Section 74(1), in combination with s.83AAG, obliges a supporting parent beneficiary to notify the DSS of her or his income 'where the average weekly rate of income . . is higher than the average weekly of the income last specified by her in a claim, statement or notification'.

During the period to which the alleged overpayment related, s.73, in combinaton with s.83AAG, required a beneficiary to provide information to the DSS relating to her income, 'whenever so required by the Director-General'.

No failure to comply with the Act

The AAT said that it was 'very difficult to see how [Irwin] can be said to have failed to comply with provisions with s.74(1)' because she had 'never specified an average weekly rate of income in any claim, statement or notification' under the Act. The only statement which she had made to the DSS was the statement of December 1980 that she had commenced work and that, therefore, her benefit should be cancelled.

The AAT noted that the insertion of s.135TE in the *Social Security Act* in October 1983 had expanded the powers of the DSS, so that, from that time on, a failure to provide information about a change in circumstances could provide the basis for recovery of overpayments. But, the AAT said, this amendment had come too late to be of any assistance to the DSS in the present case.

Discretion not to recover

If it was wrong on this point, the AAT said, this was an appropriate case to exercise the discretion in s.140(1) to waive recovery of the overpayment. In addition to the fact that Irwin was now unemployed and without any substantial assets, and the fact tha the DSS had delayed in following up the overpayment, this was a case where the DSS was largely responsible for the overpayment:

> Whatever sums might be calculated as overpayment during [the relevant] periods I would have to take into account the failure of the respondent to treat this case as one requiring close surveillance by reason of the known facts concerning variations in the applicant's income.

(Reasons, para. 36)

Formal decision

The AAT set aside the decision under review.

Overpayment: discretion to recover

VOCALE and SECRETARY TO DSS (No. V84/125)

Decided: 31 May 1985 by J. R. Dwyer.

The AAT *set aside* a decision to recover an overpayment of $1670 from a former invalid pensioner.

Vocale had been granted an invalid pension in 1976. Between then and August 1980, she had kept the DSS informed of her husband's earnings from his employment. But she did not inform the DSS of payments received by her husband as 'excess travelling time allowance'. In September 1980, after obtaining information about this allowance from the husband's employer, the DSS calculated that his income now precluded payment of invalid pension to Vocale and her pension was suspended. After collecting further information, the DSS calculated (in October 1981) that Vocale had been overpaid and decided to recover this overpayment.

The AAT said that the overpayments made to Vocale were clearly recoverable under s.140(1) of the *Social Security Act*: she had been overpaid in consequence of false statements as to the level of her husband's income (although there was no question 'that the statements were intentionally false . . . they resulted from a genuine misunderstanding as to the meaning of the word "income"'.)

However, the AAT said that this was an appropriate case for the Secretary to exercise the discretion under s.140(1) so as not to proceed to recover the overpayment. The factors which were relevant in the exercise of the discretion were:

(1) Vocale had received public moneys to which she was not entitled;
(2) the payment was a result of an honest mistake on her part;
(3) failure of the DSS to confirm her husband's income over 4 years had contributed to that mistake;
(4) Vocale had no separate income;
(5) Vocale and her husband had limited means and her husband was in poor health;
(6) the DSS had already 'notionally recovered' $895 from Vocale by withholding pension to which she had been entitled;
(7) the alleged overpayment had caused considerable worry to Vocale and her husband; and
(8) there had been a 2 year delay between cancellation of Vocale's pension and notification of the decision to seek recovery.

DOYLE and SECRETARY TO DSS (No. V84/394)

Decided: 3 June 1985 by H. E. Hallowes.

The AAT set aside a DSS decision to recover $1235 overpayment of unemployment benefit from the applicant.

This payment represented unemployment benefit paid to Doyle during a period when, according to the DSS, he had not been 'unemployed'.

A recoverable overpayment

Doyle admitted that, during the period in question, he had worked as a real estate agent, employed on commission; but he said that the money which he had received during this period did not even cover his business expenses.

The AAT said that, given that Doyle was working 5 to 6 hours a day as a real estate salesman, he could not be regarded as 'unemployed' within s.107(1)(c) of the *Social Security Act*; and it said that the present case was very much like the earlier cases of *Te Velde* (1981) 3 *SSR* 23 and *Farah* (1984) 20 *SSR* 222, where applicants who had been engaged in unrewarding activities were nevertheless not 'unemployed'.

Accordingly, the AAT said, there had been an overpayment to Doyle.

Discretion to waive recovery

However, the current financial position of Doyle was such that the discretion to recover the overpayment should be exercised against recovery: he owed substantial debts (and was facing the forced sale of his home), was now unemployed and had very poor prospects of finding employment (largely because of his age—he was 57 years old). The AAT rejected a DSS suggestion that Doyle be asked to repay the overpayment at the rate of $1 a week:

> The administrative difficulties in pursing this course of action and the expectation that a recipient of public moneys to which he was not entitled, aged 57, should look forward to an obligation for almost 25 years is untenable. I intend to exercise my discretion in the applicant's favour.

(Reasons, para. 18)

Handicapped child's allowance: eligibility

RAMACHANDRAN and SECRETARY TO DSS (No. W84/73)

Decided: 30 April 1985 by R. K. Todd, I. A. Wilkins and J. G. Billings.

The AAT set aside a DSS decision to refuse a handicapped child's allowance to the mother of an 8-year-old boy who had severely impaired language skills and below average non-verbal reasoning skills.

The AAT concluded that, because the child's disability required the mother to remain almost always in his vicinity, she qualified for the allowance under s.105JA of the *Social Security Act*—that is, the child required and she provided care and attention which was 'only marginally less than' constant and the child was likely to require this care and attention for an extended period.

The Tribunal also concluded that, because of the care and attention which the mother provided to the child, she was suffering severe financial hardship (as required by s.105JA(b)). Although the applicant held a university degree, and the child attended school each day, she was unable to enter the workforce because of the need to provide close supervision to the child immediately before and after school and the need to attend the child's school regularly in order to participate in the school's language development programme.