$958 a year, when all her bank finances added up to a debit of $33,000 approximately. The DSS amended Marsh's rate of pension and paid arrears from 23 March 1995.

The issues

The substantive issue is whether Marsh is entitled to any arrears of sole parent pension. This depended on whether a telephone call made by Marsh to the DSS tele-service could be construed as a request for a review of a decision.

The legislation

The relevant sections of the *Social Security Act 1991* are s.293, which deals with rate increase determinations and s.299 which discusses the date of effect of a favourable determination both after a review and also after the DSS has been notified of a change in circumstances.

'Application for review'

Marsh gave evidence that she had made more than one telephone call to the DSS, inquiring about the bank interest being taken into account when assessing her rate of payment. She could not recall precise dates but remembered making a telephone call in mid 1994 to the general inquiry number for the DSS.

The Tribunal received evidence from a DSS Administrative Service Officer, who advised that the officers in the Social Security Tele-Services Branch received only about 3 months training and were not experienced officers.

The Tribunal found that Marsh 'made a telephone call to query the bank interest some time between April and June 1994': Reasons, para.8. The Tribunal also found that whenever Marsh was asked to complete a review form, she did so correctly. The Tribunal noted that these forms were assessed by two DSS officers, because Marsh's rate of payment was reassessed due to changes in her employment income. But 'both officers negligently failed to notice the dramatic reduction in her bank balance': Reasons, para. 9.

The DSS argued that the appropriate date of effect of the decision to increase Marsh's rate of sole parent pension should be decided according to s.299(3). This section deals with the situation where a notice of variation of pension has been given to a recipient and the person does not request a review within 3 months. The DSS maintained that Marsh sought a review by letter dated 14 June 1995; this was more than three months after notice of variation was given; and accordingly, arrears can only be paid from the date the review was sought.

The Tribunal stated that it was 'prepared to apply a very broad definition of the term "application for review"': Reasons, para. 14. It considered the situation when a person telephoned the DSS querying the calculation of their pension entitlements. The Tribunal said:

> 'It is up to the Department, in those circumstances, to go forward to assist the enquirer both to formulate the inquiry in words and also to take a basic simple first step of checking to see whether the concern might possibley be justified. This would merely mean asking the customer her name and details and calling her record up on the computer screen. This was what Ms. Marsh was hoping for and in this sense, she was asking for her matter to be reviewed.'

(Reasons, para. 14)

The AAT found that the telephone inquiry made by Marsh in approximtely April/June 1994 constituted an application for review of the DSS's determination dated 31 December 1993. Therefore, pursuant to s.299(3), the date of effect of the determination of 4 August 1995 should be 30 June 1994.

Formal decision

The decision under review was set aside and the following decision substituted:

- that Marsh be entitled to payment of an increased rate of sole parent pension on and from 30 June 1994; and
- that the matter be remitted to the DSS to determine Marsh's entitlements in accordance with this decision.

[M.A.N.]

Age pension: rent assistance for resident of retirement village

KNEVETT and SECTARY TO DSS

(No. 10973)

Decided: 30 May 1996 before J.R. Dwyer.

Knevett requested review by the AAT of the SSAT decision that she was not entitled to rent assistance.

Knevett has been receiving the age pension for a number of years. Following the death of her husband in 1991, she moved to Victoria to be close to her son. She sold her house in Tasmania and moved into a unit in a retirement community. Knevett advised the DSS of these changes in her financial situation.

On 24 August 1994, Knevett asked the DSS whether she was entitled to rent assistance. She advised that she was paying monthly payments of $585.85 to the retirement community. The DSS decided that Knevett was a home owner under the *Social Security Act 1991*, because she had paid $125,000 as 'entry contribution' when she entered the retirement village to ensure tenure.

The law

Pursuant to s.13(2) of the Act, the monthly amount paid by Knevett to the retirement community was rent. A retirement village is described in s.12(3) of the Act as premises which are used for residential premises and primarily intended for people who are at least 55 years old. The premises must consist of either self-care units, service units and/or hostel units, as well as community facilities.

Pursuant to s.1064-D1 of the Act, rent assistance can only be paid to a person who is not an ineligible home owner. That term, 'ineligible home owner', is defined in s.13(1) as a home owner who is residing in a nursing home but not residing in a retirement village. The definition does not state whether the resident of a retirement village is a home owner.

The assets test for residents of a retirement village is set out in Part 3.12. It provides that residents of retirement villages who paid more than specified amounts for tenure of their units, are to be treated as home owners (see ss.1147, 1148 and 1150). The calculation to establish whether or not the person has paid more than the specified amount is set out in s.1190 of the Act.

Ineligible home owner

After applying the formula set out in s.1190, the AAT noted that the specified amount, or as it is defined in the Act, 'the extra allowable amount', was the difference between the pension single home owner assets value limit, and the pension single non-home owner assets value limit. The AAT applied this formula and arrived at the figure $80,500. It was noted that the DSS had used the figure $74,000. The entry contribution paid by Knevett was considerably more than that amount, being $125,000. Therefore, Knevett was deemed to be an ineligible home owner under the Act.

It had been argued on Knevett's behalf that she had only paid part of the $125,000 and therefore only that part she had paid should be considered. The AAT noted that s.1147 (1C), did not refer to the amount paid by the resident, but simply an amount paid for the resident's right to live in the unit. This amount was $125,000.

