keeping a reserve of readily available money.'

(Reasons, para.8)

The DSS guidelines, the AAT said, had been drawn up on that basis. The AAT continued:

'As with all such guidelines, they must be applied with flexibility. That has been done by the Department; on occasions, where unusual circumstances have existed in which a reasonably prudent person would have kept a reserve of more than $10 000, the Department has accepted that a higher figure should be applied.'

(Reasons, para.8)

In the present case, the AAT said, the amount of money readily available to Mr and Mrs Doyle was more than they required to keep as a reserve to meet any emergencies. Accordingly, it was not possible for the AAT to be satisfied that they would suffer severe financial hardship if the value of their farm were taken into account in determining the value of their assets for the purposes of the assets test. It followed that s.6AD did not apply in relation to that property.

The AAT said that the low level of Mr and Mrs Doyle's current income from their reduced age pension and investments was not relevant to the question whether the application to them of the assets test would cause them severe financial hardship:

'The applicants have readily available cash assets which they can use to supplement their income from their pensions and investments to bring them above the poverty line. That is what the legislature clearly intended should happen.

(Reasons, para. 11)

Formal decision

The AAT affirmed the decision under review.

DAVEY and SECRETARY TO DSS (No. W86/47)

Decided: 2 September 1986 by R.D. Nicholson, N. Marinovich and K.J. Taylor.

Walter Davey was an age pensioner who owned a large farming property. The DSS decided that Davey had a 'deemed income' of $6000 a year, in accordance with s.6AD(3) of the *Social Security Act* and that his age pension should be reduced accordingly. Davey asked the AAT to review that decision.

The legislation

Section 28(2) of the *Social Security Act* provides that the rate of a pension is to be reduced where the pensioner's property has a value exceeding a specified amount.

Under s.6AD(1), the total value of a pensioner's property is not to include any property which cannot be sold, realised or used as security for borrowing (or which it is unreasonable to expect to be sold, realised or used as security for borrowing), if the pensioner would suffer severe financial hardship were the property to be taken into account.

However, s.6AD(3) provides that, where any property has been excluded through the operation of s.6AD(1), the DSS may reduce the person's pension, 'having regard to the annual rate of income that could reasonably be expected to be derived from [that] property'.

Reasonable to expect payment of rent?

The property in question was a farming property of 929 hectares of which 534 hectares were arable. However, it was affected by salt encroachment and by a noxious weed. In order to contain these problems it was necessary to spend some $7000 a year.

The farm had been worked by Davey's son for the past 18 years. He had not been paid any wages in the expectation that the farm would pass to him in due course. However, his son received a share of the profits from the farm. These had amounted to some $9400 in 1985 and $2700 in 1986.

According to the DSS, Davey could lease the arable 534 hectares for $5340 less rates and taxes of $2171 - a nett lease fee of $3169 (not $6000 as the DSS had first calculated).

However, Davey and his son said that it would not be possible to lease only the arable areas and that it was unrealistic to expect any lessee to take on the obligation of dealing with the salt and noxious week. The AAT accepted that evidence and said that leasing the land would not be an economic use of the property. Nor was it reasonable to expect Davey's son to pay rent for the farm because

'the property in question now belongs, in all but registered title, to his son. The wages foregone by the son are the consideration for the deemed transfer. The son is not in the position of a tenant - he is farming what is now his property in all but registered title.'

(Reasons, p.8)

The AAT therefore concluded that s.6AD(3) did not operate so as to bring any 'deemed income' from the farm into account in the calculation of Davey's pension.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary to recalculate Davey's pension without regard to any deemed income from the farm.

Recovery of overpayment

ATKINSON and SECRETARY TO DSS (No. N86/60)

Decided: 6 August 1986 by R.A. Hayes, H.M. Pavlin and M.T. Lewis.

Stephen Atkinson had been paid unemployment benefit from 1979 to April 1984 at the married rate, having stated that he was living with his wife. In May 1983 he claimed additional benefit for a child born in 5 September 1982.

In April 1984 the DSS discovered that Atkinson's wife had been receiving unemployment benefit at the single rate from 1977 to 1983 and had been granted supporting parent's benefit in October 1983, following the birth of her first child in September 1983.

Atkinson then told the DSS that he had been separated from his wife and living with another woman who had a young child between 1977 and 1984.

Atkinson maintained that, during the whole of the period from 1979 to 1984, he had been qualified for unemployment benefit at the married rate, plus additional benefit for a dependent child, because he had been living in a *de facto* relationship.

