on a full-time basis. [It] also makes it clear that, although enrolment in a full-time course will not necesarily exclude someone from receiving unemployment benefit, the number of hours spent on study, the engagement of a person in part or full-time employment, and any other absences from study are not the essential elements to which a decision-maker must have regard in determining whether or not a person is engaged in a course of study on a full-time basis. Rather, Harradine makes it clear that the decision-maker must have regard to the "character of the study" which a person is undertaking'.

(Reasons, para.31)

Applying that case to these facts, the AAT decided that Huynh was clearly not inhibited from studying full-time by any employment commitments but rather chose to study his course in the way he did for his own convenience in terms of travelling and preferred methods of study.

The AAT decided that Huynh was engaged in a course of education on a full-time basis and was, therefore, not qualified pursuant to s.136 of the Act to receive unemployment benefit for the period in question.

Is there a recoverable debt due to the Commonwealth?

The AAT then considered on what basis any debt might be recoverable and decided, having perused various continuation forms signed by Huynh, that the overpayment occurred because of a false statement or omission or failure to comply with the Act on his part. Therefore, the debt was recoverable under s. 246(1) of the 1947 Act as it then provided.

Waiver

The AAT noted that in *Riddell v Secretary to the Department of Social Security* (1993) 73 *SSR* 1067 the Full Federal Court declared that the Minister's determination governing the waiver discretion, was not authorised by s.1237(3) of the 1991 Act. This left any consideration of waiver to be made solely by reference to the Act. After some consideration of Huynh's notional entitlement to Austudy, the AAT decided that this was not sufficient ground to waive any part of the debt. Nor was the AAT particularly persuaded by the reasons put by Huynh as to how the debt had arisen (e.g. his language difficulties and his difficulties in dealing with government authorities arising from his experiences in Vietnam).

Formal decision

The AAT affirmed the decision under review.

[R.G.]

Assets test: loans or equity?

THOMAS and SECRETARY TO DSS

(No.9223)

Decided: 24 December 1993 by J.R. Dwyer, L.S. Rodopoulos and D. Elsum.

The SSAT had set aside a decision of the DSS and remitted the matter to the Secretary to reconsider Mr and Mrs Thomas' pension rates in accordance with directions as to the method of valuing their assets and income. In substance the SSAT directed that the whole of the assets of the partnership B.C. and G.S. Thomas should be deducted from the assets of Mr and Mrs Thomas, and the whole of the partnership losses should be deducted from the Thomas' rental income.

Mr and Mrs Thomas were granted age pensions from 23 April 1992. Their rate was reduced from 9 July 1992 following a decision to assess their rate of pension under the assets test instead of the income test.

Mr Thomas and his son George were in partnership, running a farming business on farm land owned 90% by Mr Thomas and 60% by George. The capital contribution and income share of the partnership was 40% Mr Thomas and 60% George. Mr Thomas and George purported to lease the farm land to the partnership, for which they received an annual rental divided between them: 90% to Mr Thomas and 10% to George.

Although the AAT doubted that Mr Thomas and George could validly lease the land to themselves as partners: *Rye v Rye* [1962] AC 496, the claim had been accepted by the Commissioner of Taxation and was not disputed by the DSS. The AAT decided to accept that the rent had been paid as an outgoing of the partnership.

Legislation

Section 1121A provided for a method of valuing the assets of a primary producer or family member. The land and all other assets that the person uses for the purposes of carrying on the primary production are treated as a single asset, and their value is assessed after deducting the whole of the person's production-related liabilities.

The AAT found that Mr Thomas was a primary producer. He lived on the land and worked as a grazier. So s.1121A applied to him and his wife. His assets used for the purposes of carrying on the primary production included the land, of which he was the owner of 90%, and the plant and equipment and stock, of which he owned 40%.

Loans or partner's equity?

The main issue related to the treatment of loans. There was a $9000 loan made by Mr Thomas to the partnership, and a loan of $102,111 from George to the partnership. The partnership had no legal personality separate from the partners, who could not lend to themselves. The question was whether the amounts should be regarded as a liability of the partnership, and hence of the partners 'related to the carrying on of primary production' or whether it was simply a charge against the partner's equity in the assets of the partnership.

The evidence on this point was equivocal. As the balance sheets, except for two years, showed George's advances as loans rather than as proprietorship, the AAT accepted that the loans from George did give rise to liabilities related to the carrying on of the primary production. So Mr Thomas' liability in respect of the loan from George was to be deducted from the value of his assets. Similarly, 60% of the value of a loan that Mr Thomas had made to the partnership was to be treated as an asset of his that related to the primary production.

40% of the value of a loan by Mrs Thomas to the partnership was a liability of Mr Thomas. As Mrs Thomas was not a partner, the advance by her was undoubtedly to be classed as a loan.

Income test

The question in relation to the income test was whether the annual losses from Mr Thomas' farming activities could be used to reduce the amount of 'rent' paid to him by the partnership. The DSS said he was engaged in two separate businesses, as farmer and as landlord. Relying on *Secretary, DSS v Garvey* (1989) 53 *SSR* 711, the DSS argued that losses in the former business could not be offset against income from the latter.

The AAT distinguished the case from that considered in *Garvey*. Mr Thomas was not engaged in two income-producing activities. As one cannot lease to oneself, the 'rental' was in substance a distribution of the profit and loss of the primary production business. He was entitled to have his losses from primary production offset against his 'rental' income.

