The AAT pointed out that, during almost all of this period, Warren-Mercer's domicile depended (under common law rules) upon the domicile of her husband. There was insufficient evidence before the Tribunal to establish the domicile of her husband, the AAT said. Accordingly, the AAT directed that inquiries should be made of the Commissioner of Taxation to determine whether the Commissioner was satisfied that, during the relevant period, Warren-mercer's 'permanent place of abode' was outside Australia. If the Commissioner was not so satisfied, a further hearing of the matter should be arranged so as to receive evidence on the question of the domicile of Warren-Mercer's husband after he left Australia in 1976.

Formal direction

The AAT found that, apart from the provisions of the Reciprocity Regulations, Warren-Mercer's entitlement to an age or widow's pension depended upon her domicile for all or part of the period of her absence from Australia and upon the satisfaction of the Commissioner of Taxation as to her 'permanent place of abode'.

The Tribunal directed that inquiries be made of the Commissioner of Taxation; and, if the Commissioner were not satisfied that her 'permanent place of abode' was outside Australia during this period, a further hearing should be arranged to consider the question of the domicile of Warren-Mercer during her absence from Australia.

Special benefit: secondary students

MT, KM, NT and JT and SECRETARY TO DSS
(Nos N85/545, 550, 551, 559)
Decided: 30 January 1986 by R.K. Todd, G.R. Taylor and G.P. Nicholls.

These were 4 applications for review of decisions by the DSS to reject applications for special benefit lodged by the applicants, each of whom was a secondary student.

The facts

In 1985, **MT** was enrolled in year 11 of secondary school. She left home in February that year because of difficulties in her family situation. She lived by herself for some time and then boarded with a family until mid-November 1985, when she returned to live with her mother. Throughout the period from February to November 1985, MT's only income came from an allowance paid under the Secondary Assistance Scheme (SAS), totaling $1202 and a few occasions of casual employment. She applied to the DSS for special benefit on 19 April 1985; but her application was rejected on the ground that she was receiving the SAS allowance.

During 1985, **NT** was also enrolled in year 11 and had been obliged, because of family difficulties to leave home. She shared a flat with 2 other people. During 1985, NT received $960 by way of SAS allowance, a small amount of income from part-time work and, between October and December 1985, payments of $83 a fortnight from the NSW Department of Youth and Community Services. Some time before 21 February 1985 she attended at a DSS regional office and attempted to apply for special benefit but was told that she was not eligible. On 9 September 1985 she lodged a written claim for special benefit, but the DSS rejected this claim on the ground that she was receiving SAS allowance.

During 1985, both **KM** and **JT** were enrolled in year 9 of secondary school. Each of them had been obliged to leave home because of family breakdown and was living in a hostel for homeless young people. The hostel received payments from the NSW YACS Department for each of the children living at the hostel under s.27A of the *Child Welfare Act* 1939 (NSW). From this money, the management of the hostel gave KM and JT $20 a week each to allow them to pay for their own clothing, fares and personal needs. (According to the hostel rules, residents of the hostel who had income were required to pay 20% of that income to the hostel. It was understood that, if KM and JT were to be granted special benefits, they would be obliged to pay 20% to the hostel.) KM and JT claimed special benefit on 13 August 1985 but the DSS rejected their claims on the basis that they were receiving the benefit of payments made under State welfare legislation.

The legislation

Section 124(1) of the *Social Security Act* gives the Secretary a discretion to grant special benefit to a person where the Secretary is satisfied that the person is 'unable to earn a sufficient livelihood'.

The DSS conceded that each of the applicants was eligible for the payment of special benefit because they were 'unable to earn a sufficient livelihood' but argued that the discretion to grant a special benefit should not be exercised in their favour.

This argument was set out in amendments to the DSS Manual, which had been introduced following the AAT decision in *Spooner* (1985) 26 *SSR* 320. These amendments declared persons eligible for SAS allowances were 'not eligible for special benefit'; but that special benefit could be paid to full-time secondary students at year 10 level or below who had experienced a complete breakdown in family relationships.