In November 1984, the DSS decided that Atkinson had not been qualified for unemployment benefit at the married rate and calculated that he had been overpaid $3516. He asked the AAT to review that decision.

The legislation

Section 140(1) of the *Social Security Act* provides that an amount of benefit which has been paid following a false statement is a debt due to the Commonwealth.

Section 140(2) provides that where an amount of benefit has been paid which should not have been paid for any reason, the amount of the overpayment is to be deducted from any current benefit which the person is receiving.

Evidence before the Tribunal

Atkinson told the AAT that he and his wife had separated in 1976 and he had entered a *de facto* relationship which lasted until the end of 1982. Because his *de facto* wife had a young son, he had felt justified in claiming for a dependent wife and child, even though under a fictitious name.

The applicant refused to reveal the name of his former *de facto* wife, as he did not wish to destroy her privacy, although the AAT offered to prohibit publication of her name.

Atkinson's DSS file contained a report from a DSS officer, who knew Atkinson, that he and his wife had never separated.

The Tribunal said that there were three possible interpretations of the evidence before it:
(1) the applicant and his wife were at all times living together but claimed separation so that she could claim separate benefits;
(2) the applicant was at all times in a *de facto* relationship but had given a false name for the woman and child; and
(3) the applicant and his wife had separated and the *de facto* spouse and child were inventions to enable him to gain a higher rate of benefit.
The AAT said that it could not decide which of these was the correct version.

Was the overpayment claimed justified?
The applicant had claimed that there had been no overpayment. Although he had provided false information, he claimed that if the truth had been stated he would have been entitled to the benefit. The AAT rejected this argument in the interest of 'good administration':

> 'The provision of false information to obtain a benefit to which one would otherwise be entitled might be done for the most generous or benign of motives, to protect the feelings, confidentiality, or privacy of others involved with or affected by the claim. For example, one may have a handicapped child, but might not wish to have that child registered on departmental files as a person with a handicap, out of some misplaced fear of possible future misuse of the information. One might therefore supply a fictitious name for the child the subject of the application. All things being equal, there is little risk of loss to the revenue flowing from the deception. But in situations such as the one at hand, there is a real risk of loss to the revenue, because the provison of false information by the applicant concerning the indirect beneficiaries of his claim opens the door for such beneficiaries and for others, related in some way to them, to make claims in their correct names for benefits to which they are not entitled.'

(Reasons, p.10)

Application of s.140
The AAT considered that s.140 allowed the payment to be recovered. The statement in s.140 that an amount paid is recoverable if it would not have been paid but for a false statement on the part of the recipient 'implied the converse - that if the payment would still have been made had the truth been told, it is not recoverable'. However, this allowed a certain degree of uncertainty. The best that could be said was that the DSS *might* have paid the benefit at the married rate if the truth had been provided.

On any of the three possible versions as to the true state of affairs the AAT could not say the applicant would have received the benefit. In situations (1) and (3) there would have been clearly no benefit paid at the married rate. In situation (2) payment would depend on the *de facto* wife's circumstances, of which no details had been provided.

Formal decision
The Tribunal affirmed the decision under review.

PLUMSTEAD and SECRETARY TO DSS
(No. T86/6)
Decided: 13 June 1986 by R.C. Jennings, D.A. Kearney and W.M. Thompson.

Frederick Plumstead asked the AAT to review a decision of the DSS to claim an overpayment of $1048 in supporting parent's benefit. The DSS claimed that Plumstead had failed to inform the DSS that his daughter had left his custody, care and control.

The legislation
Section 74(5) of the *Social Security Act* obliges a pensioner (including a supporting parent's beneficiary) to advise the DSS when a child ceases to be in the pensioner's custody, care or control.

The facts
Plumstead had been receiving supporting parent's benefit since September 1983. In December 1984 his child was made a ward of state. Plumstead did not realise that there was no mechanism by which the State Welfare Department notified the DSS and he continued to receive supporting parent's benefit. Plumstead did make payments towards the maintenance of his daughter during the period and he claimed that the amount claimed by the DSS was excessive.

Could s.83AAA(2) apply?
Section 83AAA(2) deems a child to be in the custody, care and control of a person, if the child 'is being maintained' by the person. The AAT said the section was not applicable: the payments were too small (3 payments of $50 over 6 months) to qualify under that section.

Waiver of part of overpayment
The AAT referred to s.146(1) which gave the DSS a discretion to waive the whole or part of a debt arising under the Act.

The Tribunal decided that it was a proper exercise of this discretion to waive the part of the overpayment which equalled the maintenance paid by Plumstead for his daughter.

