the AAT said, he had not been incapacitated for work within s.108(1) from that time to November 1983.

His capacity for work may have been reduced during that period but the consistent efforts he had made to find work, and the fact that at various times he had worked while suffering from his anxiety state, showed that his incapacity was not total. Nor could any incapacity from which he had suffered be described as 'of a temporary nature': it had persisted for several years, according to his psychiatrist. And the earlier decision in *Shearim* (1984) 20 *SSR* 217 had said that s.108(1) required a total and temporary incapacity for work.

Backpayment?

Even if McEwan had qualified for sickness benefit from January 1983, this was not a case in which the power in s.119(3) should be exercised so as to permit backpayment of the sickness benefit:

> 32. Because the nature of sickness benefit is to provide temporary support for persons not able to support themselves, the sufficiency of the cause could vary with the consequences to an applicant of being denied payment of arrears. If an applicant had obtained no temporary support by way of social security but had had to rely on charity, I would suggest that a Tribunal or the Secretary may be more ready to accept late lodgment of a claim than in a case where, although the applicant may have been receiving payment at a slightly lower rate, he has in fact received payment of benefit from the Department of Social Security.

(Reasons, para.32)

In the present case McEwan had received unemployment benefit, and had been in contact with a doctor familiar with sickness benefit and with the DSS; it followed, the AAT said, that there was not a 'sufficient cause' for the exercise of the Secretary's discretion under s.119(3).

Law reform

The AAT concluded by observing that it could not understand –

> the rationale behind paying recipients of sickness benefit at a different rate depending on whether they had been in receipt of unemployment benefit or wages prior to the onset of the incapacity . . . If the justification for paying sickness benefit at a higher rate than unemployment benefit is that there may be expenses associated with the sickness surely this applies whether or not the beneficiary was unemployed prior to becoming sick.

(Reasons, para.33)

These provisions, the AAT said, should be reviewed with a view to their legislative reform.

Formal decision

The AAT affirmed the decision under review.

Late claim: invalid pension

WHITEHEAD and SECRETARY TO DSS
(No. V84/212)

Decided: 8 March 1985 by R. Balmford.

Robert Whitehead, who had worked for many years as a driver and motel manager, injured his left wrist in March 1979. He claimed workers' compensation (under South Australian legislation) in April 1979 and this was paid until January 1980.

Meanwhile, Whitehead enquired at a regional DSS office about sickness benefit but, when he was told that any sickness benefit would have to be refunded from his workers' compensation settlement, he did not proceed to claim that benefit.

In December 1981, Whitehead received a lump sum payment of $13 500 for workers' compensation.

Whitehead was still unable to work and in December 1982 he claimed an invalid pension; but, while waiting for that claim to be processed, he claimed and was granted sickness benefit in February 1983. (His invalid pension was granted in March 1983 with effect from December 1982.)

Whitehead then claimed backpayment of sickness benefit for the period between March 1979 and December 1982. When the DSS rejected that claim, he sought review by the AAT.

The legislation

According to s.24 of the *Social Security Act*, a person is qualified to receive invalid pension if that person is permanently incapacitated for work; whereas, under s.108 of the Act, a person is qualified for sickness benefit if that person is temporarily incapacitated for work and has thereby suffered a loss of income.

Section 39 provides that an invalid pension cannot be paid from a date prior to the lodgment of the claim for that pension; and s.119 provides that, where sickness benefit is not claimed within 13 weeks after the day on which the person became incapacitated, sickness benefit is payable from the date of the claim for that benefit; unless the Director-General was satisfied that the delay in lodging the claim was due to the cause of the incapacity or to some other sufficient cause, in which case the Director-General could backdate payment.

However, s.119(4) provides that a claim for workers' compensation lodged by a person within 13 weeks of the person's incapacity can be deemed to be a claim for sickness benefit for the purposes of the payment of that benefit.

Section 145 of the Act gave the Director-General a discretion to treat a claim lodged by a person for a particular pension, allowance or benefit under the Act as a claim for another pension, allowance or benefit under the Act, 'for the purposes of determining the date from which a pension, allowance or benefit is payable to that person under this Act . . .'

