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

income went on living expenses. The period for which back-payment was sought was relatively short – some 22 months (to the date when the children's conditions were diagnosed). While accepting 'the importance of consistency in administrative decision-making', the AAT said that the circumstances of this case justified using the discretion to back-date payment of the allowance.

Rate of the allowance

Because the allowance had been granted under s.105JA of the Act (on the basis that the children were 'handicapped' rather than 'severely handicapped'), the rate of the allowance was at the discretion of the Director-General. McGrath had been paid, until recently, at the minimum rate; but the rate had recently been increased. The AAT said that it was not clear why these decisions had been made, as McGrath's circumstances had always been very poor; and the AAT decided that the allowance should be paid at the maximum rate for the period of back-payments.

Formal decision

The AAT set aside the decision under review and substituted a decision that McGrath be paid handicapped child's allowance from September 1979 to August 1981 at the maximum rate.

HICKS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W83/135)

Decided: 3 December 1984 by G.D. Clarkson, I.A. Wilkins and J.G. Billings.

Mrs Hicks was given the custody, care and control of her mentally retarded grandson, S, in 1978, when he was 8 years old. S, who had an IQ of 65 and was described as impulsive, aggressive and uncomprehending, required considerable supervision in most of his activities; and he would have been placed in an insitution if Hicks had not accepted responsibility for him. He attended a special school for 7 hours on each school day.

When the DSS rejected Hicks' application for a handicapped child's allowance, she applied to the AAT for review.

Child at special school – 'constant care and attention'?

The AAT decided that, on the evidence before it, S needed care and attention marginally less than constant care and attention and that he was, therefore, a 'handicapped child' as defined in s.105H of the *Social Security Act*.

The only problem in concluding that Hicks provided that care and attention in a private home (so as to qualify for the allowance under s.105JA of the Act) was the fact that S attended a special school. (The DSS conceded that her care for S imposed 'severe financial hardship' on her – she was an age pensioner.)

In *Seager* (1984) 21 *SSR* 230, the AAT had left open the question about whether attendance at a special (rather than an ordinary) school might prevent a finding of 'constant care and attention' in a private home. In this case the AAT said that there was no ground for saying that S's school attendance diminished or altered 'the nature or extent of the careful supervision and attention given [S] in the applicant's home, nor its frequency nor regularity': Reasons, p. 13. So far as the general principle was concerned, the AAT said:

> Once it is accepted, as we think it now should be following *Seager's* case, that care and attention which is regular and frequent and provided on an ongoing basis, day to day over a period of months can be described as constant, – although there are periods of inattention within each 24 hour cycle when the child attends an ordinary school, – it appears reasonable to say that there will be at least some cases where a different result will not be required merely because the school attended by the child is a 'special' school.

(Reasons, pp. 12-3)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that Hicks was entitled to receive handicapped child's allowance under s.104JA, at a rate to be decided by the Director-General.

BATES and SECRETARY TO THE DEPARTMENT OF SOCIAL SECURITY (No. W84/29)

Decided: 20 December 1984 by J.D. Davies J, G.D. Clarkson and J.G. Billings.

Florence Bates, an Aboriginal woman, gave birth to her son, T, in October 1967. The child lacked a thyroid gland and, because his condition was not diagnosed at an early stage, he became mentally retarded. In April 1983, Bates applied for a handicapped child's allowance, and when the DSS rejected this application, she applied to the AAT for review of that rejection.

A 'handicapped child'

On the basis of evidence from medical specialists, T's school and Bates, the AAT concluded that T had been a handicapped child, as that term was defined in s.105H(1) of the *Social Security Act*, from some time in 1970. The AAT said that, during his developmental years, 'he needed care and attention of such regularity and frequency that it was only marginally less than constant care and attention.'

Section 105JA, which provided an allowance for a 'handicapped child', was introduced into the *Social Security Act* in November 1977. It followed, the AAT said, that Bates was entitled to the allowance from that date and that her entitlement continued until December 1983, when T stopped receiving full time education.

