Section 115B(2A) provided that, where a person receiving sickness benefit also received a lump sum payment that was, in the opinion of the Secretary, in whole or in part a payment by way of compensation in respect of the same incapacity as the sickness benefit payments, the sickness benefit payments should be reduced by an amount calculated under s.115B(2B).

Section 115B(2B) set out a formula for converting a lump sum payment of compensation into the equivalent of weekly payments. The formula required the lump sum payment to be divided by average male weekly earnings, so that the lump sum payment could be attributed to a number of weeks. According to s.115B(2B), the number of weeks calculated in this way was to be taken to have begun on the date on which the person's incapacity began.

The Tribunal's decision

The AAT first considered the sickness benefits paid to Dimovsky in 1986, totalling $681. The Tribunal noted that, at the time Dimovsky received those sickness benefits, he was also paid periodical compensation. The amount of this compensation, because of s.115B(2A), reduced Dimovsky's entitlement to sickness benefit during that period to nil. Accordingly, the sum of $681 which he received in sickness benefit in 1986 was recoverable.

However, by the time of the 1987 payments of sickness benefit, Dimovsky was not receiving periodical compensation payments. Accordingly, those sickness benefit payments were only recoverable if Dimovsky could be said to have received a lump sum payment of compensation in respect of the same incapacity, notionally converted into weekly payments of compensation in accordance with s.115B(2B).

The AAT noted that, in *Piatkowski* (1987) 12 ALD 291, the Tribunal had said that the identity of incapacity referred to in s.115B(2A) was an identity in terms of 'cause and time'.

The same point had been made by the Federal Court in *Littlejohn* (1989) 53 *SSR* 712, where the court had said that 'incapacity in this context has both a causal and a temporal aspect'.

The AAT noted that, of the compensation settlement in the present case, $3000 expressly related to the same cause as the incapacity for which Dimovsky had received sickness benefit, namely, the injuries suffered in 1984. However, the compensation award made in January 1988 had described this part of the settlement as 'future compensation', whereas the sickness benefit payments which the DSS was seeking to recover related to a period in 1987. Unless the AAT was justified in going behind the terms of the award, the temporal identity required, before it could be said that the compensation and sickness benefits were received in respect of the 'same incapacity', was not present.

The AAT noted that Dimovsky had remained unable to work for some 2 months after the compensation settlement. A compensation payment of $3000 for 2 months inability to work was not such an amount which would justify going behind the award, the AAT said: Reasons, para. 15.

However, the AAT noted that Dimovsky had received sickness benefit payments from the DSS between January and March 1988. By virtue of s.115B(2B), the lump sum payment of compensation which he received in January 1988 (described in the award as being paid as future compensation) was to be divided by the average male weekly earnings, so that it covered six and a half weeks running from the date of the settlement (29 January 1988). Those notional weekly payments should then be set off against any sickness benefit payments received by Dimovsky in that period.

Formal decision

The AAT set aside the decision of the SSAT and remitted the matter to the Secretary with the direction that the worker's compensation insurer was liable to pay to the Commonwealth an amount to be calculated in accordance with the AAT's reasons for decision.

[P.H.]

Compensation award: recovery of sickness benefits

HOGG and SECRETARY TO DSS (No. 5778)
Decided: 15 March 1990 by W.J.F. Purcell.

Robert Hogg suffered an industrial injury in March 1985. He received sickness benefit payments from 1985 to 1987.

In June 1987, Hogg settled his claim for worker's compensation for $68 000, of which $38 000 was identified as a payment for incapacity for work.

Despite that identification, the DSS decided that $50 000 of the compensation settlement represented compensation for the same incapacity for which Hogg had received sickness benefit; and that, accordingly, that sum of $50 000 was available for recovery of those sickness benefits under the former s.115B of the *Social Security Act*.

Hogg asked the AAT to review that decision.

Interpreting the settlement

The DSS decision, to treat $50 000 of the compensation settlement as being available for recovery of sickness benefits, was made under s.115B(3A) of the *Social Security Act*, on the basis that this amount represented the compensation payment for the same incapacity as the payments of sickness benefit.

In going behind the terms of the award, the DSS was applying its own Unemployment and Sickness Benefit Manual, para. 9.1321 of which calls for a careful interpretation of the award 'where it appears that the award or settlement may have been expressed in such a way as to attempt to avoid the effect of the legislation'.

In the present case, the DSS had relied on information supplied by the worker's compensation insurer about the background to the settlement. The insurer said that Hogg could have expected to recover $170 000 in compensation if his claim had proceeded to a hearing and he had been successful at that hearing.

The insurer said that, of the expected $170 000, the sum of $125 000 would have represented Hogg's past and future economic loss.

The DSS had then calculated that, as the total settlement figure ($68 000) was 40% of the potential maximum, the economic loss component of the final settlement should also be taken to be 40% of the potential economic loss claim: 40% of $125 000 was $50 000. The DSS then treated that $50 000 as a payment in respect of the incapacity for work for which Hogg had been paid sickness benefits.

However, there was other evidence from Hogg's solicitors to the effect that Hogg had settled the compensation claim because there would be some difficulty in proving the extent of his incapacity and because he was in such

serious financial need that he needed a quick settlement.

The solicitors said that the $38 000 identified in the compensation settlement as a payment for incapacity for work had been a realistic figure.

