AAT or both.)

[**Note:** This calculation depends upon a series of provisions in the *Social Services Act* 1947: none of these provisions is referred to, let alone explained, in the AAT's Reasons for Decision. The operation of these provisions is explained in the **Footnote** to this report.]

Semple appealed on 6 August 1980 to a Social Security Apeals Tribunal (SSAT) against the reduced rate grant. On 9 September 1980 the SSAT recommended that the appeal be dismissed and the Director-General of Social Services affirmed the original decision on 11 December 1980.

On 29 December 1980 (or 7 January 1981—the AAT provides two alternative dates) Semple applied to the Administrative Appeals Tribunal for a review of the Director-General's decision.

Appeal heard in applicant's absence

The applicant did not appear, nor was she represented at the AAT hearing. Enquiries by the AAT staff revealed that she 'had gone to Roma to visit a sick relative'. Nevertheless, the AAT proceeded to hear the matter in her absence. The AAT had before it her written submissions to the SSAT and to the DSS. The DSS was represented by counsel, who produced a substantial amount of evidence.

The evidence

Evidence produced by DSS showed that Semple had been born in 1921. In 1961 she began an association with Stevenson and on 16 August 1962 she gave birth to a child: the birth certificate recorded Stevenson as the child's father. From 1964 to 1976, Semple and Stevenson lived together as Queensland Housing Commission tenants. In April 1976 Stevenson and Semple entered into a contract with the Commission to purchase a house as joint tenants. They occupied this house from 1976 to 1981. The evidence also showed that over the period 1972 to February 1981, the applicant had used the name Agnes Stevenson and that, with Thomas Stevenson, she had entered into a series of financial transactions, on occasions identifying herself as Stevenson's wife.

On the other hand, Semple had told an officer of the DSS that she had only used the name Stevenson since 1975 and that Thomas Stevenson was her first cousin. (Semple's and Stevenson's own birth certificates were treated by the AAT as refuting this, and she had later said she had 'no idea' of the relationship.) Semple had claimed to the DSS that her only financial support came from her son (who, it seems, was not a child of Stevenson).

In her appeal to the SSAT, Semple had said that Stevenson had 'no real connection with me whatsoever'. He had allowed her to use his name so that she would have the chance to buy a house—'there is no way at all that I could have got one without a man's signature'. Stevenson, she said, had separate rooms in this house and, for this, 'he pays half of all accounts . . . does his own cooking and washing and is free to come and go as he likes'.

The 'cohabitation rule' and the AAT's findings

The AAT did not take the opportunity (as differently composed Tribunals had in *Waterford* and *Lambe*) to spell out its understanding of the cohabitation rule as set out in s.18 of the *Social Services Act*—it did not think the occasion called for 'an academic discussion of the limits which may be placed on or the definition of a "dependant female"'. The AAT concluded:

> It is sufficient to say that on the facts of this particular case as earlier related we consider that the applicant clearly falls within it, and that she was living with Stevenson as his wife on a bona fide domestic basis although not legally married to him. For many years they have lived under the same roof, they produced a child Tammy Patsy Anne and they have entered into a number of transactions ostensibly as husband and wife. On a number of occasions the applicant has described herself as Mrs Stevenson. The circumstances of the acquisition of the common home as joint tenants would indicate that their association was intended to be stable and permanent in that under a joint tenancy ownership would pass to the survivor of them.
> (para. 16)

So far as the statements by Semple (to the DSS and SSAT) were concerned, the AAT was sceptical: 'some are inconsistent with each other and some are demonstrably untrue. In these circumstances, we are not disposed to attach any weight to these, particularly in the light of the fact that she failed to appear at the hearing to support the truth of her claims'.

Footnote

Several sections of the *Social Services Act* operated to reduce the applicant's invalid pension (because of the finding that she was living with Stevenson as his wife on a *bona fide* domestic basis); but the Reasons for Decision do not explain the operation of these sections.

- Section 24 provides that a person who is permanently incapacitated for work, and who satisfies age and residence criteria, is qualified for invalid pension. (Semple was so qualified.)
- Section 28(1A) fixes two rates of invalid pension:

(a) the single rate, paid to 'an unmarried person' or to 'a married person whose husband or wife is not' being paid a pension or benefit under the *Social Services Act*, the *Repatriation Act*, or the *Tuberculosis Act*. This rate, as from 1 May 1980 was $122.10 a fortnight. (This is the rate for which Semple qualified because, even if she were treated as 'a married person', her 'husband' (Stevenson) was not being paid a pension or benefit.)

(b) the rate for 'any other case', that is the rate paid to a married person whose husband or wife *was* in receipt of a pension or benefit. This rate, as from 1 May 1980, was $101.70 a fortnight.