No retrospective payment

The AAT then examined the question of date from which the allowance should be paid to Bates. (Section 102(1)(a), in combination with s.105R, gives the Secretary a discretion to backdate, to the date of eligibility, payment of a handicapped child's allowance in 'special circumstances'.)

Bates told the AAT that she had not known of the existence of the allowance until shortly before she claimed it in 1983. Until that time, neither the child's doctor nor any welfare worker had told her about the allowance. She also told the AAT that she had a limited reading capacity and had lived in a small, isolated country town for 30 years.

The AAT said that there were 'special circumstances', which affected Bates' ability to claim the allowance. After referring to its earlier decisions in *Johns* (1984) 20 *SSR* 211, *Corbett* (1984) 20 *SSR* 210 and *Bygrave* (1984) 22 *SSR* 251, the AAT said:

> The applicant suffered from all the disadvantages affecting Aboriginal people living in poverty and the additional disadvantage that she lived in a small town which was not visited by members of social welfare services.

(Reasons, p. 11)

However, the AAT said, earlier decisions had established that, even in special circumstances, it was not necessarily appropriate to backdate payment of the allowance. The AAT conceded that T would have benefited through the provision of more medical care if the allowance had been paid between 1977 and 1983. The AAT continued:

> The evidence given does not suggest that any large amount of money was expended by the applicant by reason of T's condition. Of course, there were certain moneys expended on trips to and from Perth. And any moneys expended by the applicant had considerable significance to her. But the moneys expended in that way are minimal in relation to the value of the back payment sought.

(Reasons, pp. 11-2)

The AAT said that it would follow the approach established in earlier decisions and refuse to exercise the discretion in s.102(1).) (However, it appeared that one member of the Tribunal, **G.D. Clarkson**, had some doubt about this approach. The Reasons indicated that he maintained the attitude which he had adopted in *Bygrave* (above) – that is, that once special circumstances were established, then the allowance should be paid retrospectively as a matter of course.)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that Bates was entitled under s.105JA to a handicapped child's allowance for T from the date of her application for the allowance until T ceased full-time education.

LOO and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W83/122-3)

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

In June 1982, Karen Loo applied to the

DSS for a handicapped child's allowance for her 2 daughters, S (13) and L (8). After the DSS rejected her application, she asked the AAT to review that decision.

The legislation

Loo's application was based on s.105JA of the *Social Security Act*, which provides that a person is qualified for the allowance if she provides care and attention, 'only marginally less' than constant care and attention, to a handicapped child in their private home and, because of that care and attention, suffers 'severe financial hardship'.

Section 105H(1) defines a 'handicapped child's as one who needs (and is likely to need for an extended period) care and attention 'only marginally less' than constant care and attention.

'Care and attention'

S suffered from chronic asthma. Loo supervised much of her activities and her treatment regime and spent considerable time and money in ensuring that their home was as dust-free as possible. After noting that the 'margin' referred to in ss.105H(1) and 105JA could be broad (as decided in *Mrs M* (1983) 16 *SSR* 158), the AAT said that it was satisfied that S needed care and attention only marginally less than constant care and attention and would need that care and attention for an extended period.

S attended school during standard school hours. The AAT said that there had been divergent views expressed in earlier Tribunal decisions as to the effect of school attendance on eligibility for the allowance. However, the enactment of s.15AB of the *Acts Interpretation Act* in mid-1984 had provided a means of resolving this conflict. As the decision in *Shingles* (1984) 21 *SSR* 230 had demonstrated, s.15AB allowed the AAT to look at Parliamentary debates to discover the purpose and meaning of the provisions which dealt with handicapped child's allowance. Those debates made it 'clear that it was intended that a child's attendance at school should not prevent the care and attention given to him in his home being regarded as constant': Reasons, para. 9.

After examining the care and attention provided to S by Loo (including 'the considerable additional housework which the applicant does in order to reduce the risk of exposure of S to dust'), the AAT concluded that Loo provided sufficient care and attention for the purposes of s.105JA.

