The AAT decision in *Christian* (1987) 39 *SSR* 492, that the value of a person's property 'includes a valuation of that interest in property, whether it be legal and beneficial or beneficial only', was followed.

Family arrangements

The AAT further decided that family arrangements with respect to property could be capable of legal enforcement, and said that '[e]ach case must be examined on its own facts in order to determine the intentions of the parties': Reasons, p.3.

Oral declaration of trust

The AAT accepted that James' discussions with accountants, lawyers and family members when she purchased the unit evidenced an oral declaration of a trust. 'No special words are required to indicate the creation of a trust': Reasons, p.6.

Written manifestation of the trust

Section 34(1)(b) of the *Property Law Act* 1969 (WA) required that

> 'a declaration of trust respecting any land or interest therein shall be manifested and proved by writing signed by a person who is able to declare the trust . . .'.

The AAT followed *Rochefoucauld v Boustead* [1897] 1 Ch 196, which held that a trust need not be declared in writing in the first instance. It is sufficient 'that there be a subsequent written manifestation as evidence of the existence of the trust': Reasons, p.7.

The AAT found sufficient written confirmation of the trust in a letter which James sent to the DSS on 23 November 1983, seeking assistance for her daughter, in which she said the unit was purchased for her daughter and grand-daughter to live in and to make provision for them.

Alternatively, the AAT was prepared to rely upon a document appended to James' December 1987 pension claim form in which she said that the unit was purchased for her daughter and grand-daughter. The AAT added that the terms of the trust could be clarified by looking to extrinsic evidence.

Formal decision

The AAT set aside the decision under review and remitted the matter with a direction that, as the applicant did not hold the beneficial ownership of the unit, its value should not have been included in the total value of her assets.

[D.M.]

Assets test: 'value of property' — land

MORIARTY and REPATRIATION COMMISSION
(No. 4951)
Decided: 10 March 1989
by M.D. Allen.

The Repatriation Commission, in applying the assets test to the Moriartys, took into account the market value of real estate without deducting agents' and solicitors' fees that would be incurred if the real estate were sold. The applicants applied to the AAT solely in relation to the Commission's refusal to make those deductions.

The legislation

The crucial provision in this case was s.54 of the *Veterans Entitlements Act* 1986, which requires the calculation of a 'pension reduction amount', where 'the value of the property of the person' exceeds a certain amount. [As far as is relevant to the decision in this case, this provision is identical to s.8 of the *Social Security Act* 1947.]

The AAT decided that the term 'value of the property' means 'what on normal valuation principles is regarded as the value of the land to an owner in possession': Reasons, para. 22; which is the market value without deduction for agents' or solicitors' fees.

Manning v Shire of Yarrawonga (1929) VLR 258 and *Re Firth and Minister for Capital Territory* (1978-80) 2 ALD 183 were cited as authority for the proposition that, in ascertaining the value of land, agents' fees were not a permissible deduction. Similar principles applied to solicitors' fees.

It was necessary to distinguish *Re Clarke and Repatriation Commission* (1987) 13 ALD 396, which followed the High Court's decision in *Commissioner of Stamp Duties (Queensland) v Lansdowne* (1927) 40 CLR 115.

In those two cases notional brokerage was deducted in valuing shares. The AAT distinguished those cases on the basis that, in the High Court decision, 4 of the judges referred to the necessity of using a broker to realise the market value of shares. By contrast there is no obligation to engage an agent or a solicitor when selling land.

The AAT also referred to *Cowling* (1986) 37 *SSR* 464, where it was said that, in applying the social security assets test, all property should be valued at its market value. According to the AAT, this decision was not authority for the proposition that shares and land must be valued in the same way.

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Supporting parent's benefit: living separately and apart

MILAS and SECRETARY TO DSS
(No. 4979)
Decided: 21 March 1989
by J.A. Kiosoglous.

The AAT *set aside* a decision of the DSS to cancel the applicant's supporting parent's benefit. The delegate had considered she was not an unmarried person pursuant to s.53(1) of the *Social Security Act* 1947, and accordingly was not qualified to receive the benefit under s.54 of the Act.

The facts

The applicant told the AAT she married in 1973 and there were 3 dependent children of the marriage. Problems in the marriage developed as early as 1977. Her husband was often unemployed and the family moved many times to seek employment for him. There were also problems between him and members of Milas' family. As the problems increased her husband became depressed and violent towards her.

In March 1983 her husband left his family. Milas said she had no idea where he had gone and had no contact with him for 9 months. She considered the marriage had broken down and the separation was permanent. On 23 march 1983 she applied for supporting parent's benefit. She heard nothing of

her husband until December 1983, when he came to the house to see the children. She asked him to pay maintenance and he agreed to pay $60 a fortnight. She advised the DSS of this maintenance agreement.

