fix the same maximum 4-year period for the payment of this benefit as for the payment of family allowance - subject to a similar discretion for the Secretary to extend the period as in s.96(8).

'Any special reason'

Donovan had told the DSS, in July 1986, that his wife and daughter (who were both living in Papua New Guinea) would be joining him in Australia in January 1987. The necessary money for airfares was tied up on deposit until then. The DSS had taken the view, which it repeated before the AAT, that Donovan's receipt of $2500 arrears of family allowance and unemployment benefit (following the AAT's decision in March 1986) was enough to enable him to bring his wife and child to Australia.

Donovan's wife and child had not joined him by the time of the hearing in this matter, in mid-1987. The AAT observed that, despite Donovan's wish to have his family join him in Australia, 'his wife was resisting leaving home and extended family in New Guinea': Reasons, para.23.

The AAT noted that s.96(8) allowed the time limit to be extended beyond 4 years for 'any special reason in any particular case'. While this was similar to the reference to 'special circumstances' in other parts of the Act, it was not identical; and to apply the various decisions which had considered that phrase to the phrase in s.96(8) -

> 'would not assist inquiry . . . [because] the latter phrase is even more capable of embracing a wide variety of matters of a more particular kind rather than setting general limits against which particular cases must be measured as had been the tendency in interpreting the phrase "special circumstances" under the Act, particularly in regard to invalid pensions.[*sic*]'

(Reasons, para.20)

The AAT said that 'any special reason' should be examined in the context of the purpose of the legislation. Both benefits -

> 'primarily . . . are benefits provided for Australian residents, that residency requirement applying to both the claimant and to the child with exceptions arising for temporary absences. . . . [A] four year period is not a restrictive one within which to effect compliance with the overriding purpose of the Act, namely, to provide benefits for persons permanently based in Australia.'

(Reasons, para.21)

In the present case, no 'special reason' had been established for exercising the discretion to extend the 4-year period.

Formal decision

The AAT affirmed the decision under review.

Assets test: valuation

REYNOLDS and SECRETARY TO DSS
(No.S85/199)
Decided: 3 November 1987 by R.A. Layton.

The AAT *affirmed* a DSS decision that, for purposes of the assets test, the value of Reynolds' land should be taken as $15 000.

The land in question was the excess part of the 4.6 hectares on which Reynolds' principal home stood - that is, the 2.6 hectares of that land in excess of the 2 hectares 'curtilage' which is exempted from the assets test: s.4(4), *Social Security Act*. In an earlier decision, *Reynolds* (1986) 35 *SSR* 444, the AAT had set out the principles by which the value of this excess should be decided.

The DSS's valuer had valued the 4.6 hectares at $120 000, and the 2 hectares with the house at $105 000.

But a valuer employed by Reynolds had valued the whole property at $134 855 and the 2 hectares with the house at $129 105, leaving a value for the excess of $5750.

At the hearing of this review, Reynolds said that he was prepared to compromise and accept a valuation for the 2.6 hectares of $10 375. However, the DSS indicated that 'it would be inappropriate to bargain in such a manner with social security entitlements'.

Although the AAT accepted the valuation made for the DSS, it was critical of the inflexible attitude of the DSS, particularly in light of the subjective nature of valuation. Such an attitude undermined the value of preliminary conferences, the AAT said:

> 'Bearing in mind that this matter does not raise questions of law or principle but merely a decision on the facts, reasonable compromise would appear to be the best and most cost effective solution. Lack of negotiation and compromise becomes more ludicrous when one looks at the difference in values in this application being some $5000 on property valued at in excess of $130 000.
>
> In the Tribunal's view, the respondent's refusal to negotiate in a genuine claim is a waste of departmental time, money and resources and the respondent should consider its attitude to allow some margin for negotiation in a genuine case in which two different values are obtained by experts. For example, a guideline may enable negotiation where a differential value of less than $10 000 or 10% exists, whichever figure is the lesser.'

(Reasons, para.16)

Supporting parent's benefit: 'dependent child'

LAM VAN BIEU and SECRETARY TO DSS
(No. W87/67)
Decided: 22 October 1987 by J.O. Ballard.

Lam Van Bieu was granted a supporting parent's benefit from February 1979, the date when he and his wife separated and he retained custody of their 3 sons.

At some time before 1986, Lam moved to Perth with 2 of his sons, leaving the third, Chan, with his sister in Melbourne. The DSS cancelled payment of additional benefit for Chan from 12 June 1986. Lam asked the AAT to review that decision.

The legislation

Lam's entitlement to additional benefit for Chan depended on whether Chan was a 'dependent child' of Lam. At the time of the decision under review, this term was defined in s.6(1) of the *Social Security Act* as meaning a child under 16 years in a person's custody care and control or -

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

'Substantially dependent'

Chan was 19 years of age and enrolled as full-time secondary student. Chan had lived with Lam's sister until September 1986. He had received some payments under the Secondary Allowance Scheme, as well as financial assistance from his grandmother and Lam's sister. However, it appeared that Lam did not provide his son with financial support during 1986.

From January 1987, when Chan entered the final year of his secondary studies, he moved into a flat and was paid an AUSTUDY payment of $45 a week (which was not the independent rate). Lam sent his son $100 in February 1987, but was unable to make any other payments because he was not receiving additional benefit for Chan.

