Ivovic asked the AAT to review that decision, claiming that he and his wife were separated, although living under the one roof; and that this was a sufficient 'special reason' for disregarding his wife's income (as provided by s.29(2)(b)).

Separation under one roof

The AAT noted that the earlier decisions of *A* (1982) 8 *SSR* 79 and *Reid* (1981) 3 *SSR* 31 had accepted that separation under the one roof was a sufficient 'special reason' to disregard a spouse's income.

In deciding whether a married couple were separate although sharing the same house, family law cases were a useful guide. In *Pavey* (1976) 10 ALR 259, the Family Court had said that separation involved 'the destruction of the marriage relationship' and had emphasized that it was unlikely that a marriage had broken down when a husband and wife continued to live together. To establish the breakdown of the marriage, the Court would expect clear evidence and an explanation why the parties continued living under the one roof.

The Tribunal said that, in the present case, it should consider –

(a) the reason why, if the parties were in fact separated, they continued to live under the same roof;
(b) what was the marital relationship before and during the relevant period with reference to

- where the parties lived
- sexual intercourse
- mutual society and protection
- recognition of the existence of the marriage by both spouses in public
- private relationships, and
- the nurture and support of the children

(c) whether either or both of the spouses had formed the intention to sever or not to resume the marital relationship and had acted on that intention, or acted as if the marital relationship had been severed.

Ivovic and his wife told the AAT that each of them wanted to dissolve the marriage, his wife because she did not accept any financial responsibility for her husband, Ivovic because he did not want to be a burden (or dependent) on his wife. However, they still felt affection for each other, shared many household tasks and had not pursued a divorce because of their young child.

The Tribunal suggested that the key to Ivovic's situation probably lay in his humiliation in being reduced to an invalid pensioner, owing thousands of dollars to the DSS (see *Ivovic* (1982) 3 *SSR* 25) and financially dependent on his wife. The AAT quoted an observation in the DSS files:

> At the heart of the dispute between Mr and Mrs Ivovic is their wish to have separate incomes. Mrs Ivovic does not want to be burdened by her husband and he does not want to be a burden to her. It is unfortunate that the effect of the Social Security Act is to place Mr Ivovic in a dependent position in relation to his wife and to embroil the department in a dispute which it has no power to resolve.

The Tribunal decided that, while Ivovic and his wife had decided to break the marriage relationship, 'neither has with determination acted on that intention or acted as if the relationship had been severed': Reasons, para. 17. Accordingly, they could not be regarded as separated.

Formal decision

The AAT affirmed the decision under review.

Cohabitation

KELLIE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W83/103)

Decided: 5 October 1984 by A.N. Hall, I.A. Wilkins and J.G. Billings.

By a majority, the AAT *affirmed* 2 DSS decisions to cancel an unemployment benefit held by Deborah Kellie and to refuse a new claim for benefit. The decisions had been made on the basis that Kellie and a man, O, were 'married persons' and that, therefore, O's income should be treated as her income (in accordance with s.114(3) of the *Social Security Act*).

The question before the AAT was whether Kellie was living with O as his wife, on a *bona fide* domestic basis, although not legally married to him.

The AAT was told that Kellie and O had begun to live together in 1981, when they were university students. They had maintained an exclusive sexual relationship since then, but they had few interests in common, did not pool their financial resources and were agreed that the relationship was unlikely to persist.

The majority of the AAT (**Hall** and **Wilkins**) noted that, in *Lynam* (1983) 20 *SSR* 225, the Federal Court had expressly rejected the argument that financial dependence was the critical factor when deciding whether a man and woman should be treated as 'married persons' for the purposes of the unemployment benefit income test in s.114(3):

> What must be looked at is the composite picture . . . The endless scope for difference in human attitudes and activities means that there will be an almost infinite variety of circumstances which may fall for consideration.

In the present case, the majority said, Kellie and O had continued to maintain an exclusive sexual relationship and a common household. Although they were disenchanted with the relationship, they had persisted with it and Kellie should be regarded as living with O as his wife on a *bona fide* domestic basis although not legally married to him.

