

**‘MARRIAGE-LIKE RELATIONSHIPS’ AND SOCIAL SECURITY:
RETIREES AND THE AGE PENSION**

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This article illustrates the problems of senior pension holders who may be involved in marriage-like relationships under the *Social Security Act 1991*. The article shows how a changed approach to these relationships has caught a wider group of couples who may suffer a reduction of pension.

At the same time the article traces the concept of cohabitation through a change in the meaning of the concept of ‘dependency’. This approach shows how this key indicator of cohabitation has shifted or expanded with the recognition of new forms of relationships.

Jim and Mary were married for twenty years but upon their retirement they divorced and went their own ways. Mary sold her share of the family home to Jim. She soon found the proceeds were not enough to buy another property, so after three years of separating she moved back in with Jim. To meet the accommodation needs of Mary her capital was utilized to enlarge the home so they each person had their own bedroom and lounge room. They also shared expenses of the home and the car. The couple since they were divorced has not had a sexual relationship. While they cared for each other they went their own ways and the local town understood they were not a couple.

Bob is a recently widowed pensioner. At the bowling club he meets another widowed pensioner Betty. After some months of meeting socially they become friends and Bob moves in with Betty. Bob helps Betty do most of the housework while Betty does the cooking. They have separate bedrooms and they do not have a sexual relationship. However due to their poor financial situation they share expenses 50:50. They continue to go out socially together and friends know they are not a couple.

These are typical cases of elderly couples who share a home and care for each other. Such ‘carers’ as well as ‘long term friends’, ‘divorcees and ex-partners’ living

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together, could be seen by Centrelink¹ as a 'marriage-like relationship' (here after called a MLR). The consequence is that the couples could lose their respective two 'individual pensions' and receive the lesser 'married rate'.

A substantial literature has developed on MLRs. While the attributes of a MLR may be seen by Centrelink as applicable to all types of benefits and allowances (where there is a single and partnered rate) under *Social Security Act 1991(Cth)*, it is useful to isolate seniors as a special group of claimants. Commentators on MLRs (or what writers sometimes describe as the 'cohabitation rule') argue in general that the rule is discriminatory against those who are in a MLR and in particular in it is discriminatory in the way it impacts on women.²

Sutherland and Anforth have noted how the test over MLRs has been seen as discriminatory in that it disadvantages affectionate and caring heterosexual couples in comparison to homosexual couples. Furthermore, they note that the test is contrary to public policy as it discourages independent living, the pooling of resources and the sharing of scarce accommodation for those that are over 60 (Sutherland and Anforth 2005:32).

Other writers have criticized the rules on MLR as an invasion of privacy. For instance, in 1981 Jordan concluded that the rules over cohabitation were vague and that the decisions were based on subjective and arbitrary judgments. He argued that decisions were moralistic and were aimed at discouraging and penalizing sexual relations between unmarried people, and that they were based on outdated assumptions on relationships. Finally he concluded that investigations were intrusive and humiliating (Jordan 1981:5).³ These comments focused on how the cohabitation rule impacts on younger couples especially women who especially care for children.

These negative critiques must now be viewed against the Department's revised *Guide to Social Security Law* which provides greater direction to Centrelink staff to weigh up all the evidence both for and against a MLR to ensure procedural fairness..⁴

¹ Centrelink is the Commonwealth agency that delivers benefits for the Department of Family and Community Affairs.

² Mosman 1977, Hopkins 2005, Wilkie 1993, Graycar and Morgan 1990:147-160, Stewart 1999, Scutt 1990, Neave 1992, Sleep, Tranter and Stannard 2006.

³ In the most recent study it has been shown that that investigations have been based on data-matching programs, tax returns, evidence from employers, medical practices and hospitals, schools and child care centers and religious leaders. The investigators conclude that the rules represent an attempt to control clients and insure that they maintain certain types of relationships. This they claim arises from the openness of the discretion given to investigators and the openness of the rule (Sleep, Tranter and Stannard 2006:9).

