

although in June 1987 they obtained a property settlement from the Family Court.

After considering the evidence and the principles to be applied in determining whether a marriage is in existence the AAT concluded that the applicant and his wife had separated in December 1983.

'Regardless of the fact that there may still have been some similarities between the previous marital relationship and the living arrangements after December 1983, the Tribunal is nevertheless satisfied that the relationship changed dramatically after that time. Although their relationship had been deteriorating, the separation was manifested by Mrs Smithies returning to work and the applicant moving out of the marital bedroom. There was no financial interdependence and very little or no domestic co-operation ... It is obvious they preferred living under the one roof until September 1986. However neither could afford to move and as there was ample room in the jointly owned home there was no immediate reason to do so...'

(Reasons, para.34)

Waiver of overpayment

The Tribunal found that the applicant should not have received unemployment benefit at the married rate, but neither should the rate of his benefit be calculated with respect to his wife's income. Further, as he and his wife had separated at the relevant time, he was eligible to receive supporting parent's benefit. Thus the amount of any overpayment would be the difference between that benefit and the amount he actually received.

The true overpayment was in the order of \$1,456. The Tribunal considered that recovery of this amount should be waived under s.186 of the *Social Security Act*. The overpayment resulted from an innocent mistake and on discovering the error the applicant notified the Department. Also, the applicant would suffer financial hardship if he were to pay back the amount.

Formal decision

The AAT set aside the decision to cancel the supporting parent's benefit of the applicant and directed that recovery of the overpayment of unemployment benefit be waived.

BOURKE and SECRETARY TO DSS (No. N87/1272)

Decided: 2 March 1988 by B.J. McMahon

The AAT *set aside* a DSS decision to cancel the widow's pension of the applicant because she was living in a de facto relationship.

In deciding whether or not the applicant was in such a relationship the Tribunal considered the many facets of a relationship: permanence, exclusiveness, sexual intercourse, mutual society and protection, the existence of a household, relationships within the household, relationship presentation to the outside world, financial support and the nurture and support of the children of the relationship (see *Farnell and Lauritz* 11 ALN N103).

The AAT commented:

'Assessment of the significance of these factors is not a mathematical exercise. One does not count them, one weighs them. The object is to

identify, as far as humanly possible, the presence or absence of the essential characteristic of a marital relationship...'

(Reasons, para.21)

In this case the applicant and her alleged de facto spouse lived essentially separate lives, although they lived under the same roof.

TILLEY and SECRETARY TO DSS (No. S87/172)

Decided: 8 March 1988 by J.A. Kiosoglous, B.C. Lock and D.B. Williams

The Tribunal *set aside* a DSS decision to cancel the applicant's widow's pension on the basis that she was residing with her former spouse in a de facto relationship.

The evidence was that the applicant agreed to reside with her former spouse as his housekeeper. The Tribunal commented that while the relationship may appear similar to that which they had while married, it was also consistent with that of housekeeper and employer. The applicant and her former spouse did not have the commitment towards each other of a married couple.

Accepting that it was 'sensible for people who share a house to have an amicable relationship' the Tribunal noted those aspects which in this case testified to the absence of a marriage: the absence of sexual relations, the absence of any permanent commitment, the absence of any provision in wills for each other and the absence of any financial commitment to the applicant by her former spouse. The former spouse was also still married, though separated, to his second wife and had a retarded daughter to care for with that wife. This also was a relevant factor in considering the issue of the applicant's relationship with her former spouse.

Legislation

CHILD SUPPORT SCHEME: CHANGES TO THE SOCIAL SECURITY ACT

The *Social Security and Veterans' Entitlements (Maintenance Income Test) Amendment Bill 1988* is complementary to the child support legislation.

The Bill provides for an 'annual maintenance free area' which is the amount below which people in receipt of pensions or benefits will not have their rate of pension or benefit affected by any maintenance payment that they receive. In the case of an unmarried person the sum is \$780 plus \$260 for each dependent child, other than the first (see clause 4).

