ceived $90,714 into their trust account upon the sale of the property. They retained over $42,000 for costs and disbursements and the respondent paid $48,000 off his housing loan on the Waramanga property. He was also repaying the loan received from his son.

When special benefit was cancelled the respondent had two insurance policies worth a total of $19,000, equity in two properties, interests in property and equity trusts to the value of $12,000, a forestry plantation held in trust for his son and he was in receipt of superannuation payments of $192.11 per fortnight. He also had debts which totalled over $246,000.

Was the respondent unable to earn a sufficient livelihood?

The Tribunal reached the conclusion that Mr Kowalski was unable to earn a sufficient livelihood for himself. There was too little evidence to suggest that the respondent's business ventures would generate sufficient income for him to live on. It was then necessary to consider whether it was reasonable to expect him to surrender his life assurance policies or seek early redemption of his unit trusts rather than grant him special benefit.

The DSS argued that the Tribunal had decided in *Pardew* (unreported, V86/129, decided 5 December 1986) that the community should not be required to support a person so that the person might avoid a loss on the realisation of assets. The AAT commented:

> '[t]he Tribunal acknowledges that many previous decisions of this Tribunal have considered that where a claimant has available to them resources by way of readily realisable assets, it is unreasonable, in the absence of a strong counter argument, to expect that the government should subsidise the claimant's standard of living and enable them to retain the benefit of their assets. The Tribunal is also mindful that, in its consideration of earlier decisions, the findings are made on particular facts and are not stating principles of law, however these findings do provide invaluable guidance.'

(Reasons, para.8)

The respondent submitted that he should not be expected to live off his assets without consideration being given to his liabilities at the time special benefit was cancelled. He repaid money to his son and incurred legal costs at this time. His decision to also reduce his mortgage commitments through the payment of $48,000 off this loan rather than live off the money and the interest was taken in order to reduce his monthly repayments rather than face high repayments in the future.

The AAT observed:

> '[t]he Tribunal is of the opinion that the respondent's sense of urgency in relation to the repayment of his debt to his son and debt to the mortgagee was reasonable and understandable. It was the respondent's evidence that his son was needing to be repaid as he was under pressure from his financiers, and the respondent [sic] mortgagors had, in the past, placed a caveat on his Waramanga property due to arrears in mortgage repayments. Throughout the relevant period and at the time of the hearing evidence was before the Tribunal to suggest that the respondent's home was in urgent need of repair and that he was relying on the support of friends to furnish the house. However, the Tribunal acknowledges that the respondent was not in a position of dire financial hardship, and at the time of cancellation he was in a position to realise some investments and life assurance policies.'

But the AAT referred to the decision in *Schofield* (1991) 65 *SSR* 905 where the Tribunal had said that it was not necessary to prove extreme financial hardship to become entitled to special benefit. Thus the AAT concluded in the present case:

> 'During the relevant period and at the date of hearing the respondent had in fact realised some of these assets, and it was his belief that he had deprived himself and his dependent son of a financially secure future by this action. During the relevant period the respondent was 66 years of age, involved in a protracted property dispute, and was experiencing extreme stress due to his financial situation. The Tribunal believes it reasonable that a man of his age and limited future earning capacity would wish to maintain security by means of a secure house and some financial investment.'

Formal decision

The AAT affirmed the decision under review.

[B.S.]

Overpayment: contributing administrative error

LEWIS and SECRETARY TO DSS (No. 8887)

Decided: 3 August 1993 by J.A. Kiosoglous, D.J. Trowse, and R.G. Elmslie.

The applicants asked the AAT to review a DSS decision to raise an overpayment of invalid pension and wife's pension.

The facts

The applicants lived together on a property in South Australia. Mr Lewis had been injured in an accident in 1985 and was now a quadriplegic. He was confined to a wheelchair and suffered paralysis from the waist down. He ran a piggery on the property in partnership with his brother. Mr Lewis had agreed to purchase his brother's share in the piggery from his brother for $74,659. The piggery made small losses.

