ment of a debt by instalments. The AAT considered whether the exercise of the power under s.251 required that an officer must first be satisfied that a debt arose under the Act, that is, that the legal and factual elements of recoverability existed. After referring to the decision of the Federal Court in *Salvona* (1989) 52 *SSR* 695, the AAT suggested that had there been no decision made under either s.162 or s.251, the SSAT and AAT would have had no jurisdiction in relation to an assurance of support debt owed by a person not in receipt of pension, benefit or allowance.

The AAT further referred to comments by the Federal Court in *Hangan* (1982) 11 *SSR* 115, suggesting that a decision to recover money required some determination by a delegate that 'the conditions of recoverability exist'. After referring to the DSS submission that the terms of reg.22 of the *Migration Regulations* made it clear that, if there is an assurance of support and income support has been provided, there is a debt due to the Commonwealth, the Tribunal said:

> '[A]ction taken under s.162 or s.251 must be founded on the Secretary or his duly authorised delegate being satisfied that the legal and factual elements of recoverability exist. The Act of itself does not raise the debt. If the legal and factual elements of recoverability exist a person owes a debt to the Commonwealth for the purposes of those sections.'

(Reasons, para. 31)

The AAT's decision

Accordingly, the AAT found that a debt existed for the amount of $6936.46 paid between 21 February 1989 and 29 November 1989 and that a delegate had decided that the legal and factual elements of recoverability existed.

Although the AAT had jurisdiction to exercise the power under s.251(1), it was unable to exercise powers under s.162. It did, however, find that Mathias was a person 'indebted to the Commonwealth under or as a result of this Act' by virtue of s.162(11) of the Act.

After briefly considering s.246(2A) (which was not relevant since Mathias was not in receipt of a pension, benefit or allowance), s.246(3) (which was not in issue) and s.251(4) (which expressly provides that the reference to a debt in s.251(1) includes a reference to an assurance of support debt), the AAT considered whether there were any grounds for the debt to be waived, written off or paid by instalments. The AAT declined to exercise the discretion, principally on the ground that Mathias would not suffer financial hardship.

Formal decision

The AAT set aside the decision of the SSAT and substituted for it a decision that Mathias owed an assurance of support debt of $4336.46, the amount outstanding after the garnishee of $2600 from her bank account.

[R.G.]

Sole parent's pension: de facto spouse

SECRETARY TO DSS and AQUILINA

(No. 6662)

Decided: 14 February 1991 by J.R. Gibson.

On 5 March 1990 the DSS decided to cancel sole parent's pension on the basis that Aquilina lived in a marriage-like relationship with W. She was considered to be a *de facto* spouse and a married person within the meaning of s.3(1)(a) of the *Social Security Act* and, therefore, not qualified under s.44(1)(a). The SSAT set aside this decision as it was satisfied she was not living in a 'marriage-like relationship'.

The facts

Aquilina had 2 dependent children by her former husband. She obtained a divorce from him in 1987. On 11 February 1987 a third child was born, the father of whom was W.

Aquilina was granted supporting parent's benefit on 22 May 1984. The benefit became a sole parent's pension following amendments to the Act which came into force on 1 March 1989. Since 1984 Aquilina and her children lived in rented Department of Housing accommodation. The apartment was in her name.

On 4 March 19878, she claimed family allowance for her third child naming W as father but stating she did not see him any more.

On 8 September 1987 she signed a statement prepared by a DSS field officer, that she and W had lived together as man and wife for 2 weeks in May and for 3 weeks in August 1987 and that W was paying maintenance for his daughter.

On 10 April 1989 Aquilina was interviewed by a DSS field officer who noted she had said she received no maintenance from her former husband, but $35 a week from W. She had also said W paid for health insurance for her and her 3 children.

Documents obtained by the DSS from W's employer and the Electoral Office disclosed that W had given the same address as Aquilina. On 16 February 1989 Aquilina signed a statement prepared by field officers to the effect that she had lived in a situation similar to that of man and wife with W since February 1986.

Aquilina completed in her own handwriting a 'Review of Living Arrangements' dated 2 March 1989 but did not return it to the DSS until early March 1990. She disclosed in that document that she had started sharing accommodation with W when still married to her former husband.

In her evidence to the AAT Aquilina said she had never used W's name. She gave evidence of her former husband's violence towards her. After one particularly traumatic incident, which involved police being called, W had stayed overnight and subsequently assisted her in the face of further attacks. At that time W lived with his mother but stayed with Aquilina on Friday nights or weekends or when she had been involved in Family Court proceedings.

Aquilina said that, after W's mother left Sydney in late 1989, W stayed at her home most of the time but was often out at night and away for periods with his friends. He bought his own food but sometimes ate with her. He started to share the rent, had the telephone installed in his name and paid the account, covered Aquilina and the children in his health insurance and nominated Aquilina as preferred dependent for his superannuation rights. He had guaranteed some credit payments for her and minded the children for short periods of time.

Aquilina said she regarded W as a good friend, never as a possible husband or *de facto* husband, and had never discussed marriage with him. They did not go out together but she once stayed at a holiday resort where he and his friends went. He spent most of his spare time with his mates or with a woman friend. Aquilina said she had, on occasions, gone out with other men.

