property of the person to be disregarded if it cannot be sold or realised or used as security for borrowing and if severe financial hardship would occur if it were not so disregarded. Sub-section 6AD(1)(b) also gives the Secretary a discretion to disregard the application of s.6AC

But s.6AD(1) only applied to cases where the rate of pension was calculated according to the assets test. As the applicants' pension was calculated according to the income test the section could not assist them.

Formal decision
The Tribunal affirmed the decision under review.

'Deprivation of income'

FISICARO and SECRETARY TO DSS (No. N86/120)
Decided: 10 November 1986 by R. A. Hayes

The applicants had applied for age pension and wife's pension. They had been refused on the basis that they had deprived themselves of income in order to qualify for the pensions. They applied to the AAT for review of the decision.

The facts
In July 1984 the applicants transferred three rental properties to their children. They did not dispute that they did so in order to deprive themselves of income so as to qualify for a pension. They only took issue with the interpretation of the relevant provision in the *Social Security Act*.

The legislation
Section 47(1) of the Act provided until 21 September 1984:

> 'If, in the opinion of the Secretary, a claimant or a pensioner has directly or indirectly deprived himself of income in order to qualify for, or obtain, a pension, or in order to obtain a pension at a higher rate than that for which he would otherwise have been eligible, the amount of the income of which the Secretary considers the claimant or pensioner has so deprived himself shall be deemed to be income of the claimant or pensioner.'

This provision was repealed in 1984 but the amending provision provided that where under s.47 'an amount was deemed to be income of a person in respect of a deprivation of income of a person that took place before 1 June 1984, that amount shall, on and after 21 March 1985, continue to be deemed income of the person'.

The issue
The issue for the Tribunal to decide was whether the deprivation of income should be taken into account when assessing the rate of payment in the pension year of deprivation only. It was argued by the applicants that for the deprivation to have effect beyond the year in which it occurred it would have to be of a continuing nature such as a family trust.

The Tribunal saw no problem in the present case. Where a person deprived him/herself of property which produced income it would be possible to say what he/she might expect to receive in income over a number of years. While there might be some dispute as to the precise figure it was up to the secretary to make some judgment about it.

While the section was punitive in its effect it only punished those who were aware of what they were doing and knew of the risks involved. To only assess the deprived income in the pension year that the deprivation occurred would undermine the effect of s.47(1) and encourage persons to give their income producing assets to a trusted family member and after a year obtain a full pension.

Formal decision
The AAT affirmed the decision under review.

Assets test: annual rate of income

BUTLER and SECRETARY TO DSS (No. S85/94)
Decided: 8 October 1986 by R. A. Layton, J. D. Horrigan and D. B. Williams

The applicant's age pension was cancelled after the introduction of the assets test. She applied to the AAT for review of that decision.

The applicant's husband was the registered lessee of a farm property valued at $412,100. Sub-section 6(3)(a) of the *Social Security Act* provides that the property of a married person shall be 50% of the total value of their property. The DSS accepted that the hardship provisions applied to the applicant but by the operation of sub-s.6AD(3) a nil rate of pension was payable.

The legislation
Sub-section 6AD(3) provides:

> 'Where the Secretary is of the opinion that the annual rate of a pension, benefit or allowance applicable to a person under sub-section (2) should, having regard to the annual rate of income that could reasonably be expected to be derived from, or produced with the use of, property of the person or the person's spouse that is property referred to in paragraph (1)(c), be reduced, the Secretary may direct that the annual rate of pension, benefit or allowance payable to the person be reduced by such amount per annum as the Secretary determines in writing.'

The issues before the AAT were the correct interpretation of sub-s, 6AD(3) and the annual rate of income that could reasonably be expected to be derived from the use of the farm.

The background
The son of the applicant had taken over the farm and since 1981 he had received all the income from the farm. He paid $100 per week to his parents as rent. The applicant still lived on the farm with her husband. The applicant had few assets jointly owned with her husband. There was furniture valued at $2,000 and a car of the same value.

Annual rate of income: objective or subjective test?
The DSS argued that the rate of income that could reasonably be expected to be derived from the farm should be judged objectively and not subjectively. The applicant argued for a subjective interpretation that took into account her particular circumstances. The Tribunal decided on a subjective interpretation.

> '...in considering the word 'reasonably', the individual circumstances of each case must be considered. Such an interpretation is consistent with the intent of the hardship provisions contained in s.6AD in the context of the Act. The hardship provisions are aimed at giving relief to persons who would otherwise be excluded from pension benefits. It is not a section which caters for a general class of persons, but rather a section which caters for individual exceptions; discretionary elements are uppermost...'

