further 12 months in August 1973.

The DSS wrote to Hangan on 15 August 1973 in the following terms:

> Your child endowment payments will continue while you are overseas as long as you continue to satisfy the following conditions:
> 1. that your usual place of residence will continue to be in Australia and that your absence is only temporary;
> 2. that you continue to have the custody, care and control of your child(ren);
> 3. that you do not receive a payment similar to child endowment under the law of any other country.
>
> Should you cease to satisfy any of these conditions you must notify this office immediately.

Apart from short periods in Australia, Hangan, her husand and her children continued to live overseas until May 1981. Child endowment continued to be paid to Hangan's bank account (in Toowoomba) and there was no other contact between her and the DSS until July 1978, when she applied for a student family allowance for her eldest child, who had turned 16. This application gave an address in the Philippines and the DSS reviewed her case.

In November 1978 the DSS wrote to Hangan advising her that her prolonged absence overseas meant she was not entitled to child endowment. Indeed, the DSS wrote, her entitlement ended when she first left Australia in July 1972. Accordingly there had been an overpayment of $3373.

Following an appeal to an SSAT, the DSS reduced the claimed overpayment to $2692.20 (allowing for periods spent in Australia and for 'departmental error' in paying endowment for the 12 months from August 1973).

Hangan then applied to the AAT for review of this decision.

The legislation

The claim for the overpayment was based on three sections of the *Social Services Act*, ss.103(1)(d) and (e), s.104A(b) and s.140(1).

Section 103(1) provides that endowment ceases to be payable to an endowee (in this case, Hangan) for a child if—

> (d) the endowee ceases to have his usual place of residence in Australia, unless his absence from Australia is temporary only; [or]
> (e) the child ceases to be in Australia, unless his absence from Australia is temporary only

Section 104A(b) obliged an endowee (in this case, Hangan) to notify the DSS within 14 days of a child, for whom endowment was being paid, ceasing to be in Australia.

Section 140(1) provided that if an endowment was paid 'in consequence of a failure or omission to comply with any provision of this Act', and that payment 'would not have been paid but for the . . . failure or omission', the amount paid was 'recoverable . . . as a debt due to the Commonwealth'.

'Overpayment' established

The DSS claimed that Hangan had failed to notify the Department of the various occasions when the children had ceased to be in Australia (as required by s.104A) and that, as a result of this failure, the Department had continued to pay endowment to which (because of s.103(1)(d) and (e)) she was not entitled. The amount of these endowment payments were, therefore, recoverable under s.140(1).

The AAT agreed that, from July 1972, Hangan ceased to have her 'usual place of residence in Australia', her children ceased to be 'in Australia', and that neither of these absences from Australia was temporary. The Tribunal came to this conclusion after considering all the circumstances of the case, particularly the family's extended stay overseas (of some eight-and-a-half years).

Therefore, Hangan ceased to be entitled to endowment for her children in July 1972. Accordingly, there had been an overpayment of endowment.

The 'effective cause'

But was that overpayment recoverable under s.140(1)? The AAT agreed with the view taken in *Matteo*, 5 *SSR* 50, and *Forbes*, 5 *SSR* 50, that

> for an overpayment to be recoverable under s.140(1), a failure or omission by a person to comply with a provision of the Act must be shown to be the effective and not merely a contributory cause of the overpayment.

(Reasons for Decision, para.30)

In this case the action and inaction of the DSS had complicated matters. In the first place, the Department had written to Hangan in August in 1973 in terms which suggested (through the use of the words 'payments will *continue* while you are overseas [so long as] your usual place of residence will *continue* to be in Australia') that her affairs were in order and endowment would be payable in the circumstances of her case. This letter was, said the AAT, 'inaccurate and misleading'.

In the second place, although Hangan's file had been marked 'For review return to Australia 1974', no action was taken on the file between August 1973 and July 1978 because of 'administrative oversight'.

It was true, said the AAT, that Hangan had failed to comply with s.104A, by failing to notify the DSS when her children left Australia (apart from the August 1973 departure):

> On the other hand, the respondent is charged with the proper administration of the Act. We consider that when it was learned that the applicant had been overseas and was again going overseas, a review of her case should then have been undertaken. Instead all that occurred was that she was sent a 'stock' letter (which to say the least of it was apt to be misleading to its recipient) and a decision to review the case at a later time made—a decision which was never implemented. Had a review been undertaken when the department first had knowledge of the circumstances surrounding the applicant's case it seems most probable that the subsequent situation would naver have arisen . . . We accordingly are of the opinion that the effective cause of the overpayment was the department's failure to review when learning of the applicant's circumstances.

(Reasons for Decision, para. 32)

The Tribunal went on to say that the effective cause of payment of endowment between July 1972 and July 1973 was possibly Hangan's omission to comply (in July 1972) with s.104A. But the AAT did 'not think it would be a proper exercise of the [Director-General's] discretion' to recover this part of the overpayment because the DSS's letter of 15 August 1973 stated that the amount had been correctly paid: Reasons for Decision, para. 33.

The formal decision

The AAT set aside the decision under review and decided that the endowment payments, although not payable, were not recoverable under s.140(1) of the *Social Services Act* '(except as to the period referred to in para. 33 hereof)': Reasons for Decision, para. 34.

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The Following AAT decisions will be reported in more detail in the August issue of the *Reporter*.

Hales (No. V81/245). Decided 23 April 1982: The AAT found that an overpayment of supporting mother's benefit was *not* recoverable under s.140(1) because the 'substantial or dominating cause of the overpayment was the DSS's failure to carry out regular reviews of Hales' income from employment, despite having informed Hales that it would carry out those regular reviews.

Mihailov (No. V81/109). Decided 19 April 1982: The AAT found that Mihailov was permanently incapacitated for work and so qualified for invalid pension. The incapacity was produced by a 'combination of orthopaedic disabilities and personality problems' which made him 'virtually unemployable'.

Hadfield (No. Q81/45). Decided 23 April 1982: The AAT found that Hadfield was not permanently incapacitated for work and, therefore, did not qualify for invalid pension. The AAT did not explore a suggested psychiatric disability, emphasising the lack of a physical basis for any disability.

Melier (No. W81/22). Decided 23 April 1982: The AAT found that Melier's physical disabilities and his poor English and education made him totally and permanently incapacitated for work. Accordingly, he was qualified to receive an invalid pension.

Kane (No. V81/147). Decided 19 April 1982: The AAT accepted Kane's medical evidence that a stroke had left him with a 'massive disability', rejected medical evidence produced by the DSS (because it was based on brief examination rather than on long-term treatment) and found Kane qualified to receive an invalid pension.