Section 133(b) of the *Social Security Act* required a beneficiary to immediately notify DSS upon commencing to carry on a business (s.133 was repealed as from 1 June 1990).

The power to cancel a benefit is contained in s.168(1). Under s.168(2) the cancellation may take effect from a date earlier than the date of determination where there has been a failure to comply with the Act (with 2 exceptions not relevant here) or a false statement.

Although not stated by the AAT, it appears that the overpayment in this case was raised under s.246(1) of the *Social Security Act*, under which a 'debt due to the Commonwealth' was created if an overpayment resulted from 'a false statement or . . . a failure . . . to comply with any provision of this Act'. Section 251(1)(b) permits the waiving of recovery of whole or part of a debt.

Application of assets test

The Tribunal found that at all relevant times the Vines' assessable assets exceeded the permitted level of $127 000 and Mr Vines was therefore not eligible to receive sickness benefits. Accordingly the statement given to DSS by Mr Vines on 5 September 1988 that their assets did not exceed $100 000 was false.

However, the AAT did not find that there was any earlier failure to comply with the *Social Security Act*, essentially, it seems, because it accepted that Mr Vines had not received any earlier notice requiring him to inform DSS of an increase in assets.

Failure to notify commencement of business

The AAT had to determine when Mr Vines' hydroponic business commenced. Reliance was placed on the Full Federal Court's decision in *Federal Commissioner of Taxation v Osborne* (1990) ATC 4889, in which it was decided that a business of growing nuts commenced during the time when the trees grew but well before they began to bear.

The AAT concluded:

> 'There is no doubt that Mr Vines was in the business of farming by mid to late October 1988. All of the equipment had been installed and the first crop had been sown.'

(Reasons, para. 24)

> '. . . All things done prior to [mid-October 1988] were mere preparation for eventually commencing business. It follows that the Tribunal finds that Mr Vines was not in breach of s.133 . . . until he failed to notify the Department that he had commenced business as at late October 1988.'

(Reasons, para. 25)

Recalculation of the overpayment

Without clearly articulating what it was doing, the AAT took the earlier of Mr Vines' transgressions, the false statement of assets value on 5 September 1988, as the starting point and recalculated the overpayment from the next pay day, 12 September 1988, arriving at an overpayment amount of $5648.22.

Waiver

The AAT also found that, 'if Mr Vines had been declared ineligible for sickness benefit as from 5 September 1988, the family would have been entitled to the Family Allowance Supplement for the period 5 September 1988 to 30 January 1989': Reasons, para. 27. This resulted in a notional FAS entitlement of $1300.

The AAT considered comments of the Federal Court in *Salvona* (1990) 52 *SSR* 694, in which it was said that a DSS decision to recover a debt does not necessarily involve a decision not to waive recovery and therefore the Tribunal may not have had power to waive a debt where waiver has not been considered by the DSS.

In relation to Mr Vines, the AAT decided that it —

> 'will not determine the question of waiver or write-off. The matter was not argued before us and no body of evidence of sufficient cogency was placed before the Tribunal to allow a decision to be made one way or the other.'

(Reasons, para. 28)

Formal decision

The AAT decided:

(1) to set aside the SSAT decision;

(2) that at all relevant times between 18 July 1988 and 30 January 1989, the value of the Vines' property exceeded $139 500;

(3) that Mr Vines commenced to carry on the business of farming on or about 15 October 1988; and

(4) that between 5 September 1988 and 30 January 1989 Mr Vines was paid $5648.22 by way of sickness benefit to which he was not entitled and that sum is a debt owing to the Commonwealth.

It remitted the matter to the DSS with the recommendation that the $5648.22 debt be reduced by an amount of notional FAS of $1130 and that a decision be made under s.251 of the Act.

[D.M.]

Unemployment benefit: reduced employment prospects

BOROWIECKI and SECRETARY TO DSS
(No. 6914)
Decided: 8 May 1991 by K.L. Beddoe.

Stefan Borowiecki had been unemployed for some 10 years, during which period he lived in Mackay in Queensland. He moved from Mackay to Brunswick Heads in north-east NSW.

The DSS then decided that Borowiecki had reduced his prospects of employment by moving his place of residence, and that he was not qualified for unemployment benefit.

The legislation

Section 116(6A) of the *Social Security Act* provides that a person is not qualified for unemployment benefit 'on a day on which the person reduces his or her employment prospects by moving to a new place of residence without sufficient reason'.

Section 116(6B) defines 'sufficient reason' in quite narrow terms, which were not relevant in the present matter.

Section 126(1)(aa), combined with s.126(4), provides that unemployment benefit is not payable to a person for a period of 12 weeks where the 'person has reduced his or her employment prospects by moving to a new place of residence without sufficient reason for the move'.

No reduction in employment prospects

Borowiecki was a certified master of small marine vessels operating between Bundaberg and Townsville, and qualified through experience as a deck hand and a marine maintenance worker.