Knevett had argued that her neighbour was receiving rent assistance and therefore she should. The AAT stated that it could not explain why Knevett's neighbour would receive rent assistance when according to law, Knevett was not entitled to it. The AAT suggested that the DSS might look into this matter.

Formal decision

The AAT affirmed the decision under Review.

[C.H.]

Age pension: meaning of 'loan'

KLIGERMAN and KLIGERMAN and SECRETARY TO DSS (No. 11023)

Decided: 14 June 1996 by J. Handley.

The Kligermans requested review of an SSAT decision of 14 November 1995, which affirmed the DSS decision to reduce the rate of age pension payable to them because of interest deemed to have been earned on a loan made by the Kligermans to their friends.

From July 1995, the Kligerman's were paid the age pension. The Kligermans and their friends, the Kirbys, decided to sell their respective homes and buy a piece of land upon which they would construct two self-contained units. The sale of each couple's home financed the cost of purchasing the land and building the units. The land was purchased, and the Kligermans sold their home and instructed the builder to commence building their unit. The Kirbys also instructed the builder to commence building their unit, even though their home had not yet been sold.

The Kligermans agreed to pay the builder's costs on behalf of the Kirbys, until the Kirbys home was sold. The Kirbys agreed to repay the Kligermans when their house was sold. Both units have been completed and the Kligermans now live in their unit. At the date of the AAT hearing, the Kirbys had still not sold their home, and thus were unable to move into their unit. It remains empty. The sum paid to the builder by the Kligermans on behalf of the Kirbys was $47,660.

The issue

The issue to be resolved by the AAT was whether the sum of $47,660 was a 'loan', within the meaning of s.1099J of the *Social Security Act 1991* (the Act). 'Loan' is not defined in this part of the Act, and the AAT found that other definitions of 'loan' in the Act were not relevant. To ascertain the definition of 'loan' the AAT referred to *Gordon and Secretary to DSS* (decided 2 June 1992).

The loan

The AAT concluded that the monies advanced by the Kligermans to the builder on behalf of the Kirbys, was a loan because:

> 'It was in the nature of a contract, there was agreement to lend monies in consideration of an express promise and it was agreed that repayment would be made at a fixed or future time yet conditionally upon some other event occurring. The absence of any agreement to pay interest is immaterial, as also was the advancing to the applicants by Mr and Mrs Kirby of any security in consideration of the monies being advanced.'

(Reasons, para. 14)

The AAT noted that even though there was no agreement to pay interest on the money advanced, the Kirbys did enter into a written agreement in which it was stated that if something were to happen to the Kirbys, their Estate would be required to repay the Kligermans the sum of $47,660. The AAT rejected the argument that because the money was paid to the builder rather than the Kirbys it changed the nature of the transaction. It concluded that the sum of money was nonetheless a loan by the Kligermans to the Kirbys.

The AAT assured the Kligermans that it did not believe that this had been a device by the Kligermans to divest themselves of assets to obtain a higher rate of age pension. The decision by the AAT was simply an interpretation of the law as set out in the *Social Security Act.* Section 1099J provides that if there is a loan, and the person is not paid interest on the loan, then interest is deemed to be received on each anniversary of the making of the loan. The assumed rate of interest is set out in s.1099M. This interest is then treated as ordinary income under the income test, and thus reduces the rate of pension payable to the Kligermans. Because the DSS had originally made an error when calculating the date from which interest was deemed to have been received, it was necessary for the AAT to remit the matter back to the DSS to recalculate the interest.

Formal decision

The AAT set aside the decision under review and remitted the matter back to the DSS to recalculate the deemed rate of interest on the loan.

[C.H.]

Age pension: income from managed investments

CARTER and SECRETARY TO DSS (No. 10847)

Decided: 3 April 1996 by P. Burton.

The facts

Mrs Carter had received the age pension since 1987, and Mr Carter since 1991. In 1991 Mrs Carter purchased 63,366 managed investment units from GIO for $70,000. The investment was to return 12% a year under the prospectus, such that if actual investment earnings were less than 12%, payment would be made from capital to make up the balance of 12%. The prospectus stated that the monthly distributions would include accrued investment income, capital gains raised from disposal of investments and repayment of capital as required. It specified a target distribution rate of 1% a month to be determined from time to time by GIO, and did not contain any declaration of the performance of the investment in the specified period.

The DSS calculated the value of the age pension for Mr and Mrs Carter for the period November 1992 to November 1993, and took into account the value and annualised rate of return on the GIO managed investment. The rate of return for the period was calculated by the DSS as 17.994%.

The applicants sought review by the AAT of an ARO decision confirming this rate of return and of the SSAT decision that the date of effect of any favourable review of this decision would be limited to the date of lodgement of the SSAT appeal, because the appeal was lodged more than 3 months after notice of the decision. (The SSAT did not consider the merits of the DSS decision.) The AAT considered that the date of effect of its decision would be limited to the date of lodgment of the SSAT appeal, because the applicants had received sufficient notice by mail.

The substantive issue: rate of return on managed investment

The substantive issue concerned whether the formula used by the DSS to assess the applicants' income from their GIO investment was appropriate. A rate of 17.955% was reached by calculation of the formula applied by the DSS under s.1074E(7). However, it was not disputed