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

been paid invalid pension, rather than sickness benefit, for the whole of the period in question. Section 135TB(5) of the *Social Security Act* allows the Secretary to treat a claim for a pension, allowance, benefit or other payment under the Act as if it were a claim for another pension, allowance or benefit under the Act where 'the Secretary considers it reasonable'.

As the *Social Security Act* stood at the relevant time (prior to 1 May 1987), the only payments which the DSS could recover from a damages settlement were sickness benefit payments: s.115D.

According to s.108(1) of the *Social Security Act*, sickness benefit is payable to a person who is temporarily incapacitated for work by reason of sickness or accident and has suffered a loss of income. According to s.24, invalid pension is payable to a person who is permanently incapacitated for work.

Kaloudis' medical practitioner, told the AAT that he believed that K had been permanently incapacitated for work from May 1982 to May 1984. The doctor explained that he had supported Kaloudis' regular applications for grant and continuation of sickness benefit, by certifying that Kaloudis was temporarily incapacitated for work in an attempt to help Kaloudis' very slight prospects of rehabilitation.

However, the AAT noted that, at the time when the DSS had granted sickness benefit to Kaloudis, there had been ample evidence that Kaloudis was temporarily incapacitated for work and suffering a loss of income. This evidence included medical certificates signed by Kaloudis' doctor early in 1983.

Consequently, the AAT said, the DSS decision that Kaloudis had been qualified for sickness benefit, not invalid pension, prior to May 1984 had been correct; and his claim for sickness benefit should not be treated as a claim for invalid pension for the period prior to that date.

Formal decision
The AAT affirmed the decision under review.

Assets test

CHRISTIAN and SECRETARY TO DSS
(No.S86/192)
Decided: 3 June 1987 by R.A. Layton, J.A. Kiosoglous and D.B. Williams.

Mrs Christian asked the AAT to review a DSS decision that the value of three pieces of farming land ($219 500) should be included in her assets for the assets test.

The evidence
Christian had been the registered proprietor of the land until May 1985, when she transferred it to her son, F, for no consideration. The property had originally been owned by Christian's late husband who had died in July 1979.

Christian told the AAT that, in 1951, her husband had told her that he had made a will of which she was to be executrix and that their son 'was to get the land'.

At this time, F was one year old and her husband owned only one piece of land. Her husband later acquired eight other areas as sole proprietor and four other areas as tenant in common with his wife. This land was used as a single farming property.

In 1969, F entered into a partnership arrangement with his parents. In 1971, F and his parents entered into a sharefarming arrangement, under which F was to receive 50% of the profits from the properties. In 1973, Christian and her husband transferred some of their properties to F for $70 635.

Following the death of Christian's husband in 1979, she was appointed executrix of his estate, of which she was the sole beneficiary. She continued the sharefarming agreement with her son until about 1983, when she sold another of the properties to F for $42 000. At the same time, she transferred six other properties to F for no consideration.

The remaining three properties, the subject of the present appeal, were transferred by Christian to F for no consideration on 8 May 1985.

An equitable transfer?
Christian argued that, because of a secret trust created by her husband in 1951, the beneficial interest in the three properties had been transferred to F before the introduction of the assets test.

The AAT refused to follow the earlier decisions in *Millner* (1986) 35 *SSR* 445, and *Wachtel and Repatriation Commission* (1986) 10 ALD 427, which had said that equitable interests were not relevant for the purposes of the assets test. The AAT said it was obliged to consider both legal and equitable interests when determining whether the applicant owned the properties in question in March 1985.

The AAT said that Christian was now claiming that her husband had created a secret trust in favour of F in 1951. A secret trust, the AAT said, was properly classified as an express trust. Under s.29(2) of the *Law of Property Act* 1936 (SA), an express trust had to be evidenced in writing. Because, in the present case, there was no written evidence of the alleged secret trust, the AAT could not find that F had acquired an equitable interest in the property in question before the transfer of title in May 1985, as claimed by the applicant.

The AAT went on to say that if, on the other hand, a secret trust was a form of constructive trust which did not require written evidence, there was insufficient evidence in the present case to satisfy the AAT that a secret trust had existed. The AAT pointed out that Christian had share-farmed the subject properties with her son until 1983; and had sold another property, which would also have been subject to the secret trust if it had existed, to her son in 1983. These actions were inconsistent with the alleged secret trust.

Formal decision
The AAT affirmed the decision under review.

DWYER and SECRETARY TO DSS
(No.V86/513)
Decided: 29 May 1987 by J.R. Dwyer, H.C. Trinick and C.G. Woodard.

Mr and Mrs Carter, who were age pensioners, asked the AAT to review a DSS decision that the rate of their age pension should be reduced by taking into account 'deemed' income of $5600 a year. This was the amount which, according to the DSS, their farming property (being worked by their son) could be expected to produce.

The legislation
Section 6AD of the *Social Security Act* directs that a pensioner's property is to be disregarded for the purposes of the assets test if it would be unreasonable to expect the person to sell, realise or lease the property; and taking the property into account would cause the person severe financial hardship.

The DSS had decided that this provision applied to Mr and Mrs Carter and that the value of the property in question, $226 400, should be disregarded for the purposes of the assets test.

This application for review focused on the 'annual rate of income that could reasonably be expected to be derived from' the farming property. Under s.6AD(3), the annual rate of pension payable to Mr and Mrs Carter could be reduced by this 'deemed income'. The DSS had, in accordance with departmental guidelines, taken 2.5% of the capital value of the farming property as the annual rental which could reasonably be expected to be derived from that property.