treated her home as a convenient place to live.

Although Webster had admitted to Departmental officers that she had lived with B 'in a relationship similar to that of married couples since 1987', the AAT found that she lacked understanding that such a relationship involved more than the existence of a sexual relationship. The AAT accepted her oral evidence at the hearing, although some adverse comment was made on her lack of candour in the closure of the joint account shortly prior to the hearing and in her answers to pension review forms during 1989 and 1990. However, the AAT found that the nature of her relationship with Mr. B and not her candour was the issue for the Tribunal to decide.

On balance, the Tribunal concluded, with some reservation, that the relationship of Webster and Mr. B was not marriage-like.

[P.O'C.]

SECRETARY TO DSS and MULLIGAN

(No. N90/470)

Decided: 19 July 1991 by P. Moore, B. Barbour and C. Stevens.

The SSAT had set aside a decision of the Secretary's delegate to raise and recover overpayment of unemployment benefit in the sum of $34 950.28 and substituted a decision to waive recovery of all but $103.40 thereof.

Mr Mulligan claimed unemployment benefit on behalf of himself and his wife, Mrs Mulligan, on 14 April 1981 and continued to receive benefits at the married rate until 26 October 1987, with additional amounts for their 2 sons born in 1981 and 1982.

It was not disputed that Mrs Mulligan worked full-time as a registered nurse from 23 May 1987. The overpayment was raised in respect of the period 18 May 1984 to 26 October 1987 on the ground that Mr Mulligan failed to notify the Department of his wife's employment and income in that period.

Mr Mulligan said that he separated from his wife in May 1984 when she moved into a shed on the couple's rural property, leaving him and the children living in the house. He said that shortly thereafter he met and commenced living in the former matrimonial home with a woman, C.E., and continued to live with and fully support C.E. in a marriage-like relationship until October 1987. He maintained that he was therefore entitled to receive benefits at the married rate throughout the period.

Mrs Mulligan, who was summoned to attend by the Tribunal, gave evidence supporting that of her husband. However, the evidence of Mr and Mrs Mulligan as to their separation and Mr M's cohabitation with C.E. was contradicted by that of Mrs L, a neighbour of the couple, who had known them for years, worked with Mrs Mulligan, visited her at home in the relevant period, picked her up and driven her to work. Mrs L was found by the AAT to be an honest and credible witness, while Mr and Mrs Mulligan were not. The Tribunal was not satisfied that the woman C.E. even existed, but found it unnecessary to determine whether Mr Mulligan was living with C.E. in a marriage-like relationship because it found that Mr and Mrs Mulligan were not separated during the period.

During the period in question Mrs Mulligan continued to use a credit union account in their joint names. She made 2 applications for personal loans from the Commonwealth Bank, in which she described herself as 'married with two children'. Mr Mulligan never disclosed to the DSS any change in his domestic circumstances, even when interviewed by a departmental officer in May 1987. The Tribunal found that 'his answers to the questions asked of him were self-serving and designed, it would seem, to ensure the continued payment of the maximum rate of married unemployment benefits'.

The AAT's decision

Without citing the legislative provisions, the Tribunal found that because Mr Mulligan did not provide accurate information to the Department about Mrs Mulligan's income in the period Mr Mulligan was not entitled to the benefits paid to him.

The AAT found that, applying the criteria in *Hales* (1983) 13 *SSR* 136, the discretion under s.251 to waive the overpayment should not be exercised in favour of Mr Mulligan. Mrs Mulligan was in employment and assisting him financially, and he owned an unencumbered 35 acre rural property.

Formal decision

The AAT set aside the decision of the SSAT and remitted the matter to the Secretary to determine the exact amount of the overpayment. It recommended that consideration be given to allowing repayment by instalments.

[P.O'C.]

Overpayment: failure to comply with Act

DI PRINZIO and SECRETARY TO DSS

(No. 7101)

Decided: 28 June 1991 by P W Johnston.

