cancel the age pension of the applicant after the introduction of the assets test.

In deciding the appropriate annual rate of income that could reasonably be expected to be derived from the farm which was managed by her son the AAT said:

> 'The question which the Tribunal must determine is the extent to which it is reasonable that the community should support [the applicant] so that her son...is able to continue and expand his farming enterprise while paying only a minimal rent for her property.'

(Reasons, para.25)

MARCUS & MARCUS and SECRETARY TO DSS
(No. S86/91)
Decided: 4 February 1987 by R.A.Layton

The AAT *set aside* a DSS decision to reduce the age pensions of the applicants after the application of the assets test. The AAT decided that for the purposes of s.6AD(3) of the Act it was necessary to consider the financial user of the property in question, not just the finances relevant to the property in determining the annual rate of income that could be derived from the property. In the present case, although the applicants derived from the property a higher sum in the past year than normally, this was unlikely to persist in the future. The Tribunal considered that the usual income received from the property should be taken to be the deemed income for the purposes of s.6AD(3).

COPPING & COPPING and SECRETARY TO DSS
(No. S86/124)
Decided: 4 February 1987 by R.A. Layton

The AAT *set aside* a DSS decision to cancel the applicant's age and invalid pensions after the application of the assets test. The Tribunal found that a sum of $9,000 paid by the applicants to their son was a repayment of moneys paid by him to meet their costs after the cancellation of their pensions. It was thus not a 'disposal of property' for the purposes of s.6AC of the *Social Security Act*.

As to whether the applicants suffered 'severe financial hardship' under s.6AD of the Act, the Tribunal noted that the DSS guideline which stated that a pensioner with more than $10,000 will not be considered to be in hardship was only a guideline. Each case had to be considered on its facts. In this case the applicants had $11,291 but debts existed which would reduce this amount below $10,000. The AAT said:

> '...although at the time of the hearing the applicants' available liquid assets amounted to $11,291, the excess above the $10,000 guideline is minimal. the applicants also have no other source of income to provide for normal day-to-day expenses such as the payment of various necessary acounts for insurance, telephone and electricity charges, together with the payment of medical bills in excess of the reimbursement from Medicare. The applicants also said that in order to economise they will have to give up membership of some clubs. On this basis, I consider that the applicants are in circumstances of "severe financial hardship"...'

(Reasons, para.38)

Finally, the AAT considered whether the applicants could reasonably be expected to derive any income from their interest in the farm property which was managed by their son. The son was 'struggling to survive in a slumping rural economy'. To find that he should pay rent to the applicants would be an unrealistic financial burden at this time. Thus under s.6AD(3) of the Act the Tribunal concluded that the annual rate of income which could reasonably be derived from the use of the property was nil.

LAWLESS and SECRETARY TO DSS
(No. V86/25)
Decided: 13 February 1987 by J.R. Dwyer

The applicant asked the AAT to review a DSS decision to cancel her age pension after the introduction of the assets test. Mrs Lawless owned a farm which was run by her two sons. Her sons paid her mortgage, rates and living expenses. Although the Department conceded that the applicant satisfied the hardship provisions in s.6AD of the Act, it took the view that the payments made by her sons should be regarded as 'income' thus reducing her pension in accordance with s.6AD(2), or, that if those payments were not income that there should be a deemed income under s.6AD(3) of 2.5% of the value of the property.

Income

The AAT did not finally conclude whether the mortgage payments made by the applicant's sons were income. Even if they were not, they would be relevant in assessing the amount of deemed income. The rates they paid in respect of her house were in the same position as the mortgage repayments. As to the rates for the farm property the DSS conceded that this could not be regarded as income of the applicant as the primary obligation to pay these rested on her sons as they were in occupation of the property. This obligation was stipulated in s.267 of the *Local Government Act* 1958 (Vic.).

Deemed income

The Tribunal referred to *Butler* (1987) 36 *SSR* 458. Since that decision it was generally accepted that it was inappropriate to adopt as the deemed income a fixed percentage of the value of the property disregarded under s.6AC(1)(c). When the AAT considered all the circumstances of the case it found that the deemed income should be the value of the mortgage and rate payments paid by the applicant's sons. This was arrived at after taking into account the means and ability of the sons to pay the applicant rent, the circumstances in which the sons farmed the property and the current rental value of the farm. However, in this matter there was little evidence as to this latter item.

Formal decision

The AAT set aside the decision under review and directed that the applicant be paid the age pension and that the annual rate of pension be reduced by the amount of the mortgage and rate payments paid by her sons.

MORAN and SECRETARY TO DSS
(No. N85/616)
Decided: 19 February 1987 by B.J. McMahon, M.S. McLelland and G.P. Nicholls

The applicant asked the AAT to review a DSS decision to reduce her age pension after the assessment of her annual rate of income. This assessment treated the whole of her $80.00 maintenance payments over a particular period as income even though there was a $20.00 arrears component. This resulted in her loss of fringe benefits.

The Tribunal referred to the High Court decision in *Harris* (1985) 24 *SSR* 294 and the importance of taking into account the circumstances of the case to determine a fair method of ascertaining the current rate of income. It seemed absurd, as the DSS had done in the present case, to regard the payments as continuing over a longer period than the Family Court order had directed.

> 'In the present circumstances we consider that the appropriate common sense way of calculating the applicant's annual rate of income, looked at with the benefit of hindsight and in a way that is not inconsistent with the principles laid down by the majority in *Harris*, is to regard the annual rate of income of the applicant as that sum arrived at by calculating her maintenance at the rate of $60.00 per week from 8 March 1985. The additional payment between 26 June 1985 and August 1986 (when the arrears cut out) should be

spread out and averaged out over the whole period as their Honours in *Harris* thought appropriate in certain cases.'

