Act provided that a person who had the 'custody, care and control of a child' was qualified to receive family allowance for that child. This section was amended in 1985 to provide that a person who had a 'dependent child' was qualified to receive family allowance for that child. Section 6(1) defined 'dependent child' as meaning (so far as is relevant) a child under 16 'in the custody, care and control of the person'.

Section 96(5) also allows family allowance to be paid in respect of children living outside Australia where the Secretary is satisfied that it is likely that the person will bring the child to live in Australia within four years of the day that the person began to live in Australia.

The Tribunal found that it was the applicant's parents who were responsible for the day to day maintenance, training and advancement of her son. The applicant was not in a position to communicate with her parents to the extent necessary to exercise the degree of daily care and control necessary to entitle her to receive family allowance.The Tribunal referred to *Hung Manh Ta* (1984) 22 *SSR* 247, *Le* (1986) 32 *SSR* 403, *Al-Halidi* (1985) 25 *SSR* 303 and *Schneider* (1986) 30 *SSR* 381.

The AAT commented:

> Mrs Nguyen has made considerable personal financial sacrifices to enable her to make a contribution to her son's maintenance but payment of maintenance alone is not enough for the purposes of Part VI of the Act to justify the conclusion that the applicant has custody, care and control of her child (*Hung Manh Ta*). Mrs Nguyen was unable to tell the Tribunal if the money raised from the sale of goods she has sent to Vietnam is sufficient to cover the costs of [her son's] upbringing. Custody, care and control of a child may be delegated to another but it must be limited in time and purpose. The Tribunal is satisfied that the applicant's confidence in her parent's ability to bring up [her son] according to her wishes is well founded. He is learning English at school as a language which is her wish and he helps his grandparents. However, her demonstrated interest in and concern for his welfare, the affection she has for him and her financial support does not qualify her for family allowance...
> (Reasons, para.13)

Formal decision

The AAT affirmed the decision under review.

Unemployment benefit: farmer

WALLER and SECRETARY TO DSS (No.S86/25)
Decided:24 October 1986 by A.P.Renouf, B.C.Lock and J.T.B.Linn

The applicant applied to the AAT for review of a decision to cancel his unemployment benefit.

The facts

The applicant had informed the DSS in March 1984 that he was in receipt of income from share farming on his mother's property. At that time the claim for unemployment benefit was rejected on the basis that he had not taken reasonable steps to obtain work. Benefit was paid when more information was supplied by the applicant as to his efforts to obtain work. But it was cancelled again in September 1985 when it was decided that he had not taken reasonable steps to find work.

At the time of this cancellation the applicant had also informed the DSS that he would be renting 600 acres of the share farm for the running of sheep. That would only take one or two days per month. His aim was to make the farm profitable and so no longer require unemployment benefits. He was financing the running of the farm with loans and money received in unemployment benefit.

The legislation

Section 107(1)(c) of the *Social Security Act* provides that to qualify for unemployment benefit the applicant must be (i) unemployed, (ii) capable of undertaking and willing to undertake paid work that in the opinion of the Secretary was suitable to be undertaken by the person, and (iii) have taken reasonable steps to obtain such work.

Was the applicant 'unemployed'?

It was not disputed that the applicant had taken reasonable steps to obtain work. The issue for the AAT was whether he was 'unemployed'.

Dealing first with the period when the applicant was engaged in share-farming on his mother's property the Tribunal found that he was so committed to this activity that he could not be regarded as being 'unemployed'. The length of time, intensity of his involvement and the relatively high amount of financial expenditure led to this finding.

The same conclusion was reached in relation to the latter period when the applicant proceeded to rent part of the farm. At this point he substantially increased his investment and went heavily into debt.

Eligible for special benefit?

A question remained as to whether the applicant may qualify for special benefit. Section 124(1) of the Act reads:

> ...
> (c) with respect to whom the Secretary is satisfied that, by reason of age, physical or mental disability or domestic circumstances, or for any other reason, is unable to earn a sufficient livelihood for himself and his dependents (if any).

The AAT found that the applicant could not be granted special benefit. For the period between the cancellation of his unemployment benefit and prior to his renting of part of the farm the AAT said that his circumstances had not altered since he began share-farming years before. He had not become 'unable to earn a sufficient livelihood for himself and his dependents'.

