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Details of Filing

Document Lodged:	Submissions
File Number:	ACD1/2020
File Title:	BEN ANTHONY RUSHTON v COMMONWEALTH SUPERANNUATION CORPORATION & ORS
Registry:	AUSTRALIAN CAPITAL TERRITORY REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads "Sia Lagos".

Dated: 10/12/2020 10:51:35 PM AEDT

Registrar

Important Information

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Further Written Submissions by the Applicant.



~:Num. 2:2; Psa. 60:4.¹

No. ACD1 of 2020

Federal Court of Australia

District Registry: Australian Capital Territory

Division: General

On appeal from the THE AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY, ABN 38 620 494 340 (SUPERANNUATION COMPLAINTS TRIBUNAL).

BEN ANTHONY RUSHTON

Applicant

COMMONWEALTH SUPERANNUATION CORPORATION, ABN 48 882 817 243 and others named in the schedule.

Respondent[s]

The Applicant cites the following authorities for the meaning of the expressions “**living with each other**” and “**wholly or substantially dependent upon the deceased person as husband and wife on a bona fide domestic basis**” contained in Rule 1.2.1 “marital or couple relationship” and “spouse” of the schedule “**Rules for the Administration of the Superannuation Scheme**”, in the Public Sector Superannuation Scheme [Trust Deed](#), made under s 4 of the [Superannuation Act](#) 1990 (Cth).

1. [Al Salim and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs](#) (Citizenship) [2020] AATA 65 at [\[23-24\]](#).

[\[23.\]](#) The role of the Citizenship Policy is to provide guidance on the interpretation of the Act. The Tribunal is not bound to strictly apply the Citizenship Policy or the CPIs **as they are not law**. As the Tribunal stated in [Re Aston and Secretary, Department of Primary Industry](#) (1985) 8 ALD 366 at [\[21\]](#): “**Policy is not law. A statement of policy is not a prescription of binding criteria.**”

[\[24.\]](#) Most recently, in [G v Minister for Immigration and Border Protection](#) [2018] FCA 1229 at [\[210\]](#), Mortimer J, after a comprehensive review of the authorities, concluded: “**... policy is not to become a rule of law. The statute is the expression of the rule of law. Executive policy cannot, in form or more importantly in substance, be perceived by decision-makers as, or operate as, a rule.**”

¹ [UNCLOS](#) 1982 (U.N.), Art. [91](#). M.O. [414](#) (1908) (Cth). [Ruhstrat v People](#).

Filed on behalf of (name & role of party) BEN ANTHONY RUSHTON®™ and ©, Demandant and Beneficiary.

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2. [Christopher v McFarlane as executor of the Estate of Buss \(Deceased\)](#) [2017] QDC 154 at [55-58], [77], [104-111].

[77.] **Physical separation will not preclude a finding that they were living together on a genuine domestic basis** during this time... I am conscious too of the comments of Dutney J in [S v B](#) about the fragility of a de facto relationship unlike a **marriage galvanised by law**. He said at para [33]: “**The robust institution of marriage survives until formally dissolved by legal process**, even though the parties are no longer a couple and exhibit none of the observable indicia of a domestic arrangement... In [Hibberson v George](#) (NSWCA) as cited in [King v The Queen](#) [2011] VSCA 423 at [27], Mahoney JA, with whom Hope and McHugh JJA agreed, spoke of the de facto relationship as follows: “**There is, of course, more to the relevant relationship than living in the same house... The relationship of marriage, being based in law, continues notwithstanding that all of the things for which it was created have ceased. Parties will live in the relationship of marriage notwithstanding that they are separated**, without children, and without the exchange of the incidents which the relationship normally involves.”

In [King v The Queen](#) [2011] VSCA 423 at [27] with respect to the same statutory definition, in *D v McA*, [13] Powell J observed: just as human personalities and needs may vary markedly, so also will the aspects of their relationship which lead one to hold that a man and woman are, or are not, ‘**living together as husband and wife on a bona fide domestic basis**’ be likely to vary from case to case. This being so, it seems to me that each case will involve the court making a value judgment having regard to a variety of factors relating to the particular relationship, those factors including, but not being limited to, the following: [List (a)-(j)]

In [King v The Queen](#) [2011] VSCA 423 at [28], in [Lynham v Director-General of Social Security](#), Fitzgerald J considered whether the financial arrangements between the parties should be of particular importance in determining the nature of their relationship. His Honour said: “**What must be looked at is the composite picture**. Any attempt to isolate individual factors and to attribute to them relative degrees of materiality or importance involves a **denial of common experience** and will almost inevitably be **productive of error**.”

In [Mallet v Mallet](#) (1984) HCA 21 at [608-609], held that s 79 of the [Family Law Act 1975](#) (Cth) confers “**the contribution need not have been financial**” and in [Hibberson v George](#) (1989) 12 Fam LR 725 at [739], [743], it was recognised that parties may “**pool their resources**” without paying funds into a joint bank account. In *Miller v Sutherland*

(1990) 14 Fam LR 416 at [424], it was recognised that there may be a "**pooling of resources**" where no funds are contributed, but **labour is expended**.