⁴ I discuss this aspect later in the context of the recent report from the Ombudsman.

I WHAT IS A MLR UNDER SOCIAL SECURITY LEGISLATION?

Judges have for a number of years have complained about the difficulty of deciding whether or not two heterosexual people are 'members of a couple'. They have complained that it is an inconsistent, unpredictable and arbitrary process (Hopkins 2005:192).

The *Social Security Act 1991* uses the expression 'members of a couple' to include persons formally married and persons of the opposite sex who are in the Secretary's opinion in a 'marriage-like relationship'⁵ This requirement is now subject to a reform from the 1, July 2009, which makes a 'same sex couple' subject to the same law as a person of the 'opposite sex'. This is the effect of the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws- General Law Reform) Act 2008*.⁶

The section sets out five criteria, including the circumstances of the relationship' that the Secretary may have regard to when forming an opinion as to the existence of a 'marriage-like relationship'. These include the financial aspect 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.

As regards the 'financial aspect of the relationship' there are four elements. Firstly, any joint ownership of real estate or other major assets and any joint liabilities. Secondly, any significant pooling of financial resources, especially in relation to major financial commitments. Thirdly, any legal obligations owed by one person in respect of any other person. Fourthly, the basis of any sharing of day-to-day household expenses.⁷ Recently it has been held that the 'significant pooling of financial resources' goes beyond 'financial cooperation'.⁸

In short a MLR exists if two people of the opposite sex, who are not close relatives, are considered as living together as husband and wife.⁹ As I later show however the relationship may not have the ingredients of what one may normally see as a marriage.

⁵ Social Security Act 1991 (Cth) Section 4.3

⁶ See Schedule 6, Part 2 Section 25, as regards Subparagraph 4 (2) (b) (i) of the *Social Security Act 1991*.

⁷ S 4 (3) (a) i-iv.

⁸ *Pelka v Secretary, Department of Family and Community Services* (2006) 151 FCR 547. See also Tranter, Sleep and Stannard 2007.

⁹ Ibid.

Legal interpretation of the Act makes it clear that the legislation does 'not provide a checklist of circumstances to be met in all cases'¹⁰ It is made clear that these criteria should not be read as a balance sheet where a MLR is held to exist if the balance of the criteria are found.¹¹

II THE FINANCIAL IMPLICATIONS OF A MLR.

Where both members of an MLR are receiving benefits at the married rate, the rate paid is less than two singles. The single rate for a pensioner is currently at \$530.90 and a married rate is \$441.40 per fortnight. The pension for a couple is higher than the individual rate but it is approximately 84 percent of the amount of the pension that two eligible single people would receive (Stewart 1999:15) Hence those living in an MLR may be anxious to continue with a single rate of pension, but face the prospect of losing the higher rate of pension.

In the personal taxation system the individual is disaggregated from the family. However the 'MLR rule' uses the family or household as the unit of assessment. On this basis a client's relationship status is the bedrock of a claim for a benefit or allowance (Sleep, Tranter and Stannard 2006:3). Thus claimants of a social security payment who are members of a MLR continue to have their entitlements assessed against their partner's income (Graycar and Morgan 1990:147-8, Hopkins 2005:148).¹²

There is also another scenario to these typical stories detailed in my introduction. In the case of Bob and Betty, Bob has his own home and to live with Betty, Bob moves into her home and leaves his home vacant. Perhaps he intends to rent out his home. With this development Bob has an 'income and assets' test issue. This is the case as the asset (and any income) could be assessed jointly with Betty's assets. Should his house be valued at an average price of a home in a major metropolitan city this may mean the couple may suffer a reduced pension or lose it all together. Further more should Centrelink decide that a MLR commenced on a certain date the couple may be required to repay what is to be now consider as a 'debt'. Furthermore the granting of rent allowances or bereavement payments may be affected.

