(a formerly married person living in the same matrimonial home as his former spouse), the AAT then considered the purpose of s.3(8), and the two different periods provided by s.3(8)(d) and s.3(8)(e).

A purposive or literal interpretation?

The DSS argued that the 52 week period could only apply if the relevant proceedings were instituted and remained incomplete at the time benefit was claimed. Here, however, the proceedings were issued and completed prior to the claim for benefit. Greenway argued that the AAT should interpret the provision only by reference to the words in the section which did not limit its operation in the way contended for by the DSS.

Having described these competing views as the 'purpose' approach and the 'literal' approach respectively, the AAT then referred to s.15AA of the *Acts Interpretation Act* 1901 and the decision of the High Court of Australia in *Cooper Brookes Wollongong (Pty Ltd) v Federal Commissioner of Taxation* (1981) 35 ALR 151, both of which require a section to be interpreted in a manner which gives effect to the purpose or intention of the section.

The AAT continued:

> 'In my view, the purpose of s.3(8) is to confer an eligibility to benefits in specifically defined circumstances, namely, to extend eligibility where proceedings have issued but are not completed prior to the application for benefit being made. This section does not contemplate nor allow a situation such as the present where, some eight months after actual separation and five months after completion of Family Court proceedings, a person can return to his former matrimonial home, and whilst still married, live in that home with this wife and be deemed to be unmarried, so as to be eligible for benefits. No such purpose can be gleaned from this section and to interpret it literally would be an absurdity.'

(Reasons, p.4)

Formal decision

The AAT set aside the decision of the SSAT and substituted for it a decision that Greenway's entitlement to benefit be determined by s.3(8)(e).

[R.G.]

Cohabitation: supporting parent's benefit

TOMLIN and SECRETARY TO DSS
(No. 2109)
Decided: 20 February 1990 by J.R. Gibson, J.H. McClintock and M.T. Lewis.

The DSS decided that Tomlin was not qualified to receive a supporting parent's benefit from 1 September 1984 because she was living with Ward on a *bona fide* domestic basis as a *de facto* spouse. It was also decided she had made false statements and failed to comply with s.83AAH of the *Social Security Act*, in consequence of which she was liable to repay $17 231 paid as supporting parent's benefit from 1 September 1984 until 19 February 1987.

The facts

Tomlin and W met in 1983. W was having difficulty trying to run his business and look after his children and was considering employing a housekeeper. Tomlin offered to assist him. It was agreed she and her son would move in with W and his 3 children on the basis that Tomlin would pay him the same board she had been paying to her parents, and she would help in the house.

Tomlin moved to W's house in March 1984 and notified the DSS of her change of address and that she was paying $30 a week to W in about July 1984. In a 'Sole Parent's 12-Weekly Review', signed 9 January 1987, Tomlin disclosed W as her fiancee and owner of the home. She had become engaged to W on 3 January 1987. A field officer's visit followed and a decision was made to cancel benefit. The applicant did not concede to the field officer that there was a *de facto* relationship.

The Tribunal accepted the evidence of both Tomlin and W. They commenced to share a bedroom about 6 months after she commenced to reside with W. In January 1987, W asked her to marry him and from then the relationship took on a more permanent basis. Prior to the engagement both had difficulties related to their previous marriages and it was not until the engagement that there was any commitment to the future.

Tomlin had told the field officer that friends, relatives and neighbours did not know them as Mr and Mrs W. Financial arrangements were that she paid board to him and he was responsible for domestic accounts. Tomlin paid for clothing for herself and her son without any contribution from W. He guaranteed a loan which she obtained for a car. Tomlin did most of the household shopping with money provided by W. He reimbursed her for any money spent on his children, and she gave him receipts for this purpose. They had no joint assets and W owned substantially all of the contents of the house. Tomlin gave W some assistance with his business by doing the banking and he reimbursed her for the use of her car. When her benefit was terminated she did not ask W for money but obtained employment. Evidence was given that household tasks were shared.

Tomlin did not agree that she exercised control over W's children but that her role was to be there when they returned from school. Her own son had developed a good relationship with W but it was a long time before he called him 'Dad'.

The legislation

At the relevant time, s.83AAC of the *Social Security Act* and the definitions of 'supporting parent' and 'married person' were applicable to supporting parent's benefit. Definitions in s.6(1) of '*de facto* spouse' and 'married person' were also relevant. Tomlin would not have been eligible for benefit if she had been living with W as his spouse on a *bona fide* domestic basis though not married to him.

The cases

The Tribunal followed *Lambe* (1981) 4 *SSR* 43 in considering that all facets of the inter-personal relationship must be taken into account. It said that in other decisions the Tribunal had listed factors which may assist but the list was not exhaustive, and no one factor more determinative than others.

The decision

The Tribunal said there were factors in this case which indicated a *de facto* relationship, such as living under the one roof since March 1984, a sexual relationship since September 1984, cooperation in household tasks and managing the children and a degree of assistance in the business. On the other hand the Tribunal accepted that the parties did not regard themselves as being in a *de facto* marriage. There had been no joint acquisition of assets nor pooling of income, and Tomlin did not ask W to support her when the benefit ceased. Their former experiences of

unhappy marriages held them back from committing themselves permanently until W proposed marriage in January 1987.

