they received no income from the asset prior to its disposal nor have they received income from it since the disposal. The applicants were not aware of the precise effect of the disposal of the property. They may have realised that it would improve their situation in some 'non-specific' way but they relied heavily on their son's advice.

In considering what would have been the effect on the applicants' pension rate if they had not disposed of the property it was necessary to consider their eligibility under the hardship provisions. It would not have been reasonable to expect the applicants to have sold or realize the land as the result would have been to jeopardise their son's farming activities as he had secured a loan on his parent's property. Also their son's activities were relevant with respect to the operation of s.6AD(3). That section allows the reduction of the pension rate to occur by reference to the rate of income the person could expect to receive from the property. The AAT considered that the applicants would not have received any income had they retained the property as the only way they could have done so was to lease it. This was not practicable as it would have prevented the son from carrying out his farming activities.

Thus the applicants satisfied the hardship provisions. This meant that they would have been better off if they had not disposed of the property.

With respect to the fifth factor in *Twelftree* the AAT concluded that it was reasonable for the applicants to dispose of the property. The property was not income producing, it could not be said that they disposed of it to place themselves in a financially unviable position.

Having disregarded s.6AC the only remaining question was whether the applicants were in 'severe financial hardship'. Their assets falling below the DSS guideline of $10,000 the Tribunal concluded that this criteria was also satisfied.

Formal decision

The AAT (by majority) set aside the decision under review and directed that section 6AC of the Act shall be disregarded in relation to the homestead property, that section 6AD applied to the applicants, that no income could reasonably be expected to be derived from the use of the homestead property and that the applicants' pension be recalculated with regard to the above directions.

Lock dissented from the majority decision. He considered that s.6AC could not be disregarded. Section 6AC(10) sets out how a person is to be taken to have disposed of property for the purposes of s.6AC. That sub-section states that where a person disposes of property for no consideration or inadequate consideration that shall be taken to be a disposal of property.

It was clear from the facts, said Lock, that the homestead property was gifted for no consideration. That is where the matter ends.

If the matter goes further however, in the opinion of Lock, when the transfer of the property was made the dominant purpose was to qualify for the age pension and that therefore the amount of the disposition should be taken into account in assessing the value of the property of the applicants.

On the question of disregarding s.6AC, Lock saw a need for compelling reasons. He disagreed with the majority on their conclusions with respect to the application of the factors in *Twelftree*. The farm had some capacity to produce income whether by a share-farm agreement or lease arangement with his son.

If transfer of property had not taken place Lock was not satisfied that the hardship provisions would apply. In those circumstances the applicants would own land worth $141,000. The applicants admitted that they could have used the property to borrow money and live off the proceeds. Lock also considered that the applicants' son was capable of paying a rental for the property. As he was therefore of the view that the property could produce income, he did not consider that s.6AD would apply. He would have affirmed the decision under review.

MONDY & MONDY and SECRETARY TO DSS
(No. N86/314)
Decided: 17 December 1986 by C.J. Bannon, M.S. McClelland and J.H. McClintock

The AAT *set aside* a DSS decision to cancel the invalid and wife's pension of the applicants after the introduction of the assets test.

In determining whether the hardship provisions applied to the applicants the AAT first had to consider whether s.6AC should be disregarded for the purposes of the hardship provisions. Section 6AC states that a disposition of property includes a disposition for no consideration. The effect is that such dispositions in excess of $4,000 shall be included in the value of the property of the person.

In determining whether s.6AC should be disregarded as is required by s.6AD in order for the hardship provisions to operate the AAT commented:

> 'The crucial question in the Tribunal's opinion relates to Mr Mondy's motive in transferring that property to his sons. We are satisfied that he did not transfer the properties to his sons so as to obtain a pension or so as to diminish his assets in order to obtain a pension for himself or his wife; but that he transferred the properties to his sons as part of a scheme of family arrangement in which he wished to provide for his children. We believe that the applicants did not dispose of these assets for the purpose of avoiding the effect of the law and to obtain pensions by menas of disposition of property; but they did it because they have a family of eight children and they feel a proper sense of responsibility to their sons, and that is the reason why they disposed of the property.' (Reasons, p.10)

The AAT went on to find that the applicants would suffer severe financial hardship if s.6AD did not apply.

Special benefit: backdating

DOWLING and SECRETARY TO DSS
(No. Q86/268)
Decided: 12 February, 1987 by D.P. Breen

The applicant had been denied special benefit on the basis that at the relevant time he would have been entitled to unemployment benefit, and that the applicant failed to satisfy the DSS that he was unable to earn a sufficient livelihood pursuant to s.124(1) of the *Social Security Act*. The applicant applied to the AAT for review of that decision.

The facts

The applicant had resigned from the employ of the DSS in July 1985. He intended to set up a gardening business and to earn income by giving private tutoring in science and sociology. He had no response to his advertisements for work as a gardener and he could only obtain one pupil when he made himself available for private tutoring. He later obtained some work as a casual fruit picker and applied for work generally in response to newspaper advertisements. In December 1985 he applied for, and was granted, unemployment benefit although he had been eligible for that benefit since July.

The legislation

Section 135TA(1) of the *Social Security Act* provides that a grant or payment of a benefit shall not be

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.