III THE JUSTIFICATION FOR THE RULE ON MLRS

Several scholars have argued that administration of MLR in social security legislation has been based on several assumptions. Firstly, a couple may live more cheaply than two single people (Graycar and Morgan 1990:150). Secondly, MLRs are premised on the basis that the couple share expenses and produce economies of

¹⁰ *Re Pill and Secretary, Department of Social Security and Community Services* (2005) 81 ALD 266 at 272 per Member Carstairs.

¹¹ See Pelka (op. cit) and the notion that courts should adopt a more structured approach to finding a MLR, see the discussion in Tranter, Sleep and Stannard 2007:209.

¹² See Section 1064 (4) of the Social Security Act 1990.

scale (Stewart 1999: 476). Thirdly, the rule is based on the assumption that those in MLR should not be better off than those legally married (Sackville 1975:189).

In 1974 the Minister of Social Security gave the rationale behind the different rates of pay to achieve financial equity between those who live alone and those who live with others.

‘The reason for granting a higher of pension to a single person is that a married couple can share the costs of day-to-day living whereas a single person needs a relatively higher rate in order to enjoy the same living standard.’¹³

While there were economic and policy justifications for the rule as expressed in a variety of policy documents there are other implicit justifications that a member of a couple should be supported by their partner.

These ideas coincided with the notion that property represented an emotional bond between members and the ‘morality’ surrounding joint property was that a couple whose lives are together should share property. In particular this notion of property reflects ideas of dependency, that a partner in a relationship should be able to be supported by their male partner.

The idea of sharing property has a perceived gendered aspect: the masculine attribute was associated with an ethic on the merits of work and self-discipline and family support by the male head of the household and breadwinner. By contrast the female counterpart reflected ideals of domesticity and motherhood. (Broomhill and Sharp 2004, Murphy 2002, White and Hunt 2000:103-104). This traditional, married, male breadwinner¹⁴ was believed to offer protection against risk especially for women and children (Lewis 2005:39).

Failure to support family members within a family was thought to indicate a lack of moral fiber. It was expected that parents should support children and children should support parents. At the same time those in a marriage were seen to have a duty of marital support. This idea of dependency and its implicit idea of partner-support was that married women should be supported by her husband and at the same time women should be supported by their *de facto* partners (usually assumed to be men) with which they live.¹⁵

¹³ Commonwealth Parliamentary Debates, House of Representatives, 20th March 1974 668-9, Bill Hayden Minister for Social Security.

¹⁴ The male breadwinner has been defined as existing where the man is the primary income earner and the wife is being supported as a home based non- market career. It has been argued that Australian governments played an important role in supporting this model after the second world war in a period often characterized as the wage-earners welfare state (Castles 1998:42). The 1907 Harvester judgment established the principle of a minimum family wage should be sufficient for a male breadwinner to support an independent family.

¹⁵ These claims as to family property can be substantiated by an examination of eighteenth century writers on property and family. For an account, which praises these qualities, see Himmelfarb 1995. For more objective accounts see, Stone 1994, Collini 1985, Roberts

While the above may have been social prescriptions around the notion of dependency and the importance of sharing ‘family property’ in a marriage or de facto relationship under Family Law legislation a husband had only a limited duty to support his spouse (Dickey 2002:274,469, 482). Thus there is no duty in under the *Family Law Act* (1975) that a husband should support a wife in a marriage and by extension there is no duty to support a *de facto* wife. To argue other wise would be to maintain a more stringent test than exists within a legal marriage¹⁶ (Hopkins 2005:191, Graycar and Morgan 1990:155).¹⁷

It has been argued that the test for a MLR was seen to consolidate the position of normal families and to supervise those in irregular sexual unions (Jordan 1981:14). Should such family arrangements be located they ought to be supported by the men they live with (Mosman 1977:5).

However the assessment of a MLR now depends requires a balancing of the five factors referred to in each case in a holistic way. The legislation in its current form is non gender specific and makes no presumptions what ever about males supporting females in a relationship.

IV IS THERE A DIFFERENCE IN LEGAL TEST WHICH IS APPLICABLE TO OLD-AGED PENSIONERS AS AGAINST THOSE IN ALL OTHER TYPES OF MLRS?