Di Prinzio worked for James Hardie Building Products from 1952 to May 1978, when he gave up working because of illness. He was granted an invalid pension in June 1978.

At the time of the grant of pension, the DSS gave Di Prinzio a written notice that he should notify the Department within 14 days of an increase in the combined average income of himself and his wife. However, the notice included no information as to the manner in which Di Prinzio should notify the DSS of any such increase.

In August 1984, Di Prinzio sought advice from the Asbestos Diseases Society about a possible claim against James Hardie Building Products. The Society advised Di Prinzio that he could receive up to $95 compensation a fortnight without prejudicing his entitlement to an invalid pension. The Society then negotiated with James Hardie Building Products' insurer for Di Prinzio to receive payments of compensation amounting to $95 a fortnight.

In March 1986, Di Prinzio signed a DSS Income Review form, which had been completed by his daughter. The form indicated that Di Prinzio and his wife were not receiving any other income. A similar statement was made to the DSS by Di Prinzio's daughter on his behalf in March 1987.

In September 1988, Di Prinzio told the DSS that he had received a lump sum payment of compensation and that his fortnightly compensation payments of $95 had ceased.

A delegate of the Secretary then decided that Di Prinzio had received overpayments of invalid pension in consequence of his failure to advise the DSS of the level of his income and that he had been overpaid $3397.

On review, the SSAT affirmed this decision. Di Prinzio then appealed to the AAT.

The legislation

During the relevant period, s.163(1) of the *Social Security Act* 1947 obliged a pensioner to notify the Department of a change in circumstances, 'within the

period and in the manner specified in the notice' served on the pensioner.

Section 246(1) provided that an amount of pension paid in consequence of a failure or omission to comply with any provision of the Act was a debt due to the Commonwealth.

Section 251(1) gave the Secretary power to write off, waive recovery of, or allow payment by instalments of amounts payable by a person under the Act.

Incorrect advice?

An officer of the Asbestos Diseases Society told the AAT that the advice given to Di Prinzio had been based on advice provided to the Society by a DSS officer.

However, the AAT concluded that correct advice given by the DSS was probably misinterpreted by the officer of the Society. The AAT was not satisfied that the overpayment of invalid pension received by Di Prinzio was the result of incorrect DSS advice; and the DSS was not estopped from pursuing recovery — assuming that estoppel could operate where wrong advice had been given by a DSS officer.

Cause of overpayment

The AAT said that it was satisfied that the overpayment of invalid pension to Di Prinzio was the result of Di Prinzio's failure to notify the DSS of his receipt of income in the form of payments of compensation.

However, because the notices given to Di Prinzio by the DSS prior to March 1986 had not specified the manner in which Di Prinzio should notify the DSS of his receipt of income, the overpayments of invalid pension made to him prior to March 1986 had not been in consequence of a failure or omission on his part to comply with any provision of the Act.

It followed that those overpayments were not recoverable under s.246(1).

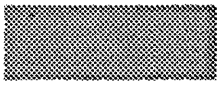
But the overpayments made after March 1986 were recoverable, because the Income Review form given to him in that month had clearly required Di Prinzio to report any income to the Department and he had failed to do so.

After examining Di Prinzio's financial situation, the AAT decided that there were no grounds for waiving recovery of the overpayment made after March 1986. Although Di Prinzio was subject to some financial difficulties, 'that is a condition shared by many. Compared with many of those in respect of whom waiver is requested he is relatively secure': Reasons, p.16.

Formal decision

The AAT varied the decision under review to the extent that the debt due to the Commonwealth comprised the amounts incorrectly paid to Di Prinzio after March 1986.

[P.H.]



GREENWOOD and SECRETARY TO DSS

(No. W91/8)

Decided: 26 September 1991 by Deputy President P.W. Johnston.

The SSAT had affirmed decisions of the Secretary's delegate to recover overpayment of sole parent's pension, under s.246(1) of the *Social Security Act* 1947, in respect of 2 periods.

