'[T]he presumption in interpreting the Act must be that a legislative provision dealing specifically with a particular problem should be interpreted as excluding a more general provision that deals generally with that topic along with others. *Generalia specialibus non derogant.* [General provisions do not derogate from special provisions.] (See *Maybury* v. *Plowman* (1930) 16 CLR 468, 473-4 per Barton ACJ).

. . .

[A] basic principle of statutory interpretation would, *prima facie*, demand that if the applicant and his wife cannot gain relief under a provision dealing specifically with separation due to illness, the more general discretion allowing relief in "special circumstances" should not be invoked.'

(Reasons, pp.10-1)

Turning to the new definition of 'married person' in s.6(1), the AAT observed:

'The problem here, as with the pre-21 September 1984 position, is that s.28(1AAA) continues to apply, and to deal specifically with the "greater living expenses" of a "married person" where the husband or wife is forced to live apart as a result of "illness or infirmity". The exclusion in the definition of a "married person" contained in s.6(1) is, in the Tribunal's view, limited by the clear contrary intention to *include* as "married persons" in s.28(1AAA), spouses living apart indefinitely as a result of illness or infirmity'.

(Reasons, p.15)

The discretion

The AAT said that, even if Mr and Mrs Fague were entitled to take advantage of the old s.29(2) or the new definition of 'married person' in s.6(1), this was not an appropriate case for the exercise of any discretion in their favour. The evidence in the present case did not show that Mr Fague was suffering any serious financial hardship: he was 'out of pocket something in the region of $10 to $15 a fortnight'; and Mrs Fague was 'experiencing no hardship, because she does have access to the income of her husband'. Although neither Mr or Mrs Fague currently had access to her income or assets, there were, the AAT said, procedures available in the protective jurisdiction of the Supreme Court by which this access could be gained. Moreover, the AAT said, Mr Fague stood to inherit his wife's assets should she pre-decease him:

'In this case, the applicant and his wife are living as a married couple, in the sense that they are facing the crisis in their lives occasioned by Mrs Fague's almost total mental incapacity in a manner which reflects a long, sustaining, and enduring mutual bond. The applicant is bestowing upon his infirm wife the manifestations of his qualities of loyalty and responsibility. The responsible, indeed the only decision is that she should be cared for in a nursing home. They are not living together, but their emotional and financial resources are being pooled for their joint benefit.'

(Reasons, pp.16-7)

Formal decision

The AAT affirmed the decision under review.

Procedure: telephone evidence

LINTOV and SECRETARY TO DSS (No N84/221)

Decided: 6 March 1986 by J.O. Ballard, D.J. Howell and J.P. Nicholls.

In the course of its review of a DSS decision to refuse an invalid pension to a 49-year-old man, the AAT considered whether it was appropriate for medical witnesses to give their evidence to the Tribunal by telephone.

The AAT conceded that evidence was frequently taken on the telephone in the Tribunal but indicated that it was reluctant to allow this practice to become the norm. The AAT suggested that a general practitioner might

'more readily give evidence as to an applicant's attendances and treatment than a specialist give opinion evidence as to causation. The first is largely reading treatment cards; the second is giving an opinion which may go far to determine the matter in issue on which counsel on the other side is likely to need to cross-examine . . . As we understand it, the reason, and the only reason, why [the specialist's] evidence was taken on the telephone was because the specialist was busy. We do not think it is desirable for s.33 of the *AAT Act* be used to take evidence on the telephone in those circumstances.'

(Reasons, para.10)

Procedure: legal professional privilege

GREENBANK and SECRETARY TO DSS (No N83/150)

Decided: 19 March 1986 by B.J. McMahon, M. McLelland and J.P. Nicholls.

In the course of its review of a DSS decision to reject a claim for invalid pension, the AAT concluded that the applicant (a 38-year-old man) was incapacitated for work.

The AAT then turned to the question whether Greenbank's incapacity for work was permanent. The DSS called on Greenbank to produce two rehabilitation reports prepared by senior hospital staff at the request of his solicitor. Greenbank declined to produce these reports, arguing that the call for their production was invalid and that they were protected by legal professional privilege.

Greenbank's solicitor told the Tribunal that he had requested the preparation of these reports for two purposes: first, to obtain evidence to use before the Tribunal; and, second, to provide information to the legal aid authority which had given Greenbank legal aid for these proceedings.

Legal professional privilege

The AAT said that the two reports in these proceedings.' (Reasons, p.15)

The Tribunal expressed regret that this claim of privilege
'should *be invoked in* relatio51 ALJR 198: the only purpose for which the reports had been brought into existence was for their possible use in legal proceedings:

> 'They were prepared for and in contemplation of these proceedings. That they were also prepared for financiers of these proceedings was not even a separate or ancillary purpose. It was part of the one overall purpose related only to the conduct of these proceedings.'

