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.

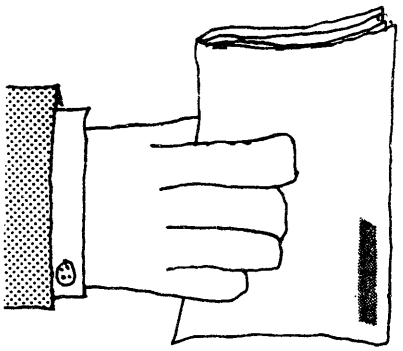
The legal issues

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

payment of sickness benefit) the Department may recover an amount equivalent to the overpaid sickness benefit under either sub-section (4) or sub-section (6).

Under sub-section (4), the DSS may recover the overpaid sickness benefit from the person who received the benefit and the workers' compensation payment. Sub-section (4A) gives the Director-General a discretion to release the person from the liability created by sub-section (4) if the Director-General is satisfied that 'special circumstances exist': see *Ivovic*, 3 *SSR* 25.

Under sub-section (6), the DSS can recover the overpaid sikness benefit from the person liable to pay compensation to the sickness beneficiary.

The discretion to waive recovery

Saqqa's representative argued that the Director-General should have considered the exercise of the discretion in s.115(4A) before seeking recovery under s.115(6). The AAT disagreed. It said that recovery (from the insurer) under s.115(6) prevented any liability to repay being imposed (on the individual) under s.115(4) and therefore it precluded the exercise of the s.115(4A) discretion:

> The discretion conferred by that sub-section can only operate upon a liability created by s.115(4). It can have no legal impact upon a liability arising pursuant to s.115(6).

(Reasons for Decision, para. 11.)

This was, said the AAT, an unfortunate but inescapable result:

> It means that the important discretionary power conferred by s.115(4A) is by-passed in every case in which there is recovery direct from the person liable to pay compensation pursuant to s.115(6). No doubt recovery is effected by that means in a large number of cases . . .

(Reasons for Decision, para 12.)

The Tribunal referred to amendments to the Act, passed in 1979, which would replace s.115 and probably overcome this gap. But the commencement date of those amendments had not yet been fixed and the gap remained.

Saqqa's representative then argued that the AAT could review the decision to recover under s.115(6), even though the discretion to waive recovery had no application. The AAT expressed strong doubts as to whether it could review that decision, now that it had been acted upon and the legal relationships between Saqqa, his employer and the DSS 'fundamentally altered by statute as a consequence of compliance with the s.115(6) notice.'

Without resolving that question, the AAT said that it was not satisfied that there were proper grounds, in Saqqa's case, for invervening, if the power existed to intervene after a s.115(6) recovery.

The AAT affirmed the decision under review.

Unemployment benefit: work test

TACEY and DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. W81/7)

Decided: 24 December 1981 by G.D. Clarkson, J.G. Billings and F.A. Pascoe.

Gail Tacey, a woman of 28 years, returned to Melbourne after four years overseas in June 1980. She lodged an application for unemployment benefit on 11 June 1980 and was requested to attend a pre-grant interview with the DSS on 24 June 1980. This appointment was cancelled at her request so that she could spend a few days in the country. (In fact she remained in the country for several months, eventually finding work at Wodonga on 21 July 1980.) On 27 June the DSS rejected her claim for unemployment benefit for failure to attend a pre-grant interview.

On 16 July, Tacey lodged another claim for unemployment benefit. She was requested to attend a pre-grant interview in Shepparton on 30 July and asked to complete an income statement. Her sister 'phoned the DSS and said that Tacey was in another part of Victoria, looking for work. The DSS also rejected this claim for unemployment benefit because 'you have left the area and not lodged your first income statement'.

Tacey appealed against both these decisions to an SSAT, which recommended on 19 May 1981 that the appeal be dismissed because 'we consider that you failed to comply with the relevant departmental requirements and you have not provided adequate evidence of work effort.' This was her first indication that the DSS was critical of her efforts to obtain employment.

Tacey then sought review by the AAT.

The Tribunal said that it was no doubt desirable for an applicant to attend a pre-grant interview and complete an income statement; an applicant who did not keep an appointment or who moved from place to place would cause considerable difficulties. But, said the AAT, none of those things amounted in itself to a disqualification under s.107 of the Act:

> The fact that an applicant does not keep an appointment with a departmental officer or moves from one place to another may on examination have some relevance to the Director-General's decision whether or not he is satisfied as to the matters in s.107(1)(c) but a failure by an applicant to keep an appointment with a prospective employer would be much more significant and a move to another area may on examination be found to be for the purpose of increasing the likelihood of employment.

Reasons for Decision, p.6.

After noting that it was unfortunate that the applicant was not told until nine months later that her job seeking efforts were in issue, the AAT found that Tacey had been, during the relevant period, willing to work and had taken reasonable efforts to obtain employment – her movements around Victoria (in Katamatite, Numurkah, Shepparton and Wodonga) were for this purpose.

The AAT set aside the decision under review and returned the matter to the Director-General for reconsideration in accordance with the AAT's finding that she was qualified to receive unemployment benefit from 18 June 1980 to 21 July 1980.

LAW and DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. Q81/40)

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

Bryan Law had been granted unemployment benefit on 25 August 1980. He regularly applied for continuation of the benefit, and it was continued until April 1981, when the DSS refused to continue the benefit because it was not satisfied that he was willing to undertake paid work or that he had taken reasonable steps to obtain work as specified in s.107(1) of the *Social Services Act*.

Law applied to the AAT for review of this decision.

The AAT was told, by Law, that he had, during the relevant period in March/April 1981, spent a good deal of time preparing for the hearing of another AAT case – No. Q81/83; and he had spent time on his part-time studies at Griffith University.

The AAT said that it could not find that, during the relevant period, Law was willing to undertake paid work – his preoccupation with the other AAT case and his studies made him unwilling to undertake paid work. However, there 'may well be sound reasons for granting the applicant a special benefit during this limited period': Reasons for Decision, p.4. That question was not, of course, before the AAT; but the Tribunal believed that the Director-General could properly take account of the time spent by the applicant in preparing for an AAT hearing when exercising the discretion in s.124 of the *Social Services Act*.

Law also told the AAT that, during the relevant period, he had 'kept an eye on the notice board outside the [University] employment office'. This was not enough, the AAT said, to show reasonable steps to find work.

The AAT affirmed the decision under review.