At the time when Whitehead received his workers' compenation settlement, s.115 allowed the Director-General to recover payments of sickness benefit from the person to whom those payments had been made, if the person had also received a compensation payment for the same incapacity and for the same period as the sickness benefit.

Backdating sickness benefit

The AAT said that, because Whitehead had lodged a claim for workers' compensation within 13 weeks of his incapacity, it was not necessary to consider backdating of the claim for sickness benefit lodged in February 1983 (see below). If it had been necessary to consider that issue, the AAT thought that it would have decided that the advice given to Whitehead in 1980 (that he would have to repay any sickness benefit) was a 'sufficient cause' for his failure to lodge an earlier claim and a sufficient basis for backdating the claim lodged in February 1983.

That advice was incorrect because the South Australian workers' compensation legislation, under which Whitehead had received his lump sum payment, provided for specified amounts of compensation to be paid for the loss of specified parts of the body; and compensation of that type was not available for recovery of sickness benefit under s.115.

The workers' compensation claim

However, because Whitehead had lodged a workers' compensation claim in April 1979 (within 13 weeks of the date of his incapacity), it was unnecessary to consider backdating his later claim for sickness benefit. According to s.119(4), his workers' compensation claim was to be treated as a claim for sickness benefit when it came to the question of fixing the date from which sickness benefit was payable.

The AAT rejected a DSS argument that, because Whitehead had received workers' compensation payments, his deemed claim for sickness benefit had effectively been satisfied and was no longer an outstanding claim. The AAT said:

> 21. The *Social Security Act* 1947 is social welfare legislation, intended primarily to provide benefits for the needy. Sub-section 119(4) is an attempt to ensure wide availability of sickness benefit to those who are in need. An omission to lodge a claim for sickness benefit is remedied by the lodging of a claim for compensation. The effect of sub-section 119(4) is not to be limited by the introduction into the administration of the Act of the technical legal concept of 'satisfaction of a claim'.

Qualified for sickness benefit?

The AAT then considered whether Whitehead was, from the date of his injury in March 1979 to December 1982 (from which date his invalid pension began) qualified to receive sickness benefit.

The AAT said that Whitehead had suffered a loss of income from that date because of his incapacity. The only question was whether that incapacity was of a temporary nature.

The medical evidence showed that Whitehead suffered from an unusual disability, called Sudeck's atrophy, which weakened his left arm (he was left-handed) and caused him continuing pain. There was no specific treatment for this condition; although the pain might be removed by an operation which would have drastic consequences – paralysis on one side of the body and the loss of sight of one eye. The medical evidence also established that this condition had probably commenced immediately after Whitehead's injury in March 1979.

In view of that evidence, the AAT concluded that Whitehead's incapacity for work had not been 'temporary' in the sense outlined by the Federal Court in *McDonald* (1984) 18 *SSR* 188. That is, it could not have been said during that period that the disability would probably terminate at some time in the foreseeable future. Rather, his incapacity for work had been permanent throughout the period between March 1979 and December 1982.

Invalid pension

The AAT then considered whether this produced the result that Whitehead would receive no income for that period (because his 'deemed claim' was for sickness benefit rather than invalid pension and because s.39 prevented backdating of the payment of invalid pension beyond December 1972).

The *Social Security Act*, the AAT said, was 'not so inflexible as to lead to such a result.' Section 119(4) was 'intended to enable flexibility in the administration of social welfare legislation. Another such section [was] s.145': Reasons, para. 32.

Because s.119(4) deemed a workers' compensation claim to be a claim for sickness benefit for the purpose of fixing the date from which that benefit was payable, it was open to the Director-General to treat that deemed claim for sickness benefit as a claim for invalid pension.