(Reasons, p.15)

The Tribunal expressed regret that this claim of privilege
'should be invoked in relation to documents of such potential relevance . . . Reviews of decisions made particularly under the *Social Security Act* should not be conducted as tactical exercises. As a matter of good faith we would normally expect a full and frank disclosure on both sides of all available evidence. If an applicant seeks a beneficial interpretation of social welfare legislation, he should not expect a consideration of his case to be carried out as if it were a jury trial.'
(Reasons, pp.17-8)

Privilege in AAT proceedings
The AAT said that this claim of legal professional privilege should be recognised by the Tribunal. Although it had been said, in *O'Reilly* v. *Commission of State Bank of Victoria* (1982) 44 ALR 27, that such a claim should not be recognised in administrative proceedings, the present proceedings were 'conducted in a formal quasi-judicial manner based on the adversary system': Reasons, p.15.
An inconclusive result
The AAT pointed out that, without the rehabilitation reports, it was unable to conclude that Greenbank's medical condition was likely to prevent him from obtaining employment indefinitely. It therefore adopted the course of setting aside the decision under review, and remitting the matter to the Secretary with a direction that Greenbank be granted invalid pension subject to review in 3 years time.

Overpayment: failure to comply with Act

BOYD and SECRETARY TO DSS
(No N85/22)
Decided: 6 March 1986 by R.A. Hayes.
Robert Boyd had been granted supporting parent's benefit in May 1983. At the end of that month he found employment but the DSS continued to pay him supporting parent's benefit at the maximum rate until September 1983.

When the DSS confirmed that Body was in employment, it cancelled his supporting parent's benefit and calculated that he had been overpaid $1574, which amount the DSS decided to recover from Boyd. Boyd asked the AAT to review that decision.
The legislation
At the time of the decision under review, s.140(1) of the *Social Security Act* provided that an amount paid by way of benefit in consequence of a failure or omission to comply with any provision of the Act should be recoverable from the person to whom the amount was paid as a debt due to the Commonwealth.

Section 74(1) obliged a person receiving supporting parent's benefit to notify the DSS where his 'average weekly rate of income' in any 8 week period was higher than the average weekly rate of income last notified by the beneficiary.
No failure to comply with Act
Both Boyd and his fiancee told the AAT that they had notified the DSS by telephone of the circumstances of Boyd's employment immediately after he started working. However the DSS had no record of any communications from Boyd or his fiancee. Nevertheless, the AAT said that Body and his fiancee 'impressed as honest, straightforward, and responsible people'; and it was prepared to accept their evidence:

> 'There was no evidence before the Tribunal from the respondent of any system, rigorously inculcated into its managerial and administrative processes, which would automatically produce a written record of communications made to it by, or on behalf of, beneficiaries of changed employment circumstances. The fact, therefore, that it has no record of any telephone calls or other communications by the applicant, or by his fiancee . . . does not even raise a presumption that such communications were not made.'

(Reasons, p.6)

The AAT also concluded that Boyd had acted in good faith in continuing to receive and cash the cheques for supporting parent's benefit which were paid to him while he was in full-time employment. He had, the AAT said, lacked

> 'intimate knowledge of the Act, the respondent's procedures and practices, and the processes involved in assessing entitlements to, calculating payment of, and paying, pensions and benefits. Inevitably, he put himself in the respondent's hands, relying upon it to compute the information which he gave to it about himself, and which he reasonably assumed it would acquire about him, and to adjust his benefit payments accordingly.'

(Reasons, p.7)
For these reasons, the AAT concluded that there had been no failure or omission on Boyd's part to comply with the Act and that, therefore, there was no foundation for the decision to recover any overpayment under s.140(1) of the *Social Security Act*.
Formal decision
The AAT set aside the decision under review and remitted the matter to the Secretary with the direction that the amount in question was not recoverable under s.140(1).

Rehabilitation training: recovery from damages

HOBBS and SECRETARY TO DSS
(No S85/104)
Decided: 27 March 1986 by J.A. Kiosoglous, B.C. Lock and J.T.B. Linn.
Thomas Hobbs was injured in a motor accident in 1981. Between February and May 1982, the DSS provided Hobbs with rehabilitation training valued at $4729.

In May 1984, Hobbs settled a claim for damages arising out of his accident for $134 000. After meeting his costs and expenses, he received $98 000 from his solicitors, who still retained $7000 in their trust account. Before this claim was settled, the DSS had notified Hobbs, his solicitors and the insurance company involved that it proposed to recover the costs of rehabilitation training provided to Hobbs from any damages which he recovered.

Hobbs asked the AAT to review the DSS decision to recover the cost of rehabilitation training.
The legislation
Section 135R(1A) of the *Social Security Act* provides that a person who has received rehabilitation training and recovered compensation is liable to repay to the DSS the costs of that training. Section 135R(1) defines 'compensation' as meaning any payment by way of compensation or damages which relates to the disability for which training has been provided.

Section 135R(1B) gives the Secretary a discretion to release a person from the obligation to repay the cost of rehabilitation training, if the Sec-