there must be 'a specific and direct relationship' between that payment and incapacity for work. That is, the payment must provide some form of compensation for some form of financial loss which has resulted from incapacity for work.

The AAT accepted that Weir had suffered an incapacity for work and that the settlement of his worker's compensation claim provided compensation for financial loss directly attributable to Weir's incapacity for work.

However, the evidence in the present case established that the $20 000 paid in settlement of the common law action had not included any component to compensate Weir for loss resulting from his incapacity for work. Rather, the whole of that payment had been intended to cover Weir's legal costs associated with his common law action. The terms of the settlement (which described the payment as 'inclusive of costs') were not conclusive for the purpose of determining whether the payment included a payment in respect of incapacity for work. 'One must', the AAT said, 'examine all of the available evidence to ascertain what the true position is': (Reasons, para. 11)

Formal decision

The AAT set aside the decision of the SSAT and substituted a decision to the effect that Weir had received a lump sum payment by way of compensation in the sum of $60 000; and remitted the matter to the DSS to recalculate the preclusion period.

[P.H.]

Compensation award: 'special circumstances'

SECRETARY TO DSS and MEYER (No. 5564)
Decided: 22 December 1989 by D.P. Breen.

The Secretary to the DSS applied to the Tribunal for review of an SSAT decision which reduced the period during which Barrie Meyer would be precluded from receiving payments of pension.

The appropriate legislation

The first question decided by the AAT was that the current preclusion provisions (ss.152-156 of the *Social Security Act*) applied in the present case, rather than the former Division 3A Part VII (ss.115-115E) of the *Social Security Act*, which was replaced by the current provisions from 1 May 1987.

Meyer had been paid sickness benefit from March 1987 to February 1988. The sickness benefits were then replaced with a rehabilitation allowance. If Meyer's social security payments could be said to have begun before 1 May 1987, then the former ss.115-115E applied to his case; but if they could be said to have begun after that date, then the current ss.152-156 would apply.

The AAT decided that the rehabilitation allowance was a separate payment from sickness benefits. The latter were paid under s.117 of the *Social Security Act*, the former under s.150. It followed that, with Meyer's transfer from sickness benefits to rehabilitation allowance in February 1988, the continuity in social security payments was broken: Reasons, para. 13.

'Special circumstances'

In the present case, Meyer had received a compensation award (in settlement of his common law action for damages) of $165 000. From this amount a number of deductions had been made, representing worker's compensation, sickness benefits, and rehabilitation payments. These amounts had been refunded to the paying authorities.

The AAT said that this was an appropriate case in which to exercise the discretion in s.156 of the *Social Security Act*, to treat part of the compensation payment as not having been made:

> 'The effect of the SSAT's decision is that they have discounted from the $165 000 lump sum payment the repayments that Mr Meyer was required to make by statute as it was felt that this would be effectively "double-dipping" to include these payments in the calculation of a preclusion period under s.152. The resultant incapacity component is $92 602.35. I am of the view that s.156 has been validly triggered and it would be a special circumstance to include the repayments in the calculation of the preclusion period in that the double-dipping effected by this would be unjust, unreasonable or otherwise inappropriate.'

(Reasons, para. 15)

Formal decision

The AAT affirmed the decision of the SSAT.

[P.H.]

Compensation award: recovery of sickness benefits

BAKER and SECRETARY TO DSS (No. 5690)
Decided: 13 February 1990 by B.J. McMahon.

Brett Baker suffered an industrial injury in 1986. He began worker's compensation proceedings against his employer. He then agreed to abandon those proceedings and his employer agreed to pay him a total of $15 000 (including $5000 for medical expenses) as an *ex gratia* payment.

Following Baker's receipt of that payment, the DSS decided that it was a payment by way of compensation, within s.152(2)(a) of the *Social Security Act*; and that Baker should repay to the DSS some $2717 paid to him as sickness benefits. The SSAT affirmed that decision and Baker then brought this appeal to the AAT.

'Payment ... in respect of an incapacity for work'

The central question in the present matter was whether the *ex gratia* payment made to Baker in return for his abandoning his worker's compensation claim fell within the definition of a payment by way of compensation in s.152(2)(a) of the *Social Security Act*: was it 'a payment by way of compensation ... in respect of an incapacity for work'?

The AAT noted that in *Cavaleri* (1989) 53 *SSR* 700 the AAT had attempted 'to narrow the meaning of the subject words ["in respect of an incapacity for work"] so that there is a specific and direct relationship between a payment by way of compensation and an incapacity for work'. The AAT commented:

> 'In my view this is reading the words down too far. They have an ordinary meaning recognised by dictionaries. Losses or substitutes for the statutory phrases are fraught with danger. If payments are made in relation to, in reference to, or in regard to a worker's incapacity, it is not essential that they have a specific relationship to any aspect of his incapacity in order to be caught up by the legislation.'