The cases concerning MLRs have been largely concerned with what I call ‘younger folk’ (non-aged pension applications). This younger group has been the main concern of successive governments as they have been seen as breaking married norms and as a drain on revenue. This group of claimants may be involved in what we now call Parenting Payments, Newstart Allowance or Youth Allowance. I should also mention the Disability Pension. I acknowledge that many claiming this latter type of pension may be nearing their retirement years.

The same statutory test applies to all MLRs regardless of what type of benefit or allowance. Two comments are necessary here. Firstly, there is some recognition that the statutory criteria on MLRs are more appropriate to younger folk. For instance in

2002. For construction of the concept of ‘family property’ in Australia, I rely on the *Royal Commission on Old Aged Pensions*, 1907-8 and debates surrounding the introduction of *Testators’ Family Maintenance Legislation*, in New South Wales Parliamentary Debates 1905 and 1906. See also Damousi 2003, for a discussion of family responsibility as regards property between the two wars.

¹⁶ *Tang and Director of Social Services* (1981) 3 ALN N83 at 84. A husband has no duty to support his wife inside a marriage other for necessities, See Dickey 2002:274,469,482.

¹⁷ In the area of law concerning family disputes over property when a relationship ends the parties may seek statutory or equitable remedies. Here I refer to the law on spousal maintenance, constructive trusts, *Testator’s Family Maintenance Legislation* and the remedies provided under *de facto* legislation. In these areas of law joint property is shared under a variety of explanations which recognise the contributions and positions of the parties.

*Needer*¹⁸ the Member suggested that the criteria are more appropriate to younger couples than to people in their mid to late fifties who are looking for security and companionship and living accommodation which they will be able to afford in the years ahead. This dictum adds a gloss to the Act that seniors will be treated differently as they are in effect in a different stage of life and have different needs. It could be argued that this 'gloss' is not authorized by the Act.¹⁹

Secondly, as regards the special treatment I give to aged-pensioners in this article I justify the treatment of the category of 'senior pension applicants' on the basis that anecdotal evidence supports the assertion that there are problems for aged pensioners in this type of pension category.²⁰ Unfortunately there is no hard data for this assertion as figures compiled by Senate Committee on MLRs do not separate out benefit types.²¹ The Commonwealth Ombudsman has received many complaints on MLR and recently their long awaited report has been released.²² The Report recommends that greater oversight be placed on Centrelink staff when conducting MLR reviews to ensure the process is fair.²³

V THE DEVELOPMENT OF THE RULE ON MLRS.

I now turn to a treatment on the development of the rule in order to show how the impact of the rule expanded to cover a wider variety of family type relationships.

Pensions were first granted by State legislation in New South Wales in 1900.²⁴ This Act included the requirement that pensioners 'be of good moral character' and that the pensioner was 'leading a sober and reputable life'. This legislation was administered in a way that refused awards to claimants that were seen not to be living a 'moral life'. This in effect meant that those who were not industrious, were drinking in excess or were involved in so-called 'irregular sexual relationships' were denied the pension (Jordan 1981:14).²⁵

¹⁸ *Needer v. Secretary, Department of Social Security* 74 SSR 1074. See also *Ford and Secretary, Department of Family and Community Services* [2003] AATA 7.

¹⁹ See submission by Mr. French in *Needer* op cit.

²⁰ Numerous workers at Welfare Rights Centers narrate stories of innocent couples providing assistance to each other and their problems over being regarded as being in a MLR,

²¹ Senate Finance and Public Administration Committee, Answers to Questions on Notice, February 2005 available at http://72.14.253.104/search?q=cache:CeBNrzHmc4J:www.aph.gov.au/senate/committee/fa+pa_ctte/estimates/add_0506/human/hs51.pdf. The committee received the information that during 2005-6, there were as regards MLR 2092 case lodgments, 1914 decisions, 1357 affirmations and 519 cases set aside.

