his assets into a trust to be used for charitable purposes he did so in a way that attracted "adequate consideration"': Reasons, para. 22. Section 6AC(11) regarded consideration in secular terms of money or money's worth.

Section 6AC(9)(b) was not available to the Mr Copley. It posited an objective test that —

> 'requires the decision-maker to stand in the shoes of the Applicant as at the date of disposition and, in retrospect, to form an opinion whether, at that point of time, the person could "reasonably have expected to become qualified or eligible for pension".'

(Reasons, para. 25)

As Mr Copley was born in 1918 he was already qualified to receive the age pension before the time of disposal in 1985.

An argument put forward by Mr Copley that the disposition was not made during a 'pension year' for the purposes of s.6AC(2)(a) was rejected because it was not necessary that the person actually receive pension throughout that 12-month period.

But suspension no longer maintainable

Although the decision to suspend pension 'was made reasonably' (Reasons, para. 28), there was no longer any basis for maintaining the suspension. This was because the AAT found that 'the greater part of the disposition must have occurred during or prior to June 1985' (Reasons, para. 28), the charitable trust having been established on 5 June 1985. As this meant that over 5 years had passed since the disposition of assets, s.6AC(9)(a) prevented the disposition of assets provisions applying to Mr Copley after 30 June 1990

Formal decision

The AAT decided that the cancellation decision of 17 June 1987 be set aside; that the suspension of payment of pension should have ceased to have effect from 30 June 1990; and that age pension was payable to Mr Copley from that date.

[D.M.]

Veteran's entitlements: income on investments

STUART and REPATRIATION COMMISSION

(No. N91/294)

Decided: 31 January 1992 by P.A. Moore, J.H. McClintock and T.R. Russell.

This case concerned an application by Stuart to review a decision of the Repatriation Commission which assessed a certain level of income on 2 accruing return investments under the *Veterans' Entitlements Act* 1986.

The facts

The applicant made 2 accruing return investments on 3 November 1988 and 1 July 1989 respectively. On 15 November 1990 a delegate of the Repatriation Commission made a decision to apply the income test in s.46D of the *Veterans' Entitlements Act* to the applicant.

For the purposes of this test, the delegate was required to determine the 'current annual rate of return' on the investments. To determine this the delegate took the average of the monthly rates of return in the period commencing 12 months prior to the date of the delegate's decision. This, it was claimed, was the policy of both the Repatriation Commission and the Department of Social Security.

It was found as a fact by the AAT that the rate of return on the 2 investments had decreased markedly in the year prior to the date of the delegate's decision. At the beginning of the 1 year period, the monthly rate of return was as high as 14% but, by the end of that period, the rate of return had fallen to a monthly rate of 8.25%.

The legislation

The pivotal provision for the purpose of this decision was s.46D of the *Veterans' Entitlements Act*, which reads as follows:

> 'If a person makes, on or after 1 January 1988, an accruing return investment, the person is for the purposes of this Act, to be taken to receive the current annual rate of return on that investment as ordinary income of the person from the day on which the investment was made.'

The issues

The issue for the AAT was whether the term 'current annual rate of return' justified the Repatriation Commission taking the average of the monthly returns on the investment over the year preceding the date of the decision. It was argued by the applicant that this approach was wrong and that the emphasis should fall upon the word 'current', which required the Repatriation Commission to determine the current rate of return on the investment as at the date the delegate's decision was made. The applicant argued that, given the facts of the case, the current rate of return at the date of the decision was 8.25%.

Decision of the Tribunal

The AAT referred to the High Court decision in *Harris v Director-General of Social Security* (1985) 57 ALR 729; and (1985) 24 *SSR* 294; and noted that, in determining an annual rate of return, the emphasis was on the word 'rate' which called for a determination of the rate existing at the time of the determination, which would then be converted into an annual rate.

The AAT rejected the argument that it is necessary to take a 12-month averaging period, the same argument in a slightly different context having also been rejected by the High Court in *Harris*.

The AAT then reviewed a number of authorities relating to the word 'current' and determined that, in the context of the phrase 'current annual rate of return', what was required was the rate of return existing in the period immediately preceding the date of determination and not an historical rate determined by averaging over a 12-month period.

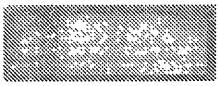
The AAT noted the administrative difficulties involved in frequent adjustments in the rate of return and noted the administrative rationale underpinning averaging over significant periods of time. The AAT noted that, notwithstanding the arguments of administrative convenience, where such an approach produced a prejudice to the applicant then the administrative convenience was not a sufficient justification for the approach. The AAT suggested that an averaging period of 3 months might in some cases be appropriate rather than an averaging over a period of 12 months.

Formal decision

The AAT set aside the decision of the Repatriation Commission and determined that the 'current annual rate of return' was to be determined as the rate of return actually existing at the date of the delegate's decision.