On the other hand, **Billings** emphasised the lack of personal interdependence between Kellie and O and described it as 'an arrangement of convenience'. On balance, she said, Kellie could not be described as living with O as his wife on a *bona fide* domestic basis.

WOOD and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W80/83)

Decided: 17 August 1984 by G. D. Clarkson.

The AAT *set aside* a DSS decision to refuse unemployment benefit to R. Wood. The decision had been made on the basis that a woman, M, was living with Wood as his wife 'on a *bona fide* domestic basis although not legally married to him' and that, in accordance with s.114(3) of the *Social Security Act*, her income should be treated as Wood's income.

After examining all the evidence of the relationship between Wood and M, the Tribunal said that it was 'extremely difficult to draw a clear line of definition between the contention on the one hand that the relationship is one of *de facto* marriage and on the other that it is similar to that of mother and child, as the SSAT thought, or to that of brother and sister as Mrs M has suggested': Reasons, p.14.

On the one hand, Wood and M owned the house in which they lived as joint tenants; and, in an affidavit lodged in 1982 under the *Family Law Act*, M had sworn that he was 'residing in a de facto relationship with [M]'.

On the other hand, the AAT found that the joint tenancy had been entered into as a means of raising a temporary loan (so that Wood would not be forced to sell his house); and that the assertion of a *de facto* relationship made in the affidavit was based on advice to Wood from the DSS and was made in order to resist a claim for maintenance from his former wife.

The AAT said that, because it was uncertain whether M was Wood's 'spouse' within the meaning of that term in s.114 of the *Social Security Act*, it followed that her income should not be treated as Wood's income. That approach was, the Tribunal said, in accordance with the observations of Woodward J in *McDonald* (1984) 18 *SSR* 188.

WATTUS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/773)

Decided: 25 July 1984 by W. A. G. Enright.

The AAT *set aside* a DSS decision to cancel a widow's pension held by Jean Wattus. That decision had been based on the belief that Wattus was living with a man, C, as his wife 'on a *bona fide* domestic basis' and was, by s.59(1) of the *Social Security Act*, excluded from the definition of 'widow'.

The Tribunal said that the relationship between Wattus and C was one of friendship: there was no sharing of income, assets

or debts nor was there a sexual relationship or any emotional commitment between Wattus and C. The AAT described the Wattus household as unusual—'rather attractive and certainly welcoming' because C was only one of a number of people who had been taken into the household, 'all of whom had received from Mrs Wattus great kindness, attention and consideration in illness and injury': Reasons, para. 15.

MATHEWS and DIRECTOR-GENERAL OF SOCIAL SECURITY

Decided: 11 October 1984 by A. B. Renouf.

The AAT *affirmed* a DSS decision not to grant unemployment benefit to David Mathews. The decision had been made on the basis that the income of a woman, E, should be treated as Mathews' income because E was living with Mathews as his wife 'on a *bona fide* domestic basis although not legally married to [M]'. (Section 114(3) provides that the income of a beneficiary shall include the income of the beneficiary's spouse unless the beneficiary and his spouse are living apart.)

The Tribunal found that Mathews and E had been cohabiting continuously for some 5 years, that their relationship had deteriorated but that, during the time for which Mathews had claimed unemployment benefit, the relationship had not disappeared. It may have been that Mathews believed that the relationship was at an end; but he had not taken any steps to terminate it and

> in fact allowed the relationship to go on unchanged in most of its material respects. In other words, from the beginning of the relevant period, there was not such a change in the circumstances in the relationship so as to prove that it had worsened to the point of separation under the same roof.

(Reasons, para. 17)

Invalid pension: permanent incapacity

ALESSI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/390)

Decided: 25 September 1984 by J. Dwyer, R.G. Downes and H.W. Garlick.

The AAT *affirmed* a DSS decision to refuse an invalid pension to a 39-year-old man, who claimed to suffer from a variety of physical and psychiatric disabilities.

The AAT concluded that Alessi's physical complaints amounted only to a moderate incapacity and that his psychiatric condition was attitudinal, rather than disabling.

The Tribunal's assessment of Alessi was influenced by evidence that he had, until very recently, displayed a sign outside his home advertising his services as a tiler and plasterer; and that he appeared to have accumulated significant amounts of cash. The AAT said that Alessi's failure to call his wife, who might have corroborated his claim that he had not worked since 1979, supported the inference that his wife's evidence would not have helped him.

