The Tribunal rejected 2 DSS submissions: first, that Boglis was not incapacitated for work because he had managed to work until his retirement; and, second, that the real cause of any present incapacity for work was Boglis' age.

As to the first argument, the AAT said that 'workers who are unfit to work must be free to give up their work for this reason and still qualify for invalid pension'. It was, the AAT said, 'no part of the law of Social Security in this country that those who have a job must hold that job or else remain indefinitely disqualified from benefits or pension in the future': Reasons, para.13.

As to the second argument, the AAT said that the evidence established that the primary cause of Boglis' inability to obtain employment was his medical condition:

> We acknowledge that even if Mr Boglis did not have his medical conditions he would probably not at age 60 be able to obtain full time employment as a wharf labourer but we find that if he did not have his medical problems he would not have retired from his position on the wharves. Thus he would not have been placed in a position where it was necessary to consider his chance of obtaining new employment at age 60.

(Reasons, para. 16)

CHRISTOPHIDES and SECRETARY TO DSS (No. N83/368)

Decided: 17 April 1985 by B. J. McMahon, A. P. Renouf and J. H. McClintock.

The AAT *set aside* a DSS decision to refuse an invalid pension to a 55-year-old former painter, who suffered from heart disease.

The AAT was told that bypass surgery might improve Christophides' condition; but that this could only be determined after extensive tests. Christophides refused to undergo these tests, which involved the insertion of a catheter into his heart. The AAT said that this refusal had to be accepted, because the insertion of a catheter amounted to 'major invasive surgery'; and the Tribunal referred to *Korovesis* (1983) 17 SSR 175.

MACHNIG and SECRETARY TO DSS (No. N83/188)

Decided: 13 March 1985 by J. A. Kiosoglous.

The AAT *set aside* a DSS decision to refuse an invalid pension to a 44-year-old woman, who had worked as a secretary until illness had obliged her to give up work in December 1980.

The balance of medical opinion was that Machnig suffered from severe arthritis, which had been complicated by back surgery, and low back pain. In combination, these impairments prevented her from performing secretarial work or from doing any work which involved bending, lifting or prolonged sitting.

The AAT concluded that Machnig was 'not in a position to be able to find and hold a job as a result of her medical disabilities'. The Tribunal referred to evidence given by a CES officer that the employment market was everely limited in the western suburbs of Sydney, where Machnig lived. Although this was significant, the AAT said, it would not of itself lead to a grant of invalid pension. The applicant's medical disability must be (as it was put in *Sheely* (1982) 9 *SSR* 86) of 'such significance that the incapacity can be said to arise or result from the medical condition'. In the present case, this had been established:

> Although the state of the labour market means that the applicant would have a lesser chance of finding employment given her medical disabilities, I conclude that her capacity to obtain work has arisen significantly from her medical condition and not the state of the labour market.

(Reasons, para. 41)

TRIKILIS and SECRETARY TO DSS (No. 82/252)

Decided: 15 March 1985 by B. J. McMahon, G. D. Grant and M. S. McLelland.

The AAT *set aside* a DSS decision to cancel an invalid pension held by a 44-year-old former labourer who had not worked since 1974, following an industrial injury.

The medical evidence was agreed that Trikilis was unable to perform heavy manual work because of his medical impairments; and that he was capable of doing light part-time work. However, Trikilis was illiterate in English and his only work experience had been as a labourer. In addition, he had, over the 10 years since he had last worked, lost confidence in his ability to work.

The AAT referred to several cases decided under the *Repatriation Act* and said:

> As in cases decided under different Acts (but which contain related concepts) the incapacity for work is to be measured by viewing the prospects of the person in his appropriate labour market at the time. All aspects of the person must be taken into account. An assessment of incapacity for work is not just a medical assessment. This has been stated in so many Tribunal cases now that it might almost be regarded as trite law.
>
> Taken together the disabilities in his particular labour market from which the applicant suffers are such as to inhibit him from attracting an employer or from holding a job if he were lucky enough to secure suitable employment. He is as permanently incapacitated now as he was in 1982 or 1974. We see no basis for raising any false hopes of recovery after so long a period out of the work force, living as an invalid.

