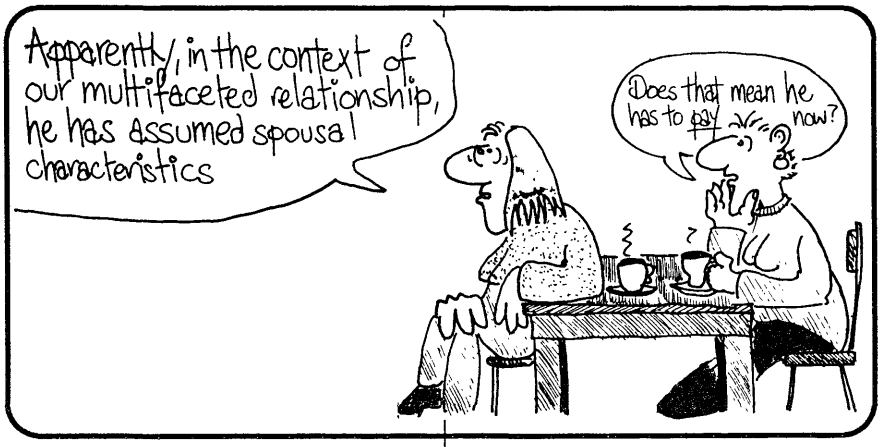

'Of his statement to the effect that he made the claims at all because "it's the Government and you take them for all you can get", it must be borne in mind that in the context of income tax, such a view is widely representative of the Australian ethos.'

(Reasons, para.27)

Notwithstanding these factors, and evidence led of a tombstone on Shine's mother's grave which described her as 'in-law of Bill', the Tribunal held that all of the other evidence of support of Shine by G was explicable by his close attachment to his only child Amelia. Each of the instances of material support followed the birth of the child. By contrast, he had known Shine for many years before the birth and no such support had been previously forthcoming, other than small contributions when he was temporarily resident in her house.

The AAT accepted that Shine -

'is the disgruntled former wife of a husband who would not work and .... that she is not interested in again entering a relationship of or akin to marriage. He is a bushy, to use the vernacular, a bachelor but a man whose moral dictates decree that he should support a life which he in part created.'

(Reasons, para.33).

Formal decision

The AAT set aside the decision to cancel Shine's supporting parent's benefit and remitted the matter to the Secretary with the direction that Shine was eligible for supporting parent's benefit.

[R.G.]

Unemployment benefit:full time students

KARNIB and SECRETARY TO DSS
(No.N88/122)
Decided: 1 June 1988 by A.P. Renouf.

The AAT *set aside* a DSS decision that Ali Karnib had been overpaid $6403 by way of unemployment benefits paid between February and August 1986.

Karnib had arrived in Australia with his wife and 7 children in 1984. He attempted to find work without success. At the beginning of 1986, he enrolled as a full-time university student for a B.Sc. degree, in the hope of improving his chances of finding employment.

The AAT found that Karnib had continued to look for work and would have abandoned his studies if he had found a job. However, Karnib did not advise the DSS of his enrolment. When the DSS discovered that he was enrolled as a full-time student, it cancelled his unemployment benefit and claimed an overpayment.

The AAT said that earlier Tribunal decisions [which it did not name - but see, for example, *Collins* (1985) 27 *SSR* 328] established that a full-time student could be 'unemployed' within s.107(1) of the *Social Security Act*. Because Karnib intended to give up his studies if he found employment and he took reasonable steps to find work during the relevant period, he had been qualified for unemployment benefit.

The introduction, from 3 June 1986, of a new provision, s.133, did not affect Karnib's eligibility: that provison had disqualified from unemployment benefit a full-time student receiving a TEAS allowance, or not receiving such allowance because of poor academic results. But Karnib was not receiving TEAS because he had refused an offer of TEAS in May 1986. In any event, the AAT noted, s.133 did not affect unemployment benefit granted prior to 1 July 1986 until 1 January 1987.

[P.H.]

Assets test: severe financial hardship

NAGLE and SECRETARY TO DSS
(No. N87/831)
Decided: 30 June 1988 by I.R. Thompson.

Eileen Nagle was granted an age pension in November 1978. She had spent the last 40 years of her life caring for her brother, who suffered from cerebral palsy, was grossly disabled and required constant care. When the assets test was introduced, the DSS cancelled Nagle's pension. She asked the AAT to review that decision.

The legislation

At the time of the decision under review, s.6AD(1) of the *Social Security Act* [now s.7(1)] provided that a person's property was to be disregarded for the purposes of the assets test where the person could not reasonably be expected to sell or realize the property or use it as security for borrowing (para (c)) and the Secretary was satisfied that the person would suffer 'severe financial hardship' if the property was taken into account (para (d)).

The DSS guidelines declared that a single person with readily convertible assets exceeding $6000 would not generally be regarded as a person who would suffer 'severe financial hardship' as required by s.6AD(1)(d). On the basis of that guideline, the DSS had concluded that Nagle could not meet the requirement of s.6AD(1)(d).

S.6AD(3) of the Act [now s.7(4)] provided that, where property was disregarded for the purposes of the assets test, the annual rate of pension payable to the person was to be reduced by the amount of income 'that could reasonably be expected to be derived' from the disregarded property.

'Severe financial hardship'

Nagle and her brother lived on a farm of 607 hectares, owned as tenants in common by Nagle and another brother, L, who managed the farm for the support of Nagle, L and L's family. In the tax year ended 30 June 1985, Nagle derived $6241 from the farm and $1078 from investments; in the 1985-86 tax year she derived $2104 from the farm and $1254 from investments; and in the 1986-87 tax year she derived $4042 from the farm and $1206 from investments.

