The AAT noted that there was a difference of opinion in earlier AAT decisions as to how critical it was that an SSAT have reviewed every aspect of a case brought before the AAT. A technical and restrictive view had been taken in *Guirguis* (1985) 28 *SSR* 351, where the AAT said that it did not have jurisdiction to consider a point which had not been reviewed by an SSAT. On the other hand, the AAT had taken a more flexible approach in *Hurrell* (1984) 23 *SSR* 266 and *Kay* (1986) 30 *SSR* 393.

The AAT decided that it did have jurisdiction to review the question whether Baats could be paid either invalid pension or sickness benefits for the period from 1981 to December 1984:

> 'We regard the issue which was before the SSAT and is now before this Tribunal as Baats' eligibility for arrears of assistance under the Act on the ground of his physical incapacity for work. We share the view of the Tribunal in *Hurrell* and *Kay* that it would be taking too narrow a view of this Tribunal's power to review if the Tribunal were only able to consider the points considered by the SSAT . . . It is appropriate for the Tribunal to exercise all the powers of the Secretary in considering whether the applicant should receive any pension or benefit on the ground of his incapacity for work at [27 December 1984].

(Reasons, para.16)

Backdating payment

The AAT said that, because it had decided that Baats had not lodged a written claim for invalid pension or sickness benefit before December 1984, there was no question of backdating invalid pension beyond December 1984. The former s.39 prevented that backpayment.

However, it might be that a payment of Baats' sickness benefit could be backdated beyond December 1984 if his delay in lodging claim for that benefit was due to the cause of his incapacity or to some other sufficient cause.

Baats' incapacity had resulted from an industrial injury in 1978. This injury had severely disabled him, both physically and psychologically for an extended period - that is, from late 1978 until about the middle of 1980. On that basis, the AAT concluded that Baats' failure to lodge his claim within 13 weeks of his first becoming incapacitated (in late 1978) was due to the cause of his incapacity. It followed that the discretion in s.119(3) could be exercised to backdate payment of sickness benefit to Baats beyond December 1984 to June 1981 (the date from which Baats had separated from his wife and from which he now sought payment of invalid pension or sickness benefit).

The Tribunal said that there was no doubt that Baats had been incapacitated for work during this period; the only question was whether his incapacity had been permanent (in which case he would have been qualified for invalid pension and not sickness benefit) or temporary (in which case he would have been qualified for sickness benefit and not invalid pension). The AAT referred to the Federal Court's decision in *McDonald* (1984) 18 *SSR* 188 and said that although this was a borderline case, it was satisfied that between 1981 and 1984 Baats' incapacity was temporary in the sense that it had not been established that it was likely to persist into the foreseeable future.

Turning to the question of the discretion to backdate payment of sickness benefit, the AAT said that there were several matters which indicated that this discretion should be exercised in favour of Baats: he had been given misleading advice by a DSS officer in 1981 about his eligibility for pension or benefit; his incapacity had been a significant contributing factor in his delay in lodging a claim; he had suffered considerable financial hardship since giving up work in 1978 and the end of 1984; and, if he had lodged his claim for worker's compensation 17 weeks earlier, he would have been entitled to sickness benefit from October 1978.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that Baats should be paid arrears of sickness benefit from June 1981.

Income test: annual rate of income

SLAVIK-BEHAR and SECRETARY TO DSS
(No. V85/405)
Decided: 24 July 1986 by J.R. Dwyer, G.F. Brewer and R.W. Webster.

Laura Slavik-Behar had been granted an age pension in June 1983. In October 1983 she advised the DSS that she intended to start a business and that she would notify the DSS if her income from that business exceeded 'the allowed limit'.

After the end of the 1983-84 tax year, Slavik-Behar supplied the DSS with copies of her tax returns which showed that she had a nett income from her business of $3998 for the tax year and which claimed a loss carried forward from the preceding year of $2370.

The DSS then decided that Slavik-Behar had an income, for the purposes of the *Social Security Act*, of $3998 during the 1983-84 tax year and calculated that, as at September 1984, her rate of income was $154 a fortnight.

The DSS then reduced the rate of Slavik-Behar's age pension accordingly. This decision took effect from October 1984 and remained in force until March 1985, when Slavik-Behar was granted a pension under the *Repatriation Act* 1920 and her age pension was cancelled.

Slavik-Behar asked the AAT to review the decision of the DSS, arguing that the DSS should have used her current business income, rather than her income for the 1983-84 tax year, when calculating her rate of income in September 1984. Slavik-Behar also argued that, in calculating her rate of income, the DSS should have deducted from her income the losses carried forward from the previous year and the amount of repayments which she was making on loans obtained for the business.

The legislation

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

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

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

Calculating the 'annual rate of income'

The AAT referred to the High Court decision in *Harris* (1985) 24 *SSR* 294, where the High Court had said that a person's 'annual rate of income' was

> 'the aggregate of those income payments which would be received by the pensioner during the ensuing year on the assumption that [she] retains all [her] current sources of income for the year and that they continue to yield income at the current level. The annual rate thus ascertained enures until something occurs which falsifies the assumption on which the particular annual rate was ascertained . . .'

In the present case, the AAT said, there was nothing before the DSS or before the AAT which falsified the assumption that Slavik-Behar's earnings would continue at the level revealed in her 1983-84 tax return. Accordingly, it was appropriate to calculate her pension entitlement from September 1984 onward on the assumption that her annual rate of in-

come for the 1983-84 tax year would continue.

