The DSS had argued that Chan could not be regarded as wholly or substantially dependent on his father, because Chan was receiving AUSTUDY and was living in another State from his father. The AAT rejected this submission, as '[n]o authority, either from the Act or Tribunal decision, was given to support either submission': Reasons, para.15.

The AAT said that a student child was dependent on a person if that person provided food, shelter and necessary clothing, as had been decided in *Mrs B* (1984) 22 *SSR* 246; and that 'substantially' meant 'in greater part'. It was clear that, during 1986, Chan had not been dependent in that sense on his father.

But the position in 1987 was different, the AAT said. Lam had sent some money to his son; but Lam's position was 'somewhat analogous to a person who cannot support his family because, being in prison, he is unable to do so.' The AAT referred to *Baker v Thomas Robinson & Son Pty Ltd* (1955) WCR 90, at 92, where it had been said, on this analogous problem:

> 'The total period during which the relationship has continued, the length of the gaol sentence, the extent to which there is evidence of facts indicating an intention to resume cohabitation upon the worker's release, and the whole history of the relationship between the parties are factors which must be taken into account, and there may be many others.'

In the present case, the AAT said, Lam had told the Tribunal that his son would join him in Perth at the end of 1987. Given that fact, Lam's payment to his son in February 1987, the fact that Chan no longer received support from his extended family in Melbourne and the level of Chan's AUSTUDY payments, the AAT decided that Lam should receive additional benefit for his son from 1 January 1987:

> 'However for the future this must be on the basis that the applicant is continuing to satisfy Chan's needs for food, shelter and clothing, by sending him funds for this purpose; unless the applicant is able to show this he will not be eligible to continue to receive the supporting parent's benefit after the date of this decision.'

(Reasons, para.26)

Formal decision

The AAT set aside the decision under review and decided that the applicant was entitled to additional supporting parent's benefit for his son, Chan, from 1 January 1987 to the date of the decision.

Handicapped child's allowance: late claim

FARACI and SECRETARY TO DSS (No. N87/442)
Decided: 19 October 1987 by A.P. Renouf, D.J. Howell and M.S. McLelland.

The AAT *affirmed* a DSS decision not to backdate payment of a handicapped child's allowance granted to Laura Faraci for her son, O, in 1986.

O had been born in 1972 and diagnosed as suffering from severe developmental problems in 1979. Although O then attended a special school, Faraci had not been told of the allowance until 1986.

Faraci claimed that her delay in claiming the allowance had been caused by 'special circumstances' within s.102(1)(a) of the *Social Security Act*: she had few English-speaking friends and spoke Sicilian at home; however, it appeared to the AAT that she had 'a working knowledge of oral English'.

The AAT said that Faraci could not be described as socially isolated: she had worked in a factory; she had also done piece-work at home, in response to newspaper advertisements; and her two elder children were skilled in English. The AAT said:

> 'As regards this question of isolation, there is so much difference with the facts in the matter of *Cox* (1984) 22 *SSR* 252 that the decision in that matter (and similar ones concerned with Aborigines) is of little help to the applicant.'

(Reasons, para.14)

The AAT said that the failure of teachers at the special school to tell Faraci of the allowance was -

> 'most unfortunate but it has to be recognized that no legal obligation existed. More pertinent is the fact that the respondent was not at fault, at least directly.'

(Reasons, para.16)

Cohabitation

SPENCER and SECRETARY TO DSS (No. N86/618)
Decided: 11 September 1987 by R.A.Hayes

The applicant applied to the AAT for review of a DSS decision to treat the applicant and a woman he lived with as husband and wife. The consequence of this decision was that their income and assets were aggregated for the purposes of calculating the rate of their age pension.

The facts

The applicant and Mrs B were both aged 66. Both of them, together with the son of Mrs B, had bought and run a business while living in the residential part of the premises. This arrangement existed for about four years. In 1984 the applicant and Mrs B left the business and bought a house together. They had separate bedrooms, holidayed separately but shared meals. They socialised together but did not present themselves as married. Household expenses were paid out of a joint fund but they each had separate personal finances.

The applicant was diagnosed as having cancer in 1981 and as his health worsened he required more assistance from Mrs B. The respective sons of the applicant and Mrs B viewed the arrangement as one of convenience.

The test

The Tribunal referred to the need to consider all facets of the relationship to determine whether it was a de facto relationship.

> 'The starting point, of course, under the statutory definition, is that the relationship must be heterosexual, and permanently under the one roof ... Given two people of the opposite sex living together under the one roof, one must then ask the question why they have chosen to do this. People will, of course, have many mixed motives for pursuing a particular course of conduct, particularly in their relationships with others. The predominant motive of each party might, however, be to secure the emotional gratification to be derived from the incidence of an ongoing personal relationship with the other; this might be sought on a permanent basis (at least, for the foreseeable future); and their presence under the one roof might be explicable predominantly by pursuit of the emotional gain from their relationship. If so, the relationship does have a special quality which would set it apart from relationships with others, and make it a de facto relationship within the statutory definition.'