(Reasons, pp.16-17)

Formal decision

The AAT set aside the decision under review and directed that the applicant's age pension be recalculated in a manner consistent with the above reasons.

NOBLE & NOBLE and SECRETARY TO DSS (No.S86/89)

Decided: 5 March 1987 by R.A. Layton

The applicants asked the AAT to review a DSS decision to cancel their age pension after the introduction of the assets test. The applicants argued that the financial hardship provisions should be applied to their case.

The legislation

Section 6AC of the *Social Security Act* provides that where a person disposes of property valued over $4,000 in a pension year then the value of the property in excess of that figure shall be included in the value of the property of the person.

Section 6AD(1) provides that the value of a person's property is to be disregarded if the property in question cannot be sold or realised or used as security for borrowing (or if it would be unreasonable to expect the property to be sold or realised or used as security for borrowing) and if the Secretary is satisfied that the person would suffer severe financial hardship if the property were taken into account for the purpose of the assets test.

Section 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'.

The facts

The applicants owned a number of farming properties. Since 1984 the applicants' son had run the property with his wife, although for some years he had run the property in partnership with the applicants. When the applicants' pension was cancelled their son paid them an amount of $1,000 per quarter in 'wages'. In June 1986 this payment ceased as it could no longer be afforded. Apart from these payments the applicants received $75 per fortnight in war service disability pension.

When the partnership between the applicants and their son was dissolved the applicants transferred their capital accounts (that is, their share of accumulated profits) to the new partnership between their son and his wife. They also did not receive wheat and barley dividends available to them in 1985 and 1986, preferring those amounts to be paid to their son to reduce an overdraft.

The income of the applicants

The Tribunal decided that the payments of $1,000 per quarter were income for the purposes of the Act. Had they been paid directly from the son to the applicants they may have come within the exception in s.6(1)(u) of the Act which provides that payments by way of gifts from parents, sons and daughters and siblings are not income.

Disposal of property

As to whether they disposed of property within the meaning of s.6AC when they wrote off their capital accounts the Tribunal decided that their conduct fell within the exception to s.6AC(10). That exception covers a course of conduct by which the applicants ceased to engage in the business of farming. Thus this property was not to be included in their assets for the purposes of the assets test. However, the disposal of the wheat and barley dividends did not constitute a disposal of income for the purposes of s.6AC of the Act and did have to be taken into calculation for determining their rate of pension.

Severe financial hardship

In determining whether the financial hardship provisions should be applied to the applicants, the AAT also had to consider whether there was any income that the applicants could reasonably be expected to derive from the use of the farm property.

The property was valued at $375,000. The value of the mortgages over the property was $130,000. The applicants' home and curtilage was valued at $50,000. Other assets (life assurance, bank accounts, motot car and personal effects) totalled approximately $10,000.

The Tribunal referred to the decision in *Butler* (1987) 36 *SSR* 458 where the AAT had said that in deciding the annual rate of income that could reasonably be expected to be derived from the property it was necessary to look to the subjective circumstances of the owner of the property. The present use of the property, by whom and in what circumstances, what income is being presently derived from the property by the pensioner and in what circumstances that amount of income was arrived at must all be taken into account, according to that decision.

Turning to the present case, the AAT decided that the financial circumstances of the appplicant's son were such that he could not pay any amount to the applicants for the use of their properties. It was not suggested that the son had arranged his financial affairs in order to make payment to the applicants impossible. In deciding that there was an amount which the applicants could reasonably be expected to produce from the use of their farm properties the AAT also gave effect to the principle expressed in *Williamson and Repatriation Commission* (1986) 5 *AAR* 41 that in administering the assets test it should be borne in mind that it would be generally unreasonable to require the sale of viable farms that may support one generation in order to meet the older generation's need for support.

> 'It is of no overall benefit to Australia to discourage the concern which families have in maintaining and working farm properties and in passing those properties from generation to generation.'

(cited in Reasons, para.31)

Formal decision

The AAT set aside the decision under review and remitted the matter for recalculation in accordance with the above reasons.

Overpayment

PIPINIAS and SECRETARY TO DSS (No. S86/63)

Decided: 6 March 1987 by J.A. Kiosoglous, J.T.B. Linn and D.B. Travers

The AAT *affirmed* a DSS decision to recover an overpayment of $407.22 in unemployment benefit. During the relevant period the applicant had been in Hong Kong negotiating the purchase of video tapes and motor cars for resale in Australia.

Under s.140(1) of the *Social Security Act* no overpayment can be raised unless there has been a failure or omission to comply with any provision of the Act and there has been a payment of benefit which would not have occurred but for the failure or omission.

Section 130A provided that a beneficiary who commenced to carry on a profession, trade or business must immediately notify the DSS. The Tribunal accepted the DSS argument that the applicant had gone to Hong Kong 'with the express purpose of commencing a business venture in the nature of importing goods for resale'. The applicant had not notified the DSS of this and as a result continued to receive unemployment benefit. The AAT accepted that had the Department been notified of the applicant's business venture then it would also have discovered that the applicant would be out of the country for two weeks. Being out of the country the applicant could not satisfy the criteria in s.107 of the Act of being 'capable' or 'willing' to undertake suitable paid work. He could not accept any employment offered to him in Australia while he was overseas.