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

of some closeness' to the house. His personal belongings remained there, his daughter protected the property in his absence and he did not own any other home. It was still his permanent home even though he did not reside there. Given the past experiences of the applicant with respect to acquisition of his homes for public purposes and the uncertainty surrounding the acquisition until it was finally bought by the Government his decision not to reside there was understandable.

Formal decision

The AAT set aside the decision under review and directed that the rate of invalid pension for the relevant period should be calculated on the basis that the house owned by the applicant was his permanent home.

Invalid pension: 'incapacity in Australia'

SURI and SECRETARY TO DSS
(No. S86/26)
Decided: 12 December 1986 by J.A. Kiosoglous, B.C. Lock and J.T.B. Linn

The applicant had been denied invalid pension and applied to the AAT for review of that decision. The basis of the DSS decision was that the applicant had been incapacitated for work before he migrated to Australia in 1983. Section 25 of the Act provides that invalid pension shall not be granted to a person unless they became incapacitated for work while in Australia.

The evidence suggested that the applicant may have had a long standing condition before leaving India. However, the critical question was whether that condition rendered him incapacitated for work prior to his arrival in Australia. Little reliance could be placed on the medical examination conducted by the Australian authorities prior to his departure from India. Records were destroyed 12 months after the examination and the only advice from the immigration authorities was that there was no objection to the applicant's entry on medical grounds.

The fact that the applicant had been in employment prior to his departure from India was strong presumptive evidence of a lack of incapacity for work. The medical evidence could not categorically state that the applicant was incapacitated for work before his arrival. In the absence of such evidence the AAT was not prepared to find that the applicant was incapacitated for work prior to leaving India. This is, in effect, the application of the 'no evidence' rule. A decision adverse to the applicant would be based on speculation, not on proven fact.

Invalid pension: portability

RAVENSTEIN and SECRETARY TO DSS
(No. V83/208)
Decided: 10 October 1986 by R. Balmford, L. Rodopoulos and G. Brewer

Wilhelm Ravenstein asked the AAT to review a DSS decision to reject his application for invalid pension. The applicant was a resident of Germany who had lived in Australia from 1958 until 1973. He worked in Australia for about 12 years before returning to Germany where he worked for a few months. He returned to Australia in 1974 for neck surgery before finally returning to Germany in 1975. He had not worked since that time.

The legislation
Section 24A of the *Social Security Act* provides that an invalid pension is payable to a person who is permanently incapacitated for work or is permanently blind, has not resided in Australia since 7 May 1973, became permanently incapacitated or permanently blind while in Australia and is a person who, in the opinion of the Secretary is in special need of financial assistance.

Was the applicant 'in special need of financial assistance'?
The only issue in dispute was whether the applicant was 'in special need of financial assistance.' The Tribunal did pause to consider whether he had resided in Australia since 7 May 1973 given his return in 1974 for surgery. The AAT concluded that his short visit at that time was for a specific purpose and he could not be regarded as being resident at that time.

In determining whether the applicant was in special need of financial assistance, the Tribunal referred to *Buttigeig* (1984) 17 *SSR* 178 and *Harris* (1985) 25 *SSR* 299. The Tribunal, following on from those cases, had to determine whether the applicant's case was exceptional in character when compared to persons in similar circumstances.

The applicant had a back injury and other painful ailments. He was a diabetic and required special meals each day. He had to pay his own medical and related costs as he did not belong to a pension insurance scheme.

The Tribunal also had evidence of the forms of assistance available to the applicant in Germany. The schemes were either contributory - which placed the applicant at a disadvantage as he had not worked in Germany for a sufficiently lengthy period to contribute sufficient sums to maximise his benefits - or depended on local government support. This latter form of social assistance appeared variable depending upon the priority accorded it by the area in which one resided.

Thus the applicant was in a worse off position than his German peers who had been contributing to the schemes available in Germany. He was also disadvantaged in comparison to the position he would have found himself in if he had chosen to remain in Australia. He had effectively 'fallen between the social security schemes of two countries.' The Tribunal concluded that he was in special need of financial assistance.