been misappropriated by her husband. The AAT 'reluctantly' concluded that

> 'even if the applicant could demonstrate that none of the family allowance was applied by the husband to the maintenance, training or advancement of the children in respect of whom it was granted, she would have no remedy under the present application.'

**The legislation**

The relevant sections of the *Social Security Act* were (at the time):

- s.94(2) [now s.79(5)], which provided, in effect, that a wife was the person eligible for family allowance where she and her husband were living together and sharing custody of a child;
- s.99A [now s.86], which prevented family allowance being paid to 2 persons for the same child unless the Secretary to the DSS declared in writing that 2 persons qualified for the allowance which was to be shared between them;
- s.135TC [now s.161], which authorised the Secretary to direct payment of a benefit or allowance (1) to a person to whom it was granted, or (2) to a person on behalf of a person specified in 135TC(1).

**Decision**

The husband had not been charged or convicted of any offence and the AAT said that even if he were, 'the fact that... payments were recoverable from him could not oblige the respondent to pay any moneys to the applicant'. Section 135TC [now s.161] confers the power on the DSS to pay family allowance to the husband's account and 'is ... in absolute terms. There is no indication of any specific matters which may or ought to be taken into consideration': Reasons, pp.6-7.

The Tribunal found that the DSS could not be held responsible for either the ignorance of an apparent claimant or any fraud committed upon her to secure her signature. Even though a comparison of signatures between the two claims 'would have put any reasonable person on enquiry', there was nothing in the Act to oblige the DSS to satisfy itself that a claim was signed by the person entitled to make it.

**Conclusion**

The AAT noted that neither the Act nor the claim forms paid attention to circumstances such as those in the present case:

> 'One wonders what special provision has been made to ensure that migrant mothers who have little knowledge of our language and our laws are protected from their own ignorance or the defection and fraud of others, especially one who might reasonably be assumed to be helping them, like a husband. I hope this case is drawn to the attention of those responsible for such matters'.

(Reasons, p.8)

**[B.W.]**

# Overpayment: recovery

**DUNCAN and SECRETARY TO DSS**
**(No. N87/1048)**
**Decided:** 6 April 1988 by A.P. Renouf.

An overpayment of $20 358.90 occurred when Duncan received unemployment benefit while running a business. The AAT found that at the relevant times Duncan was not unemployed, but was 'a self-employed businessman who was forced to fall back upon unemployment benefit as a means of trying to make his business viable and to earn a living for himself and his family'. While the Tribunal accepted that Duncan had taken some steps to obtain suitable work his inability to do so 'was conditioned by his overriding (and natural) commitment to his business'.

Duncan's failure to advise the DSS of the existence of the business misled the respondent into paying benefit which should not have been paid. A debt to the Commonwealth was thereby created. The appellant argued that financial hardship existed and the DSS should write off the debt, or waive recovery by exercising the discretion in s.146(1) [now s.186(1)] of the *Social Security Act*.

The AAT accepted that the financial circumstances were bad but, because the appellant had misled the respondent to obtain money to which he was not entitled, the financial hardship imposed by recovery of the debt was not severe enough to warrant exercise of the discretion in the appellant's favour. The Tribunal did, however, recommend that the rate of recovery should be reduced until the applicant was able to improve his financial situation.

The AAT was unimpressed by an argument that the amount of the overpayment should be reduced by the amount of Family Income Supplement to which Duncan would have been entitled, had he known of its existence and claimed it. It found that, if a person misrepresents his situation, he has to accept that a consequence of the misrepresentation may be the denial of a benefit of a nature different to the one he is seeking.

**[B.W.]**

**MALAJ AND SECRETARY TO DSS**
**(No. S86/142)**
**Decided:** 20 April 1988 by J.A. Kiosoglous, J.T.B. Linn and D.B. Williams.

The appeal dealt with three separate periods during which the appellant had received unemployment benefit. In the first period the Tribunal accepted that Malaj was employed for part of the period during which he had received unemployment benefit so that part of the benefit was recoverable. The Tribunal decided that, during the other two periods, Malaj was conducting a subcontracting business and was not unemployed within the meaning of the *Social Security Act*. Malaj had earlier been prosecuted successfully but no reparation order was made. The overpayment was recoverable 'in the normal way'.

The AAT did not accept that this was a case in which it was appropriate to exercise the discretion in s.107(3) [now s.116(4)] to disregard the work. A considerable amount of work had been done and the appellant could not rely upon the fact that he did not receive much money for the work. The Tribunal repeated the words of the AAT in *Hine* (1981) 4 *SSR* 38, that unemployment benefit is not a support scheme for inadequately remunerated employment.

**[B.W.]**

# Widow's pension: recovery of overpayment

**BYRNE and SECRETARY TO DSS**
**(No. N87/82)**
**Decided:** 28 March 1988 by Dr A.P. Renouf.

Margaret Byrne appealed to the AAT against a DSS decision to raise and recover an overpayment of widow's pension of $40,385.60 on the basis that throughout the period under review, she was living in a de facto relationship with MrIngo Golab.

Byrne had first moved to premises owned by Golab in October 1977 and in March, 1979 her third child, later acknowledged to be the child of Byrne and Golab, was born. In 1979 she had stated that she received board and lodging in return for services as a housekeeper. In 1980, Byrne had stated that she paid board and lodging to her mother. In 1983, she informed the department that board was paid to her brother, Ingo Golab.

Byrne had admitted to the DSS, when interviewed in February 1985, that she had been residing in a de facto relationship with Golab since 1977. Pension was cancelled and an overpayment, which she offered to repay over a period of time, was raised in October, 1985. Byrne signed an acknowledgement of debt and agreed to recovery being made from her family allowance.

