The AAT noted that the meanings ascribed to 'maintenance' and 'property' under the *Social Security Act* and those under the *Family Law Act* may not be the same. The Tribunal said that it was not the role of the decision maker, nor the Tribunal standing in its shoes, to categorise the payments either way:

> 'What must be done is to determine whether the payments, however characterised for the purposes of the *Family Law Act*, fall within the terms of s.3(1)(e) of the *Social Security Act*.'

The AAT then considered the purpose of the purchase and mortgage as being to provide a home for the applicant and her children, as a result of which she received a benefit within the terms of s.3(1)(e). The AAT also rejected an argument based on a submission that the Camerons could have arranged their affairs in a number of other ways to avoid this result and held that, as the wife received a benefit in the terms of s.3(1)(e), the decision to take the payments into account in calculation of her rate was correct.

Formal decision

The AAT affirmed the decision under review.

[R.G.]

Supporting parent's benefit: living separately and apart

HALLAK and SECRETARY TO DSS
(No. 5660)
Decided: 2 February 1990 by R.A. Hayes.

Mohamad Hallak asked the AAT to review a decision to raise and recover an overpayment of supporting parent's benefit of $3241.60 for the period 4 February 1988 to 12 May 1988.

Hallak had first claimed supporting parent's benefit after the death of his wife in 1985. On 20 December 1987 he travelled to Lebanon and while there remarried on 28 January 1988. He returned to Australia on 5 February 1988 but did not notify the DSS of his marriage in writing until 2 May 1988, though he told the AAT that he had informed them verbally shortly after his return to Australia.

In the few days between the marriage and Hallak's return to Australia, he and his wife did not live together. She did not join him in Australia until 25 May 1988 and up to that time, they communicated by writing and telephone.

The legislation

Supporting parent's benefit (as it then was) was payable to a person who was an 'unmarried person' with a dependent child. Unmarried person was defined in s.53 of the *Social Security Act* as meaning, *inter alia*—

> '...
> (c) a married person who is living separately and apart from his or her spouse...'

'Separately and apart'

Hallak argued that he should be treated as an unmarried person during the period under review because he was living separately and apart from his wife. The AAT noted that the definition in s.53 did not require the separation to be 'on a permanent basis', in contrast with the definition then in s.3 of 'married person', which included a person 'living separately and apart from the spouse of the person on a permanent basis...'

The AAT accepted that the evidence showed that Hallak had not commenced living with his wife prior to his return to Australia. But, until joined by his wife in May 1988, was he 'living separately and apart' from his spouse?

Hallak argued that the phrase should be given its ordinary meaning and that when applied to the facts, he and his wife were married people living separately and apart. But the Tribunal held that —

> 'absurd consequences would flow from allowing a married person to qualify for supporting parent's benefit in the common-place situation of a partner moving away for a temporary period, to work overseas, to tend to sick relatives interstate, to enjoy an extended holiday in distant climes, or whatever. The phrase, in the context in which it appears, is manifestly designed to invite attention to what is not common-place between a married couple . . . of a matrimonial relationship having broken down. . . . In other words, the phrase, "living separately and apart" does not have the ordinary meaning which Mr Hallak's counsel asserted for it, but rather, invokes the legal concept of "*consortium vitae*".'

(Reasons. pp.3-4)

The AAT held that, despite the fact that the couple had not lived together, it was a new marriage and they communicated with each other: 'there was sufficient between them to say that *consortium vitae* had begun; and it continued, notwithstanding the absence of sexual activity, over the period under review': Reasons, p.4.

The AAT found that the DSS had acted correctly in raising the overpayment and expressly found that Hallak had not notified the DSS of his marriage until 2 May 1988. It then endorsed a suggestion by the SSAT that the DSS be asked to investigate the possibility of offsetting a possible notional entitlement to unemployment benefit over the period. There was no evidence available to the AAT on which it could do so.

Formal decision

The AAT affirmed the decision under review and ordered that deductions from current benefit, which had been suspended pending the appeal, be recommenced from the next payment date.

[R.G.]

Family allowance supplement: income test

MILLER and SECRETARY TO DSS
(No. 5715)
Decided: 22 February 1990 by B.J. McMahon.

Elizabeth Miller was a school teacher who retired in April 1988 due to ill health. At that time her husband was also ill and receiving sickness benefit. Miller was entitled to fortnightly superannuation from 23 April 1988 but it was not until July 1988 that the State Superannuation Board paid Miller arrears of superannuation of $3248.88.

In July 1988, Miller applied for Family Allowance Suppplement (FAS). At that time, eligibility for FAS was established on the basis of income earned over the previous 4-week period and Miller received FAS until 1 January 1989. At that time the relevant legislation was amended and Miller was asked to provide details of the taxable income for herself and her husband for the 1987/88 financial year. Their combined income was $24 301.