For the first period, 13-27 April 1989, an overpayment was raised in the sum of $332.80; and for the second period, 29 March to 26 April 1990, a further sum of $1001.70 was raised. Both amounts had been fully recovered from Greenwood.

The basis for raising both overpayments was that Greenwood had received part-time earnings during the relevant periods and had failed to notify within 14 days of receiving each payment as required by notices given at various dates in the period December 1988 to February 1990, being notices issued under s.163(1) of the *Social Security Act* 1947.

The AAT found that on 27 April 1989 Greenwood made the first notification of earnings to an officer by 'phone, indicating that from the period 10 March 1989 to 20 April 1989 she had received payments for part-time earnings from an employment agency. Thereafter she continued to notify similar earnings at various periods at intervals of about 4 weeks. These advices were documented by the DSS. The DSS had made regular checks with the employment agency to verify the amounts notified. However, the DSS had not advised Greenwood that the reporting practice that she had adopted was not acceptable because it was not strictly in accordance with the 14-day requirement.

Greenwood had said that at an early stage in her contacts with the DSS she had been advised by a departmental officer named Joan that it would be in order for her to continue to report her part-time earnings at intervals up to 8 weeks. Furthermore, 'Joan' had not queried her initial reporting of the first lot of earnings.

The significance of the conversation with 'Joan', which the Tribunal was prepared to accept took place prior to the second series of overpayments, was that it tended to countermand the effect of the later notices issued under s.163(1). Greenwood was induced to believe by reason of that conversation that reporting at 5 or 6 week intervals, which was convenient to her, was not in breach of her obligations.

The legislation

Under s.163(1) of the *Social Security Act* 1947 the Secretary may give a notice requiring a person to notify the DSS within the period and in the manner specified in the notice of the occurrence or likely occurrence of a specified event or change of circumstances.

Section 246(1) of the Act relevantly provides:

> '(1) Where, in consequence of a false statement or representation, or *in consequence of a failure or omission to comply with any provision of this Act*, an amount has been paid by way of pension, allowance or benefit under this Act *which would not have been paid but for* the false statement or representation, failure or omission, the amount so paid is a debt due to the Commonwealth.' (emphasis added)

Did the overpayment occur 'in consequence of' the breach?

The Tribunal found that Greenwood failed to comply with her reporting obligations in s.163(1) notices but in relation to the second series of overpayments the basic cause of the overpayment was the department's failure to tell her that she was in default of her obligations. This failure was probably compounded by a departmental officer's representations that she could continue in her practice of 5 to 6 weekly reporting.

In order for an overpayment debt to arise under s.246(1), the question was whether the amount of pension sought to be recovered was paid 'in consequence of . . . a failure or omission to comply with any provision of this Act . . . '

The Tribunal referred to earlier decisions in which s.246(1), or its predecessor provisions had been discussed, in particular to *Hangan* (1982) 11 *SSR* 115, *Hales* (1983) 13 *SSR* 136, and *McAuliffe* (1991) 63 *SSR* 892. The question was not whether Greenwood's breach was the 'dominant or effective cause of the overpayment', but whether it was a contributing factor in the overpayment. Applying this test to the facts, the Tribunal said:

'The Tribunal has taken the view that her reporting of her specific earnings at 4 to 6 week intervals had no direct effect on the creation of a situation where ultimately, after some considerable time, an overpayment was sought to be recovered. The problem the respondent faces is that its own acquiescence virtually constituted an adoption of that process such that it effectively reduced to zero, that is totally subsumed, any contributory force her failure to report her earnings within 14 days might have had.'

Would the overpayment have occurred 'but for' the breach?

There was a further question whether the amount sought to be recovered would not have been paid 'but for' the failure or omission. In *Hangan*, Toohey J said that the predecessor of s.246(1) did not have two components but was rather a composite provision in which the words 'but for' were a corollary of the words 'in consequence of', rather than a separate test. The Tribunal posed the question whether the overpayment would not have occurred 'but for' the breach. The question was answered in the negative because the Department's inaction was a superseding cause or *novus actus interveniens* breaking the chain of causation which would otherwise have resulted from Greenwood's breach.