Mrs Lewis is a schoolteacher and it was increases in her salary which caused the overpayments to occur. Mr Lewis had been granted invalid pension in August 1986. In May 1990 he advised the DSS that he had married and that his wife's earnings were $966.50 per fortnight. Mrs Lewis applied for a wife's pension in the same month. In July 1990 the DSS incorrectly calculated the applicants' entitlements as being $235.40 for both Mr and Mrs Lewis. Later that month the DSS wrote to the applicants to advise them of this error and their re-calculated payment of $29.20 per fortnight. Each of the letters advised the applicants of the requirement to notify the DSS if their financial circumstances changed.

In August 1990 the DSS wrote again to the applicants to advise them of overpayments of $1237.20 and $412.40 caused by their failure to notify the DSS of their marriage within 14 days. Later that month the DSS wrote and apologised to the applicants as the overpayment had been raised in error. On 19 December 1990 the DSS re-calculated entitlements based on information provided by Mrs Lewis' employer concerning her salary. This calculation was incorrect as the DSS used her net earnings and not her gross earnings. In February 1992 Mr Lewis advised the DSS of a salary rise received by his wife and on the basis of that advice the DSS cancelled their pensions. Later that month the DSS received information from Mrs Lewis' employer giving details of her salary from 1990 to 1992. On the basis of that advice the DSS raised an overpayment of $3065.30 for both applicants.

The legislation

The 1947 Act was relevant for ascertaining the applicants' obligations with respect to notifying the DSS of change of circumstances. Section 163 of that Act provided that the Secretary could issue a notice to any person requiring details of a change of financial circumstances.

The 1991 Act was relevant to overpayment and waiver. Section 1224 provides that where an amount has been paid to a recipient by way of pension, benefit or allowance and the amount was paid because the recipient or another person made a false statement or a false representation or failed or omitted to comply with a provision of the Act or the 1947 Act then the amount paid is a debt due to the Commonwealth.

The Tribunal referred to the Federal Court decisions in *Greenwood* (1992) 67 *SSR* 963, *Hangan* (1982) 11 *SSR* 115 and *Hales (1983)* 13 *SSR* 136. These decisions bound the Tribunal to the view that

the legislation provides that if the omission or failure to comply with the Act was a contributing cause of the overpayment then the total amount paid is a debt due to the Commonwealth.

Section 1347 provides that the Secretary may decide to waive the right to recover the debt owed. In the present case the existence of special circumstances as discussed by the Federal Court in *Beadle* (1985) 26 SSR 321 would justify the exercise of the discretion.

Was there a debt due to the Commonwealth?

The DSS argued that the applicants had failed to notify the Department of salary increases as required by the letters sent to them. It was submitted that their failure caused the overpayments and so the amount should be held to be a debt due to the Commonwealth. The applicants argued that they notified the DSS as required and that there had been no failure on their part to comply with the Act. The Tribunal concluded that there had been a failure by the applicants as there were occasions when it was clear that the DSS had not been notified of a change in the applicants' financial circumstances, even though it was also clear that 'those omissions were not perpetrated as part of any plan to deceive or defraud' and 'that the payments in dispute were received by the applicants in good faith': Reasons, para.9.

The Tribunal then considered whether this omission had caused the overpayment. It concluded:

> '[a]n examination of the file demonstrates a series of incorrect calculations by the Department. Such a number is a cause for serious concern. Furthermore, it is clear that the incorrect use by the Department of net salary in its calculations of 19 December 1990 was the first step in this imbroglio and that the result of that error accounts for a substantial portion of the amounts of overpayment. However, in view of the earlier finding that the applicants had omitted to provide notification, it must be recognised that the Department was denied the further opportunity of righting the wrong it had created. For that reason, the Tribunal concludes that the omission of disclosure represents a contributing cause to the overpayments and, on the authority of *Hales* [supra] and *Hangan* [supra], those excess payments are properly classified as debts due to the Commonwealth.'

(Reasons, para.9)

Were there 'special circumstances' for waiver of the debt?