(Reasons, p.7)

The Tribunal found that the predominant motive of the applicant and Mrs B in setting up house was to secure the emotional gains of a

personal relationship conducted on a permanent basis under one roof. The support given to the applicant by Mrs B in his ill health, the joint purchase of the house and expressions of liking and concern were evidence of a strong bond between them which taken together suggest a marriage-like relationship.

Reform required

The AAT was not happy with such a finding.

The Tribunal was critical of the statutory definition of a de facto relationship which it described as 'discriminatory and contrary to desirable public policy.' It is discriminatory in that it disadvantages affectionate and caring heterosexual couples in comparison to homosexual couples, and it is contrary to desirable public policy because it discourages independent living, pooling of resources and the sharing of scarce urban accomodation on the part of people over 60.

The AAT concluded:

> 'The aggregation of a heterosexual couple's assets and income for the purpose of calculating rates of pension or benefit is one in urgent need of official scrutiny. It produces unfair and indeed, in this case, inhumane results. But the duty of the Tribunal is to apply the law, not to reform it. Thus, I have no alternative but to affirm the decision under review.

(Reasons, p.10)

Formal decision

The Tribunal affirmed the decision under review.

TAYLOR and SECRETARY TO DSS (NO. N86/7)
Decided: 3 June 1987 by R.A. Hayes

The applicant applied to the AAT for review of a DSS decision to recover an overpayment of $13,586.70 in supporting parent's benefit. The Department alleged that the applicant was no longer living apart from her de facto husband while in receipt of the benefit.

The Tribunal was satisfied that the applicant and her husband had an 'on/off' relationship over the relevant period. This had led to the applicant making a number of false statements as to her domestic situation to the Department over the relevant period. It was on these false statements that the DSS case rested.

But the fact that the applicant misled the DSS as to her relationship with her husband did not compel the inference that they had been living together during the relevant period.

> '...the real reason for her course of deception was that she thought that her husband's constant return visits, when she had nowhere else to go, were enough to disentitle her to the benefit. In other words, finding her a liar does not inexorably lead to an inference adverse to entitlement.'

(Reasons, p.15)

On the evidence, the AAT found that the visits by the applicant's husband to the applicant, which extended to weeks at a time, did not of themselves mean that they were living together. While it was not clear as to what was the motivation of the husband during these visits, it was open on the evidence to find that he stayed because he had no other place to go.

Formal decision

The AAT set aside the decision under review.

Overpayment: hardship

DENNISTON and SECRETARY TO DSS (No. V86/269)
Decided: 31 August 1987 by I.R.Thompson

The applicant applied to the AAT for review of a DSS decision to recover an overpayment of $6,271.30 in widow's pension. The Department had also decided to deduct the overpayment from the applicant's pension. A balance of $3,495.30 remained at the time of the hearing.

Hardship

The Tribunal found that the applicant had been living with a man as his wife while in receipt of widow's pension. As a consequence the applicant had been not been entitled to the pension and was thus overpaid.

The Tribunal thus turned to the question of recovery. Under s.140 of the *Social Security Act* a decision first had to be made about raising the overpayment. The applicant had cash assets of over $1,000. She owned her home and her weekly expenses came to about $68 excluding food. But the Tribunal thought that within that stated expenditure the allocation of $20 per week for petrol was unreasonable, even allowing for the applicant's location - a mile outside a country town. The Tribunal concluded that there was a capacity to deduct $7.50 per week from the applicant's pension.

The AAT also commented on the desirability of not continuing the process of recovery for too long, particularly in the case of elderly pensioners. In the present case the applicant was 62 years old. Having regard to these circumstances, the AAT decided that the amount of $15 per fortnight should be deducted but that that deduction should stop in five years time and that the right to recover the balance should be waived under s.146.

Formal decision

The AAT varied the decison under review and directed that $15 per fortnight be deducted from the applicant's pension, that the deductions be made for five years commencing on 31 August, 1987 and that the remainder be waived under s.186 [previously s.146].

Overpayment: bankruptcy

TAYLOR and SECRETARY TO DSS (No. N87/1037)
Decided: 25 September 1987 by C.J. Bannon.

The AAT *affirmed* a DSS decision to recover an overpayment of $11 548 by deductions of $10 a fortnight from the applicant's widow's pension.

During the hearing of this matter, it was argued that the DSS recovery was barred because Taylor had been declared bankrupt in March 1986. The AAT commented as follows:

> 'That point was considered in a decision given by Jenkinson J . . . in Stewart (1985) 29 SSR 359. I have not examined that law closely but it seems to me, with respect, that the learned Judge was correct in the view he took. Whether the recovery of the debt is barred by the Bankruptcy Act 1966, or not, I fully accord with the learned Judge's view that overpayments may still be deducted from a continuing pension pursuant to the provisions of s.140 of the Social Security Act 1947 as amended.'

(Reasons, p.3)