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-

clusion, the applicant would not be entitled to SPP.

Character of the relationship

Tory and Peck had been together since December 1990 and had an exclusive sexual relationship. They had strived to maintain a high degree of autonomy, independence and equality of power which they considered were factors not present in marriage. They provided emotional support and showed strong commitment to each other. Both indicated a desire that the relationship should continue indefinitely, while acknowledging that either should be free to part if either one should 'change direction'.

They did not hold themselves out as married, but were regarded by close friends and relatives as a couple. They shared some social activities but not all. The AAT found that they had a loving relationship and intended it to continue. The relationship was, in this aspect, 'marriage-like'.

They shared the space of the house, as well as the cooking and other domestic chores. The household arrangements were found by the AAT to be equivocal as an indicator of whether the relationship was 'marriage-like'.

Peck shared with her husband the responsibility for the care and support of her children. Tory had never assumed any responsibility for a 'father' role with Peck's children, nor did Peck wish him to do so. This aspect of the relationship was not 'marriage-like'.

Tory and Peck has purchased a property as tenants-in-common in unequal shares, indicating an intention to avoid the survivor succeeding to the other's share. Tory paid one quarter of the mortgage payments, Peck paid the rest. Household expenses were shared in similar proportions. Personal property was owned separately. There was one joint bank account, for the accumulation of funds for renovation of the home. There was no other significant pooling of finances. Neither had made provision for the other under any will or insurance policy.

The AAT noted Peck's views that the relationship differed from marriage, but remarked that the traditional notion of the breadwinner/home duties division of roles was no longer generally regarded as necessary characteristics of marriage (*Donald and Secretary to DSS* (1983) 14 *SSR* 140). While in *Donald* the joint investment in a home was not a conclusive factor, in the present case it carried greater weight given the existence of the emotional and exclusive involvement of Tory and Peck, factors that were lacking in *Donald*.

The AAT concluded that the relationship was 'marriage-like', because:

> Their emotional involvement and the degree of stability and permanence indicated by the purchase of a home together outweigh the lack of financial interdependence and shared parental responsibility.

Peck therefore did not qualify for payment of SPP. The AAT affirmed the decision under review.

[P.O'C.]

Marriage-like relationship: male party a homosexual

SECRETARY TO DSS and WIELAND
No. 8340

Decided: 27 October 1992 by T.E. Barnett, J.G. Billings and S.D.Hotop.

The AAT affirmed a decision of the SSAT which set aside a decision of a delegate of the Secretary to cancel Wieland's widow's pension and to raise and recover an overpayment of $46,234. The delegate's decision had been based on a finding that Wieland had been living with Kenneth Dickson as his wife on a bona fide domestic basis. Wieland disputed that finding.

Wieland was a 57-year-old divorcee. She was granted unemployment benefit from February 1984 and was transferred to widow's pension from 29 April 1987 until it was cancelled on 18 July 1991. The alleged overpayment related to the whole of the payments received during that period.

The legislation

The legislation took various forms over the period under consideration, from February 1984 to July 1991. The issue was substantially the same until the legislation was changed from 1 January 1990, namely, whether Wieland was living with a man as his wife on a bona fide domestic basis although not legally married to him.

From 1 January 1990 the legislation directed the Secretary to have regard to a list of enumerated factors when forming an opinion as to whether a person was living in a 'marriage-like relationship': these factors now appear at s.4(3) in the *Social Security Act* 1991. Even prior to the enactment of that subsection and its predecessor, very similar criteria had been developed in cases such as *Tang and Director-General of Social Services* (1981) 2 *SSR* 15.

If the relationship was 'marriage-like' then Wieland's entitlement was to be assessed as if she were married to Dickson. His income throughout the relevant period would have precluded her entitlement altogether.

Circumstances of the relationship

At the time that Wieland commenced to receive benefits, she was living in the caravan of her friend Kenneth Dickson in a caravan park in Karratha. She had been living there since 1982. There was no form of sexual or physical relationship, Dickson being a homosexual. At one stage he shared his bedroom with a male friend and Wieland accepted this.

Dickson's caravan was 20 feet long with two bedrooms. Wieland occupied the second bedroom and paid half the site-hire fee, electricity, food and other expenses. Dickson used Wieland's car on condition he paid for the fuel he used. They socialised both together and separately. Dickson would drink most evenings after work before coming home late to a meal that Wieland cooked and left in the oven for him.

In May 1984 Wieland signed a Homewest application form for rental accommodation as the 'wife' of Dickson and they subsequently leased a house together as 'Mr and Mrs Dickson'. They used separate bedrooms in the house and continued to contribute equally to household expenses. Dickson gave her signed bank withdrawal forms for payment of his contribution but required her to account for all amounts spent. In 1991 Dickson went to Perth for an operation and gave Wieland a signed authority to withdraw moneys from his bank account.

When Wieland applied for widow's pension she falsely represented on the application form that she paid board to 'Mr and Mrs Dickson'. In April 1987 she made a statement to the DSS that she shared a house with 'Mr and Mrs Kenneth Dickson and Mr Eric Strelcuinus'. In later statements and interviews she disclosed that she lived with Dickson whom she described as a 'friend'. In her evidence she said that she made the false representations out of fear that the DSS would otherwise assume a de facto relationship and cancel her pension.

Dickson gave evidence that Wieland was a close friend but that his homosexuality precluded a sexual relationship with her. He admitted they allowed people to consider them as a couple because it helped to conceal his homosexuality in