'Maintenance income' is defined as the amount of the payment or the value of a benefit received by the person from the parent of a dependent child, or spouse or former spouse for the

maintenance of the child, or from the person's spouse or former spouse for the maintenance of the person. It also includes payments or benefits given to children for maintenance (clause 4).

It is clear that the effect of the above definitions is to make misleading claims that the legislation is solely about child support. The maintenance free area is defined in such a manner that the first \$780 allowed is not necessarily a rate of \$15 per week for the first child. A person who receives \$15 per week for his/her own maintenance and \$15 per week for the first child will only be able to count the first \$15 in calculating his/her maintenance free area.

'In-kind maintenance' is also to be assessed in determining the rate of pension or benefit. For example, rent payments, a car or school fees would fall within this category (clause 4).

Capital payments and lump sum payments fall within the definition of 'capitalised maintenance income.' The value must exceed \$1500 (clause 4). Clause 5 provides a formula for apportioning such payments over a period of time so that the person is taken to receive them in fortnightly instalments.

'Special maintenance income' relates to 'in-kind housing maintenance income' (primarily the family home), in-kind maintenance income received from the person's spouse or former spouse within six months of separation (but excluding in-kind housing or capitalised maintenance income), or maintenance income provided in respect of the 'expenses arising from a physical, intellectual or psychiatric disability, or a learning difficulty, of a dependent child of the person.' The disability must be

permanent or likely to last for an extended period (clause 4).

Where special maintenance income affects the rate of a person's pension or benefit, in no case would the rate be reduced below 25% of the maximum rate (clause 6).

Clause 8 inserts a new s.47 into the Act and clause 11 inserts a new s.55 which make it a condition of receiving widow's pension and supporting parent's benefit, respectively, that where there is an entitlement for the recipient to claim maintenance from another person for

either self or a dependent child then she/he should make such a claim. Where a person has not taken such action to obtain maintenance as the Secretary considers reasonable then she/he will not be qualified to receive the pension or benefit.

Statistics

	Nov 86	Dec 86	Jan 87	Feb 87	Mar 87	Apr 87	May 87	Jun 87	Jul 87	Aug 87	Sep 87	Oct 87	Nov 87	Dec 87	Jan 88
Applications lodged*	68	68	52	55	63	62	51	71	63	92	77	69	76	68	67
Decided by AAT	18	22	6	28	29	14	19	15	9	17	22	22	15	10	4
Dismissed	0	3	4	0	5	6	4	1	5	3	5	4	4	9	5
Withdrawn	22	6	8	8	30	3	5	4	12	9	17	14	32	19	18
Conceded	4	11	7	5	19	4	3	7	13	9	9	8	15	20	10
No jurisdiction	2	3	6	1	5	0	2	3	1	1	4	3	5	1	5
Lapsed	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Awaiting decision at end of month	1109	1135	1156	1169	1144	1179	1197	1248	1270	1323	1343	1361	1366	1375	1400

*Applications lodged: type of appeal

Unemployment benefit	19	11	9	13	7	10	6	11	18	16	20	15	10	9	8
Sickness Benefit	5	2	4	3	3	7	3	4	3	6	2	1	7	8	2
Special Benefit	0	2	0	2	1	1	1	3	3	4	0	2	1	2	5
Age Pension	4	6	9	7	6	2	4	2	2	3	0	1	5	7	3
Invalid Pension	29	25	22	11	23	21	15	23	24	29	33	36	28	25	29
Widows Pension	2	1	1	3	2	2	3	0	5	8	3	4	5	4	4
Supporting Parents Benefit	4	4	3	5	6	3	6	8	1	7	2	1	8	3	7
Handicapped Child Allowance	1	3	0	5	4	4	5	4	0	0	0	2	4	4	3
Family Allowance	3	3	0	4	3	3	1	2	2	11	4	3	3	0	1
Freedom of Information	0	0	1	0	1	1	1	1	2	0	1	0	1	0	1
Assets Test	0	1	2	2	6	2	4	7	2	5	3	3	1	3	2
Other	1	6	1	0	1	6	2	6	1	3	2	1	3	3	2