The AAT referred to the need to treat every case on its merits when considering whether special circumstances exist. The Tribunal noted that in *Riddell* (1993) 73 *SSR* 1067 the Federal Court had said that the factors to consider were 'individual hardship, need, fairness, reasonableness, and whatever else may move an administration'.

The Tribunal commented that Mr Lewis' medical condition came within the last category. Mr Lewis was a quadriplegic who depended on the public health system. He also suffered from severe sinusitis and an allergic condition which caused an asthmatic reaction. He was waiting for an appointment to discuss the possibility of nasal surgery. His medication for his various conditions also cost $300 every three months. These conditions were placing considerable financial strain on the applicants. A new wheelchair would soon be needed at a cost of $2000 as well as a new shower/toilet chair and physiotherapy treatment. There was other evidence that the applicants were suffering financial hardship. Their income was only marginally more than their household expenditure and they had significant debts.

The Department's administrative errors were also relevant. The Tribunal said:

> 'In addressing the matter of Departmental error, [the Tribunal] finds that in its view this is relevant to any consideration of the factors — as described in *Riddell* [supra] — of fairness and reasonableness. The Tribunal is left in no doubt that both overpayments have, as their origin, the mistake made by the Department on 19 December 1990. But for that error, the amounts in dispute would be of minor proportions. The contributory role of the applicants is acknowledged and yet the less than satisfactory performance of the Department suggests that notification of the increases on 7 February 1991 and 5 September 1991 may not have rectified the position. In any event, the Tribunal is of the view that because of Departmental error, the recovery action now in train is unfair and unreasonable. This is particularly so where the applicants have received the moneys in good faith.'

(Reasons, p.13)

The issue of waiver is a matter of balance, said the Tribunal. On the one hand is the fact that public funds have been paid to persons who are not entitled to them. On the other side is the presence of special circumstances. In this case the medical condition of the applicant, individual hardship, and fairness and reasonableness combined to justify a substantial waiver of the debts.

Formal decision

The AAT set aside the decision under review and substituted a decision that a portion of each debt be waived, namely that each debt be reduced from $3382.83 to $1000 and that any repayments made be treated as further offsets against those reduced debts.

[B.S.]

Marriage-like relationship: 'experimental' relationship

PECK and SECRETARY TO DSS No. 8357

Decided: 2 November 1992 by P.W. Johnston.

The SSAT had affirmed a decision of a delegate that Peck was not qualified for Sole Parent Pension (SPP) on the ground that she was a 'member of a couple' as she was living in a marriage-like relationship with Charles Tory. Peck. Peck sought review of that decision.

The facts were not in dispute. Peck had been receiving SPP discontinuously for herself and the two children of her marriage, aged 12 and 14 at the time of hearing, since she separated from her husband in 1987. In March 1992 she declared in a review form that Tory, whom she described as a friend, was residing at the same address and would continue to do so 'for the time being'. Peck and Tory each made written statements to the DSS.

Peck described their relationship as 'experimental', explaining that her experience of marriage had been one of dependence and subservience and that it was important to her to preserve her freedom and independence. This would be defeated if refusal of a pension forced her into dependence on Tory.

The legislation

A person is disqualified for SPP under s.249 *Social Security Act* 1991 if the person is a 'member of a couple'. Under s.4(2) a person is a 'member of a couple' if the person is living with a person of the opposite sex and the relationship is, in the opinion of the Secretary (formed in accordance with s.4(3)), a marriage-like relationship. Subsection 4(3) directs the Secretary to have regard to all the circumstances of the relationship when forming that opinion, including an enumerated list of factors. It has been held that the list of criteria is not exhaustive (*Staunton-Smith and Secretary to DSS* (1990) 57 *SSR* 778), and the weight to be given to each factor is variable.

The 'balance of evidence' provision in s.4(4) was also applicable. As interpreted by the AAT in *Secretary to DSS and Villani* (1990) 55 *SSR* 747,the provision requires, in effect, that if the evidence is inconclusive or ambiguous so that the Tribunal is unable to reach a clear con-