similar to that of a child with mild mental retardation and, according to her doctor, she was not able to make decisions for herself.

It appeared that, over the 2 years, Technau had provided close supervision and control of K's daily activities. She had done this in a way which actively involved K in decisions about her welfare and activities.

From 8 July 1986 to 14 July 1987, K was certified as an infirm person under the *Public Trustee Act* 1958 (Vic.); but no order was made for any person to have control over K's personal affairs.

On 28 August 1987, an order was made under the *Guardianship and Administration Board Act* 1986 (Vic.) for the Public Trustee to be appointed as 'plenary administrator' of K's estate (s.46) and for Technau to be appointed 'limited guardian' of K 'for the sole purpose of ensuring that K has accommodation appropriate to her needs' (s.22).

Following the making of this order, Technau had again applied for and been granted a carer's pension.

'A guardian'?

It was not disputed that K was a severely handicapped person; and that Technau was providing constant care and attention for her. The central issue was whether Technau was K's 'guardian' before 28 August 1987, so that she could be treated as a 'relative' of K for the purposes of s.33(1).

The AAT said that the term 'guardian' should be given its normal legal meaning, as the Tribunal had decided in *Wain* (1987) 39 *SSR* 495.

For one person to be the guardian of another, the latter must be incapable of managing her or his own affairs. In the case of an infant, this incapacity was imposed by law. In the case of a person with a mental defect, there was no legal incapacity unless the person had been found (usually by a court) to be incapable of managing her or his own affairs.

For a person to a 'guardian' in the ordinary legal sense, that person -

> 'must . . . be recognised by law as having both the powers and the duties of a guardian by reason either of parenthood or appointment.'

(Reasons, para.26)

The AAT said that administrative considerations supported this view of the term 'guardian' - that it referred to a formal legal relationship:

> '. . . claims for carer's pension have to be dealt with in a prompt and expeditious manner by many different officers in the DSS throughout Australia, initially by junior and relatively inexperienced officers. Few of those making decisions in respect of those claims at any level in the Department are legally qualified. It is, I think, to be assumed that Parliament intended the provisions of the Act to be readily applicable by those officers. Where, therefore, there are several possible meanings which a word or phrase in the Act may bear, the meaning which renders the provisions of the Act readily applicable by such officers should, I consider, all other considerations being of equal weight, be preferred.'

(Reasons, para.24)

In the present case, the AAT said, there was no doubt that K had been incapable of managing her own affairs before 28 August 1987; and that Technau managed most of her affairs. Technau had undoubtedly 'acted with great compassion and in a most responsible manner' to K's considerable benefit. But, prior to 28 August 1987, she did not have the legal status of guardian; and was not K's 'relative' within s.33(1): Reasons, para.27.

Formal decision

The AAT affirmed the decision under review.

Overpayment: waiver

GOODWIN and SECRETARY TO DSS (No. A87/88)

Decided: 3 December 1987 by J.O. Ballard.

Christine Goodwin asked the AAT to review a DSS decision to recover from her an overpayment of supporting parent's benefit, amounting to $1644.

Goodwin admitted that she had been overpaid but asked the AAT to exercise the power to waive recovery given by s.186(1) of the *Social Security Act* (as renumbered from 1 July 1987).

The legislation

Section 186(1) authorises the Secretary to -

> (a) write off a debt under the Act;
> (b) waive or defer the right of the Commonwealth to recover the whole or part of a debt under the Act; or
> (c) allow a debt under the Act to be paid by installments.

Waiver of recovery

Goodwin had been overpaid when the DSS paid her supporting parent's benefit without regard to her income from casual employment. Goodwin claimed that she had advised the DSS by telephone of her employment but the DSS had no record of the notification; and she had not referred to this employment in an entitlement review form lodged by her at the time.

G had now re-married: her husband was paying maintenance to his former wife for the support of 3 children by that marriage; Goodwin had 2 children and was expecting a third child; and the household income came from her husband's job as a bus driver.

In August 1987, a DSS officer wrote to Goodwin, stating that 'the debt is written-off subject to recovery within the next 6 years. This period, however, can be reviewed at any time.'

The AAT pointed out that the Secretary's power, under s.186(1)(a), to write off a debt, was not conditional:

> '[T]here is no power under that paragraph to write off subject to recovery within the next 6 years to be reviewed at any time, apparently at the respondent's whim. Thus the letter purporting to write off under paragraph 186(1)(a) of the Act is itself in error.'

(Reasons, para.11)

However, the AAT said, this was a proper case in which to waive recovery under s.186(1)(b). Goodwin's financial circumstances were 'appalling' and there was no prospect of recovering the overpayment. As there was no evidence of fraud on her part, those considerations were decisive.

Formal decision

The AAT set aside the decision under review and waived recovery of the whole of the overpayment.

Rent assistance: rent in advance?

WHELAN and SECRETARY TO DSS (No. V86/698)

Decided: 30 October 1987 by I.R. Thompson, L.J. Cohn and G.F. Brewer.

Mr and Mrs Whelan had lived in a flat owned by Vasey Housing Ltd (Vasey) since 1972. In 1975, they were granted an age pension and a wife's pension. They subsequently applied for rent assistance on the basis that their weekly rent consisted of $25 plus some part of $4250, the sum which they had paid to Vasey before they moved into the flat.

The DSS refused to treat their rent as more than $26 a week; and they asked the AAT to review that decision.