[Editors' note: The corresponding provision in the *Social Security Act* is not couched in the same words as s.46D of the *Veterans' Entitlements Act* and accordingly this may be a decision of only marginal relevance to the *Social Security Act*.]

[A.A.]



JANSEN and REPATRIATION COMMISSION

(No. V91/21)

Decided: 19 December 1991 by J.R. Dwyer.

This was an application for review of a decision of the delegate of the Repatriation Commission to reduce the applicant's service pension on the basis of incomes received from market linked investments.

The facts

The applicant made 2 investments in 1983. The first investment was approximately $15 000 in Scottish Amicable Investment Bonds which were cashed on 2 October 1988 for a profit. The second investment, made in 1983, was the sum of $8000 in ANZ/AFT. The second investment was not successful and in 1985 was converted to an investment in the ABC Fund of Funds at a loss. That fund went into liquidation on about 30 September 1988, at which point the applicant accepted an offer to convert what remained of his investment to the ABC Aggressive Growth Fund. The applicant cashed this investment on 30 May 1989, after it had suffered even further losses.

The Repatriation Commission made a decision on 23 January 1990 concerning the applicant's income from the investments. The Commission included in the applicant's income the profits made from the Scottish Amicable investment over the 6-year period from 1983 to 1989. It did not allow any set off against that income for the losses sustained by the other investment in the same 6-year period. The Commission did allow a small amount for set off of loss of income for the period 1 November 1988 to 30 May 1989.

The applicant sought review on the grounds, *inter alia*, that all the losses sustained in the second investment in the period 1983 to 1988 should be included as a set off against the profits made from the first investment in the same period: and the investments with the ANZ/AFT through the ABC Fund of Funds to the ABC Aggressive Growth Funds should be treated as one investment for the purpose of assessing those losses.

The legislation

The AAT found that the investments were market linked investments and had to consider the law permitting set off of losses from one investment against gains from another investment. There was no statutory provision dealing with this question.

The AAT also considered the meaning of para. (e) of the definition of 'market linked investment' in s.35(1) of the *Veterans' Entitlements Act*, which provides that 'an investment consisting of the acquisition of real property, stocks or shares' is excluded from the definition of market linked investments.

The issues

There were 2 issues to be decided by the AAT:

(1) whether the investments of both these funds in unit trusts constituted investments in 'stock' within the meaning of para. (e) of the definition of 'market linked investment', hence excluding both investments from the definition of market linked investments.

(2) whether the losses incurred in the ANZ/AFT investment in the period 1983 to 1988 should be allowed as a set off against the profits made on the Scottish Amicable Investments in the same period.

Decision of the Tribunal

In relation to the first issue, the AAT reviewed the various definitions of the word 'stock' and determined that, in the context of the definition of market linked investment, it was ambiguous and obscure. For this reason the Tribunal had regard to the explanatory memorandum, which had accompanied the relevant legislation, as authorised by s.15AB of the *Acts Interpretation Act* 1901. The AAT decided that, on the basis of this material, no determined meaning could be given to the word 'stock'.

The AAT was of the view that, if the common meaning of the word 'stock' (which includes a particular fund in which 'money may be invested') were to be adopted, then para. (e) would essentially negate the whole of the definition of market linked investment, as there would be virtually no market linked investment which would not meet the definition of stock. For this reason the AAT declined to adopt this interpretation and said:

> 'Consideration should be given to amending the definition by omitting the word stock from the definition of market linked investment in the Act and also in s.9(1) of the Social Security Act 1991.'

In relation to the second issue referred to above, the AAT noted that the small profit made in the Scottish Amicable Investment did come within the definition of market linked investments but referred to what had been said in *Williamson and the Repatriation Commission* (AAT 24 June 1986 Unreported), namely that

> 'It is patently unfair that small paper increases in the redemption value over initial costs of investments should be treated as capital profits and apportioned as income so as to reduce a veteran's pension when it may actually amount to a substantial loss of capital profits in real terms after discounting it against the rate of inflation. The Tribunal recommends that the respondent give consideration to possible need for legislative amendments to take account of inflation when making these calculations.'

When dealing with the issue of set off of losses involved in the second investments against the small profits made on the Scottish Amicable investment, the AAT reviewed the law on the matter including the Full Federal Court decision in *Secretary to DSS v Garvey* (1989) 19 ALD 348; (1989) 49 *SSR* 644; itself discussed the 'quarantining of separate sources of income' approach put forward by the Federal Court in *Haldane-Stevenson v Director-General of Social Security* (1985) 7 ALD 467; (1985) 26 *SSR* 323.

The AAT noted the investment in the ABC Aggressive Growth Investment Fund was made after 9 September 1988 and therefore, pursuant to s.37J(1) of the Act, it would be deemed to have earned 11% return irrespective of its actual rate of return. Therefore, there would be no issue of setting off any losses in this period as the Act deemed an 11% return.

