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 . . . '