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

'unemployed', capable of undertaking and willing to undertake paid work and taking reasonable steps to obtain such work. Only the first criteria was a practical issue in this case.

The question arose as to whether the backpayment for the work done by the applicant at the welfare agency was indeed that, a backpayment for employment or, as the applicant argued, a 'bonus wage'.

The Tribunal considered that the payment was in the form of remuneration for his services and so he was employed for the dates that the payment was in respect of. However, there was a period for which he was not remunerated. It was during this period that he wrote the letters which indicated a reluctance to leave the welfare agency.

The AAT did not think that the letters evidenced a preference for volunteer work that would not yield to an offer of full-time employment [see *Thomson* (1981) 2 *SSR* 12]. It merely showed a reluctance to leave the agency.

The AAT could therefore conclude that there had been an overpayment for the period for which the applicant had been 'backpayed' by the welfare agency.

Exercise of discretion

The Tribunal then discussed the exercise of the discretion contained in sections 140 and 146 of the *Social Security Act* with respect to the raising and recovery of overpayments.

Section 140(1) provides that amounts paid as a result of a failure to comply with the Act or as a consequence of a false statement or representation are debts due to the Commonwealth. Section 140(2) provides that payments under the Act that should not have been made may be deducted from the pension or benefit received by the person who received the payment. Section 146 allows the Secretary to waive the recovery of overpayments.

Relevant factors in deciding to recover

The Tribunal referred to the principles set down in *Ward* (1985) 24 *SSR* 289 with respect to the factors to be considered in exercising the discretion to recover.

The AAT noted that the overpayment was not brought about by any fraud on the part of the applicant but because of the uncertainties of funding of his job. The Tribunal also noted the financial circumstances of the applicant which were sound, that the work undertaken by the applicant was of community benefit and that financial hardship would not result to the applicant if the amount was recovered. There was no reason to delay recovery and nothing to suggest that there was no prospect of recovery.

The resultant decision was that the overpayment for the period that the applicant was remunerated by the welfare agency should not be written off in whole or in part.

Formal decision

The AAT set aside the decision under review and substituted a decision that only overpayment for the period for which the applicant was subsequently paid by the welfare agency should be recovered.

Wife's pension

DEL ROSARIO and SECRETARY TO DSS
(No. W86/10)

Decided: 5 December 1986 by R. Balmford

The applicant and his wife had been resident in Australia for over 30 years. In May 1984 the applicant's wife returned to Italy to care for her ill mother. She returned in August 1985. The applicant had been in receipt of sickness benefit since October 1984 to December 1984 when he was granted an invalid pension. His wife was granted a wife's pension when she applied upon her return in 1985. Her claim for a wife's pension for the period December 1984 to August 1985 was rejected and she applied to the AAT for review of that decision.

The legislation

Section 31(1) of the *Social Security Act* reads:

> ... a woman ... who is the wife of -
> (a) an age pensioner or an invalid pensioner ...
> (b) ... and who is residing in, and is physically present in, Australia on the date on which she lodges a claim for pension is qualified to receive a wife's pension.

Physical presence

As the applicant's wife was not physically present in Australia when he became a pensioner she could not receive a wife's pension. As a result the amount of money that the family received was reduced as he had previously been paid at the rate for a married person with a dependent spouse.

Who is the applicant?

The AAT decided the preliminary issue first of who the applicant should be in the case. As the applicant's wife did not lodge an application for wife's pension during the period in question (as she was overseas and therefore not qualified) when the SSAT reviewed the original decision before her return in June 1985 they did not have before them any application from the wife for the pension.

The AAT thus took the view that the only way in which it could properly review the matter was if it was an application of review of a decision to grant Mrs del Rosario a wife's pension. But as that had not been considered by an SSAT the AAT had no jurisdiction to review it having regard to s.15A of the Act. However, the AAT held that even if it had jurisdiction there was no power to backdate the pension given the strict requirements of s.31.

Claim for an alternative benefit?

The applicant argued that if his claim was treated as an application for sickness benefit then he would be entitled to a payment in respect of his wife as a dependent.

The relevant provision at the time the applicant made his claim for invalid pension was s.145. That section provided that where a person made a claim for a pension, allowance or benefit 'and the circumstances are such that the claim might properly have been made ... under some other provision of [the] Act' then it may be treated as a claim for the payment which is the most appropriate.

Without deciding whether that section still conferred any rights on the applicant subsequent to its repeal the AAT determined that it did not assist the applicant. Sickness benefit and invalid pension were not 'interchangeable' but were mutually exclusive. Having a permanent incapacity one could not claim for sickness benefit which required a temporary incapacity. It could not therefore be said that the claim for invalid pension 'might properly have been made ... under some other provision of [the] Act'.

Could s.135TB(5) assist the applicant?

Section 135TB(5) replaced s.145 of the Act in September 1985. That sub-section allows a claim for a pension, benefit or allowance to be treated as a claim for a similar pension, benefit or allowance where the Secretary 'considers it reasonable' that the claim should be so treated.

But that section was of no avail to the applicant. As the opening words used the present tense 'where a claim is made', the AAT concluded that it was intended to apply only to claims made after its commencement. There was nothing in the provision to rebut the common law presumption against the retrospective operation legislation. As the applicant's claim was lodged prior to its commencement it could not determine the applicant's case.

Formal decision

The AAT affirmed the decision under review.