The AAT noted that the meanings ascribed to 'maintenance' and 'property' under the *Social Security Act* and those under the *Family Law Act* may not be the same. The Tribunal said that it was not the role of the decision maker, nor the Tribunal standing in its shoes, to categorise the payments either way:

> 'What must be done is to determine whether the payments, however characterised for the purposes of the *Family Law Act*, fall within the terms of s.3(1)(e) of the *Social Security Act*.'

The AAT then considered the purpose of the purchase and mortgage as being to provide a home for the applicant and her children, as a result of which she received a benefit within the terms of s.3(1)(e). The AAT also rejected an argument based on a submission that the Camerons could have arranged their affairs in a number of other ways to avoid this result and held that, as the wife received a benefit in the terms of s.3(1)(e), the decision to take the payments into account in calculation of her rate was correct.

Formal decision

The AAT affirmed the decision under review.

[R.G.]

Supporting parent's benefit: living separately and apart

HALLAK and SECRETARY TO DSS
(No. 5660)
Decided: 2 February 1990 by R.A. Hayes.

Mohamad Hallak asked the AAT to review a decision to raise and recover an overpayment of supporting parent's benefit of $3241.60 for the period 4 February 1988 to 12 May 1988.

Hallak had first claimed supporting parent's benefit after the death of his wife in 1985. On 20 December 1987 he travelled to Lebanon and while there remarried on 28 January 1988. He returned to Australia on 5 February 1988 but did not notify the DSS of his marriage in writing until 2 May 1988, though he told the AAT that he had informed them verbally shortly after his return to Australia.

In the few days between the marriage and Hallak's return to Australia, he and his wife did not live together. She did not join him in Australia until 25 May 1988 and up to that time, they communicated by writing and telephone.

The legislation

Supporting parent's benefit (as it then was) was payable to a person who was an 'unmarried person' with a dependent child. Unmarried person was defined in s.53 of the *Social Security Act* as meaning, *inter alia*—

> '...
> (c) a married person who is living separately and apart from his or her spouse...'

'Separately and apart'

Hallak argued that he should be treated as an unmarried person during the period under review because he was living separately and apart from his wife. The AAT noted that the definition in s.53 did not require the separation to be 'on a permanent basis', in contrast with the definition then in s.3 of 'married person', which included a person 'living separately and apart from the spouse of the person on a permanent basis...'

The AAT accepted that the evidence showed that Hallak had not commenced living with his wife prior to his return to Australia. But, until joined by his wife in May 1988, was he 'living separately and apart' from his spouse?

Hallak argued that the phrase should be given its ordinary meaning and that when applied to the facts, he and his wife were married people living separately and apart. But the Tribunal held that —

> 'absurd consequences would flow from allowing a married person to qualify for supporting parent's benefit in the common-place situation of a partner moving away for a temporary period, to work overseas, to tend to sick relatives interstate, to enjoy an extended holiday in distant climes, or whatever. The phrase, in the context in which it appears, is manifestly designed to invite attention to what is not common-place between a married couple . . . of a matrimonial relationship having broken down. . . . In other words, the phrase, "living separately and apart" does not have the ordinary meaning which Mr Hallak's counsel asserted for it, but rather, invokes the legal concept of *"consortium vitae"*.'

(Reasons. pp.3-4)

The AAT held that, despite the fact that the couple had not lived together, it was a new marriage and they communicated with each other: 'there was sufficient between them to say that *consortium vitae* had begun; and it continued, notwithstanding the absence of sexual activity, over the period under review': Reasons, p.4.

The AAT found that the DSS had acted correctly in raising the overpayment and expressly found that Hallak had not notified the DSS of his marriage until 2 May 1988. It then endorsed a suggestion by the SSAT that the DSS be asked to investigate the possibility of offsetting a possible notional entitlement to unemployment benefit over the period. There was no evidence available to the AAT on which it could do so.

Formal decision

The AAT affirmed the decision under review and ordered that deductions from current benefit, which had been suspended pending the appeal, be recommenced from the next payment date.

[R.G.]

Family allowance supplement: income test

MILLER and SECRETARY TO DSS
(No. 5715)
Decided: 22 February 1990 by B.J. McMahon.

Elizabeth Miller was a school teacher who retired in April 1988 due to ill health. At that time her husband was also ill and receiving sickness benefit. Miller was entitled to fortnightly superannuation from 23 April 1988 but it was not until July 1988 that the State Superannuation Board paid Miller arrears of superannuation of $3248.88.

In July 1988, Miller applied for Family Allowance Suppplement (FAS). At that time, eligibility for FAS was established on the basis of income earned over the previous 4-week period and Miller received FAS until 1 January 1989. At that time the relevant legislation was amended and Miller was asked to provide details of the taxable income for herself and her husband for the 1987/88 financial year. Their combined income was $24 301.

The DSS them estimated their combined income for 1988/89. In doing so