As for the time commencing the date that he rented part of the farm the AAT could find no authority for the proposition that special benefit should be paid to fund his living expenses until the next wool clip. The Tribunal commented:

> What happened from 3 October was that the applicant embarked upon a business venture financed by loans which he thought would be profitable (but which he has since realized was a mistake). He thus found himself lacking cash to enable him to carry on until income from the venture became available. He therefore borrowed money from the State

> Bank for living purposes. He cannot now claim that special benefit should be paid to him to enable him, in effect, to pay off part of that loan for, by his own action, he showed himself not in need of the benefit.

(Reasons,para.24)

The AAT also quoted at length from the decision in *Watts* (1984) 21 *SSR* 237 in support of its conclusion.

Formal decision

The Tribunal affirmed the decision under review.

'Income'

HANLEY and SECRETARY TO DSS (No.S86/35)
Decided: 24 October 1986 by A.P.Renouf

Leonard Hanley had been in receipt of an invalid pension since October 1980. He had been injured as a soldier whilst serving abroad in 1949. Initially the Repatriation Commission ruled that his injuries were not due to military service and so held that he was not eligible for compensation under the *Repatriation Act*. However the applicant succeeded in having this claim re-opened and in 1985 he was granted a 100% disability pension backdated to December 1980.

As a result of this decision the DSS adjusted the applicant's rate of invalid pension and raised an overpayment of $1,368. The Department of Veteran's Affairs deducted that amount from the arrears of disability pension. The applicant sought review by the AAT of the decision to raise the overpayment.

The legislation

The question for the Tribunal to decide was whether the payments received by way of disability pension were income for the purposes of the *Social Security Act*.

Section 6 of the Act defines 'income' as:

> ...personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for the person's own use or benefit by any means from any source whatsoever, within or outside Australia, and includes a periodical payment by way of gift or allowance, but does not include -...

The exclusions that follow specify a 'service pension' under the Repatriation but do not mention any other kind of pension under that Act.

War pension is 'income'

The applicant did not receive a service pension. He did not therefore come within the exclusion in section 6. The Tribunal could find no other conclusion than that the applicant's war pension, being 'moneys received' for his own use or benefit, amounted to income.

The applicant had attempted to rely on the decision in *Kolodziej* (1985) 26 *SSR* 315 where it had been decided that restitution payments made to persons persecuted by the Nazi regime were not income. But the AAT regarded that case as very different from the present case. The Tribunal agreed with the following comment made in *Kolodziej*:

> [the restitution payments] are distinguishable from compensation payments paid pursuant to Workers Compensation Acts and Australian War Pensions which are related directly to 'services rendered in one form or another'.

(Cited in Reasons,para. 14)

Formal decision

The Tribunal affirmed the decision under review.

Sheltered employment allowance: assets test

MORGAN and SECRETARY TO DSS (No.N86/339)
Decided:17 October 1986 by A.P.Renouf, M.S.McLelland and G.P.Nicholls

The applicant applied to the AAT for review of a decision to cancel his sheltered employment allowance.

The facts

The applicant had been injured in a car accident when he was 2 years old. He was now 21. He had a spastic condition in his left arm and leg and had moderate mental retardation and epilepsy. He received over $90,000 in compensation. This amount was handed to the Public Trustee to administer for the benefit of the applicant. By July 1985 the money invested had come to $217,486.51.

In May 1981 the applicant applied for and was granted invalid pension at the full rate. In January 1984 this was changed to sheltered employment allowance when he went to work at a sheltered workshop. This allowance was cancelled in March 1985 after the introduction of the assets test as the assets held by the Public Trustee exceeded the permitted limit.

Since that time the Public Trustee had been paying the applicant living expenses of $500 per month.

No exemption for mentally retarded

Despite having much sympathy for the applicant the AAT had little choice but to affirm the decision under review. There was no real dispute that the assets of the applicant exceeded the limit. The Tribunal commented:

> As the Act stands, it provides exemption from the assets test for only one class of disabled persons, the blind. It may be - and it was argued plausibly on behalf of the applicant - that in equity, the exemption from the assets test should be extended to the mentally retarded and other classes of disabled persons where monies are held in trust for their wellbeing after those closest to them are no longer living. That is not a matter for this Tribunal but for Parliament. We note in passing that were the bulk of the applicant's trust funds invested in a 'principal place of residence', he would in all likelihood be once again eligible for the sheltered employment allowance. That is, however, not the case and we can do no more than apply the Act as it stands.

(Reasons, para.14)

Formal decision

The AAT affirmed the decision under review.