insurance. She said she signed the field officers' statements after being told that the sharing of a bed or living under the one roof would constitute a *de facto* relationship.

The legislation

To qualify for sole parent's pension a person must be single: *Social Security Act*, s.44(1)(a).

'Single person' is defined in s.43(1) to exclude 'married person'.

'Married person' is defined in s.3(1) as including a *de facto* spouse and '*de facto* spouse' is defined:

> '"*de facto*" spouse means a person who is living with a person of the opposite sex, to whom he or she is not legally married, in a relationship that, in the opinion of the Secretary formed as mentioned in section 3A, is a marriage-like relationship.'

Section 43A provides that a person in receipt of a sole parent's pension, who has for at least 8 weeks shared a residence with a person of the opposite sex and a child of the couple, may be required to furnish to the DSS particulars as to the relationship and the Secretary on being satisfied the pensioner has provided all relevant information must form an opinion whether a marriage-like relationship exists.

Section 3A lists matters which must be taken into account including financial aspects, nature of the household, social aspects, sexual relationship and nature of commitment to each other.

The cases

The AAT approved *Villani* (1990) 55 *SSR* 747 in which s.43A(6) was considered. In that case the AAT said that where, in a situation described in s.43A(1), the decision-maker was unable on the evidence to conclude that a marriage-like relationship did or did not exist, s.43A(6) required a decision that such a relationship existed.

The AAT's decision

The AAT found Aquilina and W to be honest people who had no clear understanding of what constituted a *de facto* or marriage-like relationship. It was satisfied W had originally stayed overnight to protect Aquilina from violence. They owned no joint assets nor were there any joint liabilities except for the credit guarantees. There was no significant pooling of financial resources, except rental payments, and day to day household expenses were not shared except that W, for his own convenience, had the telephone installed. W had, except for short periods, slept in a separate room from Aquilina, rarely ate at home and played hardly any part in the social life of the respondent and the children.

The AAT did not regard the use of the words '*de facto*' and 'spouse' in the application for health insurance and Department of Housing forms as evidence that the couple saw the relationship as a marriage-like one. The Tribunal considered that W provided physical protection and emotional support based on friendship and 'true chivalry'.

Formal decision

The AAT *affirmed* the decision of the SSAT that a marriage-like relationship did not exist.

[B.W.]

Cohabitation

HILTON and SECRETARY TO DSS (No. N89/451)

Decided: 29 October 1990 by R.N. Watterson, C.J. Stevens (M.T. Lewis dissenting).

By a majority (Watterson and Stevens) the AAT affirmed a decision of the SSAT that Hilton was eligible for a supporting mother's benefit 'at all relevant times' from 13 October 1981 until it was cancelled by the DSS as from 8 September 1988.

The issue was whether during that period Hilton was living with a man, B, as his *de facto* spouse.

The legislation

At the time, s.44(1) of the *Social Security Act* provided that a person was qualified to receive supporting mother's benefit only if that person was a single person. A single person was defined as a person who was not married: s.43(1).

According to s.3(1), a married person included a *de facto* spouse, which was defined as a person who was living with another person of the opposite sex as the spouse of that other person on a *bona fide* domestic basis although not legally married to that other person.

Findings

Hilton and Bradford had shared Bradford's home continuously from 1985 until 20 December 1989, when Hilton and her 2 children had moved to a separate residence. During that period Hilton had used the name of Bradford for various purposes, including that of registering the birth of her younger child.

Hilton had registered Bradford as the father of her 2 children, and had represented him as such to the children's school and even to her own parents. The AAT accepted her explanation that this was a facade erected in the interests of the children, and found that Bradford was not in fact the biological father.

Bradford had acted as a father figure to Hilton's children, looking after them in Hilton's absence both during and after the period of shared residence. The AAT accepted that this was consistent with the relationship being one of friendship and support.

Although sexual intercourse had taken place between Hilton and Bradford on at least one occasion, the AAT found that the relationship lacked the element of exclusivity. Hilton had had sexual relations with other men, and this was seen by her and by Bradford as being consistent with their relationship.

During the period that they had lived together, Hilton and Bradford had led largely separate social lives. Although some domestic tasks were shared, they each kept a separate household. They occupied separate rooms and did not eat meals together.

