and resided there for 6 months should 'be deemed to be permanently resident in New Zealand'. However, this part of the agreement had not been implemented by legislation in Australia. Therefore, although the policy had 'its basis at the highest levels of the executive and therefore [had] much to commend it', there was no room for the application of that policy.

This was not a case, the AAT said, where Government policy had been developed to guide the exercise of some discretion. (If there had been some discretion in the *NZ Regulations*, that policy would have been relevant to the exercise of the discretion: *Re Drake (No 2)* (1979) 2 ALD 634.) However the AAT said, the Australian legislation was unambiguous and conferred no discretion; and, accordingly, the 6 month rule as suggested by the DSS had no legislative basis; and, as the High Court had said in *Green* v *Daniels* (1977) 13 ALR 1, any decision based on that policy would be unlawful.

Formal decision

The AAT affirmed the decision under review.

Cohabitation: separation under one roof

COOPER and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N83/85)

Decided: 25 October 1984 by J.A. Kiosoglous, G.D. Grant and J.H. McClintock.

Mrs Cooper had been granted an age pension in 1977. In her application for that pension, she had stated that she had been living in a *de facto* relationship with a man (Mr Cooper) for over 20 years. Accordingly, the DSS took account of Mr Cooper's income when calculating the rate of her age pension. In May 1982, Mrs Cooper advised the DSS that her *de facto* relationship with Mr Cooper had ended some 12 years earlier. However, the DSS decided that she was still living with Mr Cooper as his wife on a *bona fide* domestic basis and that his income should still be taken into account in fixing the rate of her pension. Mrs Cooper asked the AAT to review that decision.

The legislation

At the time of the DSS decision, s.28 (2) of the *Social Security Act* provided that a pensioner's age pension should be calculated by taking account of the pensioner's income. Section 29(2) provided as follows:

> (2)For the purposes of this Part, unless the contrary intention appears, the income of a husband or wife shall –
>
> (a) except where they are living apart in pursuance of a separation agreement in writing or of a decree, judgment or order of a court; or
>
> (b) unless, for any special reason, in any particular case, the Director-General otherwise determines,
>
> be deemed to be half the total income of both.

Section 18 of the Act defined 'wife' to include a woman who was living with a man as his wife on a *bona fide* domestic basis although not legally married to him.

The evidence

Mrs Cooper had started to live with Mr Cooper in 1958 and had adopted his surname in 1969. Until about 1965 they had enjoyed a close relationship; but, from 1970, there had been no relationship between them – they had occupied separate bedrooms, had no common social life, exchanged few words and, by 1982, had stopped sharing meals. More recently, Mr Cooper had asked Mrs Cooper to leave the house (which he owned) and, when she was unable to find alternative accommodation, had demanded that she pay rent to him.

Mrs Cooper told the AAT that her main reason for staying in Mr Cooper's house was that she could not find alternative accommodation which she could afford. Another reason for her remaining there was that Mr Cooper's house was close to her medical practitioner from whom she was receiving regular treatment for a variety of illnesses.

The AAT's assessment

The Tribunal noted that all the evidence as to Mrs Cooper's domestic situation had been given by her and had not been corroborated. Although it was generally desirable, the AAT said, for evidence of separation under the one roof to be corroborated, that corroboration was neither essential nor desirable in the present matter. This was because there was no suggestion by the DSS that Mrs Cooper's evidence should not be accepted; and because requiring the applicant to call Mr Cooper to corroborate her evidence might have aggravated the difficult situation between them.

On the basis of the evidence given by Mrs Cooper, the AAT concluded that she had been living separately and apart from Mr Cooper, although under the one roof, for some years. The evidence which tended to show the persistence of a *de facto* marriage relationship between Mrs Cooper and Mr Cooper were also consistent with the conclusion that they were living separately and apart:

- although they maintained a joint bank account, this was used only for paying household expenses;

- although Mrs Cooper provided some household services to Mr Cooper this should be seen as her contribution towards her keep;
- the information supplied by Mrs Cooper to the DSS between 1977 and 1981, that she was living with Mr Cooper as his *de facto* wife, was not supplied with fraudulent intent nor did they have any substantial significance;
- neither the adoption by Mrs Cooper of Mr Cooper's surname nor the financial relationship between them was a conclusive factor but only one factor to be taken into account; and
- Mrs Cooper's continued residence in Mr Cooper's house should be viewed in the context of her lack of financial resources and alternative accommodation.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that the income of Mrs Cooper did not include the income of Mr Cooper for the purposes of calculation at the rate of her age pension.

DAVIS and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. V84/104)

Decided: 30 November 1984 by J.R. Dwyer.

Margaret Davis had been granted unemployment benefit in October 1976, special benefit in May 1979 and invalid pension in August 1983.

Shortly before the decision to grant Davis an invalid pension was implemented, the DSS decided that she was living with a man, B, as his wife on a *bona fide* domestic basis although not legally married to him. Accordingly, the rate of her special benefit (and, later, her invalid pension) was reduced to take account of B's income.

David asked the AAT to review that decision. After the hearing of the application for review but before the AAT's decision was handed down David died.

The legislation

At the time of the decision under review, s.114(1) of the *Social Security Act* provided for the rate of special benefit paid to a person to be reduced by reference to the person's income. Section 114(3) provided that the income of a married person should include the income of that

person's spouse which, according to s.106(1), included persons living together on a *bona fide* domestic basis as man and wife although not legally married.

Corresponding provisions dealing with the rate of invalid pension were found at the relevant time in ss.28(2), 29(2) and 18 of the *Social Security Act*.

