nights per week primarily for his own convenience, as the house was close to his place of employment, where he also drank after work. Ridley incorrectly stated to the DSS that she was paying lodging of $40 per week to R. W. Ridley of the same address.

In July 1981 Ridley and Robert Ridley entered into a contract to purchase jointly a property at Wanneroo. Ridley's parents were willing to contribute the deposit, but she could not service a loan. Robert Ridley had no savings, but was eligible for a loan from Defence Service Homes Corporation. As a condition of providing the deposit, Ridley's parents required that her name be on the title. In order to obtain the loan in their joint names, they made a statement on the loan application that they had been in a de facto marriage relationship for three years and resided in the same house.

It was agreed that Ridley and her children would live in the home, and that Robert Ridley would continue the previous arrangement of sleeping there one or two nights per week as it suited him. Ridley made all the mortgage payments and she and Mr Ridley shared equally the water and land rates. Ridley continued to claim rent allowance from the DSS although she was no longer paying rent.

Ridley became pregant to Mr Ridley. She gave birth to a son Gavin in April 1982. Mr Ridley was not at all interested in the baby. Sexual relations ceased during the pregnancy but Mr Ridley continued to stay as before, for his own convenience.

After Mr Ridley's mother died in January 1983, he agreed with his father that a self-contained dwelling be erected at the rear of the Wanneroo property for the joint occupation of the two Ridley men. Mr Ridley senior provided the funds for the construction.

Following the visit of a Field Officer, Ridley's benefit was suspended on 7 August 1987. On 5 July 1988 the DSS advised Ridley that an overpayment had been raised in an amount later fixed at $46 339. Ridley appealed to the SSAT, denying that she and Ridley had been living on a basis similar to that of a married couple. She withdrew her appeal in view of a pending prosecution.

Following suspension of her benefit, Ridley decided to sell the property and return to live with her parents in Cowra. To prevent the sale of his home, Mr Ridley agreed that they would live as a married couple and that he would support her. They took up residence together in the main house in October 1987, and married in January 1988.

In July 1989, after a trial, Ridley was convicted of offences under the Act and on 14 August 1989 she was sentenced to 18 months imprisonment and ordered to pay reparation to the Commonwealth in the sum of $40 405. The Director of Public Prosecutions did not pursue recovery of the moneys due under the reparation order. Following her release from prison, Ridley recommenced her appeal to the SSAT, expressly denying that she and Mr Ridley had been living in a de facto relationship.

Evaluation of evidence

The AAT accepted the truth of the evidence given by Ridley, which was corroborated on some aspects by her 19 year old son and her mother. She was able to account for the evidence against her in a way which was reasonably credible and consistent.

The DSS case relied on circumstantial evidence. Ridley had at all times when interviewed by a DSS officer denied that she was living with Ridley in a de facto relationship. There was no evidence of shared finances, shared family life or that Mr Ridley ever placed his possessions in Ridley's house. Although Ridley had made false representations to the Department concerning her living arrangements, the purpose was not necessarily to hide the existence of a de facto relationship. She may have wished merely to avoid the risk that the DSS might wrongly form that conclusion.

The AAT could not be reasonably satisfied that Ridley ever lived with Mr Ridley as his de facto wife during the relevant period.

Jurisdiction

The AAT rejected a submission by the DSS that it lacked jurisdiction to review the matter, or that it should not do so, in view of the previous decision of a criminal court to convict the applicant. In finding that it had jurisdiction, the AAT followed previous decisions in *Re Secretary, DSS and Pomersbach* (1992) 65 *SSR* 912; *Re Secretary, DSS and Mariot* (1992) 66 *SSR* 937; and *Re WVC and Secretary, DSS* (1992) 67 *SSR* 951. The reparation order was not affected by the AAT's decision. The AAT's decision replaced the original executive decision of the Secretary.

Formal decision

The AAT set aside both the decisions of the delegate and the SSAT affirming the delegate's decision, found that Ridley was during the period from 16 July 1981 to 6 August 1987 not living with a man as his de facto wife and referred the matter back to the Secretary to calculate Ridley's entitlements.

[PO'C]

Overpayment: married person

ARMIJO and SECRETARY TO DSS

(No. 8120)

Decided: 24 July 1992 by M.D. Allen and J. Kalowski.

The supporting parent's benefit being paid to Lusvenia Armijo was cancelled on 24 September 1986 on the basis that she was married. On 17 July 1987, the DSS raised an overpayment of $24 657.10 for the period 23 September 1982 to 24 July 1986, which Armijo was requested to repay.

Armijo requested review of that decision, which was affirmed by an Authorised Review Officer on 16 March 1988.

On review, the SSAT affirmed that decision and a further decision of DSS on 3 April 1992 not to waive the overpayment.

Armijo then requested review by the AAT of both decisions.

The facts

Armijo arrived in Australia in 1974, pregnant with her son Jason. Shortly afterwards she and two other women moved into a house which was occupied by her second cousin, M, and his brother. After the birth of her son, Armijo was paid supporting parent's benefit. She returned to work in 1981 and the benefit was cancelled. After losing her job in 1982, Armijo was paid the supporting parent's benefit again.