Their financial relations caused the AAT some difficulty. In November 1989, Bradford caused a transfer of his home to be registered, from himself as sole owner to himself and Hilton (named as Bradford) as joint tenants. While this would normally indicate a marriage-like relationship, the AAT found that Bradford was confused as to the nature of the legal arrangement that he was making, believing that 'he had simply made arrangements for Mrs Hilton's children to inherit his property'.

The majority laid considerable weight on Hilton's move to separate accommodation in December 1989 as supporting its view that the relationship was one of strong friendship and mutual support rather than marriage-like.

The dissenting decision

Mrs Lewis dissented from the majority decision, finding that at all relevant times Hilton was living in a *de facto* relationship with Bradford. In her reasons, she noted the many inconsistencies and conflicts in the evidence, and found that neither Hilton nor Bradford were credible witnesses. She referred to the remarks of the AAT in *Petty* (1982) 10 *SSR* 98:

> 'The proper administration of the social welfare system depends upon applicants making a full and true disclosure of their circumstances. The question whether two people who reside under the one roof are living as

husband and wife on a *bona fide* domestic basis although not legally married is difficult enough for the Director-General to resolve without people telling lies or trying to mislead. Where applicants make an untruthful or misleading statement concerning their relationship, they must realise that the inference is likely to be drawn that they are endeavouring to conceal the true nature of their relationship.'

In support of her conclusion, Mrs Lewis found that:

- whether he was the father of Hilton's children or not, he accepted and enjoyed the role of father and was registered as such
- Hilton had used the name Bradford for various purposes and had presented to a number of different persons and instrumentalities either as his wife or his *de facto* wife
- they had provided mutual support and assistance over a number of years, in a way that was consistent with a marriage-like relationship, and
- there was considerable financial interdependence and sharing, such as the transfer of the title to Bradford's home, and the provision by him to Hilton of a sum of $26 000 from his insurance settlement for the purchase of a car with no arrangements for repayment for some 3 years.

Formal decision

By a majority, the AAT affirmed the SSAT decision.

[P.O'C.]

SECRETARY TO DSS and HUNT (No. 6422)

Decided: 19 November 1990 by R.K. Todd.

Tracie Hunt was granted supporting parent's benefit in September 1982, shortly after the birth of her first child, whose father was E. At the time, she was living with her parents in NSW.

In February 1986, Hunt gave birth to a second child, also fathered by E; but she did not claim additional payment for this child.

Towards the end of 1986, Hunt moved with her parents to a Brisbane suburb; but she did not notify the DSS of this move, continuing to receive payment of her supporting parent's benefit through her brother, who remained resident at her former address.

In May 1988, the DSS learned that Hunt had moved to Queensland. After further investigation, a delegate of the applicant concluded that Hunt had lived with the father of her children, E, from at least 30 November 1986, cancelled her supporting parent's benefit on 4 August 1988 and decided that she had been overpaid $13 242.30.

On review, the SSAT set that decision aside and decided that Hunt had been qualified for supporting parent's benefit during the whole of the period in question. The DSS asked the AAT to review that decision.

The legislation

The issue in the present matter was whether, at the relevant time, Hunt was a 'de facto spouse' and therefore a 'married person' so as to be ineligible for supporting parent's benefit.

Section 6(1) of the *Social Security Act* defines 'de facto spouse' to mean —

'a person who is living with another person of the opposite sex as the spouse of that other person on a bona fide domestic basis although not legally married to that other person . . .'

The evidence

The DSS relied on evidence that, from the time of Hunt's move with her parents to the Brisbane suburb, E had spent a considerable amount of time at Hunt's and her parents' home.

The DSS also relied on a written statement, prepared by a DSS officer and signed by Hunt in July 1988, to the effect that Hunt had been living with E in a *de facto* relationship since the end of November 1986. This statement was prepared by the officer on the basis of notes taken during an interview with Hunt.

The DSS also pointed to the fact that, during the period in question, Hunt had used E's surname when obtaining employment at E's place of work in Brisbane, and had signed as E's wife an application for finance made by E.

On the other hand, Hunt maintained

- that there had been no *de facto* marriage relationship between herself and E during the period in question;
- that she had been upset and angry at the conduct of the interview by the DSS officer on 29 July 1988 and had signed the written statement prepared by without realising its full implications;
- that she had used E's surname when obtaining employment to avoid embarrassment; and
- that she had signed the application for finance as E's wife in order to assist him.

