made unless there has been a claim for that benefit.

Section 124 of the Act states that special benefit may be paid to a person 'who is not a person to whom unemployment or sickness benefit is payable' and by reason of age, physical or mental disability or domestic circumstances, or for any other reason is unable to earn a sufficient livelihood.

Eligibility for unemployment benefit
The only issue in the case was whether the applicant was eligible for unemployment benefit for the relevant period. By the operation of s.124 such a qualification would bar him from claiming an entitlement to special benefit for the period claimed.

The applicant submitted that unemployment benefit was not payable to the applicant at the relevant time because a claim had not been made for that benefit as required by s.135TA. The DSS argued that unemployment benefit was 'payable' to the applicant if he had claimed it.

The Tribunal accepted the DSS argument. Section 135TA was merely procedural, if he had claimed unemployment benefit at that time then it would have been 'payable'. As s.124 only allows special benefit to be paid to a person to whom unemployment benefit is not payable the DSS had no power to pay special benefit for the period claimed. Section 124 was, said the AAT, 'a provision which must be interpreted having regard to eligibility and without regard to procedure.'(Reasons,p.6)

This was not a case where the applicant was totally ignorant of his rights under the Act. As a former employee of the Department he was fully aware of them.

The AAT referred to the decision in *Law* (1982) 5 *SSR* 52 where the Tribunal had indicated that the words 'is not a person to whom an unemployment benefit or sickness benefit is payable' in s.124 referred to a person who is eligible for the benefit and not a person who is in receipt of the benefit. This supported the reasoning in the present decision.

Formal decision
The AAT affirmed the decision under review.

Special benefit: student

V.K. and SECRETARY TO DSS
(No. V86/369)
Decided: 9 February 1987 by R. Balmford

The applicant applied to the AAT to review a decision by the DSS to refuse his claim for special benefit made in March 1986.

The facts
The applicant was a student at a college of advanced education. He had left the family home in January 1985 due to conflict between himself and his father. He deferred his course at that time and received unemployment benefit. He resumed his course in February 1986 and applied for TEAS. This application was rejected due to the income of the applicant's parents. He then applied for special benefit.

The Tribunal also received evidence that it was not in the psychological interests of the applicant for him to return to the family home. Deferral of his course would also not be in his psychological interests.

The legislation
Section 124 of the *Social Security Act* provided at the relevant time that a person may receive special benefit where he/she is not a person to whom unemployment benefit or sickness benefit are payable and who by reason of age, physical or mental disability or domestic circumstances, or for any other reason is unable to earn a sufficient livelihood.

Section 133 of the Act was amended in 1986 to read that a benefit is not payable to a person in receipt of a payment under a prescribed educational scheme or a person in a course of education on a full-time basis. Section 133(2) provides that a benefit granted prior to 1 July 1986 is not affected by that provision until 1 January 1987.

Thus as the claim for special benefit was lodged and rejected before the 1 July 1986 the AAT had to consider the period from the date of the claim until 31 December 1986 for the eligibility of the applicant for special benefit.

Was the applicant eligible for special benefit?
There was no doubt that the applicant was not a person to whom unemployment benefit was payable at the relevant time. He could not be regarded as unemployed while engaged in a full-time course of study.

The Tribunal was also satisfied that the applicant was unable to earn a sufficient livelihood. The AAT referred to *Casper* (1985) 25 *SSR* 300 where it was accepted that a full-time student was unable to earn a sufficient livelihood during times of instruction and examination.

Exercise of discretion in s.124
In deciding whether the discretion to grant special benefit should be exercised favourably towards the applicant the Tribunal considered the status of the applicant as a full-time student and that he was ineligible for TEAS. As in *Casper* the Tribunal considered it inappropriate to support from the public purse an applicant for special benefit when the applicant is ineligible for TEAS.

It was also relevant to consider that the applicant, if successful in his application would merely repay a loan to his mother. Being ineligible for special benefit or AUSTUDY in 1987 he would probably have to enrol part-time and find work. There would be little significant impact on his present situation if his application was successful.

Formal decision
The AAT affirmed the decision under review.

'Dependent child'

KOPCZYNSKI and SECRETARY TO DSS
(No. S85/133)
Decided: 11 February 1987 by J.A. Kiosoglous, B.C. Lock and D.B. Williams

The applicant had been in receipt of a widow's pension until December 1984 when she was transferred to an age pension. In May 1984 she applied for an additional benefit in respect of her student daughter. This claim was rejected by the DSS and the applicant sought review by the AAT.

The legislation
Section 28(1AA) of the *Social Security Act* increases the standard rate of age or widow's pension where the claimant has a 'dependent child.' That term is defined in s.6(1) to include:

> '(b) a student child, not being the spouse of the person, who is wholly or substantially dependent upon the person.'

A student child is defined as a person between the ages of 16 and 25 who is in full-time education.

'Wholly or substantially dependent'
In 1984 the student daughter had received a TEAS allowance although the applicant provided $200 in university fees and between $300 and $400 for books. During that year the applicant provided 'spasmodic' financial assistance in times of need.