Deducting previous losses

The AAT noted that, in a number of previous cases, it had been said that the concept of income under the *Social Security Act* was different from the concept used in income tax legislation: *Szuts* (1983) 13 *SSR* 128; *Smith* (1983) 15 *SSR* 151; *Shaeffer* (1983) 16 *SSR* 159; and *Paula* (1985) 24 *SSR* 288.

The Federal Court had left open the possibility that expenses incurred in earning an income might be deducted from later income: *Haldane-Stevenson* (1985) 24 *SSR* 296. But the Tribunal could not see any reason why losses derived in earlier years should be allowed to reduce Slavik-Behar's annual rate of income for the purpose of calculating her rate of pension. Moreover, the accumulated losses referred to in her tax return were exaggerated and included expenses of a personal, rather than business, nature.

Loan repayments

The AAT then examined Slavik-Behar's claim that her income should be reduced because of repayments she was making on a business loan. The AAT said that it was not satisfied that the loan was exclusively for business purposes, that the repayments represented interest rather than principal, and that some of the other deductions which had been allowed by the DSS were properly treated as business deductions. For these reasons, the AAT said, it was not prepared to allow repayment of the loans as a deduction from Slavik-Behar's income for the purposes of the social security income test.

Formal decision

The AAT affirmed the decision under review.

DUNNING and SECRETARY TO DSS (No. N85/155)

Decided: 30 June 1986 by J.D. Davies J, M.S. McLelland and H.C. Trinick.

Janice Dunning had been granted a widow's pension in July 1982. During most of 1984, Dunning worked on a casual basis at a motel, a licenced club and a restaurant.

In July 1984, the DSS decided, on the basis of Dunning's earnings from casual employment, that she had an annual rate of income of $3629. On the basis of those calculations, the DSS decided to reduce Dunning's rate of pension. She asked the AAT to review that decision.

The legislation

At the time of the decision under review, s.63(2) of the *Social Security Act* provided that the annual rate of a widow's pension should be reduced by reference to the widow's annual rate of income. At that time, s.74(1) obliged a widow pensioner to notify the DSS of increases in her average weekly income in any period of 8 consecutive weeks.

The 'earnings concession'

At the time of the decision under review, the DSS had adopted, as a standard procedure, the 'earnings concession', which allowed a pensioner to earn up to $1500 in any 'pension year' before applying the s.63(2) income test to the pensioner. (A 'pension year' was the period of 12 months commencing on the date of the grant of the pensioner's pension and every anniversary of that date.)

Dunning claimed that this 'earnings concession' should have been applied in her case, so that the annual rate of income used to calculate her pension would have been reduced by $1560. The AAT said that the calculation of a pensioner's annual rate of income and the application of the income test under s.63(2) did not involve any discretion although it might involve judgment or evaluation:

> 'In any particular case, there is a means of calculating the annual income which is the most appropriate in the circumstances of that case. That means, once identified, is the only correct means to adopt to calculate the income.'

(Reasons, p.6)

'Annual rate of income'

The AAT then looked at the nature of Dunning's casual employment. Because her work at the motel and restaurant could be regarded as regular work or part of her regular occupation, it was appropriate, the AAT said, for the DSS to calculate Dunning's annual rate of income by taking into account her earnings from the motel and the restaurant employment. However, the AAT said, the DSS should not have taken into account her earnings from her work at the licensed club because she had only worked there on one occasion and it was not part of her regular occupation.

The AAT noted that Dunning had a fluctuating income, because of the irregular pattern of her casual employment. The AAT said that the best way to calculate Dunning's annual rate of income was to average her income over the 8 week period immediately before the income test was applied to her. This 8 week period was, the AAT said, the period which Parliament had indicated in s.74(1) to be an appropriate period on which to base a calculation of the rate of annual income.

Using that 8 week period, the DSS should have arrived at an annual rate of income for Dunning of $4169, considerably more than the annual rate of income which it had calculated in July 1984. However, because that calculation would have only lasted for 8 weeks, the best course was for the AAT not to make a formal order in this matter but to adjourn it and reserve leave to the parties to have the matter restored to the list for hearing if they wished.

The 'earnings concession' was, the AAT said, 'inconsistent with the principles which were enunciated by Gibbs CJ, Brennan, Deane, and Dawson JJ in *Harris* (1985) 24 *SSR* 294': Reasons, p.4.

Income test: 'capital' or 'income'?

READ and SECRETARY TO DSS (No. Q85/113)

Decided: 26 June 1986 by J.D. Davies J.

Clara Read was an age pensioner who had purchased units in a property trust in April 1981. In May 1984 the investments of the property trust were revalued and, because that revaluation had shown an increase in the value of the investments, 8755 additional units were issued by the trust to Read. The DSS treated the value of those additional units as Read's income and reduced the rate of her age pension. She asked the AAT to review that decision.

Income or capital?

The question before the AAT was whether the issue of the additional units to Read was income or a capital gain. If it was capital, it would not have affected the rate of her pension in 1984 (which was before the introduction of the assets test).

Section 6(1) of the *Social Security Act* defines 'income' as meaning -

> 'personal earnings, moneys, valuable consideration or profits earned, derived or received by [a] person for the person's own use or benefit . . .'

Under the terms of the property trust deed, the trust's income was not to be distributed to unit holders but was to be transferred to the trust's capital fund. The deed also provided that the trust's investments were to be revalued once every 3 years. If this revaluation showed an increase, additional units in the trust were to be created and distributed to unit holders. If there was a loss after the revaluation, that loss was also to be distributed amongst unit holders.

The main investments of the trust were in real estate held as long-term investments; and, during the period when Read held her units, the trust received only a very small nett income.

The AAT said that, although the definition of 'income' in s.6(1) was wide, the definition was, in general, concerned with matters which amounted to income rather than capital receipts, according to the normal