confined in their meaning to the same class of the words 'domestic violence and incestuous harassment'. The class created by these words was 'that of physical, psychological or moral endangerment'. As the respondent had left home voluntarily her circumstances did not fall within the class.

The AAT's decision

The AAT felt no need to consider the *Guide* referred to by the DSS. It referred to the High Court's decision in *Hunter Resources v Melville* (1988) 77 ALR 8 which regarded such material as 'nothing more than an expression of opinion of what the relevant legislation means' (at 11). As the AAT regarded the meaning of the legislation as clear, it considered it unnecessary to refer further to the *Guide*.

The issue in this case was whether the respondent fell within 'exceptional circumstances' under s.5(1)(c)(ii). The AAT considered that it was not correct to limit the ordinary meaning of 'exceptional circumstances' by reference to the class of behaviour created by the preceding words in the section. In conclusion, such circumstances must 'simply be circumstances which are out of the ordinary and which make it unreasonable to expect a person to live at home'.

But the AAT then considered whether the circumstances must take place in the home or whether it could look at other matters such as the location of the home and employment opportunities. As the section used such words as 'home' and 'live' in the context of circumstances which made it unreasonable to live at 'such a home', the Tribunal concluded that 'the circumstances must pertain to the person's living at such a home rather than simply to the person's living in the area where the home may be located': Reasons, para. 16).

This precluded the respondent from the definition as:

> 'The main reasons for Miss Selke's moving from her parents' home were its isolation and the need for her to obtain training and place herself in a better position to obtain employment. While these two reasons are directly related to the location of her home at Quarantine Bay, they are not factors which pertain to the home itself and make it unreasonable for her to live there within the meaning of the Act. They pertain to the home's location and to the opportunities in the community in which it is located and not to a home such as Mr and Mrs Selke's home. They also related to her abilities to find work, and while it is unreasonable to expect that she will be able to continue to live there as well as work, the definition of a 'homeless person' relates only to circumstances of her living there and I cannot take into account circumstances relating to her working there.'

(Reasons, para. 17)

The AAT also considered that even if this view was incorrect the circumstances could not be described as exceptional:

> 'They are, unfortunately, equally applicable to other homes at Quarantine Bay and Cooktown as well as homes in other remote, and indeed not so remote, areas of Australia. Furthermore, the circumstances do not make it unreasonable to live at Quarantine Bay for, although it would not be reasonable to continue to live there and expect to work, it is not unreasonable to live there. The two concepts, that of living and that of working, are different and the legislation makes no reference to working.'

(Reasons, paras 17-18)

Formal decision

The AAT set aside the decision of the SSAT and substituted a decision that the respondent is not a homeless person within the meaning of the *Social Security Act* and is not entitled to payment of young homeless allowance.

[B.S.]

Newstart allowance: 'required' to attend CES

BROWN and SECRETARY TO DSS

(No. 9088)

Decided: 29 October 1993 by S.A. Forgie.

Background

Trevor Brown had been in receipt of newstart allowance when on 6 October 1992 a delegate of the Secretary to the Department of Social Security (DSS) decided that the allowance was not payable for a two-week period. This was because he had failed to attend an appointment at the CES on 24 September 1992. The decision was affirmed by an Authorised Review Officer and by the Social Security Appeals Tribunal. Brown then asked the AAT to review the decision.

The legislation

Section 627(1) provides that where a person is receiving newstart allowance and the Secretary is of the opinion that the person should attend an office of the DSS or the CES, the Secretary notifies the person that they are required to do so, and the requirement is reasonable, a newstart allowance is not payable to the person where the person does not comply.

Subsection 627(3) provides that the Secretary may, despite subsection 627(1), determine that the allowance is payable 'if the Secretary is satisfied that the person had a reasonable excuse for not complying with the requirement'.

Findings of fact

Brown commenced a course at Lismore TAFE in February 1992 in which he was enrolled on a full time basis. The evidence suggested that his attendance was not regular. On 23 July 1992 an officer of the CES wrote to him about the course. She suggested that he should withdraw from it and that he should contact a specialist CES officer to discuss other options. The letter also noted that he would need to have a new newstart agreement concluded.

The officer wrote to him again at the end of August 1992 suggesting that he make an appointment with the newstart officer for an assessment. In that letter she also discussed another employment placement program. A further letter of 15 September 1992 reported on developments and made further suggestions concerning people who might assist him. Following receipt of that letter, Brown phoned the CES and made an appointment for 24 September 1992. He did not attend at the CES office on that day.

The AAT considered these events in the light of subsection 627(1). The first issue was whether or not the Secretary had formed an opinion that Brown should attend an office of the CES. In view of the language in the letter, the AAT had doubts as to whether it was clear that the Secretary had formed an opinion that he should attend the office. The Tribunal also considered whether or not Brown had been 'required' to attend to the extent that there was a failure by him to do so.

'Required' to attend

After considering a number of cases about the meaning of the word 'required', the AAT concluded that the word 'can have a meaning ranging from wish or desire to require or oblige'. The AAT said the meaning must be gleaned from the context in which the word appears. Here, the effect of s.627 is that if a person does not comply with a 'requirement', the person suffers 'a not inconsequential

detriment'. 'That together with the specification that the requirement must be reasonable, leads me to the view that the requirement must be an obligation and not simply a desire or a wish': Reasons, para. 25.