Formal decision
The AAT set aside the decision under review and substituted a decision that the DSS could recover from Plumstead the sum of $898.

SDROLIAS and SECRETARY TO DSS
(No. N86/124)
Decided: 11 July 1986 by A.P. Renouf, M.D. Browne and M.T. Lewis.

Katina Sdrolias asked the AAT to review a decision by the DSS to claim an overpayment of $830 in supplementary (rental) assistance between June 1983 and October 1984.

Sdrolias had been granted age pension in 1979 and rent assistance in March 1982. She moved into a Housing Commission flat in May 1983, lodged a change of address form, but did not inform the DSS that she was paying rent to the Housing Commission. (Rent assistance is not payable to a person renting from the Housing Commission.) In November 1984, she notified the DSS that she was renting from the Housing Commission; and in August 1985 the DSS claimed the overpayment.

The evidence
Sdrolias told the AAT that she spoke little English and that a stranger in her Housing Commission flats had helped her fill out the change of address form to the DSS. She claimed that she told this person to state on the form that the new address was a Housing Commission flat. This was not done, although Sdrolias was not aware of this omission. She was also not aware that her move meant she was no longer eligible for supplementary rent assistance.

The AAT was told that Sdrolias' pension entitlement was $104 a fortnight. She paid about $29 on rent, $60 to $70 a quarter for electricity, $90 a quarter for the telephone and $41 a week for food. She had debts totalling $1150.

Which provision - old or new s.140?
Section 30B(1) of the *Social Security Act* requires notification of a reduction in rent. Section 30B(1A) provides that, where a person in receipt of supplementary (rent) allowance commences to pay Government rent, the person must notify the DSS within 14 days.

The current overpayment recovery provisions, ss.140(1), 140(2) and 146, are set out in *Raven* in this issue of the *Reporter*. But the AAT first considered whether the old s.140 applied to this case.

The AAT referred to *Costello* (1979) 2 ALD 934 and the principles for determining the applicable law. Counsel for Sdrolias argued that, as the application concerned an 'accrued liability', the earlier law should prevail.

The AAT concluded that the new law should be applied. The Tribunal said that it was not competent to determine whether Sdrolias had an ac-

crued liability. As was said in *Taylor* (1984) 21 *SSR* 238 -

> 'In raising an overpayment, an officer of the Department and, in reviewing this decision, this Tribunal, must keep in mind that the step of raising the overpayment does not affect legal rights and liabilities. It is only a court of competent jurisdiction which can do that.'

(quoted in Reasons, para.30).

The changes to the Act had also not disadvantaged Sdrolias. If anything, the AAT said, her position had been enhanced because the Secretary now had a discretion s146 to write off debts.

Compliance with s.30B(1)?

The AAT concluded on the evidence that Sdrolias had not complied with s.30B(1) by notifying the DSS of the reduction in her rent. She had not taken sufficient care when having someone else fill out the form.

This failure had been a contributory cause of the overpayment and a debt to the Commonwealth had been created. Under s.140(2) this amount had to be deducted from her pension, unless the Secretary took action under s.146.

The AAT then considered whether the decision to recover the amount by deductions of $10 per fortnight under s.146 was the best decision in line with the principles in *Buhagiar*, (1981) 4 *SSR* 34, *Gee* (1982) 5 *SSR* 49, and *Taylor* (above).

These decisions indicated that all the circumstances of the case have to be considered - fairness, financial hardship, the circumstances of the overpayment (innocent mistake, fraud, administrative error) and compassionate factors.

In this case relevant factors were: the failure of the DSS to review the change of address form as well as the failure by the applicant to comply with s.30B(1); the failure of the form to ask about Government rent; the delay before the overpayment was claimed;, the age, debts and income of Sdrolias; Sdrolias' good faith; her lack of English which hade her dependent on other people when communicating with the DSS; and the effect on Sdrolias of being advised that she owed $830 to the Commonwealth.

The AAT concluded that the discretion under s.146(1) should have been more lenient towards Sdrolias and that a fairer decision would have been to recover by deductions of $5 per fortnight.

Formal decision

The AAT set aside the decision under review and directed that the sum of $830 should be recovered by deductions from the applicant's pension of $5 per fortnight.

BOJCZUK and SECRETARY TO DSS (No. V86/18)

Decided: 1 August 1986 by R. Balmford, G. Brewer and L. Rodopoulos.

Anna Bojczuk was granted a widow's pension in January 1977 and an age pension in 1983.

