residence and absence from Australia and said the intention of the Act was 'by no means clear'. But the AAT thought that Mrs Alam's entitlement to child endowment depended on s.103(1)(d) and s.104(1) and (2).

Section 103(1) (which is subject to s.104) provides that endowment ceases to be payable if

> (d) the endowee ceases to have his usual place of residence in Australia, unless his absence from Australia is temporary only ...

Section 104(1) provides that, where a woman, whose usual place of residence is in Australia, is temporarily absent from Australia, the child endowment provisions of the Act are to operate as if that woman was in Australia. However, according to s.104(2), endowment is not to be granted or paid by virtue of s.104(1) unless the woman is a resident of Australia as defined by the *Income Tax Assessment Act*.

The combined effect of these sections, according to the AAT, was that the Tribunal must decide whether:

(a) Mrs Alam remained a resident of Australia — s.104(2); and

(b) Mrs Alam was a person whose usual place of residence was in Australia who was temporarily absent from Australia — s.103(1)(d).

The Tribunal adopted the remarks in *Kyvelos*, (1981) 3 *SSR* 30, to the effect that 'residence' had a variety of meanings. It did

> not necessarily mean the applicant has a home of his own, but that he has a settled headquarters in this country; that ownership or renting of property in Australia is not a necessary ingredient of being 'resident' here; that a person who normally lives in Australia would not cease to be 'resident in Australia' as that expression is ordinarily understood, during a period of temporary absence on vacation or on work ...

(Reasons for Decision, para 10)

The AAT's assessment

In this case, the Alams had lived in Lebanon for over four years. But they said that they had intended to stay for only six months and that they had stayed longer only because the civl war made travel within Lebanon dangerous and because of the illness of their parents. They explained the sale of their Australian house as necessary because they had outgrown it, and of their furniture as sensible because it was so old and dilapidated that it was not worth storage fees. The Alams also told the AAT that neither of them took paid work in Lebanon, nor did they rent accommodation. While away they voted in an Australian Federal election. Their children had minimal schooling in Lebanon.

All those facts were not disputed by the DSS; and, on their basis, the AAT said that the Alams did not have a settled or usual abode in Lebanon:

> [A]t no time did they, being naturalized citizens with Australian domicile, abandon the intention with which they arrived in Lebanon — namely to attend to their own and their children's future and education by returning to Sydney and buying there a new family home as soon as civil dissension and parental urging against their movement [were no longer obstacles] ... [I]t should not be found that they had ceased to be residents of Australia.

Mrs Alam was, therefore, a woman 'whose usual place of residence is in Australia', and whose absence from Australia remained only temporary: Reasons for Decision, para.17. She was, therefore, qualified to receive endowment throughout her absence.

Should endowment 'payment ... be made'?

The AAT then considered whether s.104(5) affected Mrs Alam's situation. This subsection says that endowment shall not be paid to a person temporarily absent from Australia, 'unless the Director-General is satisfied that the period of temporary absence is likely to exceed twelve months.'

The Tribunal pointed out that this provision merely suspended actual payment until the person returned to Australia, when payment could be reconsidered and made for the period of absence. Seeing that Mrs Alam had now returned to Australia, 'the force of s.104(5) is spent, and she would in any event be entitled to the endowment for the whole period of her absence': Reasons for Decision, para. 21.

Overpayment action: two options not available to DSS

The AAT also considered the hypothetical question of how the DSS might use s.140(1) or s.140(2) of the *Social Services Act* to recover any overpayment of child endowment. The Tribunal thought that Departmental practice and procedure made reliance on s.140(1) impossible: Reasons for Decision, para. 20. And recovery under s.140(2) was not available because that provision did not allow recovery from current child endowment payments: Reasons for Decision, para. 22.

Formal Decision

The AAT set aside the decision that there had been an overpayment and directed reinstatement of any endowment moneys which had been withheld from Mrs Alam.

Age Pension: portability

BURNET and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. N81/102)

Decided: 19 February 1982 by E. Smith, L. G. Oxby and I. Prowse.

This case raised the question whether an age pension, granted to Burnet, was 'portable': could it be paid overseas?

Dorothy Burnet was born in Australia in 1913; and she resided continuously in Australia until 1956, when she and her husband moved to England.

In March 1979, Burnet came to Australia, leaving her husband, who had a chronic illness, in England. She had a return flight (to England) booked for 3 June 1979.

On 4 April 1979, Burnet applied to the DSS for an age pension. This was granted on 20 April. (The DSS apparently decided that Burnet met the age and residence requirements of s.21: as the AAT pointed out, Burnet might not have met the current residence requirement in s.21(1)(b); but the question of the validity of the pension grant was not raised in this review.)

According to Burnet, the DSS then informed her (by telephone) that this pension was portable: that is, she would continue to be paid if she returned to England. (The DSS denied giving Burnet this information.) Burnet then confirmed her return flight booking and returned to England on 3 June 1979.

The DSS then cancelled Burnet's age pension and, after an unsuccessful appeal to an SSAT, she asked the AAT to review this decision.

Portable pensions—the legislation

Section 83AB declares that a person's right to be paid a pension is not affected by her or his leaving Australia, 'except as provided by this Part'.

One of these exceptions is set out in s.83AD which states the general rule that a pension is not payable outside Australia to a former Australian resident who has returned to Australia, claimed a pension and left Australia less than 12 months after returning here: s.83AD(1).

However, the Director-General 'may determine' that the general rule in s.83AD(1) does not apply to a person whose reason for leaving before the end of the 12 month period 'arose from circumstances that could not reasonably have been foreseen at the time of his return to . . . Australia': s.83AD(2).