The evidence

Evidence was given to the AAT that Davis and B had shared accommodation in 8 flats between 1976 and June 1984, when they had begun to live separately. At different times during that period, David had made contradictory statements about her relationship with B: on some occasions she had admitted that she was living in a *de facto* relationship with B, on other occasions she claimed that they were living totally separate lives and at other times she had claimed that they were no longer sharing accommodation. (The AAT observed that these contradictions might have been due to Davis' medical condition: there was evidence that she suffered from a mental disorder for which she was taking heavy medication.)

It appeared from the evidence that Davis and B had shared a limited social life, that initially (at least) there had been a sexual relationship, that Davis and B had separated on three occasions but resumed living together twice, that they shared household tasks and expenses, and that Davis has occasionally held herself out as married to B. Davis had moved out of the flat which she had shared with B in June 1984 and, at the time of the hearing of this matter, she was living in a boarding house. However, her mail continued to be addressed to the flat and she had left her furniture there.

The applicant's death

The AAT had said that, despite the death of Davis, its decision should still be delivered – not only because the decision might affect Davis' estate but because 'decisions of this Tribunal lay down principles': Reasons, para. 1.

Corroboration

The AAT noted that Davis had not called as a witness the man with whom she claimed she had been living. In those circumstances, the AAT said, it was entitled to draw the inference that his evidence would not have assisted her case; and the AAT referred to several judicial decisions – *Jones* v *Dunkel* (1959) 101 CLR 298; *O'Donnell* v *Reichard* [1975] VR 916; and *Girlock (Sales) Pty Ltd* v *Hurrell* (1982) 149 CLR 155.

'Objective indicia' of a relationship

After referring to the Federal Court decision in *Lynam* (1983) 20 *SSR* 225, the Tribunal said that social attitudes to *de facto* relationships were changing quickly. These relationships were being recognised in the context of adoption, *in vitro* fertilisation and anti-discrimination laws. The AAT continued:

> As the community becomes more accepting of people living in *de facto* situations, it becomes less likely that a woman living in a *de facto* situation will adopt the name of the man with whom she lives, or that the couple will hold themselves out as being married. Married people now sometimes retain separate names and often keep their financial affairs separate. Thus it becomes more difficult to determine from objective *indicia* which couples are living in a *bona fide* domestic situation as if they are man and wife, and which are simply living in a sharing relationship, sharing accommodation and other aspects of domestic life, but not living as if they were man and wife.

(Reasons, para. 37)

But the AAT concluded that the evidence in the present case showed that, at the time when the decision under review was made (30 August 1983), Davis was living with B as his wife on a *bona fide* domestic basis although not legally married to him. That evidence included 'an association lasting 8 years, many changes of address, some shared social life, emotional support, together with [the various statements made by Davis over the years]': Reasons, para. 38.

Recovery of past payments

The Tribunal observed that the evidence indicated that there had been a *de facto* relationship between Davis and B for some years before August 1983. Consequently, the rate of Davis' unemployment and special benefits should have taken account of B's income; and she had probably been overpaid. However, the evidence showed that, at the date of the hearing, Davis was in a poor financial position, and, therefore, it would have been

> inconsistent with welfare principles to threaten her newly established independence by demanding repayment of moneys received by her or even by making deductions from her current payments which would make it impossible for her to continue her present living arrangements.

(Reasons, para. 40)

Formal decision

The AAT affirmed the decision under review.

Handicapped child's allowance

McGRATH and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. W83/93)

Decided: 30 November 1984 by I.R. Thompson.

Joan McGrath had been granted a handicapped child's allowance for her 2 intellectually handicapped children, W and S, from July 1981. However, her application to have payment of the allowance backdated to September 1979 (when the children's conditions were first diagnosed) was rejected by the DSS. McGrath asked the AAT to review that decision.

The legislation

Section 102(1) of the *Social Security Act*, in combination with s.102R, gives the Director-General a discretion to backdate payment of handicapped child's allowance to the date of eligibility in 'special circumstances'.

'Special circumstances'

McGrath, an Aborigine, had minimal education and, until 1981, had lived in isolated rural areas. Although she had been told 'in about 1978' by medical authorities that her children were intellectually retarded, no-one had informed her of the existence of handicapped child's allowance or her possible eligibility until 1981, when her sister had started to work with the DSS and had told McGrath about the allowance.

The AAT was told (and accepted) that McGrath was 'shy and reluctant to approach persons in authority or Government departments; she took the attitude that she should wait until something was offered to her and not go and demand it.' The AAT also accepted that McGrath had always been in poor financial circumstances.

The AAT referred to the statement in *Beadle* (1984) 20 *SSR* 210, that more than ignorance of eligibility for handicapped child's allowance was needed to constitute 'special circumstances'. The Tribunal also referred to *Johns* and *Corbett* (1984) 20 *SSR* 211 and 210, where Aboriginal women, in similar circumstances to McGrath, had demonstrated 'special circumstances'. In the present case, the AAT said, there were also sufficient 'special circumstances' to allow back-dating payment of the allowance under s.102(1).

Discretion?

The AAT said that, in *Johns* and *Corbett* (above), the Tribunal had decided that there was a discretion in s.102(1) – that something more than 'special circumstances' had to be shown to support the exercise of that discretion to make a back-payment, particularly where the back-payment was for a substantial period.

Although one member of the AAT (Clarkson) had questioned (in *Bygrave* (1984) 22 *SSR* 251) whether there was a discretion under the section, and although the decisions in *Johns* and *Corbett* were under appeal to the Federal Court, the Tribunal said that those decisions should be followed because of 'the need for consistency in the decisions of the Tribunal'.

In the present case, McGrath had incurred extra expense because of the care provided to the 2 children; and she was now $400 in debt. Her financial situation was difficult – she needed several basic household item[illegible] most of her