(Reasons, p.13)

Legislation

A few 'technical' amendments

The *Social Security and Repatriation Legislation Amendment Bill*, introduced in the House of Representatives on 15 May 1985, contains a large number of amendments to the *Social Security Act*, most of which are technical or machinery changes. Amongst the more significant changes to the principal Act will be the following (when the Bill is eventually enacted during the Budget session of Parliament):

- **Summary trial for offences:** According to the present s. 138A(1), a person charged with an offence against s. 138 of the Act (basically, misleading the DSS in order to obtain some financial advantage) is entitled to trial by jury; although the defendant can agree to trial by a magistrate. The amending legislation will remove the right to jury trial: all s. 138 charges will be heard by a magistrate, although the maximum penalties remain at a $2000 fine or 12 months imprisonment. [The amending legislation does not affect the right of a DSS officer to jury trial if charged with an offence under s. 17(2) of the principal Act - that is, the offence of unlawfully disclosing information about another person's affairs.]
- **Direct crediting protection:** Section 135TD of the principal Act allows the DSS to pay all pensions, benefits and allowances to a bank, credit union or building society account. (The 'direct crediting' system is being fully implemented during June 1985.) Under the amending legislation, a new s. 135TD(7) will prevent social security payments, which are directly credited to a person's account in this way, being caught by garnishee orders. For example, a pensioner's creditors will not be able to get a garnishee order directing the bank, credit union or building society to pay over to the creditor the amount of pension credited to the pensioner's account. [However, the legislation does not exempt the pension payments from being seized by the bank etc., in order to pay out a debt owing to the bank.]
- **Dependent children:** Under the principal Act, extra pension or benefit is payable to a pensioner or beneficiary who has the 'custody, care and control' of a child (see, e.g. ss. 28(1B), 63(1A) and 112(4B)). All of these provisions are to be amended so that the extra pension or benefit will be payable where the pensioner or beneficiary has 'a dependent child'. (Similar changes are to be made to the qualifications for family allowance and handicapped child's allowance.)

  The term 'dependent child' will be defined, after the amending legislation is passed, so as to include a child (i) in the 'custody, care and control of the person'; or (ii) who 'is wholly or substantially in the care and control of the person'; and a student child who 'is wholly or substantially dependent upon the person'. The DSS says that this change (particularly the change in (ii) above) will reflect long-standing practice and give greater certainty to the position of a person who looks after a child in fact but does not have technical legal custody of the child. [The change probably does no more than adopt the approach taken to the current provisions in *Hung Manh Ta* (1984) 22 *SSR* 247.]
- **Children outside Australia:** The present Act seems to allow extra pension

and family allowance to be paid for children outside Australia - although there are major problems in obtaining these extra payments because the person may not be able to show that he or she has 'custody, care and control' of the child - see *Hung Manh Ta* (above) and *Al Halidi* (in this issue of the *Reporter*).

Under the present Act, extra pension and family allowance can be paid if the person intends to bring the child to Australia as soon as reasonably practicable; and the family allowance or extra pension cuts out if the child is not brought to Australia within 4 years of the first payment of that extra pension or benefit. The amending legislation will change these rules: the 4 year period will run, not from the first payment of family allowance or extra pension, but from the time when the person was first in Australia and her or his dependent child was outside Australia; and eligibility for the extra payment will depend, not on the person's intention to bring the child to Australia, but on the Secretary's assessment that 'it is likely that the person will bring the child to live in Australia' within the 4 year period.

[The DSS has made the following comment on this change (a comment which is a little misleading in view of the AAT decisions referred to above):

> 'In the main case to which the "4 year" rule is intended to apply, i.e. immigrants to Australia who leave their children temporarily in their native country, the result would be that these children will be capable of being regarded as dependent children during the first 4 years after the arrival in Australia of the immigrant, but not thereafter.'