The DSS had argued that Chan could not be regarded as wholly or substantially dependent on his father, because Chan was receiving AUSTUDY and was living in another State from his father. The AAT rejected this submission, as '[n]o authority, either from the Act or Tribunal decision, was given to support either submission': Reasons, para.15.

The AAT said that a student child was dependent on a person if that person provided food, shelter and necessary clothing, as had been decided in *Mrs B* (1984) 22 *SSR* 246; and that 'substantially' meant 'in greater part'. It was clear that, during 1986, Chan had not been dependent in that sense on his father.

But the position in 1987 was different, the AAT said. Lam had sent some money to his son; but Lam's position was 'somewhat analogous to a person who cannot support his family because, being in prison, he is unable to do so.' The AAT referred to *Baker v Thomas Robinson & Son Pty Ltd* (1955) WCR 90, at 92, where it had been said, on this analogous problem:

> 'The total period during which the relationship has continued, the length of the gaol sentence, the extent to which there is evidence of facts indicating an intention to resume cohabitation upon the worker's release, and the whole history of the relationship between the parties are factors which must be taken into account, and there may be many others.'

In the present case, the AAT said, Lam had told the Tribunal that his son would join him in Perth at the end of 1987. Given that fact, Lam's payment to his son in February 1987, the fact that Chan no longer received support from his extended family in Melbourne and the level of Chan's AUSTUDY payments, the AAT decided that Lam should receive additional benefit for his son from 1 January 1987:

> 'However for the future this must be on the basis that the applicant is continuing to satisfy Chan's needs for food, shelter and clothing, by sending him funds for this purpose; unless the applicant is able to show this he will not be eligible to continue to receive the supporting parent's benefit after the date of this decision.'

(Reasons, para.26)

Formal decision

The AAT set aside the decision under review and decided that the applicant was entitled to additional supporting parent's benefit for his son, Chan, from 1 January 1987 to the date of the decision.

Handicapped child's allowance: late claim

FARACI and SECRETARY TO DSS (No. N87/442)
Decided: 19 October 1987 by A.P. Renouf, D.J. Howell and M.S. McLelland.

The AAT *affirmed* a DSS decision not to backdate payment of a handicapped child's allowance granted to Laura Faraci for her son, O, in 1986.

O had been born in 1972 and diagnosed as suffering from severe developmental problems in 1979. Although O then attended a special school, Faraci had not been told of the allowance until 1986.

Faraci claimed that her delay in claiming the allowance had been caused by 'special circumstances' within s.102(1)(a) of the *Social Security Act*: she had few English-speaking friends and spoke Sicilian at home; however, it appeared to the AAT that she had 'a working knowledge of oral English'.

The AAT said that Faraci could not be described as socially isolated: she had worked in a factory; she had also done piece-work at home, in response to newspaper advertisements; and her two elder children were skilled in English. The AAT said:

> 'As regards this question of isolation, there is so much difference with the facts in the matter of *Cox* (1984) 22 *SSR* 252 that the decision in that matter (and similar ones concerned with Aborigines) is of little help to the applicant.'

(Reasons, para.14)

The AAT said that the failure of teachers at the special school to tell Faraci of the allowance was -

> 'most unfortunate but it has to be recognized that no legal obligation existed. More pertinent is the fact that the respondent was not at fault, at least directly.'

(Reasons, para.16)

Cohabitation

SPENCER and SECRETARY TO DSS (No. N86/618)
Decided: 11 September 1987 by R.A.Hayes

The applicant applied to the AAT for review of a DSS decision to treat the applicant and a woman he lived with as husband and wife. The consequence of this decision was that their income and assets were aggregated for the purposes of calculating the rate of their age pension.

The facts

The applicant and Mrs B were both aged 66. Both of them, together with the son of Mrs B, had bought and run a business while living in the residential part of the premises. This arrangement existed for about four years. In 1984 the applicant and Mrs B left the business and bought a house together. They had separate bedrooms, holidayed separately but shared meals. They socialised together but did not present themselves as married. Household expenses were paid out of a joint fund but they each had separate personal finances.

The applicant was diagnosed as having cancer in 1981 and as his health worsened he required more assistance from Mrs B. The respective sons of the applicant and Mrs B viewed the arrangement as one of convenience.

The test

The Tribunal referred to the need to consider all facets of the relationship to determine whether it was a de facto relationship.

> 'The starting point, of course, under the statutory definition, is that the relationship must be heterosexual, and permanently under the one roof ... Given two people of the opposite sex living together under the one roof, one must then ask the question why they have chosen to do this. People will, of course, have many mixed motives for pursuing a particular course of conduct, particularly in their relationships with others. The predominant motive of each party might, however, be to secure the emotional gratification to be derived from the incidence of an ongoing personal relationship with the other; this might be sought on a permanent basis (at least, for the foreseeable future); and their presence under the one roof might be explicable predominantly by pursuit of the emotional gain from their relationship. If so, the relationship does have a special quality which would set it apart from relationships with others, and make it a de facto relationship within the statutory definition.'

(Reasons, p.7)

The Tribunal found that the predominant motive of the applicant and Mrs B in setting up house was to secure the emotional gains of a