general discretion to grant arrears of family allowance. Accordingly, backpayment to the respondent is not possible': Reasons, para.20.

The DSS letter and s.168

As noted above, Perkins had received a letter indicating that backpayment was possible, even after cancellation of an allowance. The DSS conceded that the appropriate term in such a case was suspension, rather than cancellation. However, this led the AAT to consider the effect of s.168(3) and s.168(4), even though these provisions were not raised at the hearing of the matter.

After receiving further written submissions on the effect of s.168, the AAT suggested that, if a broad view of s.168(3) were taken (that it is not confined to peripheral matters arising from the suspension, cancellation or variation of a pension etc), then s.168(4)(ca), the relevant provision relating to the date from which a determination under s.168(3) comes into effect, could also be broadly interpreted so as to allow the Secretary (and the Tribunal on review) to set any earlier date as the starting date.

However, The AAT noted that 'this would be inconsistent with the whole tenor of the other provisions in the Act', in particular, ss.158 and 159 which 'exemplify the underlying policy that claimants need to make timely claims for benefits, allowances and pensions. Arrears are generally not available and the exceptions are very specific and conditional.'

The AAT concluded that despite the apparent breadth of s.168(3) and (4), they should not be given an overly broad construction.

The AAT further rejected the respondent's other arguments (the taxation analogy and the argument that a beneficial construction should be placed on welfare legislation), on the basis that the legislation simply did not provide the Secretary with a discretion (and further doubted, whether, if there were such a discretion, it would be exercised in this case).

The decision

For the reasons set out above, the tribunal set aside the decision of the SSAT and decided that Perkins was not entitled to arrears of family allowance for the period November 1987 to May 1989.

[R.G.]

SECRETARY TO DSS and CHATZIKOSMIDIS
(No. 5965)

Decided: 13 June 1990 by R.A. Balmford.

The DSS asked the AAT to review an SSAT decision that Mrs Chatzikosmidis was eligible for family allowance from 29 December 1988 rather than from 18 May 1989.

The facts

Payment of family allowance to Chatzikosmidis had been cancelled from 15 October 1987 because she had not returned the information necessary for payment to continue after the introduction of the means test in 1987.

Chatzikosmidis lodged a further claim on 23 August 1988 which had been rejected because of her income. However, her situation changed as of 15 December 1988, from which time she satisfied the income test. She had continued to be otherwise qualified in respect of her son Louis.

Chatzikosmidis did not lodge a further claim until 12 May 1989 and that claim was granted from 18 May 1989. She then sought arrears and the SSAT decided that she was eligible from 29 December 1988.

The legislation

Prior to 29 December 1988, s.88 of the *Social Security Act* had provided that a family allowance should be payable either from the first day of the family allowance period during which the claim was lodged or from the commencement of the next family allowance period after lodgment.

At all relevant times, s.158(1) provided that the grant or payment of (inter alia) a family allowance, 'shall not be made except upon the making of a claim for that ... allowance'.

Section 87 and 88 were repealed from 29 December 1988 and replaced with a new s.87 and ss.159(4A), (4C) and (4D). Section 87 now provides that 'a family allowance is payable ... on each family allowance pay-day on which the person ... is qualified to receive family allowance in respect of the child'. Section 159(4A) deems a claim to have been lodged on the date of a child's birth, if it was lodged within 4 weeks of the birth.

The AAT's decision

After setting out the terms of the legislation, the AAT referred to the recent decision of Deputy President Todd in *Perkins* [noted in this issue of the *Reporter*] and adopted the reasoning in that case, on the basis that the issue, namely whether there was any power in the Act to backdate payment of family allowance to a date when the claimant was qualified to receive it, but had failed to lodge a claim, was the same in both cases.

Formal decision

The AAT set aside the SSAT decision and substituted for it a decision that Chatzikosmidis was entitled to payment of family allowance from 18 May 1989.

[R.G.]

Married person treated as unmarried

LOBB and REPATRIATION COMMISSION
(No. 5764)

Decided: 13 March 1990 by J.R. Gibson, J. Hooper and J.M. Maher.

Lobb asked the AAT to review a decision assessing his rate of service pension on the basis that he was a married person.

The legislation

Under s.35(6)(f)(i) of the *Veterans' Entitlements Act* 1986, a reference to a married person does not include a legally married person who is 'living separately and apart from [their spouse] on a permanent basis'. [The *Social Security Act* 1947, s.3(1) contains an equivalent provision in paragraph (a) of the definition of 'married person', which is now read in conjunction with s.3A on 'marriage-like relationships'.]

There is a discretion 'for any special reason' to not treat a married person as being married: *Veterans' Entitlements Act* 1986, s.35(7). [A similar discretion is found in paragraph (b) of the definition of 'married person' in s.3(1) of the *Social Security Act* 'for any special reason in any particular case'.]

A married veteran can also be treated as unmarried where the Commission is satisfied that the veteran's living expenses are likely to be greater by reason that he and his spouse are unable to live together in a matrimonial home as a result of the illness of either or both of them and that inability is likely to continue indefinitely: *Veterans' Entitlements Act* 1986, s.47(2). [Equivalent provisions are found in ss.33(2) and 118(1A) of the *Social Security Act*.]

The facts

Lobb married in 1974 in Australia. At the time of the AAT hearing he was aged 76 years and his wife was 89. They were

granted Australian service pensions in 1977 and continued to receive them after moving to England in 1980, where they were still residing.