The AAT noted that, if it were to take the view put forward by the applicant (namely that the sequence of the second investment from the ANZ/AFT through the ABC Fund of Funds to the ABC Aggressive Growth Fund be treated as one investment) then the investment would predate 9 September 1988 and would not be caught by s.37J and accordingly the possibility of a set off would exist.

The AAT noted the taxation situation in respect of these funds (to the effect that they were discrete invest-

ments) but relied upon *Haldane-Stevenson* and other decisions to the effect that the definitions from the *Income Tax Assessment Act* are not necessarily applicable to the *Veterans' Entitlements Act*.

The AAT relied on s.119 of the *Veterans' Entitlements Act*, which required it to act in accordance with substantial justice and the substantial merits of the case, and without regard to legal forms and technicalities, to hold that the 3 investments were in fact one investment and therefore escaped the provisions of s.37J.

Having made this finding, the AAT noted the Repatriation Commission's concession that it was possible to read the decision of the Federal Court in *Garvey* as authorising the set off of one investment loss against profits made from other investments spanning the same period. The AAT doubted that this was the correct understanding of *Garvey* and *Haldane-Stevenson*; but, in the light of the fact that the Commission was prepared to make this concession, the Tribunal was not prepared to rule against the concession. However, rather than applying the concession itself, the AAT decided to leave that aspect of the matter to the Commission.

Formal decision

The AAT set aside the decision of the Repatriation Commission and remitted the matter to the Commission to recalculate the applicant's entitlements, having regard to the losses incurred over the period of the second investment.

[Editors' note: After dealing with the facts of the case, the AAT noted that s.37D of the *Veterans' Entitlements Act* deems a product rate of return on market linked investments of 11%, irrespective of the actual return, including situations where there is an actual loss. The AAT said:

'This seems so unfair a result that I suggest that consideration be given to amendment of these complex legislative provisions.'

The same situation applies in relation to the *Social Security Act* 1991.]

[A.A].

Cohabitation

SECRETARY TO DSS and BUTTON

(No. 7673)

Decided: 23 December 1991 by B.H. Burns.

The DSS asked the AAT to review an SSAT decision setting aside a DSS decision to cancel Button's sole parent's pension in December 1990. The DSS had decided that Button was living in a *de facto* relationship and so came within the definition of 'married person' in s.3(1) of the *Social Security Act* 1947. As a consequence she did not qualify for the pension claimed.

The principles to be applied

In determining whether there existed a 'marriage-like relationship' the AAT had to refer to s.3A of the Act. That section set out a number of factors which had to be considered including matters affecting 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 their commitment to each other.

Section 43A also provided that, where a person in receipt of, or claiming, sole parent's pension had shared a residence for the last 8 weeks with a person of the opposite sex then they may be required to satisfy the DSS that they are not living in a *de facto* relationship.

The facts

The Tribunal found that Button had lived in a marriage-like relationship with Mr V while residing at the residence of Mr V's parents until March 1988. In that month they moved to a Housing Trust house. In November 1989 Mr V moved out of the house as the result of arguments and fights. There was little contact between Button and Mr V until the birth of their son in August 1990. After the birth Mr V visited Button's house to see his son for short periods.

In January 1991 Mr V returned to live in the house with Button. Mr V had left his vehicle parked at the house during his absence and, combined with his visits to see his son, this supported the conclusion reached by the DSS that Button and Mr V were still in a *de facto* relationship.

The cancellation of Button's pension in December 1990 caused her financial hardship. This brought about the return of Mr V to the house in January 1991 on the basis that he would pay $80 per week rent and $20 maintenance for his son. After his return he bought his own food, did his own washing and cleaning, ate by himself and did not have a sexual relationship with the respondent.

Was there a marriage-like relationship?

The AAT concluded that a marriage-like relationship did not exist in this case. There was no joint ownership of real estate. The house was leased in Button's name only. The household expenses of Button and Mr V were separate.

Button and Mr V had separate lives. Mr V did not adopt any meaningful responsibility for the care and support of his son apart from the maintenance payment and playing with him. Button was effectively the only carer for her son.

They did not engage in any joint social activities and their friends did not consider them to be in a marriage-like relationship. There was no sexual relationship between them.

While there had been a marriage-like relationship until November 1989, the relationship now was that of landlady and lodger 'brought about by financial necessity', said the AAT.

The AAT also commented that s.43A did not apply in this case as Button and Mr V had not shared a house between November 1989 and January 1991. To be applicable, s.43A required the couple to have shared a house for at least 8 weeks.

Formal decision

As the legislation had been amended since the SSAT's decision, it was necessary to set aside the SSAT decision and substitute a decision that since December 1990 Button was a 'single person' within the meaning of the *Social Security Act* 1947 and was qualified for sole parent's pension.

[B.S.]

HUCKER and SECRETARY TO DSS

(No. 7656)

Decided: 15 January 1992 by T.E. Barnett, S.D. Hotop and R. Joske.