The AAT found, therefore, that the overpayment in the second period did not occur 'in consequence of' Greenwood's breach of her reporting obligations; and, in any event, it was not a situation where the overpayment would not have occurred 'but for' that breach.

In respect of the first period of overpayment, the Tribunal was not satisfied that the conversation with the departmental officer known as Joan occurred prior to 27 April 1989. Therefore the causal difficulties under s.246(1) that applied in respect of the second period were not operative in the first period. The Tribunal concluded that the overpayment should be maintained in respect of the first period.

Formal decision

The Tribunal affirmed the SSAT's decision to recover the amount overpaid in the first period. It set aside the SSAT's decision with respect to the second period and directed that the amount recovered from the applicant should be refunded to her.

[P.O'C.]

Assets test: land adjacent to home

EARLAM and SECRETARY TO DSS

(No. 7335)

Decided: 6 September 1991 by R.N.J. Purvis J.

Dorothy Earlam, who was 86 years of age, was the owner of 2 pieces of land in suburban Sydney. Earlam lived on one of the pieces of land (113 B Street), which shared a common boundary with the other piece, 111 B Street. Their total area was about 1.8 hectares.

Although the 2 pieces of land were on separate titles, 113 B Street had been regarded by Earlam as part of her home for many years, and it provided vehicular access to 111 B Street. Earlam maintained that her retention of 113 B Street was necessary to ensure the effective and practicable use of 111 B Street.

The DSS decided that the value of 113 B Street should be taken into account in applying the assets test to Earlam. The SSAT rejected Earlam's appeal and she appealed to the AAT.

The legislation

At the time of the DSS decision, s.4(1) of the *Social Security Act* 1947 provided that the value of a person's 'principal home' was to be disregarded when applying the assets test.

According to s.4(4), a reference to a person's principal home included —

'the private land adjacent to the [person's] dwelling house to the extent that that private land, together with the area of the ground floor of the dwelling house, does not exceed 2 hectares'.

Land 'adjacent to' a principal home

There was no question, the AAT said, that 113 B Street was private property. The crucial question was whether it was 'adjacent to' Earlam's home, 111 B Street.

The DSS pointed to the Explanatory Memorandum on the Bill which introduced the predecessor to s.4 of the 1947 Act. The Minister had said that, where a person owned 2 connecting blocks of land, one of which contained the person's home, it was not intended that the other block 'be treated as part of the curtilage of the home'.

The AAT said that, taking into account the purpose of the social security legislation ('to provide for necessitous persons'), that legislation should not be construed narrowly. The reference to adjacent land should be read as including —

'the place in which the applicant was or is living, and the area of land that the applicant regarded or regards as part of her (or his) home'.

(Reasons, p.9)

The statement in Explanatory Memorandum, the AAT said, 'could not . . . have been intended not [*sic*] to refer to private land adjacent to a dwelling house where such private land was and is regarded as part of such dwelling house': Reasons, p.9.

The evidence established that 113 B Street was regarded by Earlam as part of her home and had always been so regarded. That land, together with 111 B Street, did not exceed 2 hectares. It was, accordingly, part of Earlam's principal home. Accordingly, the value of her interest in the property should be disregarded in applying the assets test.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with the direction that the land at 111 and 113 Street should be disregarded for the purposes of the social security legislation.

[P.H.]

Income test: accruing return investment

CREEK and REPATRIATION COMMISSION

(No. 7156)

Decided: 9 July 1991 by I.R. Thompson, A.R. Argent and P.J. Burns.

This case concerned an application to review the decision of a delegate of the Repatriation Commission to the effect that Norman Creek's income was to take account of certain withdrawals of investments made by Creek and his wife from accruing return investments.

The facts

Mr and Mrs Creek had been receiving service pensions since 1981. The basic facts were succinctly stated by the AAT as follows:

'In 1981 each of them invested in a single premium life insurance policy with The Over 50's Friendly Society: bonuses were