In September 1988, Lobb requested that, on the basis of the separate financial and living arrangements of himself and his wife, he be treated as a single person for the purposes of the service pension. Mrs Lobb's pension was cancelled at her request with effect from 26 January 1989.

After moving to England in 1980 the Lobbs resided together in a flat in Truro purchased by Mr Lobb prior to their marriage. Mrs Lobb then sold a house in a different town that she owned and purchased a house in Truro. Mr Lobb moved back and forth between the 2 residences and travelled abroad for several months every second year.

In May 1988 Mrs Lobb moved to a retirement village in a different town near her son, with whom she had been living for a considerable time in order to help him care for his handicapped son after the death of his wife.

In a letter to the Commission dated June 1988, Mr Lobb said that his wife's desire to support her son and grandson clashed with her commitment as a partner of a married couple. He also stated that he needed to keep his Truro flat for the time when his wife was no longer able to look after herself. However, in June 1989, he wrote to the Commission saying that he foresaw that within a year Mrs Lobb would have to go into a retirement home for the aged.

Mrs Lobb was restricted because of a prior hip replacement operation but still spent some time at her son's home looking after her grandson. A chest X-ray report on Mrs Lobb did not reveal any particular disability and referred to changes that were not unusual for a person of her age.

Mr Lobb stated that he and his wife had kept separate finances and had no joint assets or joint financial arrangement. This was borne out by income and asset statements they had furnished to the Department between 1980 and 1989.

Illness separation

There was no evidence, according to the AAT, that Mrs Lobb's condition precluded her from living with her husband in a matrimonial home. Therefore reliance could not be placed on s.47(2) to treat Mr Lobb as if he were unmarried.

Living separately and apart

The High Court decision in *Main* v. *Main* (1949) 78 CLR 636 that the expression 'living separately and apart' referred to the conjugal relationship no longer existing was applied. The AAT considered that:

> '[T]he evidence would [not] justify a finding that Mr and Mrs Lobb lived separately and apart in the sense that their marriage relationship had come to an end. On the contrary, each has demonstrated respect for the other and concern for the welfare of the other and neither has suggested that their marriage no longer exists.'

(Reasons para 18)

A special reason for not treating as married

The AAT were of the view that the phrase 'special reason' was more limiting than the phrase 'special circumstances' in the *Social Security Act*, which had been interpreted in *Beadle* (1984) 20 *SSR* 210 as requiring unusual, uncommon or exceptional circumstances. Applying this test, the Tribunal said:

> 'As we have found, although there has been an unusually limited degree of living under the one roof in recent times, the marriage relationship of Mr and Mrs Lobb is a continuing one; but one party, for reasons which appear good to her, has postponed indefinitely any prospect of both living together, something which is a normal element of most marriages and which was, to some degree, an element of their marriage. In consequence of his wife's decision, Mr Lobb has, for the time being at least, ceased to have the benefit of that aspect of the marriage relationship. We consider this to be an unusual circumstance and that it constitutes a reason, which can aptly be described as special, why Mr Lobb should be treated as not a married person . . .'

(Reasons, para.20)

Formal decision

The AAT set aside the decision under review and decided that Lobb shall not be treated as a married person from the date of his application to the Department in September 1988 until the date of the decision under review.

[D.M.]

Overpayment: discretion to waive

SECRETARY TO DSS and COUTTS (No. 5972)
Decided: 20 June 1990 by S.A. Forgie, K.J. Lynch and T.R. Gibson.

Geoffrey Coutts was paid unemployment and sickness benefits between May 1985 and May 1988. During this period, he worked as a casual employee for a fruit cannery but did not fully inform the DSS of the amounts which he received through this casual employment.

The DSS was advised in June 1986 that Coutts was earning income from his casual employment but took no action to recover an overpayment from him until July 1988.

On appeal, the SSAT decided that Coutts had been overpaid $3586. On a recalculation, the DSS reduced the amount of the overpayment to $2891.

Coutts asked the AAT to review the SSAT decision.

The legislation

In this review, Coutts did not dispute that he had been overpaid unemployment benefit; but he asked the AAT to exercise the s.251 discretion to waive recovery of the debt.

Section 251 of the *Social Security Act* gives the Secretary a discretion to write off debts arising under the Act, to waive the right of the Commonwealth to recover such a debt, or to allow repayment of such a debt by instalments.

Discretionary factors

Evidence was given to the Tribunal that Coutts had a serious drinking problem; and that he required regular medical treatment for problems which affected his brain. The AAT found that, although Coutts had given incorrect information to the DSS, he had not done this with fraudulent intent.

The AAT noted that an earlier overpayment had been raised against Coutts in August 1976. This overpayment, of just under $300 had not been fully recovered until October 1988.

The AAT was satisfied that Coutts did not have any significant assets from which he could repay the debt, there was no likelihood of his circumstances changing in the future and that the debt was currently being recovered by withholding $20 a fortnight from his unemployment benefit.

The AAT was critical of the delay on the part of the DSS in responding to the information received in June 1986 that Coutts was being overpaid. The AAT indicated that the inaction on the part of the DSS over more than 2 years allowed Coutts' debt to grow.

The only explanation offered by the DSS for its inaction over more than 2 years was that it gave more priority to delivering payments than to raising overpayments. The AAT commented:

> 'It is laudable that such priority is accorded to payment. It is, however, difficult to reconcile that priority with the priority which Shepherd J [*Hales* (1983) 13 *SSR* 136] places on the