of the overpayments between December 1979 and August 1980? It was not, they said, and overpayments after December 1979, 'would not legally be recoverable under s.140(1)': Reasons for Decision, para. 68.

Turning to the question of calculating the amount of overpayments, Smith and Prowse adopted the views expressed by Todd and Cusack in *Harris*: 3 *SSR* 22. That is, the amount of pension payable to a pensioner should be calculated on an annual basis, taking the 'pension year' as the basis of calculation. The first 'pension year' is the pension year beginning on the date of the grant of the pension, and later 'pension years' begin on each anniversary of that grant. It is the amount of income received in each pension year which is critical to calculating, according to the income test, the pension to be paid for that year. Accordingly, a pensioner who receives a regular income of, say, $20 a week through the pension years, would be paid the same pension as another pensioner who receives a fluctuating income which totals $1040 for the pension year. (See Reasons for Decision,. paras 41-8.)

Overpayment: a minority view

The third member of the AAT, **Tickle**, agreed with Smith and Prowse on the jurisdiction of the Tribunal to review a s.140(1) 'decision'; and he agreed that, for an overpayment, to be recoverable under s.140(1), the pensioner's failure to notify income had to be the real or effective cause of the overpayment.

Of course, Tickle said, the DSS had to show that there had been an overpayment – that is, some difference between what had been paid and what should have been paid. He took the view that whenever the Director-General (or a delegate) determined the rate of pension to be paid to a pensioner, that determination was conclusive – it fixed the pension which should be paid – until a new determination of a new rate of pension is made by the Director-General. So long as the pensioner did not deceive, mislead or conceal information from the Director-General when that official determined the rate of pension, the determination stood until replaced.

Moreover, the *Social Services Act* did not allow the Director-General to adjust any pension payments retrospectively (except to deal with some default by the pensioner, such as deception or concealment of income):

> [I]n the last analysis, the discretion conferred by s.46, to adjust the rate of pension 'having regard to the income of the pensioner' is [the Director-General's] to exercise independently of the procedures [for pensioners to supply information on their income]. Whenever and as soon as information is available to him which induces him to make a new determination, then the pension rate will change. However, this new determination cannot affect the validity of previous determinations properly made, nor the inviolability of the payments made thereunder.

In Mrs Matteo's case, the DSS determined her rate of pension in December 1977, based on accurate information provided by Mrs Matteo and her husband's employer. That information was used to determine Mrs Matteo's 'annual rate of income' and the DSS made no attempt to review these determinations for two years (except to adjust the rate of pension when all pensions were increased through indexation). This failure was despite the DSS being 'aware that the applicant's husband was employed and cannot have been unaware of the almost universal increase in wage levels through the period.' Indeed, said Tickle, the Department could be said to have had 'constructive notice' of changes in Mrs Matteo's husband's income which 'warranted review and adjustment of the determined rates of income and pension': Reasons for Decision, para. 40.

Accordingly, the effective cause of the payments to Mrs Matteo was the adoption and maintenance by the DSS of an unjustified annual rate of income. Since the power to make a determination of the annual rate of income was vested in the Director-General and he made the determination in December 1977 while in possession of the relevant income information, that 'determination should prevail' and none of the pension payments from October 1977 to August 1980 were, according to Tickle, recoverable: Reasons for Decision, paras. 44-5.

The decision

The AAT set aside the decision under review and returned the matter to the Director-General for reconsideration with the recommendation that only overpayments for the first pension year should be sought to be recovered from Mrs Matteo.

Special benefit: low employment area

LAW and DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. Q81/83)

Decided: 23 November 1981 by T.R Morling, J.B.K. Williams and J.G. Billings.

For some time prior to 15 May 1980, Bryan Law (apparently aged about 27 years) had been living in Nambour, Queensland, and receiving unemployment benefit. In May he decided to move to the Atherton Tableland because he was having no success in finding work in Nambour, because he found it difficult to meet rental payments in Nambour and because free accommodation was available in Atherton. He was warned by a DSS social worker that there were few employment opportunities in the Atherton area and that his unemployment benefit could be terminated.

Law moved to Atherton and the DSS terminated his unemployment benefit. He then applied to the DSS for special benefit. The DSS refused the application and Law eventually applied to the AAT for review of that decision.