'Reason for leaving'

Burnet claimed that her 'reason for leaving', before the end of 12 months, was the DSS advice that her pension was portable. If it had not been for that advice, she said, she would have stayed in Australia for the necessary 12 months.

The AAT said that the 'reason for leaving', referred to in s.83AD(2) did not include 'matters relating to the grant of the pension itself or advice, wherever obtained, in connection with eligibility for the grant of the pension'. Rather, it referred to 'occurrences overseas (e.g. the serious illness of a close relative) which cause the person to cut short his stay in Australia or occurences in Australia (e.g. the death of a relative with whom the person came back to Australia to live) which frustrated the intention of living in Australia': Reasons for Decision, para. 20.

That interpretation of s.83AD(2) was enough to dispose of Burnet's application. But the AAT went on to consider the case on the basis that misleading DSS advice could be counted as a 'reason for leaving' within s.83AD(2).

The Tribunal reviewed the evidence in the case, including the chronic illness of Burnet's husband and her return flight booking for a date three months after her flight to Australia and said:

> We have difficulty in accepting the applicant's claim, made after the event, that she would have remained for 12 months if necessary to qualify for a portable pension . . . She had a good reason for leaving Australia, namely, to return to assist her ill husband, but that reason certainly did not arise from circumstances that could not reasonably have been foreseen when she returned to Australia.

(Reasons for Decision, paras 33, 34)

The Tribunal also doubted whether it was appropriate to exercise the s.83AD(2) discretion in favour of a person who returned to Australia 'only to qualify for a grant of pension and immediately leave Australia for permanent residence abroad': Reasons for Decision, para. 34.

Formal decision

The AAT affirmed the decision under review.

Special benefit: maintenance guarantee

ABI-ARRAJ and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. N81/76)

Decided: 17 July 1982 by J. O. Ballard.

Najla Abi-Arraj, a woman aged 65 at the time of the AAT decision, migrated to Australia from Lebanon. The date of her migration does not appear from the AAT decision; but, presumably, it was within the last four or five years.

Before she came to Australia, two of Abi-Arraj's sons (Tony and George) signed a 'maintenance guarantee' under Part IV of the *Migration Regulations*, in which they undertook to the Commonwealth government to maintain their mother during her presence in Australia.

On her arrival in Australia, Abi-Arraj stayed with Tony. She soon moved, because of overcrowding, to the house of another son, Raymond. She then applied to the DSS for special benefit. The DSS refused to grant this benefit because Tony and George had guaranteed to support her and were able to support her.

Qualifying for special benefit

Section 124(1) of the *Social Security Act* gives to the Director-General a discretion to pay special benefit to any person if he is satisfied that the person 'is unable to earn a sufficient livelihood' and if the person is not receiving a pension or qualified to receive a benefit.

The Tribunal agreed with the decision in *Blackburn*, 5 *SSR* 53, that 'the existence of the Maintenance Guarantee is not . . . a relevant factor in determining whether the applicant is entitled to special benefit': Reasons for Decision, para. 12.

The amount of special benefit

However, the Tribunal apparently thought that the guarantee was relevant to fixing the amount of special benefit which might be paid. Section 125 gives the Director-General a discretion to fix 'the rate of special benefit payable to any person' (subject to a maximum).

The Tribunal indicated that other relevant factors were the fact that Abi-Arraj was currently being supported by the third brother, Raymond, and that she was 'now a beneficiary under the *Health Insurance Act* 1973'. [This last reference was, it seems, to Abi-Arraj's entitlements (as a 'disadvantaged person') to free medical treatment.]

However, the AAT seemed to ignore some of these factors in its final conclusion. After observing that Abi-Arraj had chosen to leave Tony's house; could go back; and probably would go back as his children left home and when Raymond married—the Tribunal said:

> In these circumstances it seems proper to have regard to the income of the son who had accepted the moral obligation to support the applicant, who have [*sic*] the financial ability to give effect to that guarantee and the willingness to do so rather than that of the son with whom she now resides . . . Accordingly the applicant will be awarded special benefit on the basis that the income of the guarantors, as from time to time assessed, be taken in account in assessing the amount of the special benefit . . .

(Reasons for Decision, paras 21-22)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with the direction that Abi-Arraj be granted special benefit, the amount to be based on the income of the guarantors, as from time to time assessed.

Background

The Australian social security system is affected by (and is a response to) many economic, social and political factors. This series will explore this relationship. Comments, responses or other contributions are welcome—if they are no longer than 1000 words.

The dependent sector: issues and options

Australia has experienced in recent years substantial rises in levels of Commonwealth outlay on social security and welfare. Between 1971 and 1981, combined outlays in these categories of Federal expenditure have expanded by an average annual rate of 17%: social security alone, which averaged an annual 23% growth during the period, having increased its share of total government spending from 17% to 27%. The figures do not include government assistance to industry, mandated benefits (e.g. workers' compensation), government-regulated benefits (e.g. occupational superannuation), or benefits provided voluntarily by employers and private organisations.[1] Obviously, the figures also exclude so-called 'taxation expenditures': assistance to persons and firms through tax concessions which, has been noted by the government itself, 'are as much a call on the Budget as are direct outlays'.[2]

Federal expenditure figures on welfare and social security thus understate by a significant (if indeterminate) margin the actual size of the dependent sector in the Australian economy. The point needs to be made: to concentrate on those two categories of expenditure to the exclusion of other (direct and indirect) forms of public sector assistance is misleading as to the scope and magnitude of dependence in this society. But it is understandable; welfare and social security issues are the concern of social policy, which in turn is underpinned by interests and values of lasting consequence:

- the role of government as provider of income maintenance;
- the changing patterns of dependence in response to changes in demographic structure;