor, an accountant and a real estate agent, their advisors had not contemplated

> 'the effect on the lives of the applicant and his wife nor on their pensions of the arrangement they were allowed to make, which deprived them, both over 70 years of age, of immediate access to their remaining capital, and which substantially reduced their pension entitlement.'

(Reasons, p.9)

The Tribunal concluded by recommending that Mr and Mrs Crosby obtain 'competent professional advice' so as to come to an arrangement with their creditors to 'enable some part of the interest to be used to supplement their drastically reduced pensions . . .': Reasons, p.9.

Formal decision

The AAT affirmed the decision under review.

Income test: 'deprivation of income'

BRADNAM and SECRETARY TO DSS
(No.Q86/22)
Decided: 16 December 1985 by R. Balmford.

Mr and Mrs Bradnam were age pensioners who had private income of $9450 during the financial year 1982-83. This income was made up of rents paid by various tenants of a property which they owned as partners.

In May 1983 they sold this property for $165 000. They told their investment advisor, R, that they wanted to invest the proceeds of the sale so that they would not have to worry about managing the investments and so that any share of the proceeds which might go to their daughter or their grandson would be liable to income taxation.

R then set up a discretionary trust, to which the proceeds of the sale of the property were transferred. The trust deed provided that the trustee should hold any income produced from the funds for the benefit of any of Mr and Mrs Bradnam, their daughter and their grandson.

According to R, this trust was not set up so as to increase the age pension payable to Mr and Mrs Bradnam. However, because Mr and Mrs Bradnam gave instructions that only $1000 of the trust's total income of $8000 should be paid to each of them, their income was now reduced to a level where they qualified for age pensions at the maximum rate. The balance of the income of the trust was distributed to their daughter and their grandson, who were then liable to pay income tax on the money received by them.

The DSS then decided that the balance of the income of the trust was income of which Mr and Mrs Bradnam had deprived themselves and that, therefore, it should be treated as their income for the purposes of the age pension income test; and the DSS reduced their age pensions accordingly. Mr and Mrs Bradnam asked the AAT to review that decision.

The legislation

Section 28 of the *Social Security Act* provides that the rate at which a pension is payable is to be reduced by reference to the person's income.

At the time of the decision under review, s.47(1) provided that if the Secretary is of the opinion that a pensioner has 'deprived himself of income . . . in order to obtain a pension at a higher rate than that for which he would otherwise have been eligible', the pension's income shall include the amount of the 'deprived income'.

'Deprived'

The AAT referred to earlier decisions in *Nadenbousch* (1984) 21 *SSR* 242, *Robertson* (1983) 12 *SSR* 118, and *Roberts* (1983) 17 *SSR* 168 and said that, where a person had deprived himself of a capital sum, that person had also deprived himself of the income which the capital would have earned. In the present case, by handing over the capital sum from the sale of their property, Mr and Mrs Bradnam 'had deprived themselves of the income which they would otherwise

have received by the investment of that money': Reasons, para 19.

'In order to . . .'

The next question, the AAT said, was whether that deprivation had been effected 'in order to obtain a pension at a higher rate'.

The Tribunal said that neither Mr nor Mrs Bradnam had given evidence to the Tribunal - the only direct evidence was that of their investment advisor, R. He had told the AAT that Mr and Mrs Bradnam had set up the trust and transferred the money to it in order to ensure that their daughter and grandson paid income tax on any benefit which they derived from the income produced by those funds.

The AAT said that R.'s evidence was hearsay: it could rely on that evidence but, because Mr and Mrs Bradnam had not appeared before the Tribunal, the weight to be given to that