Having regard to the facts in the case, the AAT found that the business venture appeared to be one undertaken by three people who would immediately leave it if suitable paid work came along. His involvement did not prevent him from seeking paid work, and as another partner had done before, if suitable work presented itself the applicant would have in all likelihood left the business.

In those circumstances the Tribunal concluded that the applicant was unemployed at the relevant time. He thus satisfied all the criteria in s.107 and was qualified to receive unemployment benefit.

Formal decision
The AAT set aside the decision under review.

HOANG AND SECRETARY TO DSS (No. V86/557)
Decided: 5 May 1987 by J.R. Dwyer, L. Cohn and D.M. Sutherland.

The applicant sought review of a DSS decision to recover an overpayment of unemployment benefit. The basis of the decision was that the applicant was not 'unemployed' during the relevant period as he was self employed as a piece worker. He was thus not eligible to receive unemployment benefit at that time.

The applicant had also registered his name as a business name. This was taken by the DSS as evidence of his self employment. The overpayment was calculated from 28 August 1985, the date of registration of the business name. The applicant stated that he did not receive any payment from the company for which he was doing the piece work until 6 November 1985.

The applicant conceded the overpayment from 15 October 1985 when he stated that he first began work from home for the fashion companies that gave him the piece work. But there was no evidence as to the amounts he received from the companies or the periods during which he did work for them.

The AAT was not convinced that the applicant had made real efforts to obtain work between August and October. He also invested a considerable amount of money in the business he operated from home in that period. He deposited a large amount of money in his bank account in December, which averaged out to $770 per week for the 11 weeks since he began the business. The AAT commented that this suggested that he acquired considerable expertise in a short space of time.

This did not necessarily lead to the conclusion that the applicant had been self employed from the date of registration of the business name in August. The Tribunal commented:

> '...we are of the view that the mere registration of a business name does not establish that Mr Hoang had commenced to carry on a business on his own account. Some more evidence would be required before such a finding could be made. Mr Hoang was helpful in providing documentary evidence of his purchase of the sewing machines which clarified the ambiguities in his own evidence. The Secretary did not provide any evidence that Mr Hoang was engaged in any work for which he expected to receive payment prior to 15 October 1985. The fact that the first of the two sewing machines was not delivered until 10 October 1985 means that until that date Mr Hoang had only the overlocker on which to earn money by piece work. The evidence as to whether Mr Hoang's efforts to find suitable work during the period 28 August 1985 to 15 October 1985 was not very strong but we are satisfied that until Mr Hoang started his piece work business he was making efforts to find paid employment.'
> (Reasons, para.18)

Formal decision
The AAT set aside the decision under review and remitted the matter for reconsideration after finding that the applicant was eligible for unemployment benefits between 28 August 1985 and 15 October 1985, that from 15 October he was self employed and not eligible for that benefit and that as a consequence an overpayment occurred from that date.

Overpayment: notification of income

NUNN and SECRETARY TO DSS (No. S86/140)
Decided: 6 March 1987 by J.A. Kiosoglous and D.B. Williams

The applicant asked the AAT to review a DSS decision to recover approximately $5,000 in overpaid age pension. The central issue was whether the applicant had given adequate notification to the Department as to income she was receving from the estate of her late husband.

The legislation
Section 45(1) of the *Social Security Act* provided:

> 'Where the average weekly rate of the income received in any period of 8 consecutive weeks by a pensioner who-
> (a) is not married...
> ...
> is higher than $30 per week and is higher than the average weekly rate of the income last specified by him in a claim, statement or notification under this Part, the pensioner shall, within 14 days after the expiration of that period, notify the Department of the amount of the income received by him in that period.'

The facts
The applicant had been in receipt of age pension since July 1983 following the death of her husband. She had notified the DSS of income she received from savings accounts and gas and electricity bonds. In October she received the first payments from her late husband's estate. Her husband's will had specified that the residue of his estate was to be held by a trustee company to pay the net annual income to the applicant for her life.

Upon receipt of this payment the applicant contacted the DSS and told them that she had received money from her husband's estate. She was advised that the Department was not interested in the payment, but only in what that money earned. The applicant's daughter also gave evidence that she had inquired as to whether the receipt of money from the estate affected her mother's pension entitlement but was told that the Department was not interested in the estate money.

The DSS only discovered that the money being received by the applicant was income for the purposes of the Act in December 1984. An Entitlement Review Form prepared by the trustees of the estate and lodged at that time expressly stated that the applicant was receiving income from a life interest. The Department then raised the overpayment.

Was there sufficient notification?
The Tribunal assumed that the DSS had misunderstood the nature of the money received by the applicant when the inquiries had been made by the applicant and her daughter. It was probably thought that they were referring to a capital sum and not income. The question then became one of whether the applicant had given sufficient notification for the purposes of s.45(1) of the Act. While the applicant argued that it was the responsibility of the DSS to investigate the matter further after the applicant had contacted it, the DSS contended that s.45 requires more specific notification.

