The law

According to s.249 of the *Social Security Act 1991,* to be qualified for a SPP a person must not be a member of a couple. According to s.4(3) when deciding if a person is a member of a couple, regard is to be had to the following:

(a) the financial aspects;
(b) the nature of the household;
(c) the social aspects of the relationship;
(d) any sexual relationship; and
(e) the nature of the persons' commitment to each other.

Section 4(4) provides that if a person is receiving a SPP, has been living with a member of the opposite sex for at least 8 weeks, and is not married to that person and either:

(a) a child of both persons lives with them;
(b) they jointly own the residence;
(c) they are joint lessees of the residence with at least a 10-year lease;
(d) they own joint assets of more than $4000;
(e) they have joint liabilities of more than $1000;
(f) they were previously a couple; or
(g) they have previously shared a residence,

then the DSS must not form the opinion that the person is not in a marriage-like relationship, unless the weight of opinion supports this.

A marriage-like relationship

The AAT referred to a number of earlier AAT decisions which had closely analysed the nature of a marriage-like relationship. In *Donald and Director-General of Social Security* (1983) 14 *SSR* 140 the AAT had said that the essential quality of a marital relationship was the commitment of the parties to each other. In *Parkin and Secretary to the DSS* (decided 18 December 1995) the AAT had found that although the relationship which existed was unsatisfactory for both parties, it remained in essence a marriage-like relationship. It was argued by the DSS that the situation in *Parkin* was similar to the situation in this case. There was a substantial financial commitment as well as a personal commitment to provide for each other. There was also a commitment to maintain their present living arrangements indefinitely. Neither party had any intention of establishing a close friendship with a member of the opposite sex.

Section 4(4) set out circumstances under which the DSS:

> 'must not form the opinion that the claimant or recipient does not have a marriage-like relationship with the other person unless, having regard to all the matters referred to in subsection (3) the weight of evidence supports the formation of an opinion that the claimant or recipient does not have a marriage-like relationship with the other person.'

(Reasons, para. 17)

This is often referred to as 'the reverse onus of proof'.

The AAT found Sammut and Victor satisfied s.4(4) because they had a child, had previously been a member of a couple, and had previously shared a residence. The AAT next considered the criteria set out in s.4(3).

(a) *Financial arrangements:* The evidence shows a pooling of resources. The house in which Sammut lives is owned by her. It used to be jointly owned by Sammut and Victor. They share expenses, and this shows an ongoing commitment to each other.
(b) *Nature of the household:* the household arrangements are shared except for the sleeping arrangements. Sammut cleaned etc. inside while Victor was responsible for outside.
(c) *Social aspects:* the Sammuts' social life is limited.
(d) *Sexual relationship:* There is no sexual relationship.
(e) *Commitment:* The Sammuts live in a family situation for the sake of Bradlee.

The AAT was satisfied that Sammut and Victor Sammut were living in a marriage-like relationship.

Section 24(2)(d)

Pursuant to s.24(2)(d) a member of a couple can be treated as not being a member of that couple in the special circumstances of the case. The AAT referred to the decisions on special circumstances and decided that there must be some factors which take this case outside the common run of cases. The AAT found that neither the particular marital break-up, not the circumstances of Bradlee brought Sammut's situation outside the common run of cases.

Formal decision

The AAT decided to set aside the SSAT decision and affirmed the original DSS decision.

[C.H.]

Assurance of support debt

SANTA ANA and THE SECRETARY TO THE DSS (No. 11869)

Decided: 14 May 1997 by D.W. Muller, M.M. McGovern and S.M. Bullock

The SSAT affirmed a DSS decision to raise and seek recovery of a debt owed by Santa Ana, because social security payments had been made to his mother Dominga Santa Ana between 12 May 1987 and 27 April 1989. Santa Ana had signed an assurance of support in relation to his mother.

The facts

Santa Ana signed an assurance of support on 27 April 1982. His mother came to Australia in 1983 and left 6 months later because she could not get on with Santa Ana's wife. Santa Ana and his wife separated and Santa Ana bought his wife's share of the family home. This resulted in an increased mortgage burden. Dominga Santa Ana returned to Australia on 4 March 1987. She lived with her son for a while, and then due to a break down in their relationship she went to live with her daughter. In May 1987 she applied for a special benefit which was granted. The DSS notified Santa Ana and advised him that he would be liable to repay the money. Santa Ana supplied certain information requested by the DSS.

Dominga Santa Ana was granted Australian citizenship in April 1989. Between 1987 and 1989 Santa Ana was asked to provide information on his financial circumstances on 2 occasions. The DSS did not follow its guidelines and give Santa Ana a quarterly statement of his debt.

Is there a debt?

The AAT found that Santa Ana had signed an assurance of support in relation to his mother and the legal formalities had been complied with. Therefore Santa Ana was liable to repay any social security payments made to his mother during the currency of the assurance, which in this case was 10 years. Because Dominga Santa Ana became an Australian citizen in 1989 she gained an entitlement to a social security payment in her own right. The application for citizenship was approved in October 1988, so the debt should cease then because it was from that date she was accepted as a member of the Australian public.