Formal decision

The decision was set aside with a direction that from 1 September 1984 until 3 January 1987 Tomlin was not living with W as his spouse on a *bona fide* domestic basis.

[B.W.]

Invalid pension: RSI

RILEY and SECRETARY TO DSS (No. 2101)
Decided: 1 February 1990 by R.K. Todd, N.J. Attwood and D.B. Travers.

The Tribunal *affirmed* a DSS decision that Riley's claim for invalid pension be rejected and that he should remain on sickness benefit and be referred to the Commonwealth Rehabilitation Service for assessment. Riley applied for invalid pension on the basis of incapacity for work due to 'RSI both hands' and 'anxiety/stress'.

The facts

Riley first experienced pain in his arms and hands during his apprenticeship as a fitter and turner. He later joined the RAAF, desiring a trade as an instrument fitter. This work was lighter and he completed the physical training but was discharged from the RAAF. He soon gained work as an installation fitter and said his arms did cause problems but he kept working and did not see a doctor.

He moved to Canberra and started a building business with his brother-in-law. His work was mainly in carpentry and supervision. His arms continued to give him trouble but he sought no medical treatment. Two years later, financial problems caused the dissolution of the partnership and he obtained work at the Royal Australian Mint. The work alternated between very heavy and very light. When he commenced there his arms were 'quite good'.

The pain increased in severity and Riley sought medical treatment. In 1985 he was redeployed to light duties as a clerk but the writing caused problems so he was moved to the maintenance store. In 1986 he was moved again to the job of security marshal. He disliked the tedious nature of the job and about this time anxiety and depression became a problem. He was being teased by workmates about his redeployment and absences and he became angry and cranky at home. On one occasion, he was violent to his wife, who left him for a short time.

Riley lodged a claim for worker's compensation and liability was found in 1985 in relation to the pain in his arms. In late 1986 he amended his claim to include anxiety and depression and was off work on compensation from October 1986 until January 1987. He returned to work in 1987 but resigned in August 1987 for health reasons.

At the time of the appeal, Riley was a Level 1 track and field coach and was attending the Commonwealth Rehabilitation Service for counselling. The physical effort involved in the coaching was minimal. He enjoyed the work and planned to make a new career of it. He was virtually pain free because he was not using his arms. His mental problems were also less but Riley felt they might resume if he went back to work. Riley's daughter suffered severe epilepsy and spent most of her life in hospital and his wife suffered severe arthritis and psoriasis.

Medical evidence

Riley's treating doctor gave evidence of 'right-sided lateral epicondylitis and flexor and extensor tendonitis'. He felt that Riley could get back to work, after retraining and counselling, as a skilled technician doing non-repetitive tasks. Although Riley was fit for light work in terms of a physical capacity, this could, if it involved him in demeaning tasks, bring back his anxiety. Evidence was also given by another doctor, who agreed that inappropriate redeployment can aggravate a person's feelings of low esteem.

The DSS also called medical evidence. The Senior Medical Officer had diagnosed 'painful upper limbs' and 'anxiety/depression' in 1988. He regarded the psychiatric condition as only mildly incapacitating. He regarded the condition as a reflection of a personality type rather than an actual illness. He could find no evidence of abnormality or epicondylitis after examining Riley's neck, shoulders and upper limbs. He gave a combined impairment assessment of 5%, the whole of which was attributable to anxiety and depression. He did not accept there was an entity 'RSI' or 'occupational overuse syndrome', both of which suggest a relationship to work practices when such a connection was not, in his opinion, scientifically valid. He preferred the term 'regional pain syndrome'.

A consultant psychiatrist stated that concomitants of current neurotic illness were absent and there was nothing to warrant a diagnosis of anxiety. She said there was a difference between clinical depression and unhappiness about a symptom. She was of the opinion that Riley's complaints of physical symptoms were a result of 'somatising'. This is when a person's emotional problems present as physical problems. His stress, she said, was as a result of his family problems, not of his work.

A neurosurgeon stated that an examination in 1989 showed no abnormality and the disabilities lay in the psychiatric emotional sphere. Although the examination revealed no evidence of epicondylitis, the surgeon agreed it may have been absent due to rest over the past few years.

A rheumatologist was of the opinion that any musculo-skeletal aches Riley might have felt were as a result of fatigue and strain from heavy work but these should have cleared up leaving no sequelae. He could find no evidence of disease or injury. He found Riley to be fit for any form of work commensurate with his skill, training and physical ability. In response to the claim that Riley's hand pain began during his apprenticeship when he was doing fine handwork he said the concept of fine movements causing pain, but of heavy movements not doing so, was nonsense. He was cross-examined about his attitude to 'RSI'. He regarded the term as misleading.

The issues

The Tribunal followed *Panke* (1981) 2 *SSR* 9 and *Kadir* (1989) 49 *SSR* 638 in determining what is an incapacity for work. It said the term denotes an incapacity to engage in remunerative employment, a lack of capacity for earning and an ability to attract an employer who is prepared to engage and remunerate the disabled person.

The decision

In a physical sense Riley's incapacity was found to exclude him only from heavy work. The range of employment is limited but possibilities include coaching. Factors other than his physical capacity also had to be considered. His reluctance to undertake occupations which are unskilled and demeaning, and his compensation history, also diminish his employability.