On 30 December 1985, the DSS claimed an overpayment of $17 645, which it proposed to recover by deduction from her pension under s.140(2) of the Act. The DSS claimed that Bojczuk had failed to notify it of superannuation paid to her since the commencement of her pension, and thus had failed to comply with ss.74(1) and 138(1) of the Act. Bojczuk asked the AAT to review that decision.

Bojczuk told the AAT that she had thought the superannuation was a repayment of money 'banked' by her late husband; and so she had not mentioned these payments on her application form in 1977. In 1979 she had declared the income on an entitlement review form although, in error, she had understated its level. However, it was only in 1984 that the DSS followed up this information. In the meantime, it had continued to pay her the full amount of pension.

Compliance with ss.74(1) and 138(1)

The AAT considered that since 1979 Bojczuk had complied with the requirement in ss.74(1) and 138(1) that she advise the DSS of any source of income; and the DSS should have been aware of her superannuation income fromthat date. 'Normal administrative practice' would have required Bojczuk's entitlement to be investigated:

> 'It is of little use to send out entitlement review forms if, when completed and returned by the pensioner, those forms are not read and not acted upon.'

(Reasons, para.15)

It followed that the overpayments from 1979 on were not a 'debt due to the Commonwealth' within s.140(1). But, because they had been made 'for any reason', they were recoverable under s.140(2) by deductions from Bojczuk's current pension.

However, the DSS conceded that, because it had failed to act on Bojczuk's 1979 notification, it would be appropriate to waive recovery of that part (the majority) of the overpayment, as permitted under s.146(1). The AAT said that, if the DSS had not made this concession, the AAT would have exercised the s.146(1) discretion.

Overpayment between 1977 and 1979

Turning to the overpayment between 1977 and 1979 (an amount of about $6000), the AAT noted that s.146(2) fixed a 6-year limitation period for bringing legal proceedings to recover a

debt due to the Commonwealth under s.140(1) of the *Social Security Act*. Section 146(3) provided that this 6-year period was to run from the date when a DSS became aware of a pensioner's false statement or failure to comply with the Act.

The AAT said that it did not know when a DSS officer first became aware that Bojczuk had initially (in 1977) failed to report her superannuation income; but officers of the DSS 'should have become aware of the true facts in December 1979' (when Bojzcuk notified the DSS of her superannuation income); implying that the earlier overpayment was no longer recoiverable under s.140(1):

> 'In this context, the respondent's officers cannot rely on their failure to read documents in order to extend the time within which moneys are to be recovered.'

(Reasons, para.19)

The AAT then noted that the 6-year limitation period did not affect recovery by deductions under s.140(2). But the s.146(1) discretion to waive recovery should be used so as to ensure that an overpayment which was not recoverable under s.140(1) would not be recovered under s.140(2): *Buhagiar* (1981) 4 *SSR* 34.

The Tribunal noted that, despite the fact that Bojczuk had lodged her appeal to the AAT on 16 January 1986, the DSS had withheld all of her pension from 23 January 1986, in implementation of the recovery decision. The AAT said:

> 'We trust that it will not be necessary in future for every applicant to this Tribunal who seeks review of a decision to recover overpayments under s.140(2) of the Act to apply formally for a stay of deductions pending review.'

(Reasons, para.21)

The AAT concluded that further recovery of the overpayment should be waived - because Bojczuk had repaid $1043, because recovery under s.140(1) would not have been available, because Bojczuk's sole income was now the su-

perannuation payment of $120 per week after tax, her house was not fully paid for and she had savings of $2000.

Formal decision
The AAT set aside the decision under review and recommended that no further action be taken for the recovery of any amount overpaid.

RAVEN and SECRETARY TO DSS (No. V85/273)
Decided: 15 May 1986 by H.E. Hallowes.

Margaret Raven had been granted a widow's pension in May 1986. She had completed various entitlement review forms between 1979 and 1982, indicating on these forms that she had no other source of income and was divorced.

On 14 November 1984 the DSS claimed an overpayment of $22 663 for the period from April 1976 to February 1982, on the ground that she had been living with a man as his wife on a *bona fide* domestic basis and so did not fall within the definition of 'widow' in s.59(1) of the Act. She asked the AAT to review this decision.

A recoverable overpayment
The AAT decided, on the evidence before it, that Chapman had been living with a man as his wife during the relevant period. She had thus failed to comply with s.74(5) of the Act which required her to notify the Department of a change in her status, and the amount paid to her was recoverable as a 'debt due to the Commonwealth' under s.140(1) of the *Social Security Act*.