The AAT went on to find that nothing in the correspondence informed Brown that he had to attend at the CES office. Nor was the fact that he had made an appointment to do so any indication that he had been notified that he was required to do so. Although he had been told on a number of occasions that he had to keep appointments, this was not considered by the AAT as turning this current situation into a requirement to attend.

For these reasons it was unnecessary to consider whether or not his failure to attend was reasonable within the meaning of s.627(3). There had not been a failure to comply with a requirement of the Secretary under s.627(1).

Decision

The AAT set aside the decision under review and substituted a decision that Brown was entitled to be paid newstart allowance for the relevant period.

[R.G.]

Marriage-like relationship: estranged couple

McMEEKEN and SECRETARY TO DSS

(No. 9112)

Decided: 11 November 1993 by S.D. Hotop.

Athelie McMeeken sought review of an SSAT decision affirming a decision of an authorised review officer (ARO) in the DSS to cancel her sole parent pension (SPP) from 19 December 1991. She also sought review of the SSAT's decision to affirm the recovery of $8653.40 paid by way of SPP between 29 March 1990 and 19 December 1991 that the SSAT affirmed she had been overpaid.

Background

The McMeekens married on 5 June 1969. They had four children. In November 1989 Mrs McMeeken told her husband that the marriage was over and they ceased to occupy the same bedroom. Mr McMeeken moved into another bedroom in the same house with their son, Peter. Mrs McMeeken claimed SPP on 19 March 1990. She stated on her claim form that Mr McMeeken did not live with her and later advised the DSS that his address was that of his parents. She was granted SPP from 29 March 1990. She stated on various review forms that no other adult male lived at her address and told field officers in August 1990 and March 1991 that no one other than her children lived at her address.

In February 1991, one of Mrs McMeeken's daughters applied for unemployment benefit. She stated that she lived with both her parents but 'they are separated and have separate bedrooms'. Mr McMeeken's father was then interviewed and stated that Mr McMeeken had not lived with him since 1968. After interviewing Mrs McMeeken twice, the DSS decided her SPP should be cancelled as she was not separated from Mr McMeeken and that an overpayment should be raised.

The decision to cancel

Section 249(1) of the *Social Security Act* 1991 provides that a person is qualified for a SPP if '(a) (i) the person is not a member of a couple; or (ii) is a member of a couple who is living separately and apart from his or her partner'. Section 4 provides that a person is a 'member of a couple' if:

> '(2)(a) the person is legally married to another person and is not, in the Secretary's opinion...living separately and apart from the other person on a permanent basis...'

In deciding on the nature of the relationship between 2 people, the Secretary is to have regard to 'the financial aspects of the relationship', 'the nature of the household', 'the social aspects of the relationship', 'any sexual relationship between the people' and 'the nature of the people's commitment to each other' (see s.4(3) where these matters are further detailed). Section 4(5) contains the so-called reverse onus of proof provisions:

> 'If:
> (a) a person claims, or is receiving sole parent pension; and
> (b) a particular residence has been, for a period of at least 8 weeks, the principal home of both the claimant or recipient and a person of the opposite sex; and
> (c) the claimant or recipient and the other person are legally married to one another; and
> (d) the claimant or recipient and the other person:
> (i) are living separately and apart on a permanent basis; or
> (ii) claim to be living separately and apart on a permanent basis;
> the Secretary must not form the opinion that the claimant or recipient is living separately and apart from the other person on a permanent basis unless, having regard to all the matters referred to in subsection (3), the weight of evidence supports the formation of the opinion that the claimant or recipient is living separately and apart from the other person on a permanent basis.'

The evidence

Mrs McMeeken told the AAT that her relationship with her husband had deteriorated from the time of the birth of their son in 1981. She originally moved out of the marital bedroom, but later Mr McMeeken moved out to share a room with Peter. She said that prior to this time she had done the cooking and cleaning for the family, though Mr McMeeken had always done his own washing. After November 1989 she did no cooking or cleaning for him, although at all relevant times he was living in the same house. After Novemer 1989, Mr McMeeken gave her $60 a week for her own expenses and paid their eldest daughter $200 for household shopping which Mrs McMeeken regarded as maintenance for the children. Mrs McMeeken told the Tribunal that she and her husband had jointly owned the house they had lived in and had a joint bank account; she did not, however, have access to this. She also told them that she had not wanted to leave the matrimonial home because of a fear of losing custody of their son and any entitlement to the matrimonial home. Mrs McMeeken said that late in 1992 she had been granted a property settlement by the Family Court of Western Australia, and was now the sole owmer. Mr McMeeken had moved out. She said that she did not want to seek a divorce as she thought there was a possibility she might reconcile with her husband once the children had grown up, though there was no chance of such a reconciliation now.

Mrs McMeeken told the AAT that she had given Mr McMeeken's contact address as that of his parents on the departmental form because at that time she understood he was to be moving there. In answering subsequent departmental questions about other adults living in the house, she had presumed that they did not refer to Mr McMeeken; when she was asked whether she shared 'accommodation' with any other adult, she had thought this question referred to her bedroom, which Mr McMeeken did not share. Mrs McMeeken told the Tribunal that Mr McMeeken did use other rooms in the house.