²² Commonwealth Ombudsman, Marriage-Like Relationships: Policy Guides for Assessment Under Social Security Law (2007)

²³ For other recommendations see especially 13 (3.16) , (3.20) , 16-20, (3.37)-(3.56).

²⁴ *Old-Aged Pensions Act* 1900 (NSW).

²⁵ See *Royal Commission on Old-Aged Pension 1906, Volume 3, Minutes of Evidence, Numbers 630, 631, 678, 4249-4254, 4860, 4861. On the administration of this Act by District Boards little is know because of the considerable loss of records, but see Roe 1981, Kewley 1973:50-54, Jordan 1981:12-14, 1989.*

Later Commonwealth legislation²⁶ did not mention *de facto* relationships and the word 'moral' was dropped from the Act. In practice this legislation continued to make awards on the basis of the 'non-advantage test'. In other words that one of the parties should not be in a better position as regards the pension than if they were legally married²⁷

The 1942 *Widows Pension Act (Cth)* laid down that a female widow was entitled to the pension if the relationship had existed for three years, the women had been maintained by the man and the relationship had ended by the mans death. While the Act did not disqualify a women who had been living in a current *de facto* relationship the then DSS treated this as grounds for canceling the benefit on the grounds of equity that women in *de facto* marriages show not receive advantages over formal marriages (Jordan 1981 20, Carney 2006:185).

Carney rightfully concludes that the cohabitation rule originated in an ethical policy enunciated by the public service many decades before Parliament gave it legislative blessing (Carney 2006:185).

Successive administrative practices continued this policy. For instance the Social Security, Minister Mr. Hayden, said that the Labour Government was maintaining this policy which had been followed in Australia for many years. He claimed he was not representing a moralistic attitude and that the policy repented a realistic appreciation of the facts as they were.²⁸

Following adverse comments from the Social Security Appeals Tribunal and the Poverty Commission (1975)²⁹ this extra-legal practice of denying widow's pensions the Act was changed in 1975³⁰ to exclude 'a women living with a man as his wife on a *bona fide* domestic relationship although not legally married to him (Jordan 1981:38). The practice of finding that a MLR exists is crucial as regards applications for other benefits and allowances. In this article I only deal with the case of retirees seeking the aged pension and the issue of MLRs.

VI THE REGISTER OF DEPENDENCY AS REGARDS MLRS IN EARLY CASES

The period from 1947-1989 saw the test of cohabitation disqualify women from receiving a pension should they be regarded under the terms of the Act, as living in a *bona fide* relationship with a partner.³¹ The period ended with a new approach

²⁶ *Invalid and Old-Aged Pensions Act 1908 (Cth)*.

²⁷ Instructions issued for Guidance of Deputy Commissioners cited by Jordan 1981:17.

²⁸ House of Representative *Debates* 20th March 1974, 668-9

²⁹ See Sackville 1975.

³⁰ *Social Services (Amendment) Act 1975*.

³¹ See Section 59(1) and 60(1). On the administration of this Act in the period when the courts sought to define the 'cohabitation act' see Hanks 1979, Cossins 1979, Sackville 1975.

heralded by the 1989 Act³² and the specification in that Act of the indicia of MLRs following the case of *Re Tang*.³³ The definition of MLRs was extended by a 1995 Amendment to the Act (see later).

What were the hall marks of 'dependency' of cases prior to 1989? In other words what was the 'spark' required to find a MLR? Sackville comments that there were some reasonably well settled rules which emerged in departmental memoranda and instructions. They were the pooling of resources, sharing expenses, the women holding the man's name and the wife holding herself out in public as being married to her partner (Sackville 1975:190). The litmus test of a MLR was the comparison with a normal marriage relationship.

