# Does 'husband' include 'de facto husband'?

**JACOBY-CROFT and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/511)**

**Decided:** 13 July 1984 by J. Smart.

Michael Jacoby-Croft held an invalid pension. The DSS fixed the level of his pension by taking account of the income of Lorraine Jacoby-Croft because, the DSS concluded, the two were living together as husband and wife.

Jacoby-Croft sought review of that decision. As a preliminary point, he argued that, even if he was found to be living with a woman as her husband, the *Social Security Act* did not allow the Director-General to take her income into account.

### The legislation

Section 29(2) of the *Social Security Act* provides that the income of a husband or wife shall (apart from some exceptions not immediately relevant) 'be deemed to be half the total income of both'.

Section 18 of the Act defined 'wife' to include a 'dependent female' – that is, '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'. However, the Act did not contain any definition of 'husband'.

### 'Husband' includes 'de facto husband'

Jacoby-Croft argued that, because the Act contained no extended definition of 'husband', s.29(2) only applied to a man who was legally married to a woman: 'if a *de facto* husband was the claimant or invalid pensioner neither he [nor his *de facto* wife] would be a married person,' Jacoby-Croft argued.

The AAT examined the history of the various sections of the Act to 'ascertain and implement the object of the Act':

> [T]he 1948 amendments [which introduced the present definitions of 'wife' and 'married person'] were designed, *inter alia*, to overcome the anomalies which had existed. The principle of equality, which had existed in respect of the payment of the wife's allowance [now a wife's pension] to a wife or a *de facto* wife of a husband or *de facto* husband respectively and adjustments to that allowance, was intended to be applied in respect of the payment of a pension to a husband or a *de facto* husband, a wife or a *de facto* wife. The suggestion that a *de facto* husband was intended to be in a special position seems improbable. In the context, the alternative construction that 'husband' includes a *de facto* husband is reasonably open.

(Reasons, p. 9)

The AAT relied on the High Court's statements on statutory interpretion in *Cooper Brookes Pty. Ltd.* v *Commissioner of Taxation* 55 ALJR 434, where Mason and Wilson JJ had said:

> [T]here are cases in which inconvenience of result assists the court in concluding that an alternative construction which is reasonably open is to be preferred to the literal meaning because the alternative interpretation more closely conforms to the legislative intention, discernible from other provisions in the statute.

The AAT concluded:

> The words used in Part III of the Act, the legislative history of Part III and . . . the principles set out in the joint judgment of Mason and Wilson JJ in *Cooper Brookes*, lead me to the conclusion that the word 'husband' in s.29(2) of the Act includes a *de facto* husband.

### Formal decision

The AAT decided that if Jacoby-Croft had been living with a woman 'as her husband on a *bona fide* domestic basis, although not legally married to her', then her income could be taken into account in assessing the rate of Jacoby-Croft's invalid pension.

# Income test: when is income 'derived or received'?

**McBOW and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q81/104)**

**Decided:** 15 June 1984 by J.B.K. Williams.

Edward McBow asked the AAT to review a DSS decision to recover an overpayment of age pension.

One element in the overpayment was the result of a simple error by McBow and, it seems, he did not contest that this overpayment should be recovered.

However, the principal focus of this review was the DSS claim that McBow had been overpaid because he had failed to advise the DSS that he had invested funds with the Brisbane Port Authority and the State Electricity Commission. These investments paid interest of 12.2 per cent a year in half-yearly instalments.

### No failure to comply with the Act

The DSS claimed the 'income' from these investments should have been reported to the DSS within 14 days of making the investments.

The AAT said that s.45(1) of the *Social Security Act* required a pensioner to report an increase of 'income . . . received'. This referred, the AAT said, to 'the actual taking in hand of income' – it was directed to the actual receipt of income. Therefore McBow was under no obligation to advise the DSS of his investment – his only obligation was to report the actual receipt of interest payments, which he had done.

### Was there an overpayment?

The Tribunal then turned to the question whether there had been overpayment of age pension to McBow (an overpayment not caused by his omission to report, but an overpayment nevertheless). Had McBow been paid a pension at a rate to which he was not entitled?

The claimed overpayment depended on the meaning of 'income', as used in s.28(1) of the Act. (Section 28(1) directs that the rate of a pension is to be reduced to take account of the annual rate of the pensioner's income.)

Section 18 defined income as including money 'earned, derived or received'.

The AAT said:

> It seems clear that, in some circumstances, income may be earned or derived without the actual receipt of it. An instance is where work is performed for reward but payment has not actually been made. In that case however, the worker has an immediately enforceable claim for payment.

Here, the AAT said, McBow had not been entitled to receive anything until some six months after making the investments. Accordingly he had not derived or earned income in the period between making the investments and the date when interest payments became due.

However, it did not follow that there had been no overpayment. The circumstances of this case, the AAT said, supported the application of the pension year concept – that is, checking (on each anniversary of the grant of a pension) the amount of pension which should have been paid over the preceding year and making both a retrospective adjustment, 'in the light of known events', and a prospective (but necessarily not final) decision.

Although that process had been rejected by the Federal Court in *Harris* (1982) 11 *SSR* 116 (now under appeal to the High Court), that case had been concerned with income received by way of regular wages and the case was not relevant to the present problem.

### Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General for reconsideration and recalculation in accordance with the attached reasons.