or the DSS, and because of Poulter's dire financial situation, they were prepared to grant a stay of the decision as from the date on which the breach commenced rather than the date of the hearing.

Formal decision

The decision of the SSAT on 9 July 1996 was stayed until the AAT reviewed the SSAT decision to cancel the payment of Poulter's youth training allowance.

[H.B.]

Disability support pension: special reason not to treat married person as a member of a couple

HAWKINS and SECRETARY TO THE DSS
(No. 114446)

Decided: 4 December 1996 by A.M. Blow.

An officer from the DSS decided to reduce the amount of disability support pension paid to Hawkins from the single rate to the rate payable to a member of a couple. This decision was affirmed by the SSAT and Hawkins appealed to the AAT.

The facts

Hawkins' wife was a Filipino national who came to Australia on a tourist visa. Hawkins married her in November 1995. She gave birth to a daughter in July 1996. His wife had applied for permanent resident status. Until this was granted, she was prohibited from working in Australia and was ineligible for a wife pension under the *Social Security Act 1991* (the Act).

The issue

Under the Act, the rate of pension payable to a single person is more than that payable to a person who is considered a member of a couple. However, the DSS has a discretion under the Act to treat a married person as if he or she were not a member of a couple. Section 24(1) provides that a person may be treated as though he or she were not a member of a couple where:

- the person is legally married to another; and
- they are not living separately and apart on a permanent or indefinite basis; and
- the Secretary is satisfied that, for some special reason, that person should not be treated as a member of a couple.

Hawkins submitted that he should not be treated as a member of a couple in accordance with this discretion because his wife had no assets, income, earning capacity or financial resources. Further, he was medically unfit to earn any income to supplement his pension. The DSS submitted that financial hardship alone was not a sufficient reason for the exercise of the discretion to treat a person as not a member of a couple.

The cases

The AAT indicated that the policy behind the legislative provisions was that:

> 'ordinarily couples should be expected to pool their resources and practise economies of scale ... But that there would have to be some special reason not to apply those expectations to members of other couples.'

(Reasons, para. 33)

The AAT examined the cases which had considered what constitutes a 'special reason'. In *Reid and Director General of Social Services* (1981) 3 *SSR* 31 the AAT held that a husband and wife living separately and apart under the one roof constituted a special reason. The cases of *Trimboli v Secretary to DSS* 49 *SSR* 645 and *Beadle v Secretary to DSS* 26 *SSR* 321 indicated it was not appropriate to attempt an exhaustive definition of what circumstances will be 'special'. In *Beadle and Director General of Social Security* it was said that the adjective 'special' refers to circumstances that are 'unusual, uncommon or exceptional'.

In *Secretary to DSS v Le-Huray* (1996) 2(4) SSR 55, the Federal Court considered whether there was a 'special reason' to treat a *de facto* couple as if they were not living in a marriage-like relationship. The man made only a limited financial contribution to the household finances. Nevertheless, the Federal Court decided that the applicant was a member of a couple for the purposes of the Act.

The AAT said that the legislative expectation is that couples will pool their resources and thus live more cheaply than they would as two individuals. However, in this case, Hawkins' wife had no financial resources to pool. The AAT referred to the case of *Secretary to DSS and Tsimpidaros* (unreported No. 10292, 5 July 1995, Q 95/55) where the pensioner's husband was prohibited from earning an income or receiving social security benefits. In that case the fact that a pooling of resources was not possible was considered a 'special reason' justifying the exercise of the legislative discretion conferred by the Act.

Inability to pool resources

The AAT concluded that the 'extreme impecuniosity of the applicant's wife, coupled with her inability lawfully to earn any income' were special factors: Reasons, para.14. The AAT said that in this case one could not reasonably or possibly expect there to be a pooling of resources. The AAT was satisfied that the wife's total lack of financial resources constituted a sufficient special reason for Hawkins not to be treated as a member of a couple.

Formal decision

The AAT set aside the decision under review, and substituted a new decision that Hawkins was not to be treated as a member of a couple for the purposes of the Act.

[H.B.]

Sickness allowance: member of a couple; separated under one roof

KALOUDIS and SECRETARY TO THE DSS
(No. 11335)

Decided: 25 October 1996 by J. Handley.

Kaloudis applied for disability support pension (DSP) and sickness allowance (SA). The Authorised Review Officer (ARO) affirmed the DSS decision that she was not eligible for either. The SSAT affirmed that Kaloudis was not eligible for SA but decided she was eligible for DSP. However, the SSAT affirmed the ARO decision that Kaloudis was a 'member of a couple'. Kaloudis sought review of the decision that she was a member of a couple.

The issue

The AAT had to decide whether Kaloudis was a member of a couple and therefore entitled to a lower rate of DSP. Although there was no doubt that Mr and Mrs Kaloudis were married, the issue was whether they were living separately and

apart on a permanent basis or whether they were a 'member of a couple' for the purposes of ss.4(2) and 24(1) of the *Social Security Act 1991* (the Act).