Hunt's mother and E also gave evidence to the AAT, confirming Hunt's evidence that, although E had regularly visited Hunt at her parents' home during the period in question, there had been no *de facto* marriage relationship between Hunt and E in that period. Similar evidence had been given by Hunt's father to the SSAT.

The AAT's decision

The AAT concluded that the evidence in the present case was insufficient to establish that Hunt had been living with E as his wife during the period in question.

The AAT commented on the difficulty which it faced, when constituted by a single member, in resolving disputed questions of fact which depended on the credibility of witnesses:

'I have often regretted that force of circumstances . . . required that I sit alone in the case. The lay members of the tribunal contribute much to the tribunal, and one area of particular contribution is in those cases where the real question is whether witnesses should be believed on their oath. The sense of being a member of a small jury is a powerful one.'

(Reasons, para. 19)

The AAT said that it had been assisted, in deciding that the respondent had not been living in a *de facto* marriage relationship, by the fact that the Social Security Appeals Tribunal, with a membership of two, had also examined the evidence and concluded in favour of Hunt.

Commenting on the statement signed by Hunt, the AAT said that it would not be appropriate to rely on this statement:

'The difficulties involved in placing much reliance on such a statement are well known in the law. Quite apart from the general problem of the situation of natural dominance of the interviewee by the interviewer, a problem that arises without there being any question of any improper behaviour on the part of the interviewer, the way in which such interviews are conducted accentuates the problem.'

(Reasons, para. 22)

The AAT noted that the DSS officer had constructed the statement from answers given by Hunt to various questions asked in the form which she had filled in; and continued:

'The fact is that there is only one way in which this kind of statement can be convincing, and that is by retention of a record of the questions and answers, preferably by a tape recording. This was not done here. Nor were any notes kept. It was all left to the final statement, in which unauthenticated questions and answers were rolled up together in a reconstructed form.'

The AAT then adopted a point made by the SSAT — that Hunt 'lacked the capacity to deal assertively with the departmental field officer who obtained the incriminatory statement from her': Reasons, para. 22.

Formal decision

The AAT affirmed the decision of the SSAT.

[P.H.]

PETROVIC and SECRETARY TO DSS

(No. 6596)

Decided: 23 January 1991 by B.M. Forrest, R. Webster and G. Brewer

Milan Petrovic appealed to the AAT against a decision of an SSAT to affirm a DSS decision to reject Petrovic's claim for unemployment benefit on the ground that he was a married person and his wife's income precluded him from eligibility.

Petrovic applied for unemployment benefit in May 1988. From June 1986, Petrovic and his wife's relationship had deteriorated and they did not share a bedroom. By November 1987, although living in the same house, they did not eat together nor talk to each other, all communication occurring through their son. Mr Petrovic did all his own cooking and laundry and, until he ran out of money in May 1988, all rates, insurance etc. were equally shared with his wife.

Petrovic petioned for divorce in June 1989, stating that he had separated from his wife on 15 November 1987, and the decree nisi was due to be made absolute soon after the AAT hearing.

The legislation

At the relevant time, s.3(1) of the *Social Security Act* included the following definitions:

'"married person" includes a de facto spouse but does not include-

(a) a legally married person . . . who is living separately and apart from the spouse of the person on a permanent basis; or

(b) a person who, for any special reason in any particular case, the Secretary decided should not be treated as a married person;

. . .

"unmarried person" means a person who is not a married person;'

Section 3(8) provided:

'[W]here:

(a) a person who would, apart from this subsection, be an unmarried person was formerly a married person;

(b) the person is living in his or her former matrimonial home; and

(c) the person's former spouse is also living in the same home:

the person shall, if the conditions referred to in paragraphs (b) and (c) continue to apply to the person, be treated as a married person for the purposes of this Act after the end of the period commencing on the day . . . on which those conditions were first satisfied or 14 May 1987, whichever is the later, and ending:

(d) if the person or the person's former spouse has instituted proceedings for the purpose or partly for the purpose of retaining or acquiring an interest or other right in the home or of obtaining the whole or part of the proceeds of the sale of that home — 52 weeks after the commencing day; or

(e) in any other case — 26 weeks after the commencing day.'

Did section 3(8) apply?

Counsel for Petrovic argued that para.(a) of the definition of 'married person' did not apply to him. Instead, the Secretary should find that there was a special reason for Petrovic not to be treated as a married person. However, the argument continued, this would not make him an 'unmarried person' for the purposes of the Act as this had a specific factual content, that is that he was not married which was obviously not true. Therefore, he was neither a married person nor an unmarried person, and s.3(8) did not apply because apart from that sub-section, Petrovic would not be an unmarried person. That is, it was argued that Petrovic fell into a third category, not covered by the legislation, and was therefore entitled to unemployment benefit from 12 May 1988 when he applied, until August 1989 when he was granted an invalid pension.

The 'special reasons' advanced by counsel as to why Petrovic should not be treated as a married person included his severe financial hardship — his wife did not give him any money and he was dependent on welfare organisations and money from his sister; the domestic discord between Petrovic and his wife; Petrovic's ill health, including deafness, arthritis and anxiety reaction; and Petrovic's lack of English and his social isolation.

The Tribunal accepted that Petrovic and his wife had been living separately and apart in the one home throughout the relevant period, and had been since 15 November 1987. It also accepted that there were special reasons to exercise the discretion in paragraph (b) of the definition of married person, so that Petrovic should not be treated as a married person. However, it did not accept the submission that Petrovic fell into some third, undefined category.

The AAT followed the Federal Court decision in *Weatherall* (1990) 56 *SSR* 764, so that if the discretion in paragraph (b) was applied in Petrovic's case, this meant he became an unmarried person who was formerly a married person, for the purposes of s.3(8). Consequently, Petrovic had to be treated as a married person from 15 May 1988, a date 26 weeks after the date of separation of Petrovic and his wife. This meant that Petrovic was eligible for only 3 days of unemployment benefit.

Formal decison

The AAt decided that Petrovic was to be treated as a married person on and from 15 May 1988.

[J.M.]

RODD and SECRETARY TO DSS

(No. W90/135)

Decided: 21 January 1991 by P.W. Johnston.

Judith Rodd appealed against an SSAT decision affirming a DSS decision to cancel her sole parent's pension on the ground that she was not a single person.

Rodd told the AAT she had commenced living with a Mr Stanik as his *de facto* spouse in 1980. He was the father of 3 of her 4 children, all of whom used his surname and called him 'Dad'.

Between 1980 and 1986 Stanik was receiving unemployment benefit, including additional benefit for Rodd and the children. In 1986 Stanik left and Rodd was granted supporting parent's benefit.

Stanik returned to Rodd's home some time in 1989, probably May. The people he had been living with had left the city suddenly and Stanik had been living in his car. His unemployment benefit had been cancelled after a field officer visit and he was required to provide a residential address before it could be restored. Rodd said she accepted Stanik back because he had nowhere else to go.

Rodd explained the nature of her relationship with Stanik prior to his departure in 1986. Rodd said she cooked Stanik's meals, and did his washing. All income was shared, and bills were paid out of Stanik's unemployment benefit. They shopped together, went out socially together, and had a sexual relationship until soon before Stanik left. Both Stanik and Rodd described this as a marriage-like relationship.

Since Stanik's return in 1989, he had bought his own food and cooked it, eating at a different time to Rodd and the children. They each had their own bank accounts, and Stanik made no contribution to the household expenses; instead, he did some gardening. Stanik

did his own washing and played little part in child rearing. He drove the children to school if it was raining and took Rodd shopping once a fortnight, occasionally buying a take-away meal for Rodd and the children.

Stanik and Rodd no longer had a sexual relationship, and he had his own bedroom. They did not go out together socially and Rodd described Stanik as a friend. Stanik in turn stated that he had 'no feelings really' for Rodd. Rodd said that she had asked Stanik to leave a couple of times, but had not pressed the matter. Stanik stated that he would contribute to household expenses if asked, but he had not been asked.

On 9 February 1990, Rodd was visited by a DSS field officer and made a statement that she was about to commence living with Stanik in a *de facto* relationship. The Department then cancelled her pension.

The AAT said that, whilst Rodd's statement was a factor which had to be taken into account in its assessment of the situation, it was only one of the relevant matters; the overall circumstances had to be weighed objectively.

The legislation

The *Social Security Act* provides that in determining whether a person is living in a marriage-like relationship, the decision maker must have regard to all the circumstances of the relationship, including matters mentioned in s.3A of the Act.

These factors are the financial aspects of the relationship, the nature of the household, the social aspects of the relationship, any sexual relationship and the nature of the commitment between the people.

