Background

Rate of special benefit for Australian citizen children

The issue of the rate of special benefit (SB) to pay Australian citizen children who claim it because their supporting parent cannot access income support has been the subject of substantial appeal activity in recent times. This situation arises in the context of a citizen child being in the care of a parent who is ineligible to access social security payments for themselves or family tax benefit for their child, due to residency status. This means that the citizen child is left without any source of income support. The scenario most often seen is where a woman has left a relationship due to domestic violence, with a child of the relationship who is an Australian citizen by birth.

The *Vu* decision

In a recent Administrative Appeals Tribunal (AAT) decision *Secretary, Department of Family and Community Service v Hieu Tran Vu* (2001) 4(11) *SSR* 127 the President of the AAT created a significant precedent by establishing new principles and a new maximum rate when determining the rate of SB to be paid.

The rate of SB payable is discretionary under s.746(1) of the *Social Security Act 1991* (the Act), although subsection (2)caps the rate in certain circumstances.

> **Rate of Special Benefit**
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> **746.(1)** The rate of a person's Special Benefit is the fortnightly rate determined by the Secretary in his or her discretion.
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> **746.(2)** Subject to Part 2.24 (major disaster), the rate of a person's Special Benefit is not to exceed the rate at which Youth Allowance, Austudy payment or Newstart Allowance would be payable to the person if:
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> (a) the person were qualified for Youth Allowance, Austudy payment or Newstart Allowance; and
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> (b) Youth Allowance, Austudy payment or Newstart Allowance were payable to the person ...

In *Vu* the claimant was a young Australian citizen born in July 2000. Vu's citizenship was derived from his father who is a permanent resident. His mother was in Australia on a temporary visa. When he was three months old his mother left his father because of domestic violence. Vu's mother did not have permanent residency so she was not entitled to any social security payments. Vu was entitled to receive SB because he was an Australian citizen who was in 'severe financial hardship' and 'unable to earn a sufficient livelihood'. Centrelink decided to pay him in accordance with their current policy. He was granted SB at the rate of youth allowance paid to a person living at home — $158.80 a fortnight.

From his SB Vu paid for his and his mother's refuge accommodation (23% of his income) as well as food, transport, medical expenses and all other personal items. After paying the refuge fees they were left with $61 a week between them. On appeal the Social Security Appeals Tribunal (the SSAT) decided that the legislation enables Centrelink to pay Vu's SB at the highest youth allowance rate, called the 'single with child' rate of $380.10 a fortnight. In reaching its decision the SSAT took into account the fact that Vu needed to provide his mother with income support so that she could nurture him.

The Department of Family and Community Services (the Department) appealed this decision. The case was heard at the AAT on 10 August 2001 by a Full Bench of the Tribunal, headed by President Justice O'Connor.

The issue to be decided by the AAT was the correct rate of SB to be paid to Vu. SB exists to catch people who have a special need and who cannot otherwise qualify for social security benefits. The discretion as to rate exists so the variety of situations that may arise from time to time, and which cannot be forseen, can be taken into account.

Previous AAT decisions in *Secretary, Department of Social Security v Underwood* (1991) 15 AAR 81 and *Secretary, Department of Social Security v Kumar* (1992) held the approach of how, in exercising the discretion, to locate an appropriate benchmark group and bring the claimant up to the standard available to that group.

During the AAT hearing in *Vu* there was evidence provided about the Department's policy. It was indicated that the Department had changed its policy prior to the hearing and that the policy was that infant children of non-resident parents could be paid the 'independent' rate of youth allowance, a rate higher than the 'at home' rate but not as high as the 'newstart allowance — with child' rate. Unfortunately, the Department could not provide the Tribunal with clear evidence of the new policy. The Department could only provide a copy of a recommendation that the Department change its policy guidelines. The Tribunal noted that the Department's Guide to the Act had not been changed and concluded that the proposed new policy had not been endorsed.

The Department submitted that the discretion in s.746(1) was restricted by s.746(2) and required a decision maker to choose between the three types of payments listed in s.746(2) — newstart allowance, youth allowance or AUSTUDY. It was argued that the factor of age should determine which of the three payment types should be used to set the rate of payment.