Milas said her husband stayed for a couple of days over Christmas, and returned for a few days in the New Year period. She did not resume any relationship with him nor did they sleep together. He bought Christmas presents for the children but not her and she bought no gift for him. She said she let him stay to avoid arguments and possible violence.

Subsequently, her husband called at the house at 3-5 monthly intervals and the longest he stayed was one day, possibly two. There had been no sexual or other relationship between them and he called only to see the children.

In late 1984 her husband obtained work and a house in another town. He asked the applicant to join him there but she refused, as in her view the marriage was over. Since then he had called to see the children and Milas, 'being afraid of him', let him enter the house. The last time she heard of him prior to the hearing of this application was April 1988 when he came to the house drunk and violent. The police were called and he left.

The Tribunal heard that Milas' husband had called at her home on about 12 occasions between March 1983 and April 1988. On some of these occasions she had done his washing as she was afraid of him. He did not eat any of the food she cooked because he did not like her cooking. (He told the AAT he was afraid of being poisoned by her.) She had not applied for divorce as she had no intention of marrying again. Although there was a joint bank account prior to separation which still existed, it had only $3 in it and Milas said she has not operated it since the separation in 1983.

Her parents saw her and her husband as being separated. Their friends also accept them as being separated. Milas' husband gave evidence which corroborated that of his wife. He described the marriage as 'horrible', blaming her family and said he now lived by himself.

Legislation

Section 3(1) of the *Social Security Act* defines a 'married person' to exclude a legally married person living separately and apart from the spouse on a permanent basis. The issue before the AAT was whether Mrs Milas was an unmarried person within the meaning of s.53(1) which states:

> 'In this Part, unless the contrary intention appears . . . "unmarried person" means . . . a married person who is living separately and apart from his or her spouse.'

The nature of the relationship

The Tribunal had to determine whether or not the applicant was living with Mr Milas on a *bona fide* domestic basis despite their being geographically apart due to his work situation, or whether she was a supporting parent within the meaning of s.53(1).

It discussed the factors enumerated in the case of *Tang* (1981) 2 *SSR* 15, and looked at these under the following headings: exclusiveness, resource pooling, expense sharing, parties holding themselves out to be married, perception of relationship, whether joint parents of children, sexual relationship, social life and obligation (emotive or supportive care).

It was satisfied that Mr and Mrs Milas had not been living together as man and wife on a *bona fide* domestic basis and, pursuant to s.53(1), the applicant was an unmarried person living separately and apart from her spouse and was entitled to receive supporting parent's benefit.

[B.W.]

Compensation recovery: going behind an award

LITTLEJOHN and SECRETARY TO DSS
(No. V88/746)
Decided: 14 April 1989
by R.I. Thompson.

Littlejohn applied to the AAT for review of a decision to recover the full amount of sickness benefit paid to him for the period from 2 July 1984 to 15 February 1985, a total of $5346.70. The DSS sought recovery because Littlejohn later received a worker's compensation lump sum.

The legislation

The DSS acted under the old s.115B(3) of the *Social Security Act*, which authorised recovery where a person had received sickness benefit and a 'payment by way of compensation' in respect of the same incapacity. The relevant parts of the s.115(2) definition of a 'payment by way of compensation' were: a payment under a State compensation scheme, a settlement of a claim under such a scheme and any other payment in the nature of compensation or damages.

The facts

The applicant ceased work in May 1984 because of an injured shoulder. His claim for weekly payments from 25 May 1984 and medical expenses under the *Workers' Compensation Act* (Vic.) was initially refused but was then settled and on 4 December 1985 a consent award was made by the Accident Compensation Tribunal. Under that award the applicant's medical expenses to date were to be paid but 'all other claims to past compensation and future medical and like expenses' were dismissed. He was also to be paid $20 000 'in full settlement of all other forms of future compensation'.

The sickness benefit paid to Littlejohn for the period in question was paid for incapacity for work arising out of the injury which formed the basis of the workers' compensation claim.

The AAT also found as fact that Littlejohn had not engaged in paid employment since may 1984 because of his injury and that he was totally incapacitated for work.

Can the AAT go behind an award?

It was argued for Littlejohn that *Cocks'* case (1989) 48 *SSR* 662, where it was decided that the AAT could go behind an award, was inconsistent with other AAT decisions such as *Cristallo* (1988) 46 *SSR* 597, *Krzywak* (1988) 45 *SSR* 580, and *Walsh* (1989) 48 *SSR* 623, and with the Full Federal Court's decision in *Siviero* (1986) 68 ALR 147, and should not be followed.

The AAT noted that the Tribunal's President had sat on *Cocks'* case in order to resolve different views within the AAT on this particular question of law; and commented that, while *Cocks* 'is not binding on the Tribunal in future proceedings, it is nevertheless very highly persuasive': (Reasons, para. 9).

The AAT also concluded that the decision in *Siviero* did not prevent the DSS from going behind an award and