would be appropriate for Martin to, from time to time, request the DSS to review the rate of DSP to be paid to him.

Formal decision

The AAT affirmed the decision under review.

[P.A.S.]

Sole parent pension: marriage-like relationship

LILLEY and SECRETARY TO THE DSS

O'NEILL and SECRETARY TO THE DSS (No. 12517)

Decided: 22 December 1997 by K.L. Beddoe, H.M. Pavlin and E.K. Christie.

Lilley and O'Neill shared premises since 1992. The DSS decided on separate dates to cancel the sole parent pensions (SPP) of both Lilley and O'Neill. Both decisions were affirmed by an Authorised Review Officer and the SSAT. The issue for the AAT was whether they shared a 'marriage-like relationship'.

The law

Section 249(1) of the *Social Security Act 1991* provides that a person is qualified for SPP if not a member of a couple. Section 4(2) provides that a person is a member of a couple if he or she has a relationship with a person of the opposite sex, is not legally married to that person, but in the Secretary's view has a 'marriage-like relationship'. Section 4(3) sets out the criteria to be considered by the Secretary in determining whether there is a marriage-like relationship, including the financial and social aspects of the relationship, any joint responsibility for caring for children, the household arrangements, any sexual relationship and the length of the relationship.

The facts

The AAT commented that neither Lilley or O'Neill 'seems able to cope with details as to what happened in the past': Reasons, para. 9. It appeared they began living in the same premises at Wynnum in 1992. O'Neill and her daughter moved into the premises where Lilley and his children lived, as her mother's flat was too small to accommodate 3 people. The DSS investigated their circumstances in 1993, and did not cancel either party's SPP. The evidence showed that the DSS had considered their eligibility for SPP 'on more than one occasion': Reasons, para. 11.

Lilley and O'Neill moved to Griffin in April 1993. There was evidence of O'Neill leaving the premises and residing separately for several months in 1994. There was clear and consistent evidence that both parties had separate bedrooms and did not share a common bed. In 1996 O'Neill gave birth to a daughter, Leilani, with Lilley as the acknowledged father. The evidence was that O'Neill agreed to conceive a child because Lilley wanted a child to replace his daughter who now resided with her mother. O'Neill gave evidence that Lilley had the prime responsibility for the care of Leilani and, in the event that they no longer shared premises, Leilani would stay with her father.

O'Neill did not live in shared premises at the time of the AAT hearing, and said that she had moved away 4 or 5 times. However, her 2 daughters stayed with Lilley during the week because of their schooling.

Marriage-like relationship

The AAT found this to be evidence of joint responsibility for the care of her children together with their joint responsibility for the care of their daughter. The AAT was not satisfied that there were two distinct households operating in the shared premises. There did not appear to be joint social activities. The only evidence of a sexual relationship was the conception and birth of their daughter. Lilley was 21 years older than O'Neill and the AAT was of the view that he had very strong views about raising children and household matters. The AAT thought that O'Neill was more submissive and prepared to rely on others to help in the care of her children.

The AAT found that their relationship was a marriage-like relationship. It had particular regard to the length of the relationship, the dominant personality of Lilley, his desire to have another child, the arrangements for the care of the children and O'Neill's apparent dependence on Lilley for support.

Formal decision

The decision to cancel both pensions was affirmed.

[H.B.]

Member of a couple: same sex relationship

HARMAN and SECRETARY TO THE DSS (No. 12503)

Decided: 19 December 1997 by M.T.E. Shotter.

The background

Harman's application for an age pension had been rejected due to the level of his income. He resided in Holland but would otherwise have been entitled to a pension under the International Agreement between Australia and the Netherlands. Harman objected to the decision of the DSS and the SSAT, arguing that he should be considered as a member of a couple, which would allow for the application of a higher income limit. He argued that the refusal to consider himself and his same sex partner as a couple was contrary to the way in which assessment of pension occurred in the Netherlands, and also contravened international agreements signed by Australia.

The law

The AAT noted that s.4(2) of the *Social Security Act 1991* defines a person as 'a member of a couple' if:

> '(a) the person is legally married to another person and is not, in the Secretary's opinion . . . living separately and apart; or
>
> (b) all of the following conditions are met:
>
> (i) the person has a relationship with a person of the opposite sex (in this paragraph called the "partner");
>
> (ii) the person is not legally married to the partner;
>
> (iii) the relationship between the person and the partner is, in the Secretary's opinion . . . a marriage-like relationship . . .'

Member of a couple

Australian government policy was clearly expressed in s.4(2)(b)(i), requiring the relationship to be with a person of the opposite sex, and the AAT was bound by the legislation. The policy of the Dutch government could have no bearing on the decision. Harman's pension rate therefore had to be worked out as if he were a single person. According to the International Agreement Portability Rate Calculator, s.1210 and Article 10 of the Agreement itself, this depended upon Harman's Australian working life residence. The DSS had calculated Harman to have a working life residence of 288 months, and this was not contested by Harman. Based on this the AAT applied the relevant formula set out in Article 10

of the Agreement, using the exchange rate applicable at the time of the AAT's decision. The result of that calculation resulted in a nil rate being payable to Harman, although his income only marginally exceeded the relevant income limit. The AAT noted that it was up to Harman to keep watch on his income and the exchange rate and make a fresh application for pension should his situation alter.