Formal decision

The AAT varied the decision. In substitution for the directions for reconsidera-

tion made by the SSAT it substituted specified directions in accordance with the findings above as to the producer status, assets and liabilities of Mr and Mrs Thomas.

[P.O'C.]

Sickness allowance: jurisdiction, rate and debt recovery

REID and SECRETARY TO DSS (No. 9227)

Decided: 7 January 1994 by Professor S.D. Hotop.

Ms Reid appealed to the AAT against the SSAT's decision to affirm the DSS decisions that the rate of sickness allowance payable to her from 6 May 1992 was half the rate applicable to a married person and that a debt of $1480.47 be recovered from her.

Factual background

Reid and her partner, Verstraeten, had lived together in a *de facto* relationship since 1987. Reid had been paid sickness allowance from October 1991 to 28 April 1992 at the rate applicable to a single person. She lodged a new claim form on 28 April 1992 and was paid from 6 May 1992. at half the rate applicable to a married person. No additional amount was paid for her partner because he was not an Australian resident. Verstraeten was employed on a casual basis as a fruit picker from 1 March 1992 until 26 May 1992 and for 2 days in August 1992. However in a review form dated 21 April 1992, completed by a DSS officer but signed by Reid, she answered 'no' to the question whether she or her partner were employed. In another review form, dated 24 July 1992, Reid advised DSS that Verstaeten had been employed from 1 March 1992 to 14 April 1992 and his gross weekly wage was $220 a week. On 21 October 1992, DSS advised Reid that she had been overpaid $1480.47 because she failed to declare her partner's earnings.

Reid wrote to the DSS in October 1992 requesting a review of its decision to pay her sicknesss allowance at half the married rate. In the same month she reiterated her claim that she had been underpaid and requested that the matter go before the SSAT as soon as possible. At the same time she requested a meeting with a senior DSS officer to resolve her overpayment. A DSS officer (not an authorised review officer (ARO)) advised her in January 1993 that he had reconsidered the decision to recover the overpayment and found the decision to be correct. Reid responded to that letter in February 1993 stating that she wanted SSAT hearings for her claim of underpayment and the DSS claim of overpayment. On 3 March 1993 both decisions were referred to an ARO. The ARO declined to review the matters stating that Ms Reid had rejected the course of ARO review in preference to a SSAT hearing and as the decisions to pay at the half married rate and to raise an overpayment were made in 1991 and 1992 respectively, 'it would be improper . . . not to proceed directly to the SSAT'. Reid's appeal and the DSS submission were lodged with the SSAT on 9 March 1993.

Jurisdiction

The DSS submitted that the AAT lacked jurisdiction to review the decision of the SSAT on the basis that the SSAT itself had no jurisdiction to hear Reid's appeal because it had not been reviewed by the Secretary or an ARO as was required by s.1247(1) of the *Social Security Act* from 1 January 1993. The AAT held that whether or not the SSAT had jurisdiction in law to review, the relevant decision was, under the *Brian Lawlor* principle (1978) 1 ALD 167, irrelevant to the existence of the AAT's jurisdiction to review the decision in fact made by the SSAT. The AAT then went on to find that there had been sufficient reconsideration by the delegate in January 1993 and the ARO in March 1993 to constitute the prerequisite internal review prior to the SSAT's review and therefore the SSAT had jurisdiction.

The substantive issues

Rate of payment

From 12 March 1992, the rate of pension or benefit payable to a member of a couple whose partner was not receiving a pension, benefit or allowance, was restricted to half the rate applicable to a married person rather than the higher 'single' rate. A savings clause preserved payment of the higher rate to a person who had been receiving it immediately prior to 12 March 1992 until the person ceased to receive the pension or benefit. The AAT stated that while Ms Reid continuously received sickness allowance until 28 April 1992, she was entitled to the higher rate. Once that period of incapacity for work expired and she had to lodge a fresh claim, on 6 May 1992, there was a period of 7 days when she ceased to receive the allowance and thereby lost the benefit of the savings clause. The AAT concluded therefore that the decision to pay her at half the married rate from 6 May 1992 was correct.

The debt

It was not in dispute that the income earned by Reid's partner between 1 March 1992 and 26 May 1992 was not taken into account in calculating her rate of sickness allowance because the DSS was not notified of Verstraeten's earnings until the review form of 24 July 1992, and that Reid had been overpaid $1480.47 in that period. However the crucial question was whether this overpayment was a debt due to the Commonwealth. Section 1224(1)(a) was satisfied because Reid had made a false statement or false representation when she signed the review form dated 21 April 1992 and answered 'no' to the question whether she or her partner was employed. It was not necessary that the statement be deliberately or intentionally untrue: just that it was in fact untrue. However, under s.1224 (1)(b) there had to be a cause/effect relationship between the false statement and the amount paid and as that was the only false statement, only the amount of the overpayment that was made after 21 April 1992 was a debt due by her to the Commonwealth. The AAT remitted the matter for the amount of the debt to be recalculated.

The final issue was whether it was appropriate to waive or write-off recovery of the debt. Having regard to the straitened financial circumstances of Ms Reid and her family which left them barely able to cover essential living expenses, the AAT decided to exercise the discretion in s.1236(1) to write-off recovery of the debt for a period of at least one year.

The formal decision

The AAT set aside the decision under review and remitted it for reconsideration in accordance with the directions that:

1. as from 6 May 1992 sickness allowance was payable at half the married rate;
2. the overpayment was the amount of sickness allowance paid from 21 April 1992 to 26 May 1992 – such amount to be calculated by the DSS – was a debt due to the Commonwealth; and