invoked by the receipt, at any time from 1 May 1987, of a compensation payment.

One interesting feature of the AAT's decision in Krzywak was its acceptance that the retrospective impact of the preclusion provisions and the consequential 'injustice' to the applicant was a 'special circumstance' within s.156, so that the AAT could treat part of the compensation payment as not having been received.

In Jovanovic (p.581) the AAT took a more radical approach to the complexities of s.153(1). It described the terms of the pre-16 December 1987 version of s.153(1) as 'a manifest absurdity' which was 'well nigh incapable of rational interpretation'; and proceeded to resolve this absurdity by consulting the Explanatory Memorandum, as permitted (according to the AAT) by s.15AB(1) of the *Acts Interpretation Act* 1901. The result of doing this was a rewriting by the Tribunal of s.153(1), so as to give it the same form before and after 16 December 1987.

The difficulty with this approach is that it depends on a finding that the pre-16 December 1987 form of s.153(1) produces a result which is 'manifestly absurd'. At the risk of stressing the obvious, it should be noted that it is not enough that the form of words is 'manifestly absurd' - it is the result of those words which must be 'manifestly absurd' before s.15AB can be invoked. What result would that form of s.153(1) produce? Only a form of 'double dipping' by a person who received a compensation payment before applying for pension or benefit; and this would be limited to the period between May and December 1987. Is that result 'manifestly absurd'? If not, then how can the recourse to s.15AB and the rewriting of s.153(1) be justified?

[P.H.]

Administrative Appeals Tribunal decisions

Cohabitation

HAIM and SECRETARY TO DSS (No. Q87/358)

Decided: 2 August 1988 by M. Allen, W.A. De Maria and H.M. Pavlin.

Shirley Haim was granted a supporting parent's benefit on 23 February 1984. This was cancelled on 29 May 1986 and an overpayment of $3108 was raised on the ground that she had been living as the wife of R in a *bona fide* domestic relationship. Haim appealed to the AAT.

The evidence

Haim argued that, whatever the former status of her relationship with R, during the relevant period they were friends who had an 'association for economic purposes'.

Haim had known R since the early 1970s and had purchased a property in the names of Shirley and Gary R as joint tenants. She stated that she and R had a sexual relationship until soon after the birth of her second child. Although Gary R was registered as the father of her child, Haim stated that another man, M, may well have been the father. Haim stated that she had forged R's signature on the birth certificate. Haim had also represented herself to a Finance Company as R's wife, in order to enhance his chances of getting a loan to buy a car. Haim had also used the name R in various other property purchases, and had represented herself as R's wife in other loan dealings.

It appears that, during the relevant period, Haim and R had shared accommodation, partly in rented property and partly in property owned jointly by them. Haim stated that they had spearate bedrooms and led separate lives. Haim said that R did not go out socially.

Haim conceded that she had not always been honest in statements made to the DSS; and the AAT concluded that they would not accept Haim's evidence unless corroborated. In this context, the Tribunal noted Haim's failure to call R as a witness. M, the other possible father of Haim's second daughter, did give evidence. Haim had suggested M had given her an engagement ring; he described it as a friendship ring. A neighbour stated that she thought Haim and M were engaged and that R was not Haim's boyfriend.

The majority's assessment

The majority of the AAT, **Allen and Pavlin,** concluded:

> 'The relationship between the applicant and R is not the normal marriage as might generally be understood. However, in the context of the peer group of the applicant, neither the fact that she apparently also had a co-existing sexual relationship with M, nor that R was not apparently interested in social activities, destroys the composite picture of a couple whose financial and personal affairs were so intertwined that, during the period in question, it can be said that they were not living together as man and wife in a *bona fide* domestic relationship.'

(Reasons, para.46)

The minority view

The other member of the AAT, **De Maria,** noted that Haim had said that she did not get on well with her mother and that she had recently had a few fights with R - which might explain her failure to call them as witnesses. He drew attention to the 'wide frame of reference' of the DSS when it adduced facts which had occurred up to 13 years before the current relevant period; the only relevant evidence, in his view, related to the overpayment period.

In relation to the joint purchase of various properties, De Maria said: 'If the applicant is credible then the home purchases were characteristic of a profit-oriented business relationship she had with R during the overpayment period': Reasons, para.18. In relation to Haim's daughter, he noted that the AAT was looking, not for evidence of paternity but for evidence of fathering, when trying to establish whether there was a *bona fide* domestic relationship between Haim and R. Haim had stated that R had not taken a fathering role, evidence confirmed by R's neighbour.

De Maria concluded:

> '. . . Mrs Haim has not demonstrated to me that she was not living in a *bona fide* domestic relationship with R during the relevant period. But then again neither has the Commonwealth demonstrated that she was. . . When I think of the Haim-R relationship, the word that comes to mind is "convenience", whereas if the Department was to succeed, the word should be "commitment". The Commonwealth did not raise any evidence which suggested that the Haim-R relationship in the relevant period was marked by this commitment to each other. On this point the deficits in the evidence that could lead to a contrary view are striking:
>
> (1) no evidence of exclusivity in the relationship;
>
> (2) no evidence of care for each other;
>
> (3) no evidence of a family relationship which would include Leisha;
>
> (4) no evidence of a shared social life (as a pattern);
>
> (5) no evidence of the existence of a household.

