Section 130 provides for the rate of payment, also subject to a discretion.

The discretion in s.129

After investigating the origin of the moneys in the bank, the AAT noted the discretionary nature of special benefit and found that neither David nor her husband was able to work because of their age, and her state of health. They met the residence requirements (s.129(3)) and the AAT concluded that, the preconditions of s.129 having been met, the issue for determination was whether the discretion ought to be exercised.

Policy guidelines

The Secretary contended that the guidelines used by the DSS had been tightened following the 1988 May Economic Statement. This led to the imposition, as a matter of policy, of a more stringent 'available funds test' which required that an applicant have less than $10 000 in the case of a married couple. Accordingly, the DSS maintained that, in accordance with its policy set out in chapter 24 of the *Benefits Manual*, it had acted correctly in cancelling the payment.

The AAT quoted extensively from the relevant parts of chapter 24, including para 24.130, setting out the 'available funds test'. It then considered the relationship between the statutory discretion and the guidelines of the DSS. Having noted that a statutory discretion is to be exercised '. . . according to the rules of reason and justice . . .' (*R v Anderson; Ex parte IPEC AIR Pty Ltd* (1965) 113 CLR 177, 189) and by looking at the scope and purpose of the provision, the AAT continued:

> 'An officer of the Department exercising discretionary power shall have regard to government policy (Section 17 of the Act). In those circumstances, it is appropriate that guidelines for the assistance of departmental officers responsible for the day to day exercise of discretion be formulated from time to time to accord with policy. The guidelines have no legislative force. They are not "set in stone" but provide an administrative guide and a basis for the decision maker to exercise his or her discretion. They are no more than that.'

(Reasons, p.8)

After stating that 'there should not be a slavish adherence to what the Department describes as the available funds test', but a flexibility of approach, the AAT noted that the Department's test was applied uniformly, whether the applicants were homeowners or renters, commenting that the latter might be disadvantaged by comparison with the former.

The AAT next considered the support available from David's children and stated that, despite the assurance of support being no longer enforceable as a result of David's having become an Australian citizen, that support was nonetheless relevant. The AAT further noted David's need for medical treatment (she is a diabetic) and then considered her reason for wishing to maintain her assets. Commenting on her stated wish to preserve the capital for her children, the AAT said that special benefit 'should not be seen as an indirect way of preserving a legacy for children': Reasons, p.10.

Formal decision

For these reasons, taking into account David's capital sum in the bank, the AAT determined that the DSS decision to cancel benefit was correct. Accordingly, the decision under review was set aside and a decision substituted that a grant of special benefit should not be made to David.

[R.G.]

[Editorial note: Section 17, referred to by the AAT, provides that the Secretary and the SSAT shall 'have regard to' any 'written statement of a policy of the Commonwealth Government in relation to the administration of [the Social Security] Act' given to them by the Minister. Section 17(2) requires that such a statement shall be laid before each House of Parliament within 15 sitting days of its being given under s.17(1). Such a statement, while a matter which must be taken into account by a decision maker, is not binding on the Secretary or the SSAT. And s.17 has relevance only to those statements laid before the houses of Parliament: it does not address the DSS Manual of Instructions in any way. Accordingly, the question of the relevance of the policy guidelines affecting special benefit is not affected by s.17 (unless such a statement has been made in relation to special benefit). To the time of the AAT decision, no such statement had been made. For a discussion of s.17 and related provisions, see Peter Bayne, 'Policy statement directions and guidelines: how binding?' (1989) 49 *SSR* 647.]

Section 3(8) and property proceedings

SECRETARY TO DSS and GREENWAY
(No. 5663)
Decided: 31 January 1990 by J. Handley.

The Secretary applied to the AAT for review of an SSAT decision that Roger Greenway should be treated as a married person from 52 weeks after 9 November 1988, pursuant to s.3(8) of the *Social Security Act* (as it then provided). The Department's argument was that Greenway became a married person 26 weeks after that date, rather than 52 weeks.

The legislation

At the relevant time, s.3(8) provided that, where an unmarried person who is a formerly married person was living with his or her former spouse in their former matrimonial home, then after 26 weeks s/he was to be treated as a married person.

However, where one of them had 'instituted proceedings for the purpose or partly for the purpose of retaining or acquiring an interest or other right to that home or of obtaining the whole or a part of the proceeds of the sale of that home', the relevant time was 52 weeks: s.3(8)(d).

The facts

Greenway and his wife separated on 27 April 1988 and lived in separate premises from that date. A property application was made by the wife and a Family Court Order of 15 July 1988 transferred Greenway's interest to his wife, by consent. Although a property order was made, the parties were not divorced.

Some time later, Greenway was hospitalised. On his release on 9 November 1988 he returned to the former matrimonial home to convalesce, with the consent of his wife.

On 10 November 1988 he applied for sickness benefit which he received until 17 May 1989 when he transferred to unemployment benefit. His benefit was terminated on 7 June 1989 on the basis that, under s.3(8)(e), 26 weeks had expired.

