late, as the SSAT decision had been implemented and 'there was nothing left to stay'. This argument relied on an AAT decision in *Repatriation Commission and Delkou* (1985) 8 ALD 454. In that case the AAT had refused to use the s.41(2) power to 'stay' a decision (made by the Veterans' Review Board) that Delkou should be paid arrears of pension. As the arrears had already been paid, the AAT said that it would not be appropriate to make an order under s.41(2).

However, the AAT accepted the argument put by Webber's representative, that the present case was different from *Delkou*. In the present case the decision of the SSAT had not been fully implemented because, according to s.160(2) of the *Social Security Act*, separate instalments of invalid pension were 'payable to the person on each pension pay-day on which the person is... entitled'. That is, entitlement to pension was an on-going entitlement, not one which was irrevocable once it was given:

> 'The reality is that a different amount could be paid on each pension-day if the circumstances of the pensioner changed with that frequency as it is reviewable at any time. It follows that payment of a pension is a matter for consideration on each pension-day even if in practical terms it is not considered on each. Therefore, payment at a reduced rate in accordance with the decision of the SSAT cannot be said to have implemented the whole order as the question of the rate of pay must be considered on each day. There is something left to stay in this case.'

(Reasons, para. 8)

Exercise of discretion

The AAT decided to exercise the discretion in s.41(2) to stay the further implementation of the SSAT's decision. The Tribunal noted that the DSS maintained that it had a strong *prima facie* case that Webber was living in a de facto relationship; but also took into account that Webber denied this. Furthermore, Webber was suffering financial hardship (he was unable to afford the cost of public transport to hospital for essential treatment) and, if he were eventually unsuccessful in his appeal to the AAT, 'the amount which would be overpaid to him would not be such that it could be said to impose a considerable burden on the public purse': Reasons, para. 13.

Formal order

The AAT ordered that the operation and implementation of the SSAT decision be stayed, pending the hearing and determination of Webber's application for review.

[P.H.]

SECRETARY TO DSS and PESU (No. Q89/164)

Section 41(2) application decided: 16 June 1989 by S.A. Forgie.

Mardda Pesu had appealed to the SSAT against a decision of the DSS, refusing to pay her age pension for a period of some 3 years while she was outside Australia. The SSAT had decided that Pesu should be paid age pension for that period, a decision which entitled her to receive some $12 500.

The DSS applied to the AAT, under s.207 of the *Social Security Act*, for review of the SSAT decision. In addition, the DSS applied under s.41(2) of the *AAT Act* for an order to delay the implementation of the SSAT decision.

The legislation

Section 41(2) of the *AAT Act* allows the AAT to make an order 'staying or otherwise affecting the operation or implementation of the decision to which the relevant proceeding relates . . . for the purpose of securing the effectiveness of the hearing and determination of the application for review'.

Payment into trust

The DSS argued that an order to delay implementation of the SSAT decision would secure the effectiveness of the present proceedings because, if the SSAT decision was set aside, there would be no practical measures available to the DSS to recover the arrears of age pension paid to Pesu pursuant to the decision of the SSAT.

On the other hand, Pesu's solicitors offered to place the $12 500, which was to be paid pursuant to the SSAT's decision, in their trust account.

The solicitors also undertook that they would hold the moneys paid by the DSS, including the capital and any income which the moneys generated, pending the further order of the AAT. This undertaking, the AAT said, took away the force of any argument that the moneys would not be recoverable if the DSS were ultimately successful.

Formal decision

The AAT refused the application for a stay of the implementation or operation of the decision of the SSAT.

[P.H.]

Jurisdiction: withdrawal by applicant

NICHOLSON and SECRETARY TO DSS (No.5062)

Decided: 2 May 1989 by D.P. Breen

Nicholson applied to the AAT for review of a DSS decision to recover $31 517 from his compensation settlement. The decision had been reviewed by an SSAT and on 25 February 1987 a delegate of the Secretary affirmed the decision under review. On 27 March 1987, Nicholson, via a letter from his legal representative, applied for review of the decision to the AAT.

Three preliminary conferences were held in 1987 and in January 1988 the parties were notified that the case was set down for hearing in Cairns in March 1988.

On 12 February 1988, Nicholson's representative phoned the AAT and advised that Nicholson was withrawing his application for review. This withdrawal was confirmed in writing and the DSS advised that it consented to the application being dismissed. On 2 March 1988 the Tribunal made a direction under s.42A(1) of the AAT Act to dismiss the application.

Nicholson attempted to have the matter reopened by lodging, in person, a fresh claim for review.

The legislation

Section 42A(1) of the *AAT Act* provides:

> 'Where all the parties to an application before the Tribunal for a review of a decision consent, the Tribunal may dismiss the application without proceeding to review the decision or, if the Tribunal has commenced to review the decision, without completing the review.'

The AAT's jurisdiction

The Tribunal accepted the DSS argument that the AAT did not have jurisdiction to hear Nicholson's second application.