> . . . I must conclude that during the relevant period the applicant was not in a *bona fide* domestic relationship with R.'

(Reasons, paras 31-35).

Formal decision

The Tribunal affirmed the decision under review.

[J.M.]

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SJK and SECRETARY OF DSS
(No. Q88/118)

Decided: 23 August 1988 by D.P. Breen.

SJK asked the AAT to review a DSS decision that from 26 January 1984 to 13 November 1986 she was living with E as his wife on a *bona fide* domestic basis and had therefore been overpaid $20 992.80 in supporting parent's benefit for which she was not eligible.

The facts

SJK had separated from her husband in June 1983. Shortly thereafter, she and her children had commenced sharing accommodation with E and another woman, O. Shortly thereafter O moved out. At some stage (though the evidence was not clear) SJK's former husband also lived with them at that address.

The AAT dated the commencement of the *de facto* relationship, (January 26 1984) as the date on which SJK, her children and E moved together to new accommodation. They shared three different addresses from that time to 27 November 1986 when the relationship ended.

Assessment of the evidence

The AAT determined that SJK was living in a *de facto* relationship with E during that time. The Tribunal found that they presented themselves to real estate agents as a married couple, 'they presented to the eye of an objective beholder the appearance of husband and wife', and they had a sexual relationship which, at least on the part of the applicant, was exclusive. They pooled financial resources and had a measure of a joint social life.

The Tribunal rejected SJK and E's subjective assessment, which denied the existence of a *de facto* relationship.

> 'The principles enunciated by the case law rightly relegate the subjective evidence of the parties to such a relationship to a position well down the ladder of merit in an exercise of assessing whether or not in fact that relationship is that of man and wife, though not legally married. Testimony which swears to the issue is at best to be paid minimal regard, a fortiori, when it comes from people who acknowledge . . a sustained pattern of lies and falsehoods for a prolonged period of time.'

(Reasons, para 22).

The AAT stated that in assessing the evidence (much of which was described as 'less than truthful', 'at best a filtered version of the truth', and evidence which 'simply cannot be believed' (para. 17)), it followed the principles enunciated by the Federal Court in *Lambe* (1981) 4 *SSR* 43, requiring 'all facets of the interpersonal relationship' to be taken into account.

The AAT agreed with the DSS decision that there had been an overpayment of supporting parent's benefit, but decided that the relevant period should be extended to 27 November 1986, the day E assisted SJK in her move to her new accommodation.

The Tribunal rejected a further DSS submission that SJK was not eligible for supporting parent's benefit for the period during which she resumed cohabitation with her husband, as the evidence was unclear as to the relevant dates.

Discretion to waive under s.186

The AAT was not satisfied that SJK's circumstances provided any justification for waiving recovery of the amount of overpayment, noting that in addition to her pension, she received an amount of extra income derived from a cleaning job. However, had SJK and E notified the DSS of their actual relationship, the amount of unemployment benefit paid to E would have been increased to include additional payments for the two children (and, presumably, SJK).

Formal decision

The AAT *set aside* the decision under review, and substituted a decision that SJK was living with E as his wife on a bona fide domestic basis from 26 January 1984 to 27 November 1986. It was not appropriate to waive recovery, but an amount of $2662 (the additional unemployment benefit for the two children that would have been payable to E) should be deducted from the overpayment.

[R.G.]

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SALVONA and SECRETARY TO DSS
(No. W88/56)

Decided: 29 July 1988 by R.C. Jennings.

The AAT *set aside* a DSS decision to raise and recover an overpayment of unemployment benefit of $13 522, on the grounds that there has not been a failure to comply with any provision of the *Social Security Act*. In the alternative, the AAT considered that if there was a debt due, it should be written off or waived.

The facts

Salvona first claimed unemployment benefit in August 1983. Though he described himself as single on his claim form, he was in fact sharing accommodation with a Mrs J and her daughter. The AAT concluded that Salvona and Mrs J were living together on a *bona fide* domestic basis, though an earlier sexual relationship between them had ceased about two years before and had not resumed.

No failure to comply with the Act

The DSS had sought recovery of the unemployment benefit paid from August 1983 to January 1987 under s.181(1) 'in consequence of a false statement or representation, or in consequence of a failure or omission to comply with a provision of this Act'.

According to the DSS, Salvona's false statement had been made when he applied for unemployment benefits. The AAT said that, because Salvona had honestly believed that he was a single person at the time, he had not made a false statement or representation. And his repeated failure to inform the DSS that he was living with a woman on a *bona fide* domestic basis was not a failure to comply with s.163(1), which requires a person to inform the DSS of any change in the person's circumstances: Salvona's circumstances had not changed; and Salvona had 'never abandoned the genuine belief that a sexual association was necessary to constitute [a *de facto* relationship]'. The Tribunal accepted Salvona's evidence that he honestly believed that a sexual relationship was the determining factor as to the existence of a *de facto* relationship and decided that no overpayment had occurred.

A discretion to waive the debt?

In the event that there had been a recoverable overpayment, the AAT considered that it should be waived. It reached this conclusion by reference to