- should the debt be either waived or written off?

The facts

Bruce claimed widows pension in February 1972. In 1974 she began living with Maurice Kennett, who soon proved to be physically violent and abusive towards her and her children. Two more children were born in June 1978 and April 1981. On occasion Bruce had to seek assistance from the police as Kennett's behaviour was endangering her life. Bruce lived with Kennett at various addresses until 1989 when they separated after Kennett breached a domestic violence intervention order and was imprisoned.

Shortly after the separation Bruce discovered that Kennett had sexually abused one of her children.

Qualification for widows pension and sole parent pension

The AAT considered the eligibility criteria under the *Social Security Act 1947* to determine if Bruce was entitled to receive either widows pension or sole parent pension.

The AAT held that under the 1947 Act, to be qualified to receive widows pension, a person could not be living with a man as his wife on a bona fide domestic basis although not legally married to him.

In relation to qualification for sole parent pension, the AAT found that a claimant needed to come within the definition of a 'single person' and not a 'married person' which included a 'de facto spouse'. 'De facto spouse' was defined in the Act as someone who is living with another on a bona fide domestic basis although not legally married to that other person.

In determining if Bruce was qualified to receive these payments the AAT considered the relationship from 1974 till 1989, having regard to the financial aspects of the relationship, the common household in which they lived, the nature of any sexual relationship, social factors, and the commitment to each other.

In their overall assessment the AAT commented:

> 'The Tribunal has no doubt that the period during which the applicant lived with Maurice Kennett was, for the most part, a very unhappy and unsatisfactory one from her point of view. However, the happiness of the parties and their mutual satisfaction with their relationship are not prerequisites of the existence of a de facto or marriage-like relationship between them. Unfortunately, unhappy and unsatisfactory relationships between persons living together, whether on a de facto or legally married basis, are relatively common in contemporary society.'

(Reasons, para. 36)

In conclusion, the AAT found that:

> 'Having regard to all the circumstances of the relationship between the applicant and Kennett between 1974 and 1989, and in particular to the factors summarised above, the Tribunal finds that, throughout that period, the applicant was living with Maurice Kennett as his spouse on a bona fide domestic basis although not legally married to him.'

(Reasons, para. 36)

Thus the AAT held that Bruce was not qualified for widows pension or sole parent pension from March 1974 till December 1989.

Was there a debt?

The AAT considered whether or not there was a debt under s.1224 of the *Social Security Act 1991*. The AAT was satisfied that the amount of $97,270 had been paid and that such payments had been made as a result of false statements made to the DSS by Bruce throughout the period.

Waiver

The AAT considered whether the debt should be waived, and applied ss.1237 and 1237A of the 1991 Act. It concluded that the debt did not fall into any of the categories specified in either s.1237 or s.1237A.

Write off

The AAT then turned to the power to write off a debt conferred by s.1236(1). When considering the power to write off a debt, the AAT referred to *L and Secretary, Department of Social Security* (1995) 21 AAR 412 in which the Tribunal found that the financial circumstances of the debtor and the prospect of recovery of the debt will necessarily be the primary considerations in deciding whether to write off a debt. The AAT also noted the customary regard taken of the Federal Court's decision in *Director General of Social Services v Hales* (1983) 47 ALR 281 in deciding whether to write off a debt.

The Tribunal found that Bruce would never be able to repay more than a fraction of the total debt, and considered as well, 'the depressing and stressful effect that such a large debt would be likely to have on the applicant who is now trying — with great success ... to build a happy and secure family life for herself and her children': Reasons, para. 49. The Tribunal noted that $41,933 of the total overpayment was covered by a reparation order.

The Tribunal decided, having regard to Bruce's financial circumstances, and the prospects of recovery of the debt, that it would be appropriate to write off the balance of the total debt after deduction of the amount ordered for reparation.

Formal decision

The Tribunal set aside the decision under review and substituted a decision that the amount of $55,336 be written off.

[B.M.]

Newstart allowance: notice of previous decision

SECRETARY TO DSS and STING (No. 10435)

Decided: 29 September 1995 by S.A. Forgie.

The facts

Sting made an application for unemployment benefit on 7 February 1991, in which he completed the section asking for his partner's name, maiden name, date of birth and title. Following a request for further information by the DSS to be lodged by 15 February 1995, Sting's partner completed and returned a 'Partner Details' form within the requested time frame, and later lodged 3 'references of identification' which, it was agreed at the time of the hearing, were not adequate to be regarded as proof of identity. Sting was advised by letter dated 13 March 1991 that unemployment benefit would be paid from 8 February 1991 at the rate of $134.30, from which $20 tax would be deducted.

The rate of $134.30 was the amount of unemployment benefit payable to a single person, and Sting continued to be paid benefit, then jobsearch and newstart allowance at the rate applicable to a single person until May 1994 when, as a result of a standard review by the DSS, Sting's partner again completed a 'Partner Details form' and a further form entitled 'Questions for clients with insufficient proof of identity', these being lodged with the DSS on 26 May 1994. Following this, the DSS made a decision to pay Sting newstart allowance at the married rate from 26 May 1994, this being varied to the earlier date of 22 March 1994 on review by an authorised review officer. This decision was set aside by the SSAT, and the DSS sought review of the decision of the SSAT.