Having found that Greenway fell squarely within the provisions of s.3(8)

(a formerly married person living in the same matrimonial home as his former spouse), the AAT then considered the purpose of s.3(8), and the two different periods provided by s.3(8)(d) and s.3(8)(e).

A purposive or literal interpretation?

The DSS argued that the 52 week period could only apply if the relevant proceedings were instituted and remained incomplete at the time benefit was claimed. Here, however, the proceedings were issued and completed prior to the claim for benefit. Greenway argued that the AAT should interpret the provision only by reference to the words in the section which did not limit its operation in the way contended for by the DSS.

Having described these competing views as the 'purpose' approach and the 'literal' approach respectively, the AAT then referred to s.15AA of the *Acts Interpretation Act* 1901 and the decision of the High Court of Australia in *Cooper Brookes Wollongong (Pty Ltd) v Federal Commissioner of Taxation* (1981) 35 ALR 151, both of which require a section to be interpreted in a manner which gives effect to the purpose or intention of the section.

The AAT continued:

> 'In my view, the purpose of s.3(8) is to confer an eligibility to benefits in specifically defined circumstances, namely, to extend eligibility where proceedings have issued but are not completed prior to the application for benefit being made. This section does not contemplate nor allow a situation such as the present where, some eight months after actual separation and five months after completion of Family Court proceedings, a person can return to his former matrimonial home, and whilst still married, live in that home with this wife and be deemed to be unmarried, so as to be eligible for benefits. No such purpose can be gleaned from this section and to interpret it literally would be an absurdity.'

(Reasons, p.4)

Formal decision

The AAT set aside the decision of the SSAT and substituted for it a decision that Greenway's entitlement to benefit be determined by s.3(8)(e).

[R.G.]

Cohabitation: supporting parent's benefit

TOMLIN and SECRETARY TO DSS
(No. 2109)
Decided: 20 February 1990 by J.R. Gibson, J.H. McClintock and M.T. Lewis.

The DSS decided that Tomlin was not qualified to receive a supporting parent's benefit from 1 September 1984 because she was living with Ward on a *bona fide* domestic basis as a *de facto* spouse. It was also decided she had made false statements and failed to comply with s.83AAH of the *Social Security Act*, in consequence of which she was liable to repay $17 231 paid as supporting parent's benefit from 1 September 1984 until 19 February 1987.

The facts

Tomlin and W met in 1983. W was having difficulty trying to run his business and look after his children and was considering employing a housekeeper. Tomlin offered to assist him. It was agreed she and her son would move in with W and his 3 children on the basis that Tomlin would pay him the same board she had been paying to her parents, and she would help in the house.

Tomlin moved to W's house in March 1984 and notified the DSS of her change of address and that she was paying $30 a week to W in about July 1984. In a 'Sole Parent's 12-Weekly Review', signed 9 January 1987, Tomlin disclosed W as her fiancee and owner of the home. She had become engaged to W on 3 January 1987. A field officer's visit followed and a decision was made to cancel benefit. The applicant did not concede to the field officer that there was a *de facto* relationship.

The Tribunal accepted the evidence of both Tomlin and W. They commenced to share a bedroom about 6 months after she commenced to reside with W. In January 1987, W asked her to marry him and from then the relationship took on a more permanent basis. Prior to the engagement both had difficulties related to their previous marriages and it was not until the engagement that there was any commitment to the future.

Tomlin had told the field officer that friends, relatives and neighbours did not know them as Mr and Mrs W. Financial arrangements were that she paid board to him and he was responsible for domestic accounts. Tomlin paid for clothing for herself and her son without any contribution from W. He guaranteed a loan which she obtained for a car. Tomlin did most of the household shopping with money provided by W. He reimbursed her for any money spent on his children, and she gave him receipts for this purpose. They had no joint assets and W owned substantially all of the contents of the house. Tomlin gave W some assistance with his business by doing the banking and he reimbursed her for the use of her car. When her benefit was terminated she did not ask W for money but obtained employment. Evidence was given that household tasks were shared.

Tomlin did not agree that she exercised control over W's children but that her role was to be there when they returned from school. Her own son had developed a good relationship with W but it was a long time before he called him 'Dad'.

The legislation

At the relevant time, s.83AAC of the *Social Security Act* and the definitions of 'supporting parent' and 'married person' were applicable to supporting parent's benefit. Definitions in s.6(1) of '*de facto* spouse' and 'married person' were also relevant. Tomlin would not have been eligible for benefit if she had been living with W as his spouse on a *bona fide* domestic basis though not married to him.

The cases

The Tribunal followed *Lambe* (1981) 4 *SSR* 43 in considering that all facets of the inter-personal relationship must be taken into account. It said that in other decisions the Tribunal had listed factors which may assist but the list was not exhaustive, and no one factor more determinative than others.

The decision

The Tribunal said there were factors in this case which indicated a *de facto* relationship, such as living under the one roof since March 1984, a sexual relationship since September 1984, cooperation in household tasks and managing the children and a degree of assistance in the business. On the other hand the Tribunal accepted that the parties did not regard themselves as being in a *de facto* marriage. There had been no joint acquisition of assets nor pooling of income, and Tomlin did not ask W to support her when the benefit ceased. Their former experiences of