The Tribunal set down some broad guidelines for dealing with cases such as this:

> 'The question in this type of case

is one of degree to be decided with reference to the circumstances of the claimant. To give a simple example, a retired accountant or lawyer may be expected to provide more precise information under s.45 than a person unfamiliar with accounting/legal concepts such as 'capital' and 'income'. To this extent, absloute objectivity in relation to notification would not be insisted upon; there would be a certain elasticity in the concept correlative to what may be reasonably expected from the particular applicant in question. However, a minimum standard in information-providing must be imposed upon all pension recipients; that is, the information provided should allow a diligent Departmental officer a reasonable opportunity to discover that 'income' may be involved. Nor must the information be inaccurate in any material particular. Moreover, if the applicant withholds any information which he knows, or should know (given personal characteristics such as age, experience, education) will affect the determination of the officer, then sufficient notification has not been given.

(Reasons, para.13)

Turning to the applicant the Tribunal found an elderly lady unfamiliar with legal concepts. Had she been asked by the Department there was no doubt that she would have supplied the information that would have enabled the money to be identified as income. The DSS mistake as to the nature of the money was not induced by the applicant. It was the Department that had the responsibility of inquiring to ascertain from the applicant the true nature of the money. To expect the Department to do so was not placing it under an unreasonable duty; being made aware of the existence of the estate it might be expected that inquiries would be made to establish whether its value exceeded the assets test.

As the applicant had not withheld information that she knew or should have known to be relevant there had been sufficient notification under s.45(1). Accordingly, there was no failure to comply with a provision of the Act which is a precondition to raising an overpayment under s.140.

Exercise of discretion

Even if there had not been sufficient notification the Tribunal considered that there existed sufficient basis to exercise the discretion in s.146 to waive recovery. This was because the overpayment had arisen principally as a result of the failure of DSS officers to check the nature of the money received by the applicant.

Formal decision

The AAT set aside the decision under review and substituted a finding that there was no failure to comply with s.45 of the Act and therefore no overpayment recoverable.

Recovery from compensation

Re RILEY and SECRETARY TO DSS (No.T85/70)
Decided: 8 May 1987 by R.C. Jennings.

Noel Riley had suffered a heart attack at work in October 1981.

He was paid sickness benefits by the DSS between December 1981 and December 1984 - a total of $14 471. In November 1984, Riley was awarded $42 794 in workers' compensation, on the basis that his heart attack had totally incapacitated him for work.

The DSS then granted Riley an invalid pension retrospective to September 1983, so that the amount of sickness benefit paid to the applicant was reduced to $8681. The DSS then decided that Riley should repay that amount from his compensation award. Riley asked the AAT to review that decision.

The legislation

At the time of the DSS decision, s.115D of the *Social Security Act* provided that, where the Secretary to the DSS is of the opinion that an award received by a person is a payment of compensation for the same incapacity for which the person received sickness benefit, the Secretary may direct that person to repay to the Commonwealth the amount of sickness benefit.

Section 108 provided that a person was qualified to receive sickness benefit where the person met age and residence requirements and satisfied the Secretary that he or she 'was incapacitated for work by reason of sickness or accident (being an incapacity of a temporary nature) . . .'

Not qualified for sickness benefit

The AAT said that DSS's right to recover sickness benefit payments from a compensation award was dependent on two factors. First, the recipient of those payments had to be a person who was qualified to receive sickness benefit. Secondly, the workers' compensation payment to the recipient had to be a payment for the same incapacity for which the recipient had been qualified to receive sickness benefits - that is, 'an incapacity of a temporary nature'.

The medical evidence on which the DSS had relied in paying sickness benefits to Riley over three years was not before the Tribunal. But there was evidence in the workers' compensation decision to the effect that Riley had been permanently incapacitated for work from the time of his heart attack.

The AAT said it was clear that, at some time during the period when the DSS was paying Riley sickness benefit, the DSS knew or ought to have known that Riley's incapacity was not temporary. Accordingly, the AAT said, it appeared that 'the greater part, if not all, of the sickness benefits paid to the applicant were not payments which he was qualified to receive because his incapacity was not temporary':Reasons, p.12. Therefore, they were not payments which the DSS was entitled to recover out of the workers' compensation award.

Formal decision

The Tribunal set aside the respondent's recovery decision and remitted the matter to the respondent with a direction that it consider whether Riley was ever qualified to receive sickness benefits and to calculate the amount of sickness benefits paid during the period when Riley was qualified. Recovery should be limited to that amount.

KALOUDIS and SECRETARY TO DSS (No.V86/599)
Decided: 2 June 1987 by H.E. Hallowes, L.S. Rodopoulos and R.W. Webster.

The DSS had granted Kaloudis sickness benefit in November 1982 following his injury in a motor vehicle accident. In February 1985, Kaloudis settled his damages claim for injuries suffered in the accident for $62 500.

The DSS then recovered $19 441 from the third party insurer, under s.115D(d) of the *Social Security Act*. This was the amount of sickness benefit paid to Kaloudis up to the settlement date.

In May 1985, Kaloudis claimed and was granted an invalid pension. In December 1985, the DSS decided to backdate Kaloudis' invalid pension to May 1984. A refund of $6758 was paid to Kaloudis, representing sickness benefit payments for the period from May 1984 to February 1985 and which the respondent had recovered from the insurer. Kaloudis asked the AAT to review the DSS decision to retain the balance of the money recovered from the insurer ($12 633).

Sickness benefit or invalid pension?

Kaloudis argued that he should have