The Tribunal noted that once the AAT has decided a case after a hearing, the jurisdiction of the Tribunal 'has been exhausted'. There were two other ways a Tribunal could dispose of matters: the dismissal power in s.42A(1) and s.34(2), the AAT's equivalent of a consent order.

The Tribunal said that if a Tribunal properly exercised its powers under

s.34(2), this also exhausted the Tribunal's powers. Similarly, if both parties consent to dismissal, an order to dismiss an application under s.42A(1) also exhausts the Tribunal's jurisdiction.

Nicholson told the Tribunal that, although his solicitors were acting on his instructions in withdrawing his appeal, he had not understood the effect of dismissal. According to the Tribunal:

> '... that makes no difference. His reasons for withdrawal, his understanding of that effect, are of no relevance. What is involved is a fundamental question of statutory interpretation. The Tribunal has only those powers which are expressly conferred upon it and when its powers have been exhausted in respect of a particular decision, then the matter is at an end.'

(Reasons, para.19)

Formal decision

The Tribunal accordingly directed that it had no jurisdiction to review the decision.

[J.M.]

Unemployment benefit: living in remote area

ATKINSON and SECRETARY TO DSS

(No. 5002)

Decided: 5 April 1989 by J.A. Kiosoglous.

Atkinson sought review of a DSS decision to refuse unemployment or sickness benefit during the period 25 June to 6 October 1987. The DSS considered he did not qualify for unemployment benefit as he was living in a remote area of low employment prospects, and by remaining there was not taking reasonable steps to secure suitable paid work. As he did not suffer a loss of salary, wages or other income because of an incapacity for work, the delegate argued, the only possibility of paying him sickness benefit was to hold that but for his incapacity he would have qualified for unemployment benefit. The delegate also considered that the claim for sickness benefit lodged on 1 October 1987 was outside the 5-week period which would prohibit payment of arrears.

The legislation

During the relevant period, s.116(1) of the *Social Security Act* dealt with eligibility for unemployment benefit, s.117(1) with sickness benefit and s.121(1) (a) and (b) with the amount payable as sickness benefit, and s.125(3) with the 5-week rule.

The facts

The applicant was a qualified diesel fitter who, in January 1987, left his home in Queensland where he had been unemployed for 10 months, to seek work in Mintabie, South Australia. He had been told Mintabie, an opal mining centre, contained a heavy concentration of earth-moving equipment and there was plenty of work there for persons with his qualifications. On arrival he discovered the company which had offered him work had been involved in a dispute and there was no work for him. He remained in Mintabie in receipt of unemployment benefits for 6 months and told the AAT he searched for work every day. He gave details of his work efforts.

On 20 May 1987 his benefit was suspended because he failed to attend an interview with a field officer of the DSS. The interview was to have been a discussion about his work efforts because he had remained in an area of low employment prospects. He denied having been notified of the meeting and said he had remained because there was more potential work for someone of his qualifications at Mintabie than in Queensland and elsewhere, and he had insufficient money to move elsewhere. The area was not one of low employment prospects for him.

On 9 August 1987 Atkinson suffered a back injury. He lodged a claim for sickness benefit which was rejected on the grounds that, pursuant to s.117 and 121, he had not shown he had suffered a loss of income, and by remaining at Mintabie he was ineligible for unemployment benefit and thus ineligible for sickness benefit.

The DSS also contended that Atkinson had been engaged in opal mining in Mintabie. He said that in walking about looking for work he did some 'noodling', i.e. looking for opals in rubble and tailings. There was evidence that he had applied for and received an explosives and mining permit. Atkinson remained adamant that he had never been engaged in serious efforts to mine opals.

The decision

The AAT was satisfied that, until he injured his back, the applicant was unemployed and qualified for unemployment benefits. It took into account his particular expertise and abilities in finding that Mintabie was not an area of low employment prospects for him. It also concluded that the casual mining work he had done was undertaken in the hope of finding permanent paid employment.

As he would have qualified for unemployment benefit he also satisfied the requirements of s.117(1)(c)(ii) for sickness benefit. However, as his application for sickness benefit was outside the statutory 5-week period the claim could not be backdated, pursuant to s.125(3).

Formal decision

The AAT set aside the decision under review and decided that Atkinson should receive unemployment benefit between June and August 1987, and sickness benefit for the next month.

[B.W.]

Unemployment benefit: postponement

SECRETARY TO DSS and BOON-KIAT FOO

(No. 5139)

Decided: 15 June 1989 by G.L. McDonald.

Boon Kiat Foo had come to Christmas Island to work in the phosphate mine in 1974. The mine closed early in 1986, and Foo returned to Malaysia, after receiving a redundancy payment, apparently with the intention of marrying and returning to Christmas Island.

In May 1988, Foo returned to Christmas Island at the invitation of members of the Bahai community living there, in the expectation of finding work on the Island. After his arrival on the Island, Foo applied for and was granted unemployment benefits. Several weeks later, the DSS decided to postpone payment of unemployment benefits to Foo for 12 weeks. Foo appealed to the SSAT against the DSS decision. The SSAT set aside the suspension of Foo's unemployment benefits; and the DSS then appealed to the AAT.