In *Waterford*³⁴ a women lived with a man in a caravan as an act of desperation. While there was some sharing of chores there was no sexual relationship and little or no financial sharing. Under the terms of the Social Security Act 1947, it, was necessary for the Members to decide whether she was living with the man on a *bona fide* basis. To locate what was the essence of cohabitation, the Members decided that a comparison was to be made with marriage. The relationship of cohabitation therefore was seen as a 'relationship with a man' which had 'all the indicia of a marriage save that it lacked the legal bond'.³⁵

*Re Lambe*³⁶ was another case on the same section of the 1947 Act regarding a claim for widow's pension. In this case there was a relationship for three years with the sharing of appliances, the woman washing clothes and house cleaning for the man. The man accepted some financial responsibility for the child, but the couple remained financially independent.

To determine whether they were living in a state of cohabitation it was held that there had to be a household in which a relationship between the parties subsists as a key to understand the requirement of the section. In the search for this 'household' all facets of the relationship had to be taken into account, such as the relationship of the parties to the children, the way the parties present the relationship to the outside world, as well as whether the relationship had the indicia of the family unit. In the courts view it was held there must be both 'permanence and exclusiveness' in the relationship, as these elements were the 'essence of a marriage relationship'.³⁷ Thus in evaluating any given relationship to say whether a woman was living with a man on a *bona fide* domestic basis the court thought that regard may properly be had to what, current society recognizes as constituting a relationship of man and wife.³⁸

³² *The Social Security and Veteran Affairs Legislation Amendment Act (No 3) 1989* inserted in the 1947 Act a new section, 3A.

³³ *Re Tang v. Director-General of Social Services* (1981) 3 ALN 83.

³⁴ *Re Waterford and Director-General of Social Services* (1980) 3 ALD 63

³⁵ Ibid 70. The tribunal held there was not a MLR in this case.

³⁶ *Re Lambe and Director-General of Social Services* (1981) ALN N 372.

³⁷ Ibid 75

³⁸ Ibid 76

My objective in discussing these cases is to demonstrate the moral register³⁹ of dependency and its connection with the notion of the breadwinner model of marriage. The essence of dependency in given in these cases was the idea that a woman should not receive a pension should a woman be in a consortium with a man who could provide for her as was supposedly the case of a married relationship. I emphasize this meaning of 'dependency' as it enables me to later describe the importance of the 1995 Amendment and a shift in the concept of dependency.

VII LATER DEVELOPMENTS AS REGARDS MLRS.

An important change was made in 1995 when Parliament legislated⁴⁰ that the phrase 'is living' should be replaced with a more generic phrase of 'has a relationship'. A superficial excuse was given for this change⁴¹ but the effect was to expand the range of relationships that would constitute a MLR⁴² (Sutherland and Anforth 2005:16).⁴³

The change in the legislation reflected a policy that the 'relationship' may not even be 'marriage-like' (Sleep, Tranter and Stannard 2006:4). Stewart notes the policy of recent cases reflects a notion that a specific category of family is broad enough to encompass long-term friendship between members of the opposite sex who were involved in household or financial arrangements (Stewart 1999:453).

From a stigmatized meaning of dependency there is now the idea of relative independence. This comes from an erosion of the breadwinner model in terms of social practice and prescription (Lewis 2005:40).

I suggest there now is a new register to the notion of dependency which sought to locate a new moral area of family life. From a meaning of dependency where someone in a relationship was seen negatively to be 'hanging to another' a new shift

³⁹ I argue that the term 'dependency', may have a different meaning or register in different discourses (e.g. legal, economic, or in public policy debates) and that the meaning of 'dependency, may shift in different periods of time, see Fraser and Gordon 1994:312.

⁴⁰ *Social Security (Non-Budget Measures) Legislation Amendment Act 1995* (Cth) (No 105/1995).section 14a.

⁴¹ The reason was given that it would stop solo parent pensions to be paid while they temporarily lived apart. The example of a truck driver was given. See the Explanatory Memorandum to the Bill.

⁴² Quoted with approval in *Pelka v Secretary, Department of Family and Community Services* (2006) 43 AAR 220 at 230. See also *Bell v. Secretary, Department of Family and Community Services* (2001) AATA 355 (2 May 2001).