Should the overpayment be recovered?
The DSS had entered into an agreement with to recover the amount of $10 per month. Raven was no longer receiving a pension and so s.140(2) (allowing recovery by deductions from a current pension) could not apply.

The AAT did not consider there was any reason to exercise the discretion to waive recovery of all or part of the debt under s.146(1)(b) or (c) of the Act. The applicant had supplied false information and, although the Tribunal felt compassion for her ill fortune in health, 'the fact that she has received public moneys to which she is not entitled must be the paramount consideration': Reasons, p.15.

The limitations period in s.146
The AAT commented on the effect of the limitation period in s.146.

Section 146(2) provides that, subject to sub-s.(3), proceedings for recovery of any amount payable by a person to the Commonwealth under the Act 'shall not be commenced after the end of the period of 6 years commencing on the day on which that amount became payable'.

Section 146(3) provides that the 6-year limitation period for recovery of any amount payable by a person to the Commonwealth under the Act because of the person's false statement or failure to comply with the Act commences 'on the day on which an officer becomes aware that the statement or representation was false or that the person has not complied with that provision as the case may be.'

The AAT said that these provisions

> 'have now provided a period of limitations in respect of proceedings for the recovery of any amount payable. Proceedings shall not commence after the end of the period of 6 years commencing on the day on which the amount became payable. Should the [DSS] wish to vary [the decision to recover the overpayment at the rate of $10 per month], s.146(3) provides that proceedings for the recovery of the amount may be commenced at a time within the period of 6 years commencing on the day on which an officer became aware that a statement or representation was false, or that the person had not complied with the provisions of the Act . . .
>
> Sub-section 146(2) provides that, subject to sub-section (3), proceedings for recovery of any amount payable as a result of the Act shall not be commenced after the end of 6 years commencing the day on which the amount became available. *The period over which an overpayment has been made is not relevant to the question as to whether the overpayment be waived. It may be relevant to the decision as to the means by which recovery of the debt due to the Commonwealth should be sought.* Sub-sections 146(2) and (3) do not extinguish the cause of action, but affect only the period within which it may be brought.

(Reasons, pp.16-17; our emphasis)

Formal decision
The AAT affirmed the decision under review.

Sickness benefit: back-payment

BAATS and SECRETARY TO DSS (No. V85/449)
Decided: 8 August 1986 by J.R. Dwyer, E. Coates, and D.M. Sutherland.

In December 1984, Wilhelmus Baats successfully applied for sickness benefit. In January 1985 he applied for invalid pension which the DSS granted and, eventually, decided to backdate to December 1984.

However, the DSS refused to backdate payment of the invalid pension to 1980, a date when Baats claimed that he had lodged an earlier application. Baats asked the AAT to review that refusal.

The earlier claim
Baats told the AAT that he had attempted to claim an invalid pension or sickness benefits (he was not sure which) during 1980; but that the DSS had told him that, because he had recently recovered worker's compensation, he was not eligible to make the claim.

After hearing evidence from DSS officers, the AAT decided that Baats had not lodged a written claim for either invalid pension or sickness benefits before the end of 1984 but that he had made enquiries at a DSS office in early 1981 about his eligibility for invalid pension or sickness benefit and that he had been incorrectly told by a DSS officer that he would not be eligible.

The legislation
At the time of the decision under review, s.39 of the *Social Security Act* provided that an invalid pension should not be paid from any date prior to the lodging of a claim.

Section 145 gave the Secretary a discretion to treat a claim lodged for one pension or benefit as a claim for another, more appropriate, pension or benefit.

From 5 September 1985, these provisions were repealed and replaced by new sections, ss.135TBA and 135TB(5), which were substantially to the same effect.

Section 119(2) provides that a sickness benefit can be paid from the date of eligibility if the claim for that benefit is lodged within 13 weeks of eligibility. If the claim is lodged after that 13 week period, the benefit is to be paid from the date of the claim unless the Secretary is satisfied that the delay 'was due to the cause of the incapacity or to some other sufficient cause', in which case the benefit is to be paid from the date of eligibility.

According to s.24, invalid pension is payable for permanent incapacity for work; and, according to s.108, sickness benefit is payable for temporary incapacity for work.

Jurisdiction
Section 15A(1) of the *Social Security Act* gives the AAT jurisdiction to review a decision of the Secretary affirming, varying or annulling an officer's decision which has been reviewed by an SSAT. In this case, the SSAT had considered backpayment of invalid pension but not of sickness benefit.