The AAT described the approach adopted by the DSS as 'not appropriate in the circumstances' because there was no question that the terms of settlement had been expressed so as to avoid the effect of the legislation. The AAT continued:

> 'The applicant has been frank and open with the respondent even to the extent of providing an unsolicited copy of counsel's opinion as to the potential of his claim. The delegate analysed the applicant's potential claim, not the terms of the award the applicant received in fact. The delegate discounted all heads of damage to a percentage of the potential claim, a course which was not open to him in my view, unless the consent award did not indicate "the true nature of the settlement" and was expressed in such a way as to "attempt to avoid the effect of the legislation".
>
> ...
>
> The applicant settled the balance of his claim, the incapacity component, for an amount that was less than he had been advised he could receive, if the matter was litigated. Whatever were the considerations that he and his legal advisers took into account, the reality is that he accepted an award for economic loss at a discounted figure which was to his financial disadvantage and not in an attempt to avoid the effect of the legislation.'

(Reasons, paras 20-22)

Formal decision

The AAT set aside the decision under review and substituted a decision that the amount of $38 000 was the incapacity component of the lump sum compensation award received by Hogg.

[P.H.]

Defacto relationship: effect of the new legislation

SECRETARY TO DSS and VILLANI
(No. 5799)
Decided: 29 March 1990 by R.A. Balmford.

On 2 December 1988, a DSS officer decided that Villani had been overpaid widow's pension totalling $6074 during the period 14 April 1988 to 10 November 1988 because she had been living in a *de facto* relationship with N throughout that period. The SSAT set aside this decision and the Department applied to the AAT for review of the SSAT's decision.

The facts

In 1978 Villani separated from her husband, with whom she had had one child, P. She was granted a class A widow's pension on 17 July 1978.

Villani met N, who was a friend of her brothers, in 1978. In late 1980, N invited her to rent a room in his house in a Melbourne suburb. As the house in which she was living was too small for herself and P, Villani moved into N's house. At the time she moved in, N was living with another woman and his daughter. In 1982 N sold the house and moved to a country town. Villani and P moved there too.

In mid-1985, Villani and N had an affair which resulted in a child, E, being born in March 1986. In May 1986, Villani moved out and went to live with N's daughter until November 1987, when she moved to her brother's house. In April 1988, she returned to N's house where she still lived at the time of the AAT hearing. The AAT found that the living arrangements and the relationship between Villani and N had not changed significantly since April 1988.

Villani and N did not have any joint assets or liabilities and did not significantly pool financial resources. Villani paid rent to N of $50 per week. N took no responsibility for P but his daughter E was very important to him. Villani and N occupied different rooms and did not normally eat meals together. They generally each looked after themselves around the house.

Their only joint social activities involved Villani's brothers, with whom N was friendly before they met. They never held themselves out as married. They had occasionally had sexual intercourse since their affair in mid-1985 and the AAT found that they were not emotionally dependent. N proposed marriage to Villani soon after E was born but she refused and moved out of his house. They regarded themselves as friends but not close friends.

In November 1988, Villani signed a statement prepared by a DSS field officer that she had moved back to N's house in April 1988 and started living with him 'in a situation similar to that of a married couple'.

The legislation

During the period of the alleged overpayment, a woman could not qualify for a widow's pension if she was 'living with a man as his wife on a *bona fide* domestic basis although not legally married to him'.

From 1 March 1989 the class of widow's pension which Villani used to receive was replaced by a sole parent's pension which had a similar exclusion for persons who had a *de facto* spouse.

New legislation regulating *de facto* relationships, which have been renamed 'marriage-like relationships', came into operation on 1 January 1990. The principal new provisions are contained in ss.3A and 43A of the *Social Security Act*.

Section 3A sets out 5 categories of factors to which the Secretary is to have regard in forming an opinion about whether a relationship is marriage-like or a separation. Those categories cover financial aspects, the nature of the household, social aspects, sexual relationship and the nature of the persons' commitment to each other.

Section 43A contains a number of sub-sections, most of which deal with the provision of notices to sole parent pensioners and their requirement to provide information in response. Sub-section 43A(1) sets out the circumstances in which s.43A applies, including where 2 people of the opposite sex have shared a residence for at least 8 weeks and (a) a child of both of them also lives in the shared residence or (f) they have at any time shared another residence with each other. Sub-section 43A(6) states that:

> 'Where this section applies, the Secretary must not form the opinion that the pensioner . . . is not living . . . in a marriage-like relationship unless, having regard to all of the matters specified in . . . section 3A, the weight of evidence supports the formation of an opinion that the pensioner . . . is not living in a marriage-like relationship . . .'

Application of the new legislation

The AAT decided that, because Villani's circumstances fell within paragraphs (a) and (f) of s.43A(1), s.43A could apply, particularly s.43A(6).

The Tribunal said that 'sub-section 43A(6) does not depend for its operation on the service of a notice under the earlier sub-sections. Thus *prima facie* the Tribunal, standing as it does in the shoes of the Secretary' must act in accordance with the directions in s.43A(6): Reasons, para. 16.

The AAT noted that this matter fell to be decided in accordance with the relevant provisions as they stood in the overpayment period from 14 April 1988 to 10 November 1988. However it seemed appropriate that, as the relevant circumstances had not changed since