The DSS them estimated their combined income for 1988/89. In doing so

they calculated that Miller would receive 26 fortnightly payments of her superannuation pension amounting to $17 589 and also took into account the amount she received as arrears of this pension giving an estimated taxable income of $20 873.88. (At the time of the AAT hearing her 1988/89 assessment was available and showed an income of $20 818.)

The AAT concluded that the DSS had correctly applied the legislation, even though this led to a reduction in fortnightly FAS from $144 between July and December 1988 to $18.76 and Miller's financial circumstances had remained constant over the period.

The AAT noted that some attempt had been made in the legislation to deal with such anomalies: s.74B(3) of the *Social Security Act* effectively provides that, if a person's taxable income drops or is likely to drop 25% in a subsequent year, then that year's income can be used to calculate eligiblilty for FAS.

However, this provision did not assist Miller. The only way it could have helped her would have been if the lump sum was included in the 1987/88 tax year rather than the 1988/89 year. The AAT said that if taxable income had not been defined as the amount shown in a person's income tax assessment, it would have included the arrears of pension in Miller's 1987/88 tax year, as it represented payment due in that year and it was 'derived' in that year.

The Tribunal drew attention to the criticisms of the amendments to FAS in *Meadows* (1989) 52 *SSR* 693 and concluded:

> 'If the legislation is to be reviewed as a result of the decison in *Meadows*, I would urge those who carry out the review to take into account the present circumstances. The 25% rule is not a satisfactory basis for the exercise of discretion. It is, in itself, inflexible.'

Formal decision

The AAT affirmed the decision under review.

[J.M.]

Residence in Australia

SEGEDIN and SECRETARY TO DSS
(No. 5714)
Decided: 22 February 1990 by B J McMahon.

Kate Segedin's husband was granted an age pension in 1975. He returned to Yugoslavia in 1975 and married Segedin there in 1977. In 1982 they both returned to Australia for two months. Segedin applied for a wife's pension then, but her application was refused on the ground that she was not residing in Australia.

Segedin's husband continued to receive the age pension paid at the standard (single) rate. They returned to Australia in May 1985 and Segedin reapplied for a wife's pension. This was granted relying on her statement that she was residing in Australia.

In April 1986, Segedin applied to have the wife's pension paid in Yugoslavia as she intended to return there. At this point her pension status was reviewed, and her wife's pension cancelled and the DSS determined that her pension should never have been granted.

The legislation

Section 31(1) of the *Social Security Act* provided that a woman who was not herself and age or invalid pensioner, but was married to an age or invalid pensioner, and 'who is residing in, and is physically present in' Australia on the date on which she lodges a claim for a wife's pension, was qualified to receive a wife's pension.

Residence in Australia

The Tribunal relied on the Federal Court decision of *Hafza* (1985) 26 *SSR* 321, which had considered the meaning of 'residence'. There Wilcox J had said residence had two elements — 'physical presence in a particular place and the intention to treat that place as home: at least for the time being, not necessarily forever'. The Court had further noted that once a home is established in a particular place, absence from that place does not necessarily mean a person ceases to be resident there though whether he or she does so depends on intention.

In applying *Hafza*, the AAT concluded that Segedin was not a resident of Australia when she applied for the wife's pension. When Segedin applied for wife's pension in 1982, she had stated that she and her husband owned their own home in Yugoslavia and they would be staying in Australia with relatives. In 1985, at the time of the second application, she and her husband were staying at the same address and she had stated that they were not paying rent, but were contributing to household expenses. This, together with the fact that their first visit was for two months and their second for 11 months, indicated that they had merely a temporary connection with the Australian address.

Further, Segedin's passport indicated that she had entered Australia in 1985 on a visitor's visa which was edorsed 'employment prohibited' and had made no application to become a permanent resident as at April 1986. Segedin had also come to Australia in 1985 on a return ticket and, if she had stayed in Australia beyond April 1986, she would have had to pay an extra $3000 for her airfare.

The Tribunal concluded that Segedin was not a resident of Australia when she applied for the wife's pension.

Formal decision

The Tribunal affirmed the decision under review.

[J.M.]

Age pension: portability

SCHRODERS and SECRETARY TO DSS
(No. 5704)
Decided: 6 December 1988 by R.A. Hayes.

(Written reasons provided 16 February 1990)

Constanta and Gerarda Schroders appealed against a DSS decision to cancel their age pensions from 27 November 1986 on the ground that they had left Australia before the expiration of the 12-month period provided in the then s.83AD [see now s.62] of the *Social Security Act*. If the Schroders had stayed in Australia until 1 June 1987, they would have been eligible to have their pensions paid overseas.

The SSAT had recommended that the Schroders' pensions be restored, but the DSS had rejected this recommendation and affirmed the original decision.