This pattern continued through 1985 and 1986, although in 1986 the daughter did not receive TEAS and had to rely on part-time work and a loan from her sister in addition to the applicant's assistance. There was also evidence of other items being provided by the applicant throughout the relevant period, including clothes, food and furniture.

The Tribunal referred to *Grech* (1981) 3 *SSR* 28, *Mrs B* (1984) 22 *SSR* 246 and *Al-Halidi* (1985) 25 *SSR* 303. In the first two decisions the test formulated was 'whether the applicant's daughter is in all essential features dependent upon her mother for the satisfaction of her financial needs.' According to *Grech* the meaning of 'substantial' was not to a 'great degree' but to a 'greater degree'. In *Al-Halidi* however, the test was formulated in terms of a 'significant degree'. Dependence was in that decision to be assessed absolutely and not relatively.

The AAT concluded that on either of the above tests the applicant's daughter could not be described as a 'dependent child'. She was largely independent of her mother and the assistance provided was only a small proportion of her total income.

Formal decision
The AAT affirmed the decision under review.

Age pension: evidence of claim

SIMILLIS and SECRETARY TO DSS (No. N86/739)
Decided: 19 February 1987 by A.P.Renouf, J.H. McClintock and H.D. Browne

The applicant had been granted the age pension from 1 February 1985. She claimed that the commencing date should be 6 September 1984 on the basis that she had first claimed the pension on 4 September 1984. The DSS refused this claim and the applicant asked the AAT to review the decision.

The facts
The DSS said that they could not find the claim that the applicant alleged she lodged in September 1984. The applicant said that she lodged the claim when she went to the DSS office with her husband to lodge his Entitlement Review Form in respect of his pension. The applicant's accountant supported the applicant's account of events by stating that he had assisted the applicant in the preparation of the claim in September 1984. He had also accompanied the applicant and her husband to the DSS office and had himself enquired as to the progress of the claim before Christmas 1984. He was told that it was held up due to industrial action.

The DSS argued that the authority to grant a benefit under the *Social Security Act* was dependent upon the lodgement of a claim and that no claim could be found that was lodged prior to February 1985. Also the evidence showed that the applicant had ticked a box in the claim of February 1985 (which was lodged when the applicant was informed that her initial claim could not be located) that indicated that she had not previously made a claim for the pension. The DSS thus submitted that on the balance of probabilities a claim had not been lodged prior to February 1985.

Benefit of doubt
The AAT did not accept that submission. While there was some doubt that the applicant had made a claim at the earlier date the Tribunal said:

> '... in view of the impression of credibility Mrs Simillis made upon us, in view of the corroboration of her evidence by [her accountant] and in view of the beneficial nature of the Act, we feel bound to give the applicant the benefit of the doubt and find in her favour.' (Reasons, para. 6)

Formal decision
The AAT set aside the decision under review and directed that the applicant was entitled to age pension from 6 September 1984.

'Permanent home'

CLARK and SECRETARY TO DSS (No. N86/400)
Decided: 4 November 1986 by B.J. McMahon

The applicant had qualified for invalid pension in March 1973 but the rate of pension was assessed at nil having regard to the combined income and property of the applicant and his wife. In May 1985 the DSS affirmed that decision and the AAT was asked to review that decision.

The facts
At about the time the applicant qualified for invalid pension the applicant learned that an expressway was to be built through his property. He had lost two previous homes in the same manner. He had attempted to ensure this third property would not suffer the same fate. When he was told that this home was to be acquired he was upset and immediately placed it on the market. The applicant and his wife then moved to a flat on the coast. Subsequently they bought a block of land and erected a garage on it in which they lived until they could build a house. They could only do that when their house was sold.

The house remained on the market for four years. In that time the applicant's daughter stayed in the house and paid an amount towards the cost of rates and repairs. The applicant was happy to have her stay in the house as caretaker. The personal effects, clothes, photographs, and furniture of the applicant and his wife remained in the house. These arrangements continued up until the time the applicant qualified for age pension, that is the period with which the AAT was concerned for the purposes of the decision.

The legislation
At the time of the original decision s.18 of the *Social Security Act* provided that 'income derived from property' means income derived from property owned by the person other than income which consists of an annuity or which is derived from property that is the permanent home of the person.

Section 30 provided that in calculating the value of property owned by the person there shall be disregarded the value of the permanent home of the person, any charge existing over the property and if for any special reason the Director-General so directs, the value of the whole or any part of the property of the person.

'Permanent home'
The issue was whether the DSS had calculated the value of the 'permanent home' of the applicant when assessing his income under s.18 or the capital value under s.30.

There was no detailed discussion of the phrase 'permanent home' as it appeared in the Act. The Tribunal referred to *Lin Ho* (1984) 17 *SSR* 179 which considered the meaning of the phrase 'residing permanently'. In that case Fox, J said that one was looking for 'a relationship to the country of some closeness' and 'that the phrase was something akin to home'.

In the case of the applicant the AAT concluded that he had a 'relationship