(Reasons, para.59)
Thus all of the circumstances of the use of the property must be considered to determine the annual rate of income that could reasonably be expected to be derived from the property. Factors such as the present use of the

property, by whom and in what circumstances, the present income being derived by the pensioner from the property and how and in what circumstances that income was derived are all relevant. While the DSS may assume that the property may produce a certain rate of income, any figure arrived at as a deemed income should only be regarded as a guideline.

Was the rent 'reasonable'?
The AAT said that the amount paid by the son as rent was probably well below market rates. However, applying the principles discussed above the Tribunal concluded that $5,200 per annum was the annual income that could reasonably be expected to be derived from the property. This conclusion was reached having regard to the length of time the son had worked on the property, the financial circumstances of the applicant and her husband and the son and his wife, the relationship between those parties and the living arrangements of the families on the property.

Thus the annual rate of pension should be reduced by the amount of $2,600 pursuant to sub-s.6AD(3).

Formal decision
The AAT set aside the decision under review.

Jurisdiction: age pension backpayment

ENDERS and SECRETARY TO DSS (No. A85/30)
Decided: 27 November 1986 by E. Smith

The applicant had been refused age pension from the date of her application in June 1965 to 1976. She had also been paid the pension from 1976 at a rate which took into account restitution payments from Germany as income. She applied to an SSAT for review of those decisions. That tribunal rejected her appeal in relation to the inclusion of the restitution payments in her income for the purposes of calculating her rate of pension. It did not deal with the rejection of pension between 1965 and 1976. She then applied to the AAT for review of the decisions.

Restitution payments conceded
In the course of the hearing in the AAT the DSS conceded that the restitution payments were not income payments but capital payments consistent with the decisions of the Tribunal in *Artwinska* (1985) 24 *SSR* 287 and *Kolodziej* (1985) 26 *SSR* 315. This concession guaranteed the applicant a substantial part of the backpayment she sought.

The only issue that then remained was whether the applicant was entitled to the pension from 1965. She maintained that she had lodged an application in that year just prior to attaining the age of 60 years.

Jurisdiction
As the SSAT had not dealt with this remaining issue it had first to be determined whether the AAT had jurisdiction to decide the matter. Section 15A of the *Social Security Act* gives jurisdiction to the AAT only where the SSAT has first considered the matter or the Secretary has certified that an important principle is involved.

The Tribunal concluded that it had jurisdiction in this matter:

> '... the Social Security Appeals Tribunal had the entire matter before it and the fact that it dealt specifically with the main issue, which made further consideration unnecessary, is sufficient to meet the requirements of s.15A. It is not every aspect of every decision that must be dealt with by such a Tribunal before this Tribunal can have jurisdiction in the matter ... [The Tribunal referred to *Kay* 9 *ALD* 177 and *Baats* V85/449, unreported and continued] ... I do not think that the policy of s.15A is directed to ensuring that every aspect of a matter must have been considered by the Social Security Appeals Tribunal: I see that section as being directed to a filtering process rather than to a prohibition' (Reasons, para.9)

The factual question
Having decided that there was jurisdiction in the AAT to decide the question the AAT proceeded to consider whether the applicant had lodged an application in 1965. This involved some difficult questions of fact.

The AAT concluded that on balance the applicant made an application for pension in 1965. While there was no record of her application kept by the DSS, it being practice at that time to destroy rejected applications after three years, some reliance could be placed on the recollections of the applicant and her son and other documents form that time.

As the decision to reject her claim was based on the view that restitution payments received by her were income and that point had now been conceded by the DSS, it was concluded that she had been entitled to the pension from the date of her application in 1965.

Formal decision
The AAT set aside the decision under review and directed that the applicant was entitled to to paid pension from the first pension pay day after she attained the age of 60 years.

Overpayment: unemployment benefit

MARTIN and SECRETARY TO DSS (No. W86/69)
Decided: 10 December 1986 by R. D. Nicholson, J. G. Billings and N. Marinovich

The applicant asked the AAT to review a DSS decision to seek an overpayment of $5,660.30 in unemployment benefit.

The facts
The applicant had obtained a position as a youth worker with a welfare agency. He took the job on the understanding that when funding was obtained he would be paid. After three weeks he applied for unemployment benefit stating that funding for his position had not eventuated. In letters at the same time to the Minister of Social Security and the Western Australian Premier he complained of the lack of funding for his position and that he had had to apply for unemployment benefit even though he had a job. The applicant told the AAT that despite what he wrote he would have taken work if it had been available.

Eventually funding was obtained by the welfare agency and the applicant was paid for his work including work he performed while on unemployment benefit. It appears that the work he undertook while in receipt of unemployment benefit was on a voluntary basis, there appearing to be little prospect of funding.

Was the applicant 'unemployed'?
The DSS claimed the overpayment on the basis that the applicant had been in recepit of unemployment benefit during a period that he was not qualified under the Act. Section 107(1)(c) requires an applicant for unemployment benefit to be