Formal decision

The AAT affirmed the decision under review.

[A.T.]

Newstart allowance: whether 'unemployed'

JAMES and SECRETARY TO THE DSS
(No: 12570)

Decided: 30 January 1998 by A.F. Cunningham.

James and her father had been involved in owning and racing horses since 1972, and she had obtained a trainer's licence in the late 1970s. James had received newstart allowance (NSA) since 1993, and in 1994 she had leased and moved to a 9 hectare property set up to train race horses. James said she had some 20 horses being worked and trained on the property at various times, and most had been unsuccessful. Since the middle of 1996 she had only 2 or 3 horses on the property. She had never registered the business because she did not have the $30 fee, and she had never derived any profit from it.

On 7 June 1996 James entered a Case Management Activity Agreement (CMAA) in which she agreed to 'continue with horse training business' and to 'develop concept of horse training business'. A DSS officer arranged to visit James at home on 27 June 1997. According to James he arrived early, just as she was about to go for a ride with an owner and a trainer. The evidence was that the officer did not inform James of her rights in respect of the visit. The interview was conducted outside within hearing of the others, and took less than 20 minutes. The interview form stated James was working 8 hours a day for 7 days a week. James said she was anxious to conclude the interview quickly, so she read and signed the form quickly. NSA was then terminated as James was considered to be not unemployed, and she sought review of that decision.

The SSAT had affirmed the decision because it found James' business activity demanded a substantial amount of time which would prevent her from engaging in other remunerative work. James told the AAT her current involvement consisted of an hour each morning to feed, clean out and work the horses, and 15 minutes in the evening to feed and clean out. Her racing involvement averaged 3 days a month, mainly Sundays. It did not prevent her from taking on other paid work, and she had made recent efforts to seek employment.

Unemployed

The issue was whether James was unemployed within the meaning of s.593 of the *Social Security Act 1991*. The AAT also looked at s.595(1) which provides:

> 'If:
>
> (a) a person undertakes paid work during a period; and
>
> (b) the Secretary is of the opinion that, taking into account:
>
> (i) the nature of the work; and
>
> (ii) the duration of the work; and
>
> (iii) any other matters relating to the work that the Secretary considers relevant;
>
> the work should be disregarded;
>
> the Secretary may treat the person as being unemployed throughout the period.'

The AAT found that James' present time commitment of 1.25 hours a day was minimal and could scarcely prevent her from undertaking remunerative employment. It was satisfied that she was unemployed within the meaning of s.593. It said it appeared inconsistent for the DSS to require James to enter a CMAA in which she agreed to continue her horse racing business, and then to terminate NSA 12 months later when she was acting in accordance with the agreement.

Formal decision

The AAT set aside the decision and remitted it for reconsideration with the direction that NSA be reinstated.

[K.deH.]

Application for review: limitation on date of effect

THE AZZOPARDIS and SECRETARY TO THE DSS
(No. 12422)

Decided: 21 November 1997 by A.M. Blow.

Mr and Mrs Azzopardi live in Malta. They lodged claims for disability support pension (DSP) and wife pension respectively in January 1995. In August 1995 Mr Azzopardi's claim was rejected on basis of his level of impairment. As a result Mrs Azzopardi's claim was also refused. In January 1996 an officer of the Maltese Department of Social Security contacted his Australian equivalent and asked about the status of the Azzopardis' claims. The Australian officer replied on 9 February that the claims were rejected. On 20 May 1996 a Maltese officer sent a further facsimile together with additional medical evidence. On the basis of this information, the DSS decided in June 1996 to grant DSP to Mr Azzopardi with effect from 8 February 1996, the first pension pay day after the receipt of the first communication from the Maltese officer in January 1996. Mr Azzopardi appealed the decision not to grant the pension from the date of claim. Mrs Azzopardi's claim was refused because she did not qualify for the wife pension before 30 June 1995.

The issues

The issues were whether Mr Azzopardi sought a review of the decision, and whether the date of effect of the grant of DSP should have been earlier.

The legislation

The relevant parts of s.1240(1) of the *Social Security Act 1991* (the Act) state that a person affected by a decision of an officer under the Act may apply to the Secretary to the DSS for a review of the decision. Section 1239(1) indicates that the Secretary may review a decision if satisfied that there is sufficient reason to review the decision.

Section 115(1) states that a determination to pay the DSP under s.114 takes effect on the day on which the determination is made, or on such later day or earlier day as is specified in the determination. Section 115(3) states that if a decision is made to reject a claim for DSP, notice of this decision is given to the person, the person requests a review