Prosecution action was commenced under s.138 [now s.174] of the Act. Byrne then appealed to the SSAT, stating that she had been confused when she admitted living in a de facto relationship. She claimed that she had agreed to the recovery of the overpayment as a result of intimidation and harassment. However, before the SSAT was able to consider the matter, Byrne had been convicted. Notwithstanding the conviction, the SSAT recommended that the appeal be upheld, a recommendation which was rejected by the DSS. An appeal against conviction was dismissed.

The major evidence against Byrne, aside from her own disputed admissions, was the existence of a number of credit accounts and loan applications in the names of Margaret and Ingo Golab. These were explained by Byrne as having been necessitated by previous credit problems which would have precluded her from securing credit in her own name.

She claimed to have moved into a flatette in the garage at the rear of the house as a housekeeper in 1977. Shortly thereafter, she had a brief and transitory sexual relationship with Golab, resulting in the birth of the son Troy. However, her evidence was that the parties were financially independent and lived totally separate lives.

The AAT heard and rejected evidence from two social workers to the effect that Byrne is unassertive and deferred to persons in authority. One of them stated that Byrne's 'home environment had not been one where she was encouraged to express honest thoughts, feelings and beliefs about herself' and concluded that the relationship between the parties was that of employee and employer (para 26).

The Tribunal did, however, concede that the report of the NSW Anti-Discrimination Board on Women and Credit 'lends some support ... to the applicant's assertion that to get credit, she had to resort to the use of Mr Golab's name' (para 30).

**Was there a de facto relationship?**

At the relevant time, s.59(1) [now s.43] of the Act defined a 'widow' as not including 'a woman who is living with a man as his wife on a bona fide domestic basis although not legally married to him'.

The AAT considered that of the many indicia of a de facto relationship, the following were relevant. Byrne lived at the premises owned and occupied by Golab; the relationship was longstanding; the parties had a child; Byrne used the name Golab freely and her children attended school under that name; Golab allowed Byrne to pose as his spouse for the purpose of obtaining credit and he had nominated her and her children as beneficiaries under his superannuation, describing her as his wife (para 40). Although evidence of a shared social life was lacking, these facts were sufficient in the AAT's view to warrant a conclusion that a de facto relationship existed.

The AAT went on to state:

> 'I am reinforced in the above view by the fact that the District Court of NSW has found the applicant guilty of giving false and misleading information to the respondent ... being such as to conceal that she had a de facto relationship with Mr Golab. *Rimmer* (1984) 20 *SSR* 224 and *Letts* (1984) 23 *SSR* 269 are authority for the view that I should take account of what went on in the District Court, while not regarding the result of proceedings there as conclusive.'

(Reasons, para 42).

**The discretion to recover the overpayment**

The AAT stated that because the applicant was not honest with the Department, and because it could not fault the respondent's conduct toward the applicant, the only matter relevant to whether the debt should be written off or waived under s.146 [now s.186[ was financial hardship. Despite holding that the 'applicant is, financially, on the borderline', the AAT was unable to find that the applicant was being treated unjustly by the DSS. It continued:

> 'As regards the amount of the deduction [$32.50 per fortnight, out of a total income of $524.55], there is the other point that there seems to be no reason why Mrs Byrne should not supplement her income by work, such as child-minding or making crafts each of which she has done before, or otherwise.'

(Reasons, para 47)

**Formal decision**

The AAT affirmed the decision under review.

**[R.G.]**

# Cohabitation rule

**HODGSON & WRIGHT and SECRETARY TO DSS**
**(Nos N86/841 & 842)**

**Decided:** 11 March 1988 by R.A. Hayes.

Valerie Hodgson was receiving a supporting parent's benefit and Eric Wright was receiving unemployment benefit at the single rate in September 1985.

The DSS decided that they were living together as de facto husband and wife. The DSS cancelled Hodgson's benefit, and decided to pay Wright's unemployment benefit at the married rate. They asked the AAT to review those decisions.

Hodgson and Wright had lived as part of various communal households in the same accommodation between 1973 and 1987. They had purchased two of the premises in which they lived as joint tenants. They told the AAT that they had bought the properties for experiments in communal living with other people.

Hodgson gave birth to a child while she was sharing accommodation with Wright; but she claimed that she did not know who was the child's father. Both of them denied there was a sexual relationship between them.

**A burden of proof**

The AAT noted that there were several factors to consider when deciding whether a man and woman were living as husband and wife: these included their financial relations, whether there was a common household, their sexual relationship, social factors and the degree of commitment between them. The AAT observed:

> 'One does not categorise a relationship by reference to a "tick-off list", with a particular points tally in mind. The adumbrated factors are signposts to a goal for which the decision-maker is searching, that goal being the isolation of some exquisite quality in a relationship between two people which distinguishes it from the others built up in the course of their lives.'

(Reasons, p.5)

The AAT said that, at the end of the day, it could not come to a conclusion on the essential question, and 'was in the state of uncertainty alluded to by Woodward J. in *McDonald*' - (1984) 18 *SSR* 188. Because the Secretary was cancelling 'benefits granted on a particular basis . . . because it was being asserted that circumstances had changed'. The Tribunal said it -

> 'had no alternative but to resolve the very real uncertainty that I felt existed on the material before me in favour of the applicants. I could not find that they were in a de facto relationship at the relevant time. But equally, I could not find that they were not.'

(Reasons, p.9)

**Formal decision**

The AAT set aside the decisions under review and remitted the matters to the Secretary with directions that they were not living in de facto relationships at the relevant time; and that the benefits payable to them were to be recalculated.

**[P.H.]**