if...the endowee ceases to have his usual place of residence in Australia, unless his absence from Australia is temporary only...[or] the child ceases to be in Australia, unless his absence from Australia is temporary only...'

Were the applicant and his children temporarily absent from Australia?

The question then became one of whether the applicant and his children were temporarily absent from Australia. The Tribunal referred to the decision of the Federal Court in *Hafza* (1985) 26 *SSR* 321. In that decision the Court had referred to the relevance of the intention of the applicant in determining whether absence from Australia could be regarded as temporary. The Court referred to a temporary absence becoming an indefinite absence even though it may not be a permanent absence. The example of a person who leaves Australia to visit a sick relative and then decides to stay on after the expiration of that purpose was also posited by the Court as an example of a situation where the 'absence will cease to be temporary notwithstanding an intention eventually to return to Australia'.

That example in *Hafza* was similar to the facts in the present case said the AAT. The fact that he and his family had stayed away for seven years, that as Australian citizens they could return to Australia at any time, that he had property in Lebanon but none in Australia and that his children all attended school in Lebanon all became relevant in determining whether his absence was temporary. On the whole the AAT was not convinced that but for a lack of money for air fares the family would have returned soon after the death of the applicant's father. [The applicant obtained part-time work after the death of his father to earn money to pay for return fares to Australia but the work was sporadic due to the war.] It appeared that the applicant's plans were somewhat indefinite for a period of years after the death of his father.

Formal decision

The AAT gave effect to the DSS concession at the start of the hearing that the original decision be set aside and a decision be substituted that family allowance be cancelled from March 1980 and that family allowance recommence from September 1985.

De facto relationships

Re STOPPER and PALOMBO and SECRETARY TO DSS
(Nos S86/243 & S86/245)
Decided: 31 March 1987 by J.A. Kiosoglous, J.T.B. Linn and D.B. Williams.

The AAT *set aside* a DSS decision that the two applicants, Stopper and Palombo, were living in a de facto relationship and were ineligible for supporting parent's benefits.

Stopper and Palombo, each of whom was a supporting parent beneficiary, had been living together for 3 years. They told the AAT that their relationship had always been one of employer and housekeeper: Stopper, a 48-year-old woman, was responsible for house cleaning and, in return, Palombo, a 51-year-old man, provided free accommodation for her and her son.

Stopper and Palombo assumed individual responsibility for their own cooking and washing, although Palombo and his daughter had occasionally eaten food prepared by Stopper; they each contributed to household bills; they did not jointly own any property and had separate bank accounts; they occasionally shared outings; and they did not sleep together nor had they ever had a sexual relationship.

S had applied for separate public housing; and she told the AAT that, as soon as she was offered housing, she would move out of Palombo's house.

The question before the AAT was whether the two applicants were 'de facto spouses' as defined in s.6(1) of the *Social Security Act*: that is, whether they were -

'living with another person of the opposite sex as the spouse of that other person on a *bona fide* domestic basis although not legally married to that other person . . .'

The AAT decided that, although the applicants were living together on a *bona fide* domestic basis, they were not living together as spouses. Their relationship was 'sustained primarily by necessity'; and had 'not made a commitment to live together because of any personal relationship': Reasons, paras 20, 21.

Re JONES and SECRETARY TO DSS
(No.N86/878)
Decided: 8 May 1987 by A.P. Renouf, C.J. Stevens and M.T. Lewis.

The AAT *set aside* a DSS decision to reject a claim for sickness benefit lodged by Jones, a 39-year-old man, because of the income of a woman (his former wife) with whom he was living.

The AAT decided that Jones was not living in a marriage-like relationship with the woman, although they were sharing a house, had once been partners in a de facto marriage and were the parents of two young children.

The AAT accepted Jones' evidence that he and the woman had terminated their de facto relationship, now had no sexual relationship, had no common social life and had only minimal communication at home. The Tribunal also accepted Jones' claim that he had remained living under the same roof as his former de facto wife only because of his concern for his children's well-being (an attitude which she shared) and because he was determined to retain custody over the children.

The AAT noted that the DSS had adopted the approach that a former de facto couple who continued to share a roof and support their children should be regarded as still 'married' for the purposes of the *Social Security Act*:

'This is a reasonable hypothesis and in such a situation the evidence refuting it, if it is to be refuted, has to be weighty. We consider that the evidence in this case is sufficient to refute the hypothesis. The circumstances surrounding the relationship of [Jones and the woman], as described by each of them, are very unusual but in this day and age, they are not improbable.'
(Reasons, para.43)

Re ROBERTS and SECRETARY TO DSS
(No.W86/295)
Decided: 11 May 1987 by R.D. Nicholson, I.A. Wilkins and J.G. Billings.

The AAT *set aside* a DSS decision that Chantal Roberts was not qualified to receive supporting parent's benefit because she was living as the de facto spouse of a man, also known as Roberts.

The applicant had adopted the surname of Roberts, with whom she shared accommodation and who was the father of her child. However, several other people shared the same accommodation - it was a 'communal household' consisting of 5 adults and 2 children.

Each of the adults occupied a separate bedroom and contributed equally to the rent for the house, the cost of food and utilities, and shared the household chores. The father of the applicant's child provided her with no financial support; and there was now no sexual or romantic relationship between them.