Special benefit is payable under s.124(1) of the *Social Services Act*:

> 124. (1) Subject to sub-section (2), the Director-General may, in his discretion, grant a special benefit under this Division to a person –
> (a) who is not in receipt of a pension under Part III or IV, a benefit under Part IVAAA, an allowance under Part VIIA of this Act or a service pension under the *Repatriation Act* 1920;
> (b) who is not a person to whom an unemployment benefit or a sickness benefit is payable; and
> (c) with respect to whom the Director-General is satisfied that, by reason of age, physical or mental disability or domestic circumstances, or for any other reason, that person is unable to earn a sufficient livelihood for himself and his dependents (if any).

Sub-section (2) prevents payment of special benefit to any person disqualified from receiving unemployment benefit because of an industrial dispute.

Law claimed that his inability to earn a sufficient livelihood was due to his physical and mental disabilities. Two social workers told the AAT that, while the applicant had not been unemployable, he had been 'temporarily in a physical and mental state which made it very difficult for him to obtain and cope with full-time employment.

However, the AAT decided that this evidence did not establish that Law was 'by reason of . . . physical or mental disability . . . unable to earn a sufficient livelihood' with in s.124(1)(c).

Was there some 'other reason' which led to Law being unable to earn a sufficient livelihood? Only, according to the AAT, that there were few employment opportunities in the Atherton area, to which Law had moved. But that was not a sufficient reason to exercise the discretion to grant a special benefit, a discretion which was wide but 'not unlimited' – see *Te Velde*, 3 *SSR* 23. The AAT continued:

> We do not think it would be a proper exercise of the discretion to grant a special benefit to a person whose need for it arises directly from his own action leading to the termination of an unemployment benefit which would otherwise be payable to him.

Reasons for Decision, p. 6.

The AAT also suggested, without making a final decision, that s.124(1)(b) would exclude payment of special benefit to Law because he might be regarded as a person entitled to receive unemployment benefit, even though he was not in fact receiving that benefit whilst at Nambour.

[*Note*: This argument is difficult to accept. If Law's unemployment benefit was terminated when he moved to Nambour, the termination was because the Director-General was no longer satisfied that he was taking reasonable steps to obtain work – because he was no longer qualified to receive unemployment benefit under s.107(1)(c)(ii) of the *Social Services Act*. Being disqualified from receiving unemployment benefit,

Law could no longer be described as a person to whom unemployment benefit was payable, and s.124(1)(b) could present no barrier to the payment of special benefit.]

The AAT affirmed the decision under review.

Special benefit: migrant guarantee

BLACKBURN and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. N81/25)

Decided: 8 January 1982 by R.K. Todd, I. Prowse and M.S. McLelland.

Benjamin Blackburn migrated to Australia in 1975, from Mauritius. Shortly before his entry to Australia, his son-in-law (Broudou) signed a 'maintenance guarantee' under Part IV of the *Migration Regulations*.

In February 1976 Blackburn was granted unemployment benefit by the DSS. In August 1978, the DSS cancelled the unemployment benefit because Blackburn was over 65 (see s.107(1)(a) of the *Social Services Act*). As Blackburn had not resided in Australia for ten years he was not qualified for an age pension (s.21(1)(b)). But he was granted special benefit by the DSS.

In September 1980 the DSS established that Broudou had signed a maintenance guarantee for his father-in-law and, after assessing Broudou's finances, the DSS cancelled Blackburn's special benefit.

Blackburn appealed unsuccessfully against cancellation and then asked the AAT to review the decision. While the appeal and review were being dealt with, Blackburn and his wife were supported ('on a very restricted basis') by his three daughters: but no support was provided by Broudou.

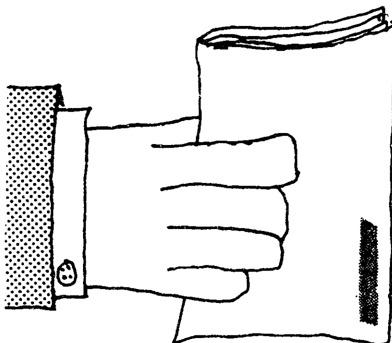
The legal issues

Section 124(1) of the *Social Services Act* gives 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. (The full text of s.124(1) is set out in *Law*, Q81/83, noted in this issue of the *Reporter*.)