- Section 28(2) provides the 'income test': the rate of invalid pension is reduced where the pensioner has other income. In the case of a 'married person', the first $34.50 a fortnight of private income is ignored; but, for every $1.00 of private income above that $34.50, 50c is deducted from the payable pension.
- Section 29(2) provides that 'the income of a husband or wife shall . . . be deemed to be half the total income of both'. (The Director-General has a discretion to change this income-splitting; but that discretion is exercized only in exceptional cases.)
- Section 18 defines 'wife' to include a dependent female; which is defined to mean 'a woman who is living with a man (in this Part referred to as her husband) as his wife on a *bona fide* domestic basis although not legally married to him'.

Accordingly, if Semple was treated as 'a dependent female', the amount of invalid pension payable to her would be affected by one-half of Stevenson's income, that is by $213.68 a fortnight. The first $34.50 would be disregarded and half of the remainder deducted from the payable pension. Accordingly, Semple's invalid pension should have been fixed (initially) at $122.10, less half of $179.18 ($89.59), that is $32.51 a fortnight.

- However, this calculation would be overridden by s.29(2A) of the Act:

> (2A) A married person whose husband or wife is not in receipt of a pension or allowance referred to in paragraph (a) of subsection (1A) shall not be paid a pension under this Part at a rate exceeding twice the rate at which a pension under this Part would be payable to that person if the husband or wife of that person were in receipt of a pension referred to in that paragraph.

On that basis, the maximum pension payable to Semple would be twice the pension she would get if her pension was calculated on the married rate: $101.70 less half of $179.18 ($89.59), that is $12.11. Her maximum rate or pension would be twice that amount, namely $24.22 a fortnight.

How did the DSS arrive at $9.20 a fortnight? Who knows? Certainly the AAT made no attempt to find out; or, if it did make that attempt, there is no reference to the answer in its Reasons for Decision.

File note: Invalid pension guidelines

On 7 May 1981 the Minister for Health and Social Security released new guidelines for the assessment of eligibility for invalid pensions.

The new guidelines replace the guidelines issued in February 1980, which had been attacked as too restrictive and inconsistent with ss.23 and 24 of the *Social Services Act*: see (1980) 5 *LSB* 172. They represent a substantial change of policy by the Department of Social Security, a change that was foreshadowed by the then Director-General of Social Security, Lanigan, in a letter to the Department of Health in December 1980: see (1981) 6 *LSB* 94.

The guidelines, issued to Commonwealth Medical Officers are described as 'medical evaluation guidelines [to be used] in the assessment of permanent incapacity'. They will appear in paragraph 35B(1) of the Manual issued to CMOs.

> (1) **Medical Evaluation**
> (a) **Eligibility**
> To be eligible for an invalid pension a person must be permanently incapac-

itated for work to the extent of not less than 85% or must be permanently blind.

(b) **Assessment of Permanence**
An incapacity is considered permanent if no fundamental or marked change for the better can be expected in a person's condition in the future.

(c) **Assessment of Incapacity**
Incapacity is defined by the degree of permanent incapacity of a person compared with the capacity for work which that person would have had, but for his incapacity.

The comparison is to be made with regard to all work that could reasonably be regarded by the assessor as being within the claimant's capacity.

Assessment of incapacity is made having regard to the degree of the claimant's impairment which, together with relevant facts about the applicant such as age, sex, education, lack of skills and personal disabilities, constitutes incapacity. It is important to recognise that it is permanent incapacity and not permanent impairment that is relevant for invalid pension purposes.

Permanent Impairment—This is a purely medical condition. Permanent impairment is an anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved, which abnormality or loss the Commonwealth Medical Officer considers stable or non-progressive at the time evaluation is made. It is always a basic consideration in the evaluation of permanent incapacity.

Permanent Incapacity—This is not a purely medical condition. A person is permanently incapacitated or under a permanent incapacity when his actual or presumed ability to engage in gainful employment is reduced or absent because of impairment which, in turn, may or may not be combined with other factors.

While fluctuations in the labour market are to be disregarded in the assessment of the applicant's capacity for work, that capacity must be assessed in the light of work of kinds that (subject to such fluctuations) are available in Australia, regardless of whether or not they are available at places reasonably accessible to the applicant at his current place of residence. However, age, sex, education, lack of relevant skills and personal disabilities are factors to be taken into account, together with impairment, in determining the capacity of an individual applicant for work that is not so reasonably accessible.

The fact that a severely handicapped applicant might be able to get work at a time of full or 'over-full' employment because of the scarcity of labour would not disentitle him if he was unlikely to get work at any reasonably foreseeable time given the general level of demand for labour in Australia.