In the meantime Armijo, M and 3 other persons had bought a house in Randwick as tenants in common in equal shares. In 1981 Armijo and M bought a property in Paddington as joint tenants. The purchase was financed by a mortgage. Armijo and M

were married on 23 November 1981. When the DSS became aware of this in 1987, Armijo's benefit was cancelled.

The law

The AAT applied the decision of *Cirkovski* (1992) 67 *SSR* 955 when deciding which Act should be applied. The 1947 Act applied to the decision to raise the overpayment and the 1991 Act to the decision to recover the overpayment.

Relying on the Federal Court decision of *Hales* (1983) 47 ALR 281, the AAT agreed with the DSS that it was reviewing two separate decisions.

Section 3(1) of the 1947 Act defined a married person as not including a person who was living separately and apart from the person's spouse, or who for any special reason should not be treated as a married person.

The evidence

Armijo told the AAT that the marriage was a sham to help M gain custody of his daughters living in Peru. This would enable him to bring them to Australia. Both Armijo and M told the AAT that the marriage had never been consummated. The only time they held themselves out to be married was to the immigration authorities.

However the evidence showed that in fact M had stated on several occasions that he was married when it was to his advantage. M had applied for a Bankcard and a Mastercard and had stated that he was married to Armijo on both forms.

M's explanation to the AAT that he did not understand the forms was not accepted as he had a good command of English and held a number of influential positions in the community.

In her application for supporting parent's benefit, Armijo had stated that she was single and paying rent to Mr and Mrs M at the same address where she was living. At that time Armijo was married and living with M at the Randwick address.

The AAT's assessment

After the AAT heard all the evidence it found that there were:

> 'numerous other examples which can be taken from the evidence of Juan Montesinos to demonstrate that his evidence was unsatisfactory and contradictory. Neither did his demeanour inspire confidence in his veracity . . . [t]he Applicant herself had a pathological inability to give direct and frank evidence.'

(Reasons, paras 38 and 39).

The AAT concluded that the relationship between Armijo and M was unclear. There was evidence of deliberate attempts to mislead several government departments. Armijo submitted that as she did not have an interpreter at the interview with DSS, much of the evidence based on that interview should be rejected. The AAT rejected that submission, finding evidence that Armijo understood far more English than she admitted.

Armijo and M held property jointly, had joint bank accounts and Armijo had credit cards in M's name.

The AAT decided that Armijo and M were not living separately and apart and there was no special reason not to treat Armijo as a married person. The AAT did not think it appropriate 'to seek to explain away inconsistencies in evidence by simply referring to cultural differences'.

Waiver

The Ministerial directions published on 13 May 1992 were applied by the AAT when considering the waiver provisions under s.1237 of the 1991 Act. It was accepted that Armijo was living in straitened financial circumstances and was unlikely to ever repay the total overpayment. The AAT concluded that it could waive the overpayment only if special circumstances existed.

In deciding on the rate of recovery the SSAT had been influenced adversely by the fact that Armijo was represented by a barrister and that her son attended a private school. The AAT rejected these considerations and reduced the rate of recovery, largely to avoid an adverse effect on Armijo's son, who was in his final year of secondary study at a private school.

Formal decision

The AAT affirmed the decision to raise the overpayment but set aside the decision to recover the amount at the rate of $59.71 per week, reducing the rate to $50 per week.

[C.H.]

Wife's pension: male to female transexual

SECRETARY TO DSS and SRA

(No. 8219)

Decided: 4 September 1992 by D.F. O'Connor, B.A. Barbour and D.J. Grimes.

SRA was a pre-operative (male to female) transexual. The SSAT had decided that SRA was entitled to a wife pension on the basis that SRA was living in a *de facto* relationship with a male pensioner, B. The Department appealed against this decision to the AAT.

SRA was born a male child in 1965. She had felt different from an early age and when she was 16 she realised she was a transexual and sought psychological counselling. She also saw psychiatrists and an endocrinologist, commencing hormone therapy in March 1983. From April 1983 she started to present as a woman, and had done so ever since.

SRA had been living with B since April 1984. SRA had been in receipt of unemployment benefit since February 1984, in a female name. She was advised in January 1985 that wife's pension (as it was called under the 1947 Act) was the appropriate payment by a field officer. She did not tell the officer that she was a transexual because she knew she was a woman and had been living as one for 2 years. Wife's pension was granted from 10 January 1985.

B and SRA separated in February 1987 for a short time and B told the DSS; SRA's wife's pension was cancelled. SRA commenced to receive unemployment benefit. In March 1987 the DSS obtained a copy of SRA's birth certificate and received anonymous advice that B was living with another man, SRA.

In November 1987 SRA told the DSS that she and B were living together again, but that she wanted to stay on unemployment benefit. However, she was transferred to wife's pension from 26 November 1987. In October 1990, the DSS informed SRA that she did not qualify for wife's pension.

In 1989, SRA again saw her psychiatrist who said she was ready for sex reassignment surgery. However, SRA did not pursue this because of the cost, some $5000. A series of doctors lodged