The legislation

At the time of the decision under review, s.30A(1)(b) of the *Social Security Act* provided that a person was qualified to receive rent assistance if, *inter alia*, 'the person pays, or is

liable to pay, rent at an annual rate exceeding' a specified amount.

At that time, s.6 defined 'rent' as meaning -

> 'rent, not being Government rent, in respect of premises, or a part of premises, occupied by the person as the home of the person . . . '

Rent in advance?

Vasey provided accommodation for former members of the armed services. Under a 1972 agreement between Mr and Mrs Whelan and Vasey, Mr and Mrs Whelan had acknowledged paying $4250, described as a free and voluntary donation, to Vasey. Vasey had agreed that Mr and Mrs Whelan should be entitled to occupy a flat in Vasey's building.

The agreement gave Vasey the right to end the Whelans' tenancy if they failed to meet payments of rent, if they did not observe the terms of the agreement or if they vacated the flat. The agreement provided that, should the Whelans no longer require the flat or should their right of occupation be terminated by Vasey, the company would be under no obligation to repay any part of the donation but would have a discretion to do so.

It was argued on behalf of Mr and Mrs Whelan that, in determining their eligibility for rent assistance, the $4250 paid by them on the signing of the agreement in 1972 should be taken into account as rent paid in advance.

The AAT said that there were several reasons why that $4250 could not be treated as rent in advance for the purposes of rent assistance.

First, 'rent', according to its normal meaning, meant a payment by a tenant to the landlord for a specific period. As the period of the Whelans' tenancy was not a certain period, the payment in advance could not be treated as rent - there was no way in which the annual rate of such a payment could be ascertained with certainty.

Secondly, a payment of rent referred to in s.30A(1)(b) must be made, or be payable, during a period when an instalment of pension was payable. In the present case, the payment in question had been made some three years prior to any pension becoming payable to the Whelans.

Thirdly, the evidence in the present case established that the payment in question was made under an agreement collateral to the tenancy agreement between the Whelans and Vasey and was the consideration for Vasey entering into the tenancy agreement with the Whelans.

Formal decision

The AAT affirmed the decision under review.

Age pension: 'income'

V.R. and SECRETARY TO DSS (No. V87/431)

Decided: 4 December 1987 by R.A. Balmford.

V.R. was an age pensioner. The DSS decided to treat moneys received by V.R. in each year since 1980 as 'income' for the purposes of calculating the rate of his age pension. He asked the AAT to review that decision.

Present or future income?

V.R. had set up a waste product processing business in 1980. He had received subscriptions from investors totaling some $200 000. Each of the investors signed a form letter stating that the investor was retaining V.R.'s services to process waste products and paying V.R. $4000 for those services. Each of the investors expected to receive a product from V.R. when the processing commenced - according to V.R., within a few months after the hearing of this application for review.

In the meantime, V.R. had paid the money into his own bank accounts, using it for business and personal expenses. However, V.R. had maintained financial records, crediting the money received to a suspense account in the year of receipt; and he said that he would transfer this credit to an income account in the year in which he supplied the processed product to each investor.

V.R. argued that the subscriptions received by him should be treated as income only in the year in which he supplied the processed product to the investor and the credit in the suspense account was transferred to the income account. This argument was supported by a High Court decision on income tax law, *Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation* (1965) 14 ATD 98.

The AAT said that definitions of 'income' developed for the purposes of the *Income Tax Assessment Act* were not readily transferable to the *Social Security Act*. That point had been made in several AAT decisions, including *Shafer* (1983) 16 *SSR* 159, and by the Federal Court in *Read* (1987) 38 *SSR* 484.

The inclusion, in the *Social Security Act*, of a definition of income 'clearly renders the decision in the *Arthur Murray* case irrelevant to the interpretation of the . . . Act', the AAT said: Reasons, para.9. The sums of money paid to V.R. were, the AAT said -

> 'in terms of the definition of "income" in the *Social Security Act*, "moneys received by [him] for [his] own use or benefit". Indeed they are so treated by him. His perceived obligation to supply goods, an obligation which in some cases has remained unmet for 7 years, is a separate matter which is not the concern of the respondent.'

(Reasons, para.10)

Formal decision

The AAT affirmed the decision under review.

Age pension: sex discrimination

McCORMACK AND SECRETARY TO DSS (No. V86/469)

Decided: 13 July, 1987 by M.E. Hallowes.

The applicant, who was permanently blind, had been in receipt of invalid pension since May 1984. She received the maximum rate applicable to a person whose spouse did not receive a pension. She was transferred to age pension when she turned 60 years late in May 1984.

In September 1985 the applicant's spouse was granted age pension. As a consequence the applicant's pension was reduced to the maximum married rate. The applicant appealed against that decision.

The legislation

Section 28(1A) of the *Social Security Act* provides the maximum rate of pension available shall be:

'(a) in the case of an unmarried person or a married person whose spouse is not in receipt of a prescribed pension -

(b) in any other case - $3985.80 per annum.'

Discrimination

The applicant believed that she was being discriminated against because of her marital status. She complained that if she was a single aged blind pensioner her pension rate would not be reduced.

The Tribunal had no option but to affirm the decision under review. The *Sex Discrimination Act* 1984 (Cth) did not apply to the *Social Security Act* (see s. 40 of the former Act) and although invalid pensioners had historically been treated differently to other pensioners for the purposes of means testing, the present legislation was clear. The applicant's spouse was in receipt of a prescribed pension and accordingly her pension was reduced to the maximum married rate.

Formal decision

The decision under review was affirmed.