(Reasons, para. 19)

Where a person's medical condition had led to an incapacity for work and the worker was reimbursed for the cost of treatment of that condition and for the cost of medico-legal examinations, the reimbursement should properly be regarded as compensation in respect of the person's incapacity for work:

> 'The purpose of compensation is to put the worker in the same position that he would have been in had his physical integrity not been impaired in the course of his employment. In the same way that he is reimbursed for loss of wages, so also is he reimbursed for medical expenses incurred.'

(Reasons, para. 20)

The AAT also said that the *ex gratia* payment made by Baker's employer in return for Baker agreeing to withdraw compensation proceedings was a 'payment . . . in respect of an incapacity for work', even on the assumption (which the AAT doubted) that the agreement was not legally enforceable:

> 'It was a payment that was made in the course of compensation legal proceedings and the payment was made as a result of those proceedings having been brought. It is true that it was not a payment pursuant to a court order. Nevertheless having regard to the totality of the evidence, I am of the view that it cannot be regarded as anything other than a payment by way of compensation as defined in sub-section 152(2).'

(Reasons, para. 26)

Formal decision

The AAT set aside the decision of the SSAT that the payment of medical expenses was not a payment by way of compensation; affirmed the decision of the SSAT that the payment made in return for Baker abandoning his compensation proceedings was a payment by way of compensation; and remitted the matter to the DSS with a direction that both payments were payments by way of compensation within the meaning of the *Social Security Act*.

[P.H.]

Cohabitation

WEBBER and SECRETARY TO DSS
(No. 2096)
Decided: 19 January 1990 by D.W. Muller, W.A. De Maria, and H.M. Pavlin.

The AAT *set aside* a DSS decision that Webber was a 'married person' as defined in s.3(1) of the *Social Security Act*. At issue was the rate of invalid pension payable to Webber, as the woman who shared a house with him had an income of her own.

The facts

Webber was permanently incapacitated for work and suffered from permanent brain damage. He was granted invalid pension from 1981. In 1981 he met Wilkinson. They went out together socially on a few occasions and attempted sexual intercourse but failed because of Webber's disability. Their decision to share a house was because Webber needed someone to look after him and Wilkinson and her daughter needed somewhere to live. Household tasks were shared and at all times they had separate bedrooms.

In 1983 they moved into a house which they purchased together as joint tenants. Living expenses were split evenly and household and gardening tasks were shared.

The AAT accepted Wilkinson's evidence that her commitment to Webber was limited to the financial benefit to her.

Findings

The AAT found that Webber and Wilkinson had represented themselves as being married in order to purchase a time-share unit but, the Tribunal regarded the circumstances surrounding the loan application as peculiar to that transaction and not indicative of a 'marriage-like' situation.

Their social lives were mostly separate with some shared family gatherings. There was no pooling of resources towards common purposes and goals other than household expenses. They had never felt bound to each other by any exclusive relationship and each had had other relationships from time to time. The living arrangement satisfied a practical solution to a physical problem. For Webber it meant there was someone to care for him in a medical emergency, and for Wilkinson it eased her financial burdens and provided a home of a standard she would not otherwise have been able to afford.

The living arrangement was one of convenience which had grown into domestic compatibility. The Tribunal said this was far short of a *de facto* relationship and Webber and Wilkinson had never lived together as the spouse of each other.

[B.W.]

Special benefit: the role of DSS guidelines

SECRETARY TO DSS and DAVID
(No. V89/459)
Decided: 23 January 1990 by B.M. Forrest.

The Secretary sought review of a decision by the SSAT to pay Noeline David special benefit. The SSAT had decided that David was entitled to special benefit at a rate of maximum age pension plus rent assistance minus the amount of income generated by her assets.

The facts

David and her husband came to Australia from Sri Lanka as permanent residents on 8 July 1983. She was then 59 and her husband 60. Prior to their arrival, their daughter and her husband had signed a guarantee for their support and they lived with her initially after which they rented a flat for $100 per week in 1984.

David and her husband were unsuccessful in obtaining public housing because they had combined assets of $18 000.

David became an Australian citizen on 29 September 1987 but would not satisfy age pension residence requirements until July 1993. Neither David nor her husband had been employed in Australia. Mr David was in receipt of unemployment benefit but benefit ceased when he turned 65 in January 1988. David was then granted special benefit until a decision was made to cancel benefit from 17 March 1989 on the ground that her assets precluded payment. At the time of cancellation, she and her husband had a sum of $44 000 in a bank account. David said that she intended to leave this money to her children. For this reason, while she and her husband used the interest, they were keen to leave the principal intact. This was no longer possible after cancellation of benefit.

The legislation

Section 129(1) of the *Social Security Act* gives the Secretary a discretion to grant a special benefit to a person who is not in receipt of any other pension or benefit under the Act and of who 'the Secretary is satisfied that, by reason of age, physical or mental disability or domestic circumstances, or for any other reason . . . is unable to earn a sufficient livelihood . . . '