Assessing 'permanent incapacity'

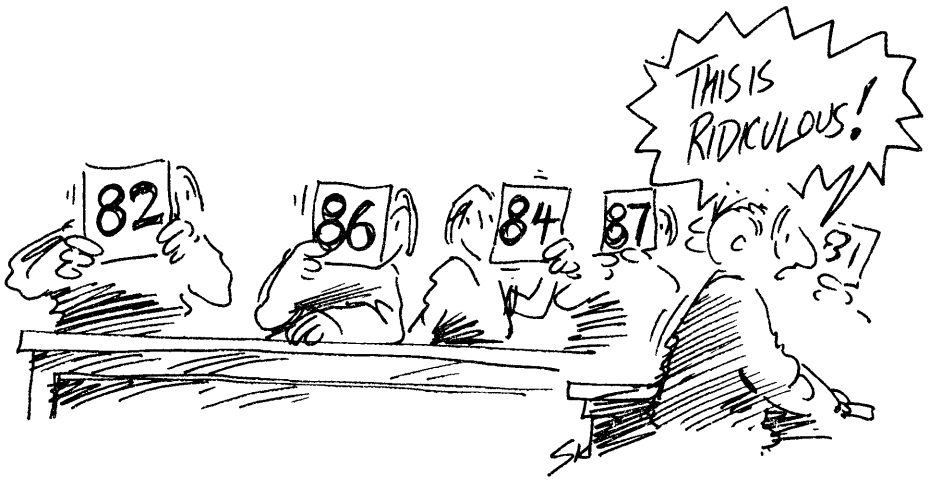
In the course of its Reasons, the AAT discussed the process of assessing 'permanent incapacity for work' under s.24 of the *Social Security Act*. This was a complex process, the AAT said, largely because of the wording of s.23, which introduced the concept of 85% permanent incapacity for work.

The AAT noted that many earlier decisions had established that 'incapacity for work is not simply a medical matter, but requires an assessment of the person's capacity to obtain work in his disabled condition in the market place': Reasons, para. 10.

That approach meant that a person with a 'medical permanent incapacity for work of any percentage may well qualify for Invalid Pension in the current economic climate'. The AAT referred to the earlier decisions in *Panke* (1981) 2 *SSR* 9, *McGeary* (1982) 10 *SSR* 95 and *Howard* (1983) 13 *SSR* 134, and concluded from those decisions that a person could be permanently incapacitated for work within s.24 of the *Social Security Act* on the basis of a partial medical impairment, quite independent of the '85%' provision in s.23.

In the light of that analysis, the AAT said, s.23 might only be relevant in those cases 'where the applicant has and is able to use a residual capacity for work which can in fact be quantified in terms of hours worked, earnings or productivity': Reasons, para. 15.

If this reading of ss.23 and 24 were correct, the AAT said, it would be appropriate for Parliament to repeal or clarify s.23. In the meantime, the practice adopted by the DSS, of asking doctors to assess incapacity in percentage terms, should be abandoned. That practice appeared to reflect an (incorrect) assumption that 'every case of incapacity can be quantified in percentage terms and that the assessment of the appropriate percentage is a medical question': Reasons, para. 9.



YUSUF and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/350)

Decided: 13 September 1984 by I.R. Thompson.

The AAT *affirmed* a DSS decision to refuse an invalid pension to a 62-year-old man, who suffered from a series of disabilities.

The DSS conceded that Yusuf was permanently incapacitated for work but claimed that he had become permanently incapacitated for work before his migration to Australia from Cyprus in 1977.

Section 25 of the *Social Security Act* prohibits the granting of an invalid pension to a person who has been resident in Australia for less than 10 years –

> . . . unless he became permanently incapacitated for work or permanently blind . . . while in Australia or during a temporary absence from Australia.

The Tribunal found that Yusuf had worked as a clerk and an architectural draftsman up to the time when he emigrated from Cyprus, but that he had been suffering from severe deafness when he left that country. The Tribunal concluded that his deafness, in combination with his limited work experience, age and lang-