W moved out shortly before the AAT hearing because of problems with one of Aquilina's children but she expected he would continue to pay maintenance for his own child and to provide health

insurance. She said she signed the field officers' statements after being told that the sharing of a bed or living under the one roof would constitute a *de facto* relationship.

The legislation

To qualify for sole parent's pension a person must be single: *Social Security Act*, s.44(1)(a).

'Single person' is defined in s.43(1) to exclude 'married person'.

'Married person' is defined in s.3(1) as including a *de facto* spouse and '*de facto* spouse' is defined:

> '"*de facto*" spouse means a person who is living with a person of the opposite sex, to whom he or she is not legally married, in a relationship that, in the opinion of the Secretary formed as mentioned in section 3A, is a marriage-like relationship.'

Section 43A provides that a person in receipt of a sole parent's pension, who has for at least 8 weeks shared a residence with a person of the opposite sex and a child of the couple, may be required to furnish to the DSS particulars as to the relationship and the Secretary on being satisfied the pensioner has provided all relevant information must form an opinion whether a marriage-like relationship exists.

Section 3A lists matters which must be taken into account including financial aspects, nature of the household, social aspects, sexual relationship and nature of commitment to each other.

The cases

The AAT approved *Villani* (1990) 55 *SSR* 747 in which s.43A(6) was considered. In that case the AAT said that where, in a situation described in s.43A(1), the decision-maker was unable on the evidence to conclude that a marriage-like relationship did or did not exist, s.43A(6) required a decision that such a relationship existed.

The AAT's decision

The AAT found Aquilina and W to be honest people who had no clear understanding of what constituted a *de facto* or marriage-like relationship. It was satisfied W had originally stayed overnight to protect Aquilina from violence. They owned no joint assets nor were there any joint liabilities except for the credit guarantees. There was no significant pooling of financial resources, except rental payments, and day to day household expenses were not shared except that W, for his own convenience, had the telephone installed. W had, except for short periods, slept in a separate room from Aquilina, rarely ate at home and played hardly any part in the social life of the respondent and the children.

The AAT did not regard the use of the words '*de facto*' and 'spouse' in the application for health insurance and Department of Housing forms as evidence that the couple saw the relationship as a marriage-like one. The Tribunal considered that W provided physical protection and emotional support based on friendship and 'true chivalry'.

Formal decision

The AAT *affirmed* the decision of the SSAT that a marriage-like relationship did not exist.

[B.W.]

Cohabitation

HILTON and SECRETARY TO DSS (No. N89/451)

Decided: 29 October 1990 by R.N. Watterson, C.J. Stevens (M.T. Lewis dissenting).

By a majority (Watterson and Stevens) the AAT affirmed a decision of the SSAT that Hilton was eligible for a supporting mother's benefit 'at all relevant times' from 13 October 1981 until it was cancelled by the DSS as from 8 September 1988.

The issue was whether during that period Hilton was living with a man, B, as his *de facto* spouse.

The legislation

At the time, s.44(1) of the *Social Security Act* provided that a person was qualified to receive supporting mother's benefit only if that person was a single person. A single person was defined as a person who was not married: s.43(1).

According to s.3(1), a married person included a *de facto* spouse, which was defined as a person who was living with another person of the opposite sex as the spouse of that other person on a *bona fide* domestic basis although not legally married to that other person.

Findings

Hilton and Bradford had shared Bradford's home continuously from 1985 until 20 December 1989, when Hilton and her 2 children had moved to a separate residence. During that period Hilton had used the name of Bradford for various purposes, including that of registering the birth of her younger child.

Hilton had registered Bradford as the father of her 2 children, and had represented him as such to the children's school and even to her own parents. The AAT accepted her explanation that this was a facade erected in the interests of the children, and found that Bradford was not in fact the biological father.

Bradford had acted as a father figure to Hilton's children, looking after them in Hilton's absence both during and after the period of shared residence. The AAT accepted that this was consistent with the relationship being one of friendship and support.

Although sexual intercourse had taken place between Hilton and Bradford on at least one occasion, the AAT found that the relationship lacked the element of exclusivity. Hilton had had sexual relations with other men, and this was seen by her and by Bradford as being consistent with their relationship.

During the period that they had lived together, Hilton and Bradford had led largely separate social lives. Although some domestic tasks were shared, they each kept a separate household. They occupied separate rooms and did not eat meals together.

Their financial relations caused the AAT some difficulty. In November 1989, Bradford caused a transfer of his home to be registered, from himself as sole owner to himself and Hilton (named as Bradford) as joint tenants. While this would normally indicate a marriage-like relationship, the AAT found that Bradford was confused as to the nature of the legal arrangement that he was making, believing that 'he had simply made arrangements for Mrs Hilton's children to inherit his property'.

The majority laid considerable weight on Hilton's move to separate accommodation in December 1989 as supporting its view that the relationship was one of strong friendship and mutual support rather than marriage-like.

The dissenting decision

Mrs Lewis dissented from the majority decision, finding that at all relevant times Hilton was living in a *de facto* relationship with Bradford. In her reasons, she noted the many inconsistencies and conflicts in the evidence, and found that neither Hilton nor Bradford were credible witnesses. She referred to the remarks of the AAT in *Petty* (1982) 10 *SSR* 98:

> 'The proper administration of the social welfare system depends upon applicants making a full and true disclosure of their circumstances. The question whether two people who reside under the one roof are living as