On the basis of this evidence, the AAT said it was not satisfied that the applicant and the father of her child had a commitment to each other of the type which was an essential characteristic of a marital relationship:

> 'There is a commitment by the Applicant and separately by Mr Roberts to [their child] but that is no substitute for the mutual commitment being the essential characteristic of the marital relationship.'
> (Reasons, p.18)

Accordingly the applicant could not be regarded as a 'married person' and remained eligible for supporting parent's benefit.

Re CORKER and SECRETARY TO DSS
(No.W86/134)
Decided: 7 May 1987 by R.D. Nicholson, J.G. Billings and N. Marinovich.

The AAT *affirmed* a DSS decision to assess the rate of invalid pension payable to Corker, a 58-year-old woman, on the basis that she was living in a marriage-like relationship with a 67-year-old man, with whom she had been sharing accommodation for some 5 years.

The two were tenants in common of the house in which they lived; had made mutual wills; shared household expenses and chores; and the man provided Corker with a measure of security in case of breakdown in her health. The AAT decided that these elements of the relationship were enough to qualify the relationship as equivalent to a marriage, despite the lack of any sexual relationship.

In the course of its Reasons, the AAT made some comments on the administration and the impact of the cohabitation rules:

> 'The terminology of these definitions [of "married person" and "de facto spouse"] is unfortunate as their impact on this Applicant demonstrates. She objects strongly to being told that she is in a de facto relationship. The use of the word "de facto" clouds the issue in the eyes of the public to whom it is applied because the real question under the Act is whether or not there is a spousal relationship between the two persons for the purpose of determining the rate of pension applicable to them.
> . . .
> '[T]he Tribunal [must] inquire into the nature of the relationship, including the sexual relationship, between them now and in the past, a type of inquiry long ago made largely inapplicable in family law matters. Not only is the inquiry of the Tribunal made into sensitive areas, but it also requires the Tribunal to form a judgment on the basis of objective evidence as to the existence of one of the most subjective states imaginable. . .
> 'An additional unsatisfactory feature of the application of the provisions is potentially apparent in this matter. If a spousal relationship is found to exist, the consequence could be a deterrent towards elderly people living together in circumstances which can be construed as spousal so that their rate of pension may be lowered. There is an obvious community loss in this because at a time of enormous cost and inadequate facilities for aged care, discouragement would be given to self-help home-care of a private nature. . .'

Assets test: disposition of property

CHRONIS & CHRONIS and SECRETARY TO DSS
(No. N86/184)
Decided: 20 February 1987 by R.A. Hayes, J.H. McClintock and G.R. Taylor

The AAT *affirmed* a DSS decision to include in the value of the applicants' assets, for the purpose of the assets test, two properties they had gifted to their children. This resulted in the applicants' invalid pension and wife's pension being paid at a reduced rate.

Section 6AC(9)(b) of the *Social Security Act* exempts from calculation the value of any disposition of property that took place within five years of the time that the person became qualified for the pension but before the time that the Secretary is satisfied that the person 'could reasonably have expected' that they would become eligible for the pension. This was the relevant section in this case.

The Tribunal turned to the evidence that at the time of the disposition Mr Chronis had not worked for eight months, he had attempted to return to work but had been prevented by his health, he had little expectation of working in the near future, he was in receipt of sick pay from his employer and that the medical advice was that his condition was of a long term nature.

The Tribunal concluded that Mr Chronis could reasonably have expected that he would become eligible for the invalid pension in the near future. Thus s.6AC(9)(b) could not operate to exempt the value of the property for the purpose of the assets test.

The AAT also determined that the hardship provisions did not apply to the applicants. It was not appropriate to disregard the value of the gifted property nor was it unreasonable to expect the applicants to sell or realise the capital investment in what had been previously their family home and which was now leased to their son for $20.00 per week.

Re MURPHY and SECRETARY TO DSS
(No.Q86/155)
Decided: 9 April 1987 by D.P. Breen.

Bridget Murphy held an age pension. She was also the life tenant and co-trustee of the estate of her late husband; and her son was the remainderman - that is, he was to receive full title to the estate on his mother's death.

The capital value of the estate was being eroded by inflation and Murphy saw her son as having a real need for the modest capital remaining in the estate: he and his family could not afford to move out of the caravan in which they were living. Murphy then executed a deed of release, in her capacity as life tenant of the estate, authorising the trustees to transfer the remainder of the estate to her son. The DSS treated this as a disposition of the income which Murphy had been receiving from the estate ($2,185 a year) and decided that her age pension should continue to be reduced accordingly. Murphy asked the AAT to review that decision.

The legislation

Section 6AC(11) of the *Social Security Act* defines a disposition of income (which is to have no effect for the purposes of the income test - the income disposed of being deemed to remain income of the pensioner: s.6AC(5)) as a course of conduct that diminishes, directly or indirectly, the pensioner's income, where the pensioner's motive was to qualify for a higher rate of pension or fringe benefits, or where the pensioner receives no or inadequate consideration.

Under Queensland legislation, the transfer of the estate could have been made without Murphy's consent as life tenant if the Supreme Court had so ordered: s 62(5), *Trusts Act* 1973 (Qld).

No disposition of income

In these circumstances, the AAT decided, the applicant had not engaged in a course of conduct that had diminished directly or indirectly her rate of income: