The legislation

As agreed by the parties, the provisions of the *Social Security Act* 1947 were applied in this case. Section 129(3)(a) provided that special benefit was not payable to a person in respect of a period unless the person was 'an Australian resident' or fitted into one of a number of other categories, none of which applied in this case.

So far as was relevant s.3(1) stated:

> ' . . . unless the contrary intention appears . . . 'Australian resident' means a person who resides in Australia and who is: (a) an Australian citizen; [or] (b) a person who is . . . the holder of a valid permanent entry permit.'

The facts

The facts were not disputed. Mr and Mrs Morais and their 3 children had been living in Australia since June 1988. They had been sponsored as migrants by Mr Morais' employer, who unfortunately went into liquidation in 1989.

Their application in August 1989 for permanent resident status was originally rejected because Mr Morais had lost his job but was approved in June 1991 after review by the Immigration Review Tribunal. They were actually issued with permanent resident status on 26 August 1991.

In the meantime, on 13 May 1991, Mrs Morais applied for special benefit, entitlement to which was denied on 23 May 1991.

The issue

The only issue considered by the AAT was whether the s.3(1) definition of 'Australian resident' applied to that term occurring in s.129(3)(a).

Morais' solicitor argued that the s.3(1) definition did not apply to s.129(3). Reliance was placed upon *Tickle Industries Pty Ltd v Hann and Richardson* (1973-1974) 2 ALR 281, 289 where Barwick CJ said that it was 'a sound rule of statutory construction that a meaning of the language employed by the legislature which would produce an unjust or capricious result is to be avoided' and similar statements in *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231. It was submitted that the substitution of the term 'resident of Australia' by 'Australian resident' in 1990 was to prevent people from simply becoming residents and then becoming entitled to a special benefit. The intention was to limit special benefit to those who had exhibited the fullest intention to remain in Australia, such as the Morais had.

Applicability of the s.3(1) definition of 'Australian resident'

The AAT had little hesitation in deciding that the s.3(1) definition of 'Australian resident' applied to s.129(3). There was no 'contrary intention' making the definition inapplicable. The legislative history of the amendments to s.129(3) supported this conclusion. It appeared that in 1990 Parliament had clearly chosen to move from a requirement of 'resident of Australia' to 'Australian resident' as defined in s.3(1). Accordingly the AAT concluded that:

> 'in view of the legislative history of the provision, this is not a case in which Parliament and the draftsman could not have envisaged the anomaly or could not have been prepared to accept it.'

(Reasons, para.18)

Formal decision

The AAT set aside the SSAT decision and substituted a new decision that Mrs Morais is not an Australian resident and was, therefore, ineligible for a special benefit by virtue of s.129(3) of the *Social Security Act* 1947.

[D.M.]

Widow B pension: 'entitled person'

SECRETARY TO DSS and AKRITIDIS

(No. 8034)

Decided: 19 June 1992 by R. Balmford, G. Brewer and J. Brassil.

The DSS sought review of a decision of the SSAT setting aside the delegate's decision of 5 July 1991 to cancel Akritidis' widow B pension.

The facts

Akritidis claimed widow's pension in July 1973, her husband having deserted her on 18 March 1973. She was granted widow's pension with effect from 25 September 1973. On 17 March 1974 she returned to Greece and had not resided in Australia since that time. Her husband died in Greece on 24 November 1986.

She continued to receive widow's pension. On a review form completed on 17 May 1989 she ticked a box indicating that she was 'widowed'. On a previous review form completed on 2 September 1986 she had ticked a box indicating that she was 'separated'. The change in her response did not prompt any further enquiry by the DSS nor did she lodge a new claim on the basis of her new marital status. Payment of her pension continued.

On 26 April 1991 the DSS wrote to Akritidis advising her that under changes to the rules on payment overseas of Class B widow's pension, her entitlement to payment would cease if she stayed away from Australia for more than 12 months after 1 July 1990.

On 5 July 1991 a decision was made to cancel her widow B pension. Akritidis appealed to the SSAT which set aside the decision on the ground that she fell within the definition of 'entitled person' in s.1216B(2).

The legislation

The qualifications for widow B pension are set out in s.362 of the *Social Security Act* 1991. In the case of a woman who was legally married and whose husband has died, there are 3 alternative bases of residential qualification. She is qualified if she had been an Australian resident for at least 5 years continuously immediately before claiming the pension, or for a continuous period of at least 10 years at any time, or if both she and her husband were Australian residents at the time of her husband's death.

Under s.1216, a woman who has been an Australian resident, has been outside Australia continuously for a period of 12 months and at the expiration of the 12 month period is not in Australia or in a specified foreign country is disqualified for widow B pension. This is subject to s.1216B(1), which provides that a woman's qualification is not affected by her being outside Australia while an 'entitled person'.

There are 3 categories of 'entitled persons' specified in s.1216B(2), the relevant one being in para. (b), viz. 'a woman in receipt of a widow B pension because she was legally married and her husband has died'.

'Entitled person'

Akritidis was a woman who had been an Australian resident, had been outside Australia continuously for a period of 12 months immediately prior to 1 July 191 and on that date was not in Australia nor in a 'specified foreign country'. Under ss.1216 and 1216B she was no longer qualified for widow B

pension unless she fell within the definition of 'entitled person' in s.1216B(2).

Akritidis argued that she fell within para. (b) of the sub-section as being 'a woman in receipt of widow B pension because she was legally married and her husband has died'. She had originally received widow B pension as a deserted wife but had continued to receive it after her husband's death as a widowed person, which was an alternative ground of qualification.

The AAT did not accept this argument. After the death of her husband in 1986, Akritidis was no longer a 'deserted wife' in terms of the definitions in s.59 of the 1947 Act. Thus her qualification for Class B widow's pension ceased. She could have lodged a new claim for widow's pension on the ground that she was now a widowed person, but at that time she was no longer qualified in respect of the residential requirements of s.60(1).

She therefore received widow's pension after the death of her husband without being qualified for it. She was not in receipt of the widow's pension 'because' her husband had died, and therefore was not an 'entitled person' under s.1216B(2)(b).

Formal decision

The AAT set aside the SSAT decision and substituted a decision that Akritidis was not an 'entitled person' in terms of the definition of that expression in s.1216B(2).

[P.O'C.]

Widow's pension: cohabitation

BOWERS and SECRETARY TO DSS

(No. 7811)

Decided: 19 February 1992 by J. Kiosoglous, D. Trowse and J. Hancock.

On 3 January 1991 the DSS cancelled Bowers' Class B widow's pension. The SSAT affirmed the decision of the DSS, and Bowers applied to the AAT.

The legislation

The issue was whether Bowers was a 'widow' within the meaning of Schedule 1B *Social Security Act* 1947. The definition of 'widow' excluded 'a woman who is living with a man as his wife on a *bona fide* domestic basis although not legally married to him'.

The principles to be applied in determining this question had been discussed in a number of cases, notably *Lambe v Director-General of Social Services* (1981) 4 *SSR* 43, *Re Tang* (1981) 2 *SSR* 15 and *Re Waterford* (1980) 1 *SSR* 1.

The facts

Bowers' husband died on 29 August 1987, and Bowers was granted widow's pension from 3 September 1987. In December 1987 Mr G., who was married but living separately from his wife, commenced to live with Bowers at her home. Apart from a 3 week period, he had continued to live at her home from that time.

The AAT found that Bowers and Mr G. did not own assets jointly, there was no significant pooling of financial resources and no sharing of household expenses, all of which were paid by Bowers. Mr G. took no interest in or responsibility for the care of Bowers' children. They shared a bed and had an ongoing sexual relationship. They had not held themselves out as a married couple to others. They engaged regularly in social activities together. There was permanence and commitment in the relationship and each derived companionship and emotional support from the relationship. The relationship was an exclusive one.

Weighing the factors

Particular weight was placed on the factors of commitment, permanence and ongoing exclusive sexual relationship as supporting a finding of a marriage-like relationship. Some weight was placed on the common social activities.

While the lack of joint responsibility for housework and the care of children told against a marriage-like relationship, little weight was given to those factors. It is very common in marriage for the wife to do most of the housework and in the present case Bowers' children 'were not very receptive towards Mr G.'.

The AAT attached little weight to written statements recorded by DSS officers in which Bowers described the relationship as 'marriage-like' and referred to Mr G. as her 'boyfriend'. The AAT said:

> 'Our impression is that neither the applicant nor Mr G. had perceived the need, until questioned by the Department, to categorise their kind of relationship. Without the benefit of forethought, the answers supplied are of limited evidentiary value.'

Financial support

Bowers argued that the relationship was not marriage-like because of the lack of financial support offered to her by Mr G., who contributed nothing to their joint household expenses.

The AAT referred to *Re Tang* (1981) 2 *SSR* 15 in which the AAT said that the duty of a husband to support his wife had now been recast as a general duty of either spouse to support the other to the extent to which they are able (*Family Law Act* 1975, s.72). Bowers' argument failed to take account of the financial support that she provided to Mr G., in terms of free accommodation, food and domestic services which he otherwise would be obliged to procure for himself.

Furthermore, the reason for Mr G's failure to contribute financially was his inability to do so. The absence of jointly owned assets was referable to their situation as a mature couple living in a home already owned, equipped and furnished by one of them. Their financial arrangements supported the existence of a marriage-like relationship.

Formal decision

The AAT affirmed the decision under review.

[P.O'C.]

Invalid pension: degree of permanent incapacity

SECRETARY TO DSS and HARDY

(No. 7772)

Decided: 26 February 1992 by B.A. Barbour, J. Kalowski and P. Parker.

Hardy was 39 years of age, married, with one dependent child. He left school aged 15 and, after an unsuccessful apprenticeship as a draftsman, trained as a carpenter and joiner. He worked as a carpenter until a motor cycle accident in 1975 in which he injured his left ankle, back and neck. He continued working on light duties