The amended DSS guidelines also declared that the discretion to grant special benefit could be exercised where a secondary student was not being supported by a responsible adult, was not receiving support through a State welfare authority, and was not eligible for an education allowance or other form of income support.

The Secondary Assistance Scheme was established by the Commonwealth Government under a ministerial directive. A policy manual, issued under the authority of the minister, described the basic aim of the scheme as 'to assist parents with limited income to maintain their children at school for the final 2 years of secondary education (i.e. years 11 and 12)'. The scheme also could be used to provide 'direct assistance to students to assist them with their own support'. Under the scheme, a student must have access to additional cash resources of at least $1800 a year; but the means of the student or the student's family should not exceed a prescribed ceiling. The maximum rate of SAS allowance in 1985 was $1202, payable in three equal amounts at the beginning of each school term.

'Unable to earn a sufficient livelihood'

The AAT said that each of the applicants was unable to earn a sufficient livelihood during the relevant period because he or she was attending school and because his or her commitments to school work meant that he or she was not available for full-time or substantial part-time employment. On this point, the AAT followed the decision in *Spooner* (above).

In particular, the AAT accepted that the reference in s.124(1) to earning a livelihood referred to the person's ability to engage in full-time or substantial part-time employment and not to question whether the person was receiving some form of (perhaps gratuitous) support. On this point, the AAT acknowledged, some of the comments made in the earlier decision in *Beames* (1981) 2 *SSR* 16 had been mistaken.

The DSS guidelines

The AAT said that, although the DSS guidelines were necessary for the administration of a large department with widespread responsibility and although the AAT should not attempt to exercise broad discretions (such as the discretion in s.124(1)) in a vacuum without regard to such guidelines, the amended guidelines issued in September 1985 and relied on by the DSS in the present case were 'fundamentally flawed'.

The discretion

The AAT said that the structure of the Secondary Assistance Scheme made it

Section 122(2) provides that, where a person receiving sickness benefit becomes qualified for unemployment benefit, the person may be paid unemployment benefit 'from and including the day after the day up to which the sickness benefit is paid to that person . . .'

The s.145 power

The AAT first concluded that it was empowered to treat the claim for unemployment benefit lodged on 22 January 1985 as a claim for sickness benefit. The power to do this was conferred by the old s.145 and the new s.135TB(5), there being no material differences between the 2 provisions.

The AAT noted that the question of the exercise of the s.145 discretion had first being raised before the AAT and had not been considered by an SSAT nor by the Secretary when considering the recommendation of the SSAT. The AAT also noted that, in *Guirguis* (1985) 28 *SSR* 331, the AAT had concluded that, in such circumstances, it did not have jurisdiction to use the s.145 power. The AAT said that, if *Guirguis* could not be distinguished from the present case, it would not follow that decision. The AAT pointed out that, in *Hales* (1983) 13 *SSR* 136, the Federal Court had discouraged the adoption of a 'narrow or pedantic approach . . . in determining whether a decision falls within the scope of review by the AAT.' The AAT continued:

> 'In my opinion it would be taking too narrow a view of this Tribunal's power to review decisions of the respondent to limit it strictly to questions which have been considered by the SSAT . . . this Tribunal is empowered to exercise all the powers and discretions that are conferred on the person who made the original decision (s.43 *AAT Act* 1975). This must include the power to exercise the discretion formerly conferred by s.145 and now conferred by s.135TB(5).'

(Reasons, pp.14-5)

The Tribunal said that, although the claim for unemployment benefit lodged on 22 January 1985 could not be described as a claim for an inappropriate benefit, the discretion in s.145 (now s.135TB(5)) could be exercised by the AAT so as to treat that claim as a claim for sickness benefit for the period when Kay was qualified for sickness benefit and as a claim for unemployment for the period when he was qualified for unemployment benefit. This, the Tribunal said, was the approach adopted in *Dixon* (1984) 20 *SSR* 213 and *Hurrell* (1984) 23 *SSR* 266.