Waiver

The AAT heard evidence of Santa Ana's financial circumstances and decided that he could afford to repay the debt at the rate of $50 a week.

Formal decision

The AAT varied the decision so that Santa Ana was liable to repay social security payments made to his mother until 20 October 1988, and the debt was to be repaid at the rate of $50 a week.

[C.H.]

Debt: full-time/ part-time student

JIANG and SECRETARY TO THE DSS
(No. 11943)

Decided: 16 May 1997 by D.W. Muller and M.M. McGovern.

Jiang requested review of the decision to cancel payment of his newstart allowance (NSA) in November 1995, and to raise an overpayment of NSA and job search allowance (JSA) of $2587.89 paid between 13 July 1995 and 16 November 1995.

The facts

Jiang had been granted a 4-year temporary residence visa in 1990, and he was paid a special benefit from 1991. He continued to be paid the special benefit while he studied for and then competed his Masters degree in April 1994. In November 1994 Jiang was granted permanent residency. After finishing his Masters, Jiang had tried to obtain employment in his field. He was unsuccessful. At the end of 1994 Jiang had gone to the DSS and the CES and explained that he was looking for work. He was told that there was no need to transfer from the special benefit to JSA.

In 1995 Jiang enrolled in a PhD course. He told the DSS that he had enrolled in a PhD course, and gave them a letter from the university which advised that Jiang was a full-time student. Jiang told the AAT that he attended university once a week or once a fortnight. In mid 1995 he was visited by an officer of the DSS who advised him to transfer to JSA. Jiang told the AAT that when he completed the form he did not indicate that he was a student on the advice of the DSS officer. The JSA was granted. In November 1995 another officer of the DSS advised Jiang that he was not entitled to JSA or NSA because he was a full-time student, and his payments were cancelled. Jiang had completed a form every fortnight in which he did not reveal that he was a student. He told the AAT that he had completed the first form correctly, but in the later forms he did not reveal he was a student because he did not think he was full-time and he had already told the DSS he was a student. He had attempted to tell his case manager but she was not interested.

The AAT's assessment of the evidence

The AAT found Jiang to be a truthful and reliable witness, who had been co-operative with the DSS in all his dealings. From January 1995 the DSS had been aware that Jiang was a full-time student. He would not have applied for JSA if the DSS officer had not visited him and encouraged him to do so. This DSS officer had been aware of Jiang's status. Jiang had told the DSS that studying was only filling in time while he looked for a job.

Full-time student

The AAT said that it was aware of AAT decisions which had found that the Tribunal should be guided by the student's status as stated by the university when deciding whether a student is full-time or part-time. However other AAT decisions had found that it was necessary to examine each case on its merits. In this matter the AAT preferred to look at the facts 'rather than use a mechanical formula': Reasons, para. 7. The AAT concluded that Jiang was not a full-time student on the evidence.

Waiver

In the alternative the AAT considered whether the overpayment should be waived. The DSS had argued that Jiang had given false information when he failed to advise the DSS that he was a full-time student. The AAT rejected this argument, and found that Jiang had been paid JSA and NSA solely due to administrative error, and that he received the money in good faith. It also found that there were special circumstances in this case.

Formal decision

The AAT set aside the SSAT decision and determined that Jiang did not receive a social security benefit to which he was not entitled. If he did, any debt should be waived.

[C.H.]

[**Editor's Note:** The AAT did not explain what made the circumstances of this case special. Presumably it was influenced by the fact that Jiang would have continued to be entitled to special benefit throughout the period in question.]

Mature age allowance: carrying on a business

MILLS and SECRETARY TO THE DSS
(No. 12040)

Decided: 18 July 1997 H.E. Hallowes.

The SSAT had varied a DSS decision to raise and seek recovery of a debt of mature age allowance (MAA) paid to Mills so that the period was reduced and ended on 19 October 1996.

The facts

Mills lodged a claim for a MAA on 12 August 1994 when he turned 60. He had not worked since 1987. His claim was accepted and Mills was advised in writing that he must tell the DSS if his income exceeded more than $45 a week. Mills' annual income was recorded as $2. In September 1995 the DSS advised Mills that the Tax Office had recorded that he (Mills) was employed. He was asked to supply details of his income. Mills' employer provided the DSS with information about the period of his employment and the lump sum payments made to him. Mills objected to the method used by the DSS to calculate his fortnightly income. He argued that his expenses associated with earning this income were unusually high. He had initially believed that he was to be hired as a consultant. When he was told that this was not possible, he was already committed to the project and so continued the employment.

Mills had approached the DSS for advice when he was attempting to obtain the consultancy. He was told that if he was self employed, he would be able to reduce the income from his business by his expenses. Mills calculated that his expenses were greater than his earnings, and so he did not advise the DSS that he had an income. Mills' employer supported Mills' evidence that he was to be employed as a consultant initially. Mills told the AAT that he had not informed the DSS of his actual employment, but had discussed it in general terms. Because he did not earn more than $45 a week after deducting expenses he did not advise the DSS that he was earning an income.