Before moving from Mackay to Brunswick Heads, Borowiecki had been receiving unemployment benefits for some 10 years.

He told the AAT that there were a number of fishing fleets operating from the far north coast of NSW, and that he had bought a motor-cycle so that he could seek work with those fleets.

The AAT said that a move from a place which had failed to provide Borowiecki with work over a long period to a place where the prospects of

relevant employment were objectively no worse could not be said to have reduced the applicant's employment prospects. If he had moved to an area where there was no marine employment, there might be basis for saying that he had reduced his employment prospects; but 'if anything he improved his prospects of employment rather than reduced them by making the particular move': Reasons, para. 10.

Formal decision

The AAT set aside the decision under review and substituted a decision that Borowiecki did not reduce his employment prospects by moving from Mackay to Brunswick Heads.

[P.H.]

SECRETARY TO DSS and KITCHENER
(No. 6913)

Decided: 8 May 1991 by K.L. Beddoe.

Craig Kitchener was living and working in Sydney when he and his wife decided to move to Tabulam in north-eastern NSW. They sold their home in Sydney and bought a rural property, which they intended to farm.

However, on taking possession of the property, Kitchener discovered that the vendor had removed much of the property's plant, equipment and livestock.

Because Kitchener was unable to use the property to generate income, he applied for unemployment benefit.

The DSS rejected that application on the basis that Kitchener had reduced his employment prospects by moving from Sydney to Tabulam.

On review, the SSAT set aside that decision. The DSS appealed to the AAT.

The legislation

The AAT said that s.116(6A) of the *Social Security Act*, which declares a person who reduces her or his employment prospects by moving residence not qualified for unemployment benefit, was not relevant to the present case. That sub-section, the AAT said,

> 'can only apply to a person who is already in receipt of unemployment benefit and not, as is the case here, to a person who applies for unemployment benefit after having removed to the new place of residence.'

(Reasons, para. 4)

According to the AAT, the relevant provision was s.116(6A) which, in combination with s.126(4), provides that unemployment benefit is not payable to a person for a period of 12 weeks where the 'person has reduced his or her employment prospects by moving to a new place of residence without sufficient reason for the move'.

The range of reasons which are regarded as sufficient for the purpose of s.126(1)(aa) is narrowly defined in s.116(6B). They did not apply in the present case.

Self-employment not relevant

The AAT first held that the term 'employment prospects' in s.126(1)(aa) referred to prospects of employment arising out of a master/servant relationship and not to self-employment.

It followed that Kitchener's prospects of working his newly-acquired farm were not relevant to the question whether he had reduced his employment prospects by moving his place of residence.

Reduced employment prospects

The AAT then concluded that Kitchener reduced his employment prospects by moving from Sydney to Tabulam. This conclusion was based on evidence from CES officers that Kitchener had reasonable prospects of employment as a despatch manager in Sydney, but that such employment was unlikely to be available in the area of Tabulam.

The AAT also referred to Kitchener's disqualification from driving a motor vehicle and the absence of public transport which he could use to travel to any work which he might find.

Formal decision

The AAT set aside the SSAT's decision and substituted a decision affirming the DSS decision to defer payment of unemployment benefit to Kitchener for 12 weeks.

[P.H.]

Special benefit: applicant for refugee status

AL-SAEED and SECRETARY TO DSS
(No. 6701)

Decided: 27 February 1991 by P.W. Johnston.

Khaled Al-Saeed was born in Kuwait of Palestinian parents. In March 1990, he came to Australia on a 12-month visa, to undertake study here. Following the Iraqi invasion of Kuwait in August 1990, Al-Saeed lost all contact with his family in Kuwait and ceased receiving financial support from his father.

Al-Saeed then applied to the Department of Immigration, Local Government and Ethnic Affairs (DILGEA) for refugee status; and, when this application was refused he lodged an appeal to the Determination of Refugee Status (DORS) Committee.

Al-Saeed's application to the DSS for a special benefit was refused on the basis that he was not 'a resident of Australia' as s.129(3)(a) of the *Social Security Act* then required. Following unsuccessful review by the SSAT, he asked the AAT to review that decision.

The legislation

Shortly before the hearing of Al-Saeed's appeal, s.129(3)(a) was amended, with effect from 1 August 1990. In its amended form, the provision required that, before special benefit could be paid to a person, he or she must fall into one of a number of categories, including 'an Australian resident', or a person to whom refugee status had been granted, or 'an applicant for that status who has been advised by [DILGEA] that he or she has a substantial claim to that status'.

The AAT avoided deciding whether Al-Saeed's eligibility for special benefit should be determined under the old or the new form of s.129(3)(a); although it said it was inclined to the view that the new version of the provision was applicable.

It was unnecessary to resolve that question, the AAT said, because Al-Saeed could not qualify for special benefit on either form of the provision.

The new provision

Al-Saeed could not qualify for special benefit under the new s.129(3)(a) because he was not 'an Australian resi-