In the present case, the AAT said, it was reasonable to treat the claim for unemployment benefit lodged on 22 January 1985 as a claim for sickness benefit for that part of the period between 14 December 1984 and 21 January 1985 when Kay was qualified for sickness benefit. This was because Kay had not had the advantage of appropriate advice from the DSS as to the course which he should follow when the payment of sickness benefit to him ceased on 14 December. (The AAT was satisfied that Kay had not received the standard form normally sent by the DSS when a person's sickness benefit expired, advising the person to lodge a further medical certificate.)

Eligibility for sickness benefit

The AAT noted that Kay's illness had continued until the end of 1984. It said that, if he could provide a medical certificate that he was unable to work between 14 December 1984 and January 1985, he should be granted sickness benefit to the date specified in that certificate. However, if Kay could not provide such a certificate, the Secretary should consider exercising the discretion given by s.117(1) of the *Social Security Act* to dispense with that certificate. If the Secretary were to decline the exercise this discretion, Kay should be free to re-apply to the AAT.

Eligibility for unemployment benefit

The AAT said that, if sickness benefit was paid to Kay for the period up to early January 1985, then the unemployment benefit granted to Kay from 22 January should be backdated, under s.122(2), to the date when the sickness benefit ended - so as to ensure a continuity of benefit. The Tribunal expressly rejected a DSS argument that the only power to backdate unemployment benefit was the limited power in s.119(A).

The AAT also referred to the situation which might arise if Kay was unable to establish entitlement to sickness benefit beyond 13 December 1984. The AAT said that, in those circumstances, Kay would not be able to rely on s.122 so as to require retrospective payment of a new claim for unemployment benefit. [The AAT did not explain why s.122 would be unavailable in such a situation.]

The question would then arise, the AAT said, whether Kay could be paid unemployment benefit for that intervening period (from 14 December 1984 to 21 January 1985) on the basis of the claim for unemployment benefit lodged on 7 November 1984. The AAT noted that, in *Turner* (1983) 17 *SSR* 174, the Tribunal had decided that a new claim for unemployment benefit was necessary for each period of eligibility; but that, in *Hurrell* (above) another Tribunal had disagreed with this view. In the present case, the AAT said that this difference of opinion would have to be resolved if Kay were unable to establish his entitlement to sickness benefit for the period from 14 December 1984 to early January 1985; and reserved that question should it become necessary to decide it.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with directions -

that Kay be paid sickness benefit upon the lodging of a claim and a medical certificate;

that the Secretary consider dispensing with the need for such a medical certificate if Kay were not able to supply one; and

if sickness benefit were paid for the period from 14 December 1984, Kay should also be paid unemployment benefit from the end of the sickness benefit period to 21 January 1985.

The Tribunal also reserved liberty to either party to apply should any further difficulties arise.

Widow's pension: proof of age

ALAMEDDINE and SECRETARY TO DSS
(No.N85/428)
Decided: 14 February 1986 by A.P.Renouf.

The AAt *affirmed* a DSS decision to cancel payment of widow's pension as from 19 April 1985 on the ground that the widow no longer had the 'custody, care and control' of a child.

By virtue of s.60(1) of the *Social Security Act*, if a widow has not reached the age of 45 at the time when she loses custody, care and control of a child under 16, then she loses her pension. If she has reached that age at that time, she qualifies for a class B widow's pension (normally paid to widows over 50 without the custody etc of a child).

As Alameddine's last child had turned 16 and given up full-time studies on 8 December 1984, she would need to have been born on or before 8 December 1939 in order to remain qualified for widow's pension.

The applicant said that she did not know her date of birth, but believed that she was over 45 years of age. A card from the Alfred Hospital in Sydney gave her date of birth as 5 August 1939, but this was merely a record of her statement.

Alameddine's Lebanese passport stated that she was born in 1943 but she claimed that her family had reduced her age when they went to Lebanon so that she would qualify for free milk and food.

The NSW Registrar-General's Department recorded her year of birth as 1940 or 1942. Her family allowance file recorded her year of birth as 1940 or 1943.

The Tribunal concluded that the dates of birth given on her behalf on