In January 1985, Nagle had liquid assets of $16 942; and at the date of the hearing of this review those assets amounted to $19 894.

The AAT said that, taking into

account the circumstances in which Nagle had inherited the farming property and now owned it as tenant in common with L and the partnership under which they now farmed the property, Nagle could not reasonably be expected to sell the property. Because of her limited income, she could not reasonably be expected to use the property as security for borrowing. It followed that she met part of the requirements of s.6AD.

Would Nagle suffer severe financial hardship? The AAT said that the DSS had applied its guideline without regard to Nagle's particular circumstances. These included the constant demands on her time involved in giving intensive care to her disabled brother, B, 24 hours a day. They also included Nagle's determination to maintain a life assurance policy on her life in order to provide for the cost of nursing care if she should die before B; the distinct possibility that B could require urgent and expensive surgery; and the costs of providing various aids and comforts essential to meet his needs, but not covered by B's own limited income, from an invalid pension. Taking into account those circumstances, the AAT said, it would not have been reasonable in 1985 to expect Nagle to reduce her cash assets; and it had not been reasonable at any time since then to expect her to do so. Accordingly, she met the 'severe financial hardship' requirement of s.6AD(1).

Discrimination between urban and rural residents?

The AAT adjourned hearing of the question of the amount of income which could reasonably be expected to be derived from disregarded property. It noted that the 'deemed income' would be deducted, dollar for dollar, from the age pension which would otherwise be paid to Nagle: see now s.7(4). This was in contrast to the normal income test, which deducted only half of a pensioner's actual income in excess of $40 a week: see now s.33(1)(a)(i).

The AAT also noted that the exemption of a person's principal home from the assets test could produce an

> 'apparent lack of even-handedness in the Act as it affects country residents and city residents respectively. A city resident with assets substantially exceeding in value those of a country resident may receive the full pension and fringe benefits while the country resident receives no pension at all, and necessarily, therefore, no fringe benefits.'

(Reasons, para.18)

The AAT said that it had drew attention to this problem in *Doyle* (1986) 33 *SSR* 414. Since then, s.7(4) had been made more stringent. This was -

> 'clearly a cause of grievance to those adversely affected by it. If their perception of a lack of even-handedness in the Act is a false perception, possibly appropriate steps might be taken to explain to them why it is false. If, on the other hand, the perception is correct, it may be thought fitting to amend the provisions appropriately.'

(Reasons, para.18)

Formal decision

The AAT decided that Nagle would suffer severe financial hardship if the former s.6AD and the present s.7 did not apply to her.

[P.H.]

Rehabilitation assistance

PORTER and SECRETARY TO DEPT OF COMMUNITY SERVICES AND HEALTH
(No. V87/444)

Decided: 1 June 1988 by R.C. Jennings.

Anthony Porter applied to the Department of Community Services and Health (DCSH) for training under s.135 of the *Social Security Act*. When his application was refused, he asked the AAT to review the refusal.

Porter suffered from a serious and deteriorating hearing problem. He had been employed in the Commonwealth Public Service as a clerk since November 1983. In 1985, he began a part-time university course in psychology, and completed the first year successfully. He had applied to the DCSH for rehabilitation assistance with this course of study, but that application was rejected.

At the beginning of 1986, Porter was granted leave from his employment to undertake full-time university study. He again applied for rehabilitation assistance. This application was supported by the director of the university's learning centre, who explained that Porter required 'notetaking support for tutorials and lectures in his subjects'. The DCSH also rejected this application.

The legislation

At the time of the decision under review, s.135(1) of the *Social Security Act* gave the respondent power to provide 'treatment and training' to -

> 'persons who are suffering from a physical or mental disease . . . who would be likely to derive substantial benefit from that treatment and training".

According to s.135A(2)(b), a person was not eligible for treatment and training unless, *inter alia*, the person's physical or mental disability was, or was likely to be, 'a substantial handicap ... to the person's undertaking employment.'

The DCSH had developed guidelines, which restricted rehabilitation assistance 'to those people who are unemployed or whose employment is clearly at risk.'

On 5 June 1987, the *Disability Services Act* repealed ss.135 and 135A of the *Social Security Act*; but the rights of any person receiving, or eligible to receive, treatment and training under s.135 were converted into rights under the *Disability Services Act*.

Handicap to 'undertaking employment'

The AAT said that the critical question was whether Porter's permanent position with the Commonwealth Public Service prevented a finding that his disability was a substantial handicap to his 'undertaking employment' within s.135A(2)(b). Could that phrase relate to persons already in employment?

The AAT said that the history and context of ss.135 and 135A provided no basis for excluding persons who might already be in employment. And there was no justification for reading 'undertaking' to mean 'to enter upon, begin'; rather it was used in the sense of 'to take upon oneself' or 'to perform'.

The AAT had no doubt that Porter would derive a 'substantial benefit' from assistance with his course of study; and that he was therefore eligible for assistance under the former s.135 and for a rehabilitation program under the present *Disability Services Act*. However, the AAT declined to prescribe the type of program to be provided. It had 'neither the expertise, the information nor the flexibility of the respondent', the AAT said.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary to the DCSH with directions that Porter was eligible for treatment or training under the former s.135 of the *Social Security Act* and for a rehabilitation program under the present *Disability Services Act*. The AAT recommended that a program be approved as soon as practicable.

[P.H.]

Income

HACK and SECRETARY TO DSS
(No. N87/1256)

Decided: 24 May 1988 by A.P. Renouf

The application was for review of a decision to reject age pension because of insufficient evidence of age, and because of the income test. Anna Louise Hack was a'protected person' as defined in the NSW *Protected Estates Act* 1983 and, since October 1986, her estate was managed by the NSW Protective Commissioner.