The legislation

The AAT made a preliminary determination that, as the decision to increase Sting's rate of newstart allowance was a decision taken under the *Social Security Act 1991*, the date of effect of that deci-

sion had to be determined pursuant to that legislation and not the repealed *Social Security Act 1947* under which Sting first received unemployment benefit.

The decision to increase Sting's rate of payment was taken under s.660G of the *Social Security Act 1991*, which requires the Secretary to make such a determination if satisfied that the rate being paid is less than the rate provided for in the Act. The date of effect of such a determination is, in accordance with s.660K, dependent on whether a person who receives a newstart allowance is given notice of a previous decision about that allowance, and if so, whether they apply to the Secretary for review of that previous decision within 3 months after such notice is given. In Sting's case this would mean that if it was determined that no such notice had been given, the date of effect of the decision to increase his rate of newstart allowance would be the date on which the previous decision took effect, that is 1 February 1991. If it were determined that he was given notice of the previous decision, then, as he had not sought review within 3 months of such notice being given, he could only be paid the increased rate of newstart allowance from the later date of 22 March 1994.

Notice of previous decision as to rate payable

The DSS argued that in making a decision about a claim for newstart allowance, it was only necessary that the DSS advise the applicant of the grant, the rate of payment, the date on which payments would commence and the manner in which payments would be made, and the letter dated 13 March 1991 complied with those requirements. Sting argued that the decision the DSS had to make was whether he would be paid at the single or married rate, and the letter of 13 March 1991 did not advise him of that decision.

The AAT decided that s.660G is only concerned with the rate of payment, and that the 'previous decision' referred to in s.660K must therefore be a decision about the rate at which payment of newstart allowance is made. It was sufficient that the letter dated 13 March 1991 advised Sting that the rate of unemployment to be paid would be $134.30. It was not necessary that he be advised of the way in which that rate was calculated.

The AAT determined that Sting had been notified of the previous decision about the rate of his newstart allowance and, as he had not applied for review within 3 months, the later determination to increase the rate could only take effect from the day on which he sought a review, 22 March 1994.

Formal decision

The AAT set aside the decision under review and substituted a new decision that Sting be paid newstart allowance at the married rate with effect from 22 March 1994.

[A.T.]

Newstart allowance: Finance Direction

JEPSEN and SECRETARY TO DSS (No. 10506)

Decided: 2 November 1995 by J.R. Dwyer.

Jepsen sought review of an SSAT decision of 10 May 1955 which affirmed a decision of the DSS to reject his claim for newstart allowance.

The facts were not in issue. Jepsen was employed by the ANZ Bank for 38 years. He was retrenched on 20 February 1992, and received a superannuation payment of $250,187. He claimed job search allowance which was granted from 18 March 1992, and after 12 months he claimed newstart allowance. In this claim he disclosed a superannuation fund credit of $188,298 in an annuity fund. On 18 March 1993 Jepsen's claim was rejected because his assets exceeded the asset limit.

Jepsen received a notice dated 18 March from the DSS advising him of the decision and setting out the assets being taken into account. On 28 February 1995 Jepsen lodged another claim for newstart allowance which was granted from 9 March 1995. On 13 March Jepsen asked the DSS to review its original decision to reject his claim for newstart allowance. The DSS affirmed its original decision and Jepsen requested review by the SSAT.

The legislation

On 18 March 1993 s.1118(1)(f) of the *Social Security Act 1991* provided:

> 'In calculating the value of a person's assets for the purposes of the Act (other than subparagraph 263(1)(d)(iv) and sections 1125 and 1126), disregard the following:
>
> ...
>
> (f) if the person has not reached pension age — the value of any compulsorily preserved superannuation benefit of the person;'

The Act was amended from 25 March 1993 by omitting paragraph (f) and substituting the following paragraph:

> 'f) the value of the person's investment in:
>
> ...
>
> (iii) a deferred annuity;
>
> until the person:
>
> (iv) reaches pension age; or ...

This meant that the annuity investment was a disregarded asset until Jepsen reached the age of 65.

The AAT agreed with the DSS that the law applicable to Jepsen's first claim was the legislation in force at 18 March 1993. Because his superannuation was voluntarily preserved, it had to be taken into account as part of Jepsen's assets.

Jepsen argued that he should have been told by the DSS in March 1993 that the law was about to change, and that he should lodge another claim after 25 March 1993. The DSS 'was blatantly negligent, in not advising me (Jepsen) of the changing legislation, on 25 March 1993': Reasons, para. 15. At the hearing evidence was provided that the DSS was to notify all people whose investment details had been recorded before 12 March 1993 of the change in the law. Jepsen was not advised, and the DSS acknowledged that he should have been.

Finance Direction

The AAT agreed with the DSS that there was no remedy available to Jepsen under the Act. The SSAT had explored the options of a Finance Direction or an Act of Grace payment. The DSS told the AAT that steps were being taken to consider whether a payment should be made to Jepsen pursuant to a Finance Direction. The AAT noted it did not have the power to order that a Finance Direction be made. It did, however, agree with Jepsen that:

> 'a client of the Department is entitled to be advised when a claim is rejected, of changes to the legislation which have already been passed and assented to, but have not yet come into operation, where those changes will have a substantial impact on the client's entitlements.'

(Reasons, para. 20)

Formal decision

The AAT affirmed the decision under review.

[C.H.]