The AAT noted that, according to the evidence, Whitehead was left-handed with a useless left arm and in more or less constant pain. It concluded that he had been permanently incapacitated for work and therefore qualified to receive an invalid pension from the time of his injury. The AAT concluded:

> I consider it reasonable, for the purpose of determining the date from which that pension was payable, to treat the claim for sickness benefit deemed to have been lodged by him on 4 April 1979 as a claim for invalid pension, being the appropriate claim in the circumstances, and as having been lodged in accordance with the Act.

(Reasons, para.37)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that Whitehead be granted an invalid pension from April 1979.

Special benefit

MACPHERSON and SECRETARY TO DSS
(No. N83/892)

Decided: 25 January 1985 by J.O. Ballard.

Robert Macpherson entered into a share-farming arrangement with his father in 1973. Macpherson was to farm a property owned by his father and retain two-thirds of the gross income. However, drought conditions between 1974 and 1984 reduced the farm's income so that it no longer provided a sufficient livelihood for Macpherson and his family.

In November 1977, Macpherson was granted special benefit; but the DSS cancelled this benefit in May 1978 because of his failure to supply it with a copy of his income tax return.

Macpherson was granted special benefit again from June 1980; but the DSS cancelled it in December 1982, again on the ground that Macpherson had failed to provide it with a copy of his income tax return for the previous year.

Macpherson then appealed to Director-General of Social Security under s.15 of the *Social Security Act*. That appeal was considered by an SSAT, which recommended that the cancellation of Macpherson's special benefit be affirmed. The Director-General adopted that recommendation and affirmed the cancellation.

Macpherson then asked the AAT to review that decision on three grounds.

(1) Because there was no obligation on Macpherson to provide the DSS with a copy of his tax return;
(2) because the procedures adopted by the Director-General in dealing with his s.15 appeal had denied Macpherson natural justice; and
(3) because, at all relevant times, Macpherson had been unable to earn a sufficient livelihood.

The legislation

Section 124 of the *Social Security Act* gives the Director-General a discretion to pay special benefit to a person who is 'unable to earn a sufficient livelihood for himself and his dependants (if any)'. At the time of the decision under review, s.15 allowed a person affected by any decision under the Act to appeal to the Director-General who could 'affirm, vary or annul the . . . decision'.

Obligation to provide information

The AAT said that the DSS had not been wrong in requiring Macpherson to produce his income tax return. Where information, such as that contained in the income tax return, was ' peculiarly within the knowledge of a party', it was reasonable to require that party to produce the information so as to satisfy the DSS as to his inability to earn a sufficient income.

Denial of natural justice

However, the AAT said, the DSS had not given Macpherson sufficient time to produce his income tax return before cancelling Macpherson's special benefit. That failure was a denial of natural justice. Moreover, the action of the Director-General in adopting, automatically, the recommendation of the SSAT showed that the Director-General had not properly considered Macpherson's appeal under s.15 of the Social Security Act.

The nature of AAT review

The denial of natural justice and the failure to fully consider Macpherson's appeal could have made the cancellation decision void, the AAT said.

However, it was the responsibility of the AAT to review administrative decisions and to decide what decision should be made in the exercise of an administrative discretion. The fact that the decision under review might be legally ineffective (because it was void) did not affect the AAT's responsibility. Accordingly, the AAT said, it should proceed to review the DSS decision to cancel Macpherson's special benefit.

'Unable to earn'?

The AAT then looked at the accounts of Macpherson's share-farming business and at the evidence given by Macpherson about his financial affairs. This material, the AAT said, contained many inconsistencies and omissions.

For example, Macpherson had not explained why the share-farming arrangement with his father could not be renegotiated or whether his father might provide some security for loans to Macperson. Each of these points related to information which Macpherson could reasonably be expected to supply and, therefore, it had not been established to the satisfaction of the Tribunal that Macpherson was 'unable to earn a sufficient livelihood'.

The discretion

Even if Macpherson was unable to earn a sufficient livelihood, the AAT said, it would not exercise the discretion in s.124. The AAT referred to *Te Velde* (1981) 3 *SSR* 23 where the Tribunal had said that, when exercising the discretion in s.124, the degree of control which a