However, the AAT said, the care and attention provided by Loo to L was not sufficient to meet the requirements of s.105JA: that child suffered from ear infections, which called for some 20 minutes of care (over and above the care needed by a normal child) a day. That care and attention was 'not far enough along the line of the continuum of care and attention to be regarded as only marginally less than constant care and attention': Reasons, para. 17.

'Severe financial hardship'

The AAT said that it was satisfied that Loo suffered severe financial hardship because of the care and attention provided to S. Loo was an invalid pensioner with 5 children, separated from the children's father; and the money she spent on cleaning materials imposed considerable financial strain because of her difficult circumstances. Accordingly, Loo met the second requirement of s.105JA and was qualified for a handicapped child's allowance for S.

Given Loo's financial circumstances and the financial hardship which provision of the care and attention caused to her, the AAT decided that the discretion in s.105JA should be exercised so that she was paid at the maximum rate.

Backpayment

S had suffered from asthma since about 1974; and, the AAT said, Loo would have qualified for handicapped child's allowance from November 1977, when the allowance was extended to handicapped (rather than severely handicapped) children. But Loo had not lodged her claim until July 1982: were there sufficient 'special circumstances' within s.102(1) to justify backpayment of the allowance?

Section 102(1) provides that, unless a claim for handicapped child's allowance is lodged within 6 months of eligibility, payment of that allowance can be backdated to the date of eligibility only in 'special circumstances'.

Loo, who was an Aborigine, had run away from her foster home at the age of 13, and had begun to live with her *de facto* husband when she was 14. From that time, they were constantly moving around and she suffered from constant ill-health. She said that she had learnt of the allowance in 1980; but that, for two or so years after then, she had experienced so many domestic problems that she had not had the opportunity to consider whether she might be eligible for the allowance for S: she had suffered ill-health, as had 3 of her 5 children; she had been subjected to domestic violence and had moved in and out of women's refuges. None of the medical personnel who had treated S had raised the possibility of the allowance, until a welfare worker advised her in 1982.

> The AAT said that –
>
> mere ignorance of eligibility due to inadvertence on the part of a well educated person with ample opportunity to acquire knowledge of it is not a circumstance which can be regarded as special; it is a very common circumstance. However, the circumstances may be special where there are good reasons for the inadvertence, as exemplified in *Re Johns* and *Re Corbett*. I am satisfied that in the applicant's case there were good reasons for her inadvertence and that there were special circumstances which could have permitted the Director-General to allow a longer period for lodging the claim.
>
> (Reasons, para.22)

However, the decisions in *Johns* and *Corbett* (1984) 20 *SSR* 211 and 210 had said that, even when there were 'special circumstances', the Director-General (and therefore the AAT) had a discretion whether to allow backpayment or not. While those decisions stood (they were on appeal to the Federal Court), they should be followed, the AAT said (see *McGrath* in this issue of the *Reporter*).

In the present case, Loo had borrowed money in order to support her family; but she had repaid that money; and, following *Johns* and *Corbett*, there were no factors which would support an exercise of the discretion to make a retrospective payment for 4½ years.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that a handicapped child's allowance be paid to Loo for S under s.105JA at the maximum rate.

Payment of pensions etc. overseas

APPENZELLER and APPENZELLER and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N83/444)

Decided: 24 September 1984 by R. Smart.

Josefa Appenzeller had migrated to Australia with her husband and son in 1950. They took out Australian citizenship in 1956; but, in 1971, Appenzeller and her husband travelled to Europe, where they established a home.

In January 1977, Appenzeller and her husband returned to Australia and were granted age pensions after declaring they intended to live in Australia permanently. However, in May 1977, they left Australia for Germany without informing the DSS. When the DSS learned of their departure, it cancelled their age pensions.

Appenzeller's husband died in 1980; and Appenzeller and her son then asked the AAT to review the cancellation of her age pension.

The legislation

Section 83AD(1) of the *Social Security Act* provides that where a former resident of Australia returns to Australia, claims a pension and leaves Australia within 12 months of her return, any pension granted to that person is not payable while that person is outside Australia.

However, s.83AD(2) gives the Director-General power to waive the negative provision in s.83AD(1) if the person's