⁴³ Note the above Amendment Act specified in section 14 (3)A that 'the Secretary must not form the opinion that the relationship between a person and his or her partner is a marriage-like relationship if the person is living separately and apart from the partner on a permanent or indefinite basis.". Now see section 4 (3A) of the 1991 Act. As I suggest later this change does not exclude the possibility that peoples whose lives are intertwined, but not substantially in a relationship may not be regarded as in a MLR.

in the meaning has entered the legal discourse where in a post-industrial society women are claiming the same kind of independence as men (Fraser and Gordon 1994:312). At same time there has been a decline in the nature of obligation and a rise of the language of individual entitlements (Eekelaar and Maclean 2004, Giddens 1992, Beck and Beck-Gernsheim 1995, Smart and Neale 1999). In this new register people should be seen as dependant should their lives be intertwined or connected through some form of fairly minimal consortium. 'Property rights' arise (and a MLR) not only in cases where parties may depend on each other (as in the previous period), but now what I will describe as a 'social entwinement' of a relationship.

Aspects of this approach was seen in *Lambe*⁴⁴ where the court held that financial circumstances and 'financial sharing' were only one of several criterion of finding a MLR. There is 'no support in the legislation that it is of paramount consideration ... it is an important factor which will vary from case to case'.⁴⁵ In that particular case it was held a MLR even though there was no sharing of property.⁴⁶

In *Staunton-Smith*⁴⁷ the judge noted that it was not sufficient to note that a couple are sharing accommodation, nor is it sufficient that one is financially dependent on the other; *it is necessary to delve deeper to find the reasons for those arrangements*. The reasons will be better indications in determining the correct nature of the relationship.⁴⁸

There is a collection of cases concerning couples who reside in the same house, who could be seen as 'brother and sister' or as cooperating with each other to minimize expenses. This form of joint residence has been seen as a sufficient connection to form the basis of a MLR. Cases where a MLR was held to exist is shown by the following three cases:

In *Gill*⁴⁹ a man offered housing to the mother of his two children at a time of a crisis in her life. This housing arrangement was seen indicative of the significant bond between them and that there was a MLR as the relationship had a qualitatively difference from the commitment of either to anyone else.

⁴⁴ *Lambe v Director-General of Social Services* (1981) 4 ALD 362. I note *Lambe* was prior to the changing in the definition of cohabitation in 1995, but I submit this case reveals an earlier search for a wider basis of a MLR.

⁴⁵ *Ibid* 369.

⁴⁶ Ironically, there is little capacity of the law to compel sharing of property, but on divorce, the proceeds are shared following an assessment of the contributions under the *Family Law Act 1975*. In most States there is comparable legislation for de factos to share the proceeds of property. Trust law also gives remedies for those who jointly contribute to property under the rules that apply to constructive trusts.

⁴⁷ *Staunton-Smith v. Secretary, Department of Social Security* (1999) 25 ALD 26.

⁴⁸ *Ibid* page 35, my stress.

⁴⁹ *Gill and SDFaCs* [1999] AATA 452.

In *Stevens*⁵⁰ the husband went into aged care. After a period he returned to live with his ex-wife. The wife supported him and cared for him. The wife claimed she was no longer in a MLR as they no longer had joint bank accounts, a tenancy agreement or an electricity agreement. The wife claimed the social aspect of the relationship was lacking because of her husband's illness. The court held that there was a MLR as their lives were 'inextricably linked' as they were living under the same roof where the wife cared for her husband. The Member considered that lives were interlinked emotionally as the husband was completely dependant on the wife. In this regard the nature of the commitment to each other under the *Act* was therefore satisfied and they were considered to be in a MLR.

In *VHB*⁵¹ the couple was married in 1985. They subsequently bought property together as joint tenants and divorced in 1995 and separated. However they came to live together again and lived in a jointly owned property. They shared different parts of the house, ate at different times, did not socialize together and were known as being divorced. The court held they were living in an MLR.