3. [Harris v Trustee Commonwealth Superannuation Scheme](#) [2006] FCA 373 at [7], [14], [22]. N.B. "**ordinarily lived** together as husband and wife on a permanent and bona fide domestic basis."

[14.] The Tribunal's reasoning continued to the effect that for the purposes of the [Superannuation Act](#), s [8A\(1\)](#) stipulates that there is a '*marital relationship* if two people **ordinarily lived together** as husband and wife *on a permanent and bona fide domestic basis* at the relevant time, and further that it was '*fairly clear*' that those s [8A\(1\)](#) terms such as '**ordinarily**', '**lived together**', '**permanent**' and '**bona fide domestic basis**' imported requirements...

4. [SHA & CHAM](#) [2017] FamCAFC 161 (Full Court) at [63-64].

[63.] In [Clarence & Crisp](#) (2016) FLC 93-728 at [46] the Full Court held that: "... [s]ince one of the matters in the checklist is **"the nature and extent of [the parties'] common residence"**, it inexorably follows that it is possible for a couple to be in a de facto relationship **without residing in the same home on a full-time basis.**"

[64.] This supports the comments of the Full Court in [Jonah & White](#) (2012) [FamCAFC 200] FLC 93-522 at [65], p. [86,683](#) that: "His Honour was alive to the issue that the term **"living together"** can encompass circumstances where parties **live together** **"...for only a small part of each week..."** (at [65]). We agree that the definition may be fulfilled where parties have **lived together for limited periods** provided that other indicia or the circumstances of the matter enable a finding that they were **"living together on a genuine domestic basis"**.

5. [Kanis and Minister for Immigration and Border Protection \(Citizenship\)](#) [2018] AATA 3222 at [22-23].

[22.] The Act does not include a definition of 'de facto partner'. The [Acts Interpretation Act 1901](#) (Cth) ('[Interpretation Act](#)') provides the following definition of 'de facto relationship' in section 2F: (4) *For the purposes of paragraph(1)(c), the persons are taken to be **living together on a genuine domestic basis** if the persons are not living together on a genuine domestic basis only because of:*

(a) a temporary absence from each other; or

(b) illness or infirmity of either or both of them.

6. [Commissioner for Superannuation v Scott](#) [1987] [FCA 98](#); [79](#) (Full Court) at [\[13-26\]](#).

[\[13.\]](#) The crucial factor is that the word "substantially" finds its place in the phrase "**wholly or substantially dependent**" and must be construed alongside the adverb "wholly" and thus as meaning something less than total dependence. We prefer the line of authority appearing in the decisions of the Tribunal which have adopted this meaning, namely *Re Grech* [\(1981\) 3 ALN. 94](#), *Re Mrs. B.* [\(1984\) 6 ALD 609](#) and *Re Janice Mary McGrath* a decision delivered on 30 June 1986. This preference accords with the approach of Ambrose J. of the Supreme Court of Queensland in *Re Bonny* [\(1986\) 2 Qd R 80:-](#) "In my view when considered in the context of a definition that talks of a person who is '**wholly or substantially dependent on**' another, the term '**substantially**' connotes '**in the main**', or '**essentially**'."

[\[14.\]](#) In our opinion the **Tribunal erred in law** in directing itself that the word "**substantially**" meant something more than **trivial, minimal or nominal**.

[\[20.\]](#) At page 188 Gibbs J... said: "However, in its relevant sense, the adjective 'dependent', as defined in the Oxford English Dictionary, means that the person to whom it is applied '**depends or has to rely on something else for support, supply, or what is needed**'. The word, as this definition shows, is capable of different shades of meaning. It may mean 'relying for support', so that it connotes actual reliance, or '**having to rely for support**', so that it connotes not only reliance in fact but a need to rely for support."

See also per Gibbs J. in *Aafjes v. Kearney* [\[1976\] HCA 5](#); [\(1976\) 8 ALR 455](#) at page 461 where he repeated his view stated in the earlier case.

[\[22.\]](#) Gibbs J. emphasized in the above two cases that a person may be dependent even though not in receipt of support in fact, **so long as there is a need to rely upon another for support**. In this sense a person may be dependent on another so long as he or she has a need for support, notwithstanding the fact that the need is for one reason or another not being satisfied by that other. **It may be conceded that a person without wages or private income needs to rely for support upon some person**. To the extent that such a need is not satisfied, **he or she is reliant upon social security or like pensions** and private charity. **In our opinion this concept of dependence based upon a need for support could have relevance in a matter such as this**.

[\[26.\]](#) The appeal should be allowed, the decision appealed from set aside, and the matter remitted to the Tribunal for reconsideration with a direction that **the word 'substantially' in the definition of 'spouse' in s.3 of the [Superannuation Act 1976](#) means 'in the main or essentially'**.

Schedule

No. ACD1 of 2020

Federal Court of Australia

District Registry: Australian Capital Territory

Division: General

Applicant:

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Respondents

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Second Respondent: MARK DESMOND KANEY as litigation guardian for
Kane Anthony RUSHTON, Jye Luke RUSHTON and
Brydie Maree RUSHTON.

Solicitor for the Second Respondent: SINCLAIR WHITBOURNE, LAWYER.

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Third Respondent: THE AUSTRALIAN FINANCIAL COMPLAINTS
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Date: 10.12.2020.