Vu submitted that s.746(1) conferred a broad discretion and if a person did not 'fit' within one of the three payment types listed in s746(2) then the decision maker should go back to the broad discretion in s.746(1) unfettered by the qualifications in s.746(2). The appropriate benchmark was submitted to be one based on position in society or on need.

The Tribunal rejected the argument that age should determine which of the three payment types in s.746(2) was applicable in setting the rate of payment.

> The Tribunal noted that while the intention to place a limitation on the rate of special benefit to be paid was clear, no mention was made in the Explanatory Memorandum of the fact or age and there was no apparent intention to adjust the underlying policy of the provision.
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> (Reasons, para. 25)
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> The [Department's] policy concentrates on a factor (age) which, under the scheme of the Act, yields a generally lower amount of payment (youth allowance). At the same time the policy disregards the ramifications of that factor for the conditions of existence of the claimant. This, in the Tribunal's view, produces an unnecessary injustice.
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> (Reasons, para. 29)

The Tribunal found that because of his age, Vu did not fit into any of the payments listed in s.746(2). However, while the subsection did not have direct application in this case, it did provide evidence of an intention to impose a ceiling on the rate of payment of SB.

The Tribunal then looked at Vu's particular circumstances to find the correct rate of payment. The Tribunal found that Vu was an infant and therefore reliant on

his mother for survival. Vu's father provided no support and his mother had no means of support and was prevented from working because of her non-resident status. Vu and his mother were in temporary refuge accommodation. The Tribunal found that Vu was dependent on his mother for survival and as an infant Australian citizen of a non-resident parent, Vu required a level of income support that recognised his need for a carer.

The Tribunal found that the appropriate rate of SB for Vu was the maximum amount that can be paid up to the ceiling indicated by s.746(2), being the rate of newstart allowance payable to a person who is single, 21 or over and with a child ($386.90 a fortnight).

Current departmental policy

The *Vu* decision marks a significant departure from earlier cases that tried to fit each applicant into an appropriate 'benchmark' group based on age. It allows the Department to consider the child's circumstances rather than having to decide which category of youth allowance payment most fits the child's situation.

The Department's current policy in relation to the appropriate support for these vulnerable citizen children is unclear.

At the time of writing, the Department's Guide to the Act states at 3.7.2.80:

> **SpB for Australian citizen Children in the Custody of a Non-permanent Resident ...**
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> **Determining the rate of payment**
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> A child who is granted SpB when in the custody of a non-permanent resident, should be paid at a rate equivalent to the amount of FTB (Part A) that would other wise be payable to the parent in respect of the child. This may also include RA, however the total rate paid should not exceed the 'at home' rate of YA
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> Explanation: this rate is comparable with the level of assistance available for the support of other Australian children of the same age

It is clear that despite the above 'explanation', the rate recommended in the Guide is in no way comparable with the level of assistance available for the support of other Australian children of the same age. Both family tax benefit and the 'at home' rate of youth allowance are *supplementary* benefits, they are paid for the support of children whose parents have other income support from either employment or Centrelink benefits. The citizen children of non-resident parents are at an enormous disadvantage compared with other children as they need to provide financial support to their parents to enable their parents to nurture and support them. The *Vu* decision is, therefore, very important as it goes some way towards alleviating this disadvantage.

Full implementation of the *Vu* decision would not have a large impact on the social security budget. However, it would have an enormous positive impact on those families to whom it applies. These children rarely rely on SB for more than two years and there are only small numbers of them. The rate of SB can be reviewed at the time that the citizen child's parent's residence status is resolved, or at the time of any other relevant change.

Jackie Finlay

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There is no good reason at law why participants on 'Work For The Dole Programs' should be denied the basic right that all workers in Australia take for granted. When this matter was taken up with the office of the then Minister, the writer was told rather bluntly that it was not a priority for the government. A letter was subsequently received from the Department arguing that the above insurance cover should be adequate for participants and that in essence the points made above are 'unfounded'.

Alan Anforth

Alan Anforth is a Canberra barrister