Section 43 provides that in order to be eleigible for a sole parent's pension, an applicant must be a single person.

Section 43A of the Act was in force at the time. This allows the DSS, where one of a number of trigger factors apply (for example, where 2 people of the opposite sex have lived together for 8 weeks with a child of both of them), to issue a notice seeking certain information. Once this information is given, the Secretary then decides whether the person is living in a marriage-like relationship: s.43A(5). The Secretary must not form the opinion that the pensioner is not living in a marriage like relationship, unless the weight of the evidence supports that view: s.43A(6).

The legislation applied

In this case, no notice had been issued to Rodd under s.43A. The AAT considered whether s.43A(6) could apply without such a notice having been given, but concluded it did not have to decide the issue.

The AAT suggested that s.3A could probably be considered as a 'stand-alone' provision, and noted that it codified the factors which had been treated as relevant to establishing the existence of a de facto relationship over many years.

In relation to Rodd and Stanik's financial relationship, the AAT noted that there was no joint ownership of any property. Apart from Rodd's current dependence on Stanik's continuing benefit, Stanik made no contribution to the rent, utilities or other household expenses. Stanik bought his own food.

The Tribunal noted that Stanik took little role in relation to the children, seeing it as Rodd's job. Rodd had little idea what Stanik did with his time. The gardening he did was because he paid no rent.

Rodd had told the AAT that she was known as Mrs Stanik by the school and the children had the surname Stanik. She had occasionally signed her name as Stanik but, in the Tribunal's view, this was 'consistent with her desire to project a certain public image for the sake of her children. It does not amount to a summary of how she subjectively regards her relationship . . .': Reasons, para. 19.

The AAT accepted that there was no longer a sexual relationship between the parties. In relation to the statement made by Rodd to the DSS officer, the AAT, while careful not to criticise Departmental practice nor the officer concerned, stated:

> '[T]here are often many irrational reasons why people sign such statements and in this instance, the Tribunal is not prepared to attach much weight to the statement.'

(Reasons, para. 22)

In relation to the nature of the commitment to each other, the AAT noted that Rodd and Stanik had known each other for a long time, but there was little emotional support provided and it was unclear how long the relationship might continue. It further found that there was no evidence that other people regarded their relationship as marriage-like.

The Tribunal summarised its considerations:

> 'In this case, perhaps more than in most, the Tribunal had the benefit of seeing and hearing the principal parties. Whether two people are living in any kind of relationship depends on there being some degree of mutuality and reciprocity between the parties. If consideration were given solely to the applicant's evidence, one might be persuaded that she was not a "single person" for the purposes of the s.44 of the Act and was living in what could be described as a "de facto" relationship, "equivalent to marriage". In this respect, the Tribunal appreciates why the majority decision of the SSAT found it difficult to understand why the applicant had not insisted on Mr Stanik assisting her with payment of rent and household bills. It might also seem to one unfamiliar with the parties somewhat incredulous that the applicant has not pressed Mr Stanik to leave. But if regard is had to the relationship in terms of Mr Stanik's participation and contribution a different complexion can be ascribed to the relationship. At the end of the day, this Tribunal was strongly persuaded that Mr Stanik was a man who was to a large degree self-centred and self-interested, and largely indifferent to the overall responsibilities that one might have expected someone in a mutual relationship to have undertaken. The little he did do . . . should be discounted as a minimal contribution consistent with the barest regard to civility. The fact he was able to stay in the same house as the applicant was a product of a convenient situation and the applicant's unwillingness to confront him and press him to leave.
>
> . . .
>
> It is true that some and perhaps many marriages are attended with an absence of emotional closeness, are devoid of any regard for the other partner, and lack any perception of mutual society. But it is a fallacy to reverse the proposition and say because many marriages are like the relationship of the applicant and Mr Stanik, their relationship must therefore be marriage-like.'

(Reasons, paras 27-29)

The Tribunal concluded :

> 'To the extent it is necessary to do so, the Tribunal is satisfied that the weight of evidence supports the formation of an opinion, having regard to all the matters specified in s.3A, that the applicant was not living in a marriage-like relationship.'

(Reasons, para. 30)

Formal decision

The Tribunal set aside the decision under review and substituted for it a decision that the applicant was and is a single person for the purposes of the Act.

[J.M.]