The DSS argued that, in exercising the discretion to pay special benefit, the Director-General was entitled to take account of the maintenance guarantee.

The *Migration Regulations* provided (in Part IV) that the Minister could require a maintenance guarantee to be given for any person seeking to enter Australia: reg.21. Where a guarantee had been given and maintenance of that person was provided by the Commonwealth (including benefit) for the person covered by the guarantee, the Commonwealth could recover the amount of maintenance provided from the guarantor: reg.22.

> The terms of the guarantee signed by Broudou were as follows: . . . I . . . hereby guarantee that I will be responsible for the maintenance of the immigrant during [his presence in Australia] and declare that I give this maintenance guarantee for the purposes of Part IV of the *Migration Regulations.*



The effect of the guarantee

The AAT said it was 'difficult to see how the primary obligation to support seemingly created by this document could be enforced.' After the Commonwealth had expended funds on Blackburn's maintenance, there would be a debt owing from Broudou to the Commonwealth – 'but before that the situation is much less clear.' While the guarantee created a moral obligation on Broudou to support Blackburn, the *Migration Regulations* contemplated first the payment of special benefit to Blackburn and then the recovery by the Commonwealth from Broudou of the amounts paid:

> This is entirely reasonable, for the primary social demand is that an individual be maintained in a state of security, albeit at a very reduced level. The secondary social demand is that the cost of such maintenance be adjusted as between Australian taxpayers generally on the one hand and those who have 'sponsored' migrants on the other. We are at this stage concerned only with the primary social demand. Whether there should be a response to the secondary demand involves legal issues concerning, inter alia, the enforceability of the maintenance guarantee.

Reasons for Decision, para. 18.

The AAT considered that the problem of payment of special benefit must be approached in isolation from the existence of the maintenance guarantee.

The special benefit discretion

The question then arose whether the daughters' provision of financial support was a sufficient ground to exercise the discretion to pay special benefit against Blackburn. They had provided that support only after the cancellation of the special benefit. And 'the Australian system of social security does not make any assumption that children should support their adult parents': Reasons for Decision, para. 18. (The AAT distinguished *Beames,* 2 *SSR* 16, where a 15-year-old boy had been refused special benefit because of his parents' financial support.)

The AAT concluded that 'ultimately our prime consideration must be a compassionate approach to the security in society of this applicant', and that the s.124(1) discretion should be exercised in his favour. (It was conceded that he was, because of age and physical disability unable to earn a sufficient livelihood.) The AAT set aside the decision under review.

Taking account of the fact that Blackburn had been supported by his daughters, the AAT decided that special benefit be granted at the maximum rate, from the date of the AAT decision.

Finally, the AAT warned that it was possible that Broudou would be required to repay to the Commonwealth any special benefit paid to Blackburn and that the family would 'need to consider whether they should make provision for this': Reasons for Decision, para. 21.

Sickness benefit: recovery from employer's insurer

SAQQA and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. N81/44)

Decided: 3 December 1981 by A.N. Hall, L.G. Oxby and I. Prowse.

In August 1978, George Saqqa was granted sickness benefit by the DSS. Payment of the benefit continued until 2 August 1979.

On 7 March 1980 the NSW Workers' Compensation Commission ordered that Saqqa's former employer pay him workers' compensation for the period from 11 August 1978 to 9 May 1979. This payment was in respect of the same incapacity as the sickness benefit.

On 23 May 1980 the Director-General of Social Services served a notice on the employer's insurer, claiming a payment of $4049.86 from the insurer under s.115(6) of the *Social Services Act.* The insurer paid this amount to the DSS on 18 June 1980, deducting it from the money due to Saqqa under the order of 7 March 1980.

Saqqa asked the AAT to review the Director-General's decision to recover the $40949.86 from the insurer.

The Legislation

Section 115 of the *Social Services Act* is, in the AAT's words, 'lengthy and somewhat complex.' Sub-section (1) provides that the rate of sickness benefit payable to a person is to be reduced by the amount of workers' compensation the person is receiving or entitled to receive, so long as the sickness benefit and the workers' compensation cover the same period and the same incapacity.

If sickness benefit is paid without any deduction (where, for instance, the award of compensation comes after the