The difficulty is that, according to the AAT, a child overseas cannot be regarded as in the 'custody, care and control' of their parent in Australia; and the somewhat expanded concept of 'dependent child' in the amending legislation does nothing to overcome that difficulty. It is, to say the least, unfortunate that the Government has not taken the opportunity (when drafting this amending legislation) to correct the difficulty highlighted by the AAT. The AAT invited the Government to take that action in *Al Halidi* (in para. 17 of the Reasons):

> 'If in fact the interpretation of the phrase custody care and control applied in *Re Hung Manh Ta* and this decision is more strict than Parliament intends, the legislation perhaps will be amended to clarify the concept of custody care and control where the child is outside Australia but the parent claiming pension or allowance is in Australia.'

The amendments proposed by the amending legislation (particularly the broadening of the concept of 'custody, care and control') ignore this invitation; and do nothing to alleviate the problem highlighted by the AAT.] **P.H.**

Statistics

	Feb. 85	Mar. 85	Apr. 85	May 85
Applications lodged*	29	32	45	44
Decided by AAT	13	18	22	15
Withdrawn	19	15	7	12
Conceded	26	20	8	20
No jurisdiction	3	4	5	1
Lapsed	0	11	3	0
Awaiting decision at end of month	725	690	690	686
***Applications lodged: type of appeal**				
Unemployment B	5	3	5	5
Sickness B	2	1	4	2
Special B	1	0	1	0
Age Pension	3	4	3	1
Invalid Pension	11	13	20	16
Widow's Pension	2	3	2	3
Supp. Parent's B	1	0	0	2
HCA	2	3	3	7
Family Allow.	0	2	2	4
FOI	1	1	2	2
Other	1	2	3	2
State where application lodged				
ACT	0	3	0	1
NSW	15	11	8	11
NT	0	3	0	0
Qld	3	6	13	2
SA	3	1	3	7
Tas.	0	1	3	0
Vic.	1	2	14	11
WA	7	5	4	12

Long term trends

In the first 5 years of the AAT's social security jurisdiction (1 April 1980 to 31 March 1985), there have been 3666 applications for review of social security decisions. Of these, 2301 were medical (invalid pension, sickness benefit and handicapped child's allowance) and 1365 were non-medical.

As we pointed out in 19 *SSR* 208, the rate of new appeals reached a peak in May 1983 (when there were 121 new appeals), and has been steadily declining since then. (In the first 3 months of 1985, only 85 new appeals were lodged.)

A major factor in the decline in appeals has been the reduced number of medical appeals - down from a high of 818 in 1983 to 299 in 1984 (and 30 in the first 3 months of 1985). Generally, the number of non-medical appeals has remained steady at around 30 a month, apart from March 1985 when there were only 5.

New South Wales and Victoria continue to dominate the AAT's caseload, as this table shows:

ACT	26
NT	8
WA	214
Tas.	120
SA	267
Qld	534
NSW	1350
Vic.	1133
Total	**3666**

Although social security's share of the AAT caseload has shrunk from 36% to 30%, it still constitutes by far the largest single category of appeals (FOI, with 21%, is the next largest). (Overall, the number of appeals to the AAT (i.e. in all its jurisdictions) has fallen from 506 in January-March 1984 to 391 in January-March 1985.)

The decline in social security appeals may only be a temporary phenomenon: 'This trend,' the Administrative Review Council has observed, 'will no doubt be reversed when appeals against valuations made under the *Social Security and Repatriation (Assets Test and Budget Measures) Act* 1984 eventually come before the AAT.'*

The AAT has reported that, over the last 5 years, 3243 appeals have been 'determined'. In 152 cases, the AAT had no jurisdiction; the DSS conceded 1252 appeals (500 of these concessions were made in 1984); and 794 appeals were withdrawn by applicants. The AAT adjourned a further 179 appeals indefinitely. The remaining 866 appeals were decided by the Tribunal as follows:

affirmed	402
set aside	445
varied	19

1984 was a particularly busy year for the AAT - it decided 342 social security appeals (compared with 251 in 1983). And it was a particularly successful year for applicants, who won 222 (65%) of the appeals decided by the AAT (apart from the 500 appeals conceded by the DSS in 1984).

As at 26 March 1984, there were 423 appeals awaiting decision (compared with 1021 a year earlier). Of these, 58 had been heard and were awaiting decision, 1 was part-heard, and 226 had been listed for hearing.