Self-inflicted incapacity brought about for the purpose of obtaining a pension disqualifies a person from pension.

(d) **Employment Considerations**
While it is not generally possible for a person engaged in employment to be considered as being permanently incapacitated for work all relevant factors should be considered where a person is engaging in some form of employment, including
- the nature of employment (part-time, sheltered, therapeutic, token);
- whether employment is within the claimant's remaining capacity for work;
- whether employment is compatible with the claimant's medical condition;
- whether employment will continue.

The Department of Social Security may request a review of medical entitlement if a pensioner commences work.

(e) **Other Considerations**
A person who has lost the use of both arms or legs may be considered to be permanently incapacitated, independent of their personal and employment circumstances, even when engaged in some limited employment. A similar assessment may be made if a person has suffered some other permanent impairment which is as broadly disruptive of his capacity for work as the loss of both arms or legs would be.

Comment

The new guidelines represent a victory for those groups which had pressured the Department of Social Security and the Government to abandon its restrictive view of 'permanent incapacity for work'. The guidelines now accept that this incapacity is to be measured by looking, not only at the claimant's medical condition, but also at a range of other factors.

However, on two important factors, the new guidelines are, at best, unclear: (these are, first, variations in the labour market and second, geographical or physical accessibility of work).

On the first of these, the section of the guidelines headed 'Permanent Incapacity' distinguishes between short-term (or seasonal) fluctuations in the labour market and long-term (or structural) changes: at least, we assume that this is the distinction which is drawn in the opening clause of the second paragraph and the third paragraph. So the fact that work which the claimant could do is *temporarily* available (because of some *short-term* drop in demand for labour) would not make the claimant 'permanently incapacitated for work'. But, on the other hand, an *indefinite* drop in demand for labour in the type of job or work which the claimant could do would contribute to making the claimant 'permanently incapacitated for work'.

On the second of these factors (accessibility) the new guidelines are both confused and contradictory. (Indeed, the *Reporter* will award one year's free subscription to the first person who can reduce this part of the guidelines to a simple and intelligible form.) The guidelines say (in the second paragraph of the section headed 'Permanent Incapacity' that the availability 'at places reasonably accessible to the applicant at his current place of residence' is irrelevant. But they go on to say that, where there is inaccessible and available work, the capacity of the claimant for *that* work is to be measured by reference to (amongst other things) the claimant's 'personal disabilities' and 'impairment'. What if the disabilities or impairment are such that the claimant cannot travel? Surely then the inaccessibility of the work *will* be taken into account.

What, we might ask, are the poor Commonwealth Medical Officers to make of all this complexity and confusion?

Apart from that confusion it is absurd to say that accessibility of work is irrelevant when one is considering the capacity of a person (with an impairment) to engage in that work. How can the availability only in Darwin of work suited to a disabled claimant who lives in Hobart be relevant to deciding that the claimant is or is not incapacitated for work?

We can expect that the adequacy of these guidelines will soon be raised before the Administrative Appeals Tribunal: indeed, several invalid pension appeals were being heard by the AAT in Melbourne as this *Reporter* went to press. And the AAT can, of course, reject these new guidelines as unintelligible or inappropriate.

File note: Legal aid for AAT appeals

Section 69 of the *Administrative Appeals Tribunal Act* provides that an applicant or other party before the AAT can apply to the Commonwealth Attorney-General for legal aid.

Until recently, the Australian Legal Aid Office (ALAO) treated this provision as preventing it from granting aid to people who had appealed to the AAT: these applications for aid were regarded as within the exclusive province of the Attorney-General.

However, the Attorney-General has now directed ALAO that it is to process all applications received by it for aid in AAT matters. If these applications fall within the standard ALAO guidelines (on means and merits), ALAO is to approve aid.

In those cases where the applicant cannot satisfy ALAO guidelines but where there is an element of 'public interest', ALAO has been directed to refer the application for aid to ALAO central office, which will submit the application to the Attorney-General for his decision under s.69 of the *AAT Act*. An element of 'public interest' will be involved where the AAT appeal relates to a matter of general public importance, or to a matter which could affect the rights of a significant section of the public, or where the appeal raises the validity of Commonwealth legislation.

Accordingly, any person seeking legal aid for an AAT appeal now has two options:

(1) To apply direct to the Attorney-General under s.69 of the *AAT Act*.
(2) To apply to the local ALAO.

(In Queensland, South Australia and Western Australia, where the ALAO has disappeared, applications for aid can be made to the Legal Aid (in SA Legal Services) Commission.)