What are the hallmarks of this form of a MLR in these cases? These cases indicate that the legal indications of a MLR have been widened through the recognition of an expanded test for a MLR relationship. This new test is in effect a lesser form of commitment or even involvement in the other person's life in a MLR than we have seen in the pre-1980 cases. This approach recognizes a new form of 'relationship' based on the 'intertwinement of lives'. Perhaps this new form of MLR indicted by these cases could be called a 'relationship within the same dwelling that does not amount to a form of man and women partnership'.

VIII CONCLUSION

The purpose of this article has been to illustrate the problems of seniors who may be involved in a MLR. This article does not deny that in each case a holistic view of the whole circumstances must be taken into account. I attempt to make clear that a wider group of relationships may be considered as a MLR.

The judgments discussed above indicate that parties who live in the same house, or continue to live together after a relationship has ended may be seen as living in a MLR. In many cases the couple may not be having a sexual relationship, or give the community the impression that they were a couple. Furthermore they may remain financially independent from each other. The 'spark' that indicates the MLR seems to be the common residence of a dwelling and the occasional sharing of lives.

⁵⁰ *Stevens and Secretary, Department of Family and Community Services* [2004] AATA 1137.

⁵¹ *VHB and Anor; Secretary, Department of Family and Community Services* [2006] AATA 1 (4 January 2006). See also *Karafoulidas and Department of Family and Community Services* [2001] AATA 757.

These judgments however were released before the Department revised the *Guide to the Social Security Act*⁵² which provides greater direction for Centrelink staff to weigh up all the evidence in deciding if there is a MLR. This guideline reads:

'Care' relationships exist which involve people of all ages. In cases where a person is sharing with another person of the opposite sex primarily for caring reasons and companionship and there is little evidence of other factors present (discussed below), the decision-maker should not form the opinion that a marriage-like relationship exists.

In the light of these Guidelines it may be that such cases would not come to court and that they maybe decided differently. However it must be remembered that they are only guidelines and not law as Guidelines are not binding on a judge.⁵³

Secondly, recent formulations of a new type of cohabitation now described as a MLR, has been influenced by the findings in the social sciences on new forms of relationships. The implication is that those living in the new marriage like form should share property as these are the new forms of 'coupledom' in modern society.

Several comments may be made about the recognition of the new family forms in case law. Here I argue that the courts have attempted to move with the times and to recognize the existence of non-traditional families. Sociology has developed a large literature on new family forms and the changing attitude of people within relationships.⁵⁴

In the *Gill*⁵⁵ case the Tribunal quoted the sociologist Anthony Giddens and his ideas on the changing nature of relationships. The Tribunal noted how Giddens had commented that the idea of 'relationships' were rather new. 'Only 30 years ago or so years, no one spoke of a relationship. Marriage at that time was the commitment'....However, marriage is no longer the chief defining basis of coupledom'.⁵⁶ After citing this opinion of Giddens the Tribunal in *Gill* commented that the *Act* endeavors to reflect the basis of the historical change reflected in the nature of marriage.

⁵² Section : Determining a Marriage-Like Relationship, 2.2.5.4.

⁵³ *Green v. Daniels* (1977) 51 ALR 463.

⁵⁴ See for instance the work of Giddens 1992, Beck and Beck-Gernsheim 1995, Smart and Neale 1999. These authors are extracted in the leading cases and commentary materials for law students, see Parkinson and Behrens 2004. Other literature on families and the new forms of intimacy in relationships is easily accessible in Giddens 2006:248. See also the comments by Justice Kirby in *Permanent Trustee Ltd v Fraser*, 24 February 1995 (CA40573/93) CA(NSW) unreported, where he cites the article by Grainer (1994) that it is inappropriate to consider the family in modern times in terms of duty. This case is best accessed in Atherton and Vines 1996:668.

⁵⁵ Op cit.

⁵⁶ See the Reith lectures at http://news.bbc.co.uk/hi/english_static/event/reith quoted in Sutherland and Anforth 2005:28