The evidence

Kaloudis lived with her husband in rented accommodation. They owned no real estate and their combined personal property was estimated at $5000. Since she had ceased work, her husband paid all the household bills and gave her $70 a week for groceries. She did all the household chores.

She and her husband did not share a bedroom and rarely interacted. There was no sexual relationship and no real companionship or emotional support. They ate meals separately but the meals were prepared by Mrs Kaloudis. They watched television separately in separate rooms. They did not look after each other when sick. They occasionally attended social occasions such as children's birthdays together. The evidence of the daughter Anna Maria Kaloudis was that her parents' marriage was 'hopeless', that they rarely communicated and avoided each other within the home. The daughter-in-law also confirmed that the marriage was strained, giving evidence that the husband was abusive, rude and withdrawn. Mr Kaloudis did not give evidence.

A form completed by Mrs Kaloudis stated that she did 'all the household chores and in return I receive free board'. Similarly, Mr Kaloudis completed a question by writing 'because I pay all the bills and the weekly groceries our arrangement is she does all the household tasks for free board'.

The AAT was not satisfied that the claim for SA and the 'partner details' were completed by Mr and Mrs Kaloudis together as alleged by the DSS.

Although different documents completed by Mr and Mrs Kaloudis gave differing separation dates, the AAT commented that 'the T-documents tend to confirm the bleak nature of the relationship as described by Mrs Kaloudis': Reasons, para. 22.

The AAT noted that documents completed by Mrs Kaloudis when applying for sickness benefit in February and June 1993, confirmed that she was 'married', but that she did not endorse a box beside the word 'separated'. The AAT noted that these forms were completed when these proceedings were not contemplated, although the forms were contemporaneous with the alleged date of separation.

Living separately and apart?

The AAT referred to the case of *In the Marriage of Todd (No. 2)* (1976) 9 ALR 401 at 403 where Watson J said that separation involved 'the destruction of the marital relationship (the consortium vitae)'. Watson J went on to say that 'in every case it will be necessary to have regard to the particular circumstances of the people . . . it is wholly inappropriate to fall back on standards, conventions or "role models"': Reasons, para. 29.

The factors which suggested the couple were living separately and apart were:

- the absence of meaningful regular communication;
- the absence of domestic and social interaction between the couple;
- the eating of meals separately;
- the apparently abusive and condescending behaviour of Mr Kaloudis;
- the absence of a sexual relationship; and
- the absence of any compassion or caring for each other.

The factors which suggested they were not living separately and apart on a permanent basis were:

- they continued to share the same home;
- they remained married and had been for over 20 years;
- Mrs Kaloudis did all the domestic chores including cooking her husband's meals and washing his clothes;
- they owned personal property jointly; and
- the financial arrangement where Mr Kaloudis paid the bills and provided weekly grocery money.

The AAT found, on balance, that Mrs Kaloudis was a 'member of a couple', and was not living separately and apart. In reaching this conclusion, the AAT pointed to the fact that they continued to live in the same house, that she did all the domestic chores and that Mr Kaloudis paid all the bills and provided grocery money. The AAT indicated that these factors 'suggested a regime inconsistent with living separately and apart': Reasons, para. 36.

Decision

The SSAT decision was affirmed by the AAT.

[H.B.]

CMAA: unreasonable delay

SECRETARY TO THE DEETYA and CHADWICK (No. 11524)

Decided: 11 December 1996 by M.D. Allen.

Background

The DEETYA made a decision that Chadwick had unreasonably delayed entering into a Case Management Activity Agreement (CMAA). Chadwick appealed to the SSAT which decided that Chadwick had not unreasonably delayed entering into such an agreement. The DEETYA sought a review of the SSAT decision.

The issue

The issue for consideration by the AAT was whether or not Chadwick had unreasonably delayed entering into a CMAA.

The facts

On the 30 August 1995 the Commonwealth Employment Service (CES) sent a letter to Chadwick advising him that he was to have an interview with his case manager on 11 September 1995 to complete his CMAA. Chadwick failed to attend this interview. A second letter was sent to Chadwick on the 14 September 1995 advising of a rescheduled interview for 21 September 1995. Chadwick also failed to attend this interview. As a result of his failure to attend, the CES sent a breach notice to Chadwick.

Chadwick gave evidence that at the time of the proposed appointments, he was concerned with the health of his aged parents. His mother who lived at her home was almost blind and his father who had suffered a broken hip was in hospital. At this time, Chadwick was living in Naremburn and his mail was forwarded to that address. Chadwick gave evidence that he did not check his mail everyday. He conceded that he had received the first letter but that he had not opened it until after the appointed date for the interview. He also gave evidence that the second letter was retrieved from the mail box but when opened the time for the interview had also passed. Chadwick stated that he did not know why he did not contact the case manager in either of these circumstances after realising that he had missed the interviews.

Unreasonable delay — objective test

The AAT acknowledged that Chadwick had matters which occupied much of his