stances of Flores's application she did not request the Secretary to make a determination under this point.

> 'No request is made by her in response to the questions she answered at the end of the form. She agreed that she would "tell Social Security" if her estimate changed and if her actual income was more than 110% of her estimate that she would repay any overpayment resulting. However, she made no request on the form for the estimate she provided on the form (T8) to be used to calculate her rate of payment at that time.'

(Reasons, para. 13)

The Tribunal adopted the reasoning of the SSAT. In particular it found in Flores's case:

> 'the notifiable event occurred on 25 June 1996, that is, close to the end of the 1995/96 tax year. Her taxable income for 1995/96 was $29,511. This was not more than 110% of her taxable income for the base tax year, 1994/95, which was $27, 598. Her taxable income would have needed to be at least $30,357 ($27,589 + $2,759) in order to be 110% of her taxable income of the base tax year. As Mrs Flores' situation did not meet the conditions in section 1969-H18, her appropriate tax year remained the base tax year.'

(Reasons, para. 14)

The Tribunal agreed that section 1069-H19 did not apply to Flores's situation and that:

> 'the decision to change her appropriate tax year and to calculate her rate of family payment on the basis of her estimated income for 1996/97 of $28,000, was not authorised by the legislation.'

(Reasons, para. 15)

The Tribunal found that until the end of 1996, Flores's base tax year (ending 30 June 1995) remained the tax year for calculating her rate of family payment.

The Tribunal considered that a rate of family payment is struck for a calendar year unless a notifiable event occurs or a person requests that an estimate be used to calculate a rate (s.860). The Tribunal accepted the Department's submission that the rate of family payment payable should have been calculated at the beginning of the calendar year 1997 using the new base tax year ending 30 June 1996 (s.1069-H13 and H14) until the further notifiable event that Flores had commenced work on 1 May 1997 when a further rate was required to be struck under s.860.

In relation to the payment of 19 June, the Tribunal again adopted the reasons of the SSAT, which held that s.1069-H18 did apply to the second notifiable event. As Flores's actual taxable income for 1996/97 — $39,010 — was more than 110% of the estimate, s.885(1) and s.981 applied and her rate had to be recalculated on the basis of her actual taxable income from the date she was paid on the estimate, 19 June 1997. Under s.1223(3) of the Act, the difference between the amount paid and the amount which would have been paid taking into account her actual taxable income, was a debt to the Commonwealth.

But the debt raised ended with the payment made on 19 June 1997 as that was the final payment in the 1996/97 tax year. Under s.1223(4), any debt in respect of payments made in the 1997/98 tax year were precluded from being raised until after the tax year has finished.

**Formal decision**

The decision under review was set aside. The matter was remitted to the Secretary for reconsideration in accordance with a direction that the rate of family payment payable to Mrs Flores during the relevant period be re-calculated in accordance with the AAT's reasons. Liberty to apply was reserved should there be any dispute with respect to the calculations.

**[M.A.N.]**

# Pension rate: discretion to treat as not a member of a couple

**KADDOUS and SECRETARY TO THE DFaCS (No. 19990183)**

**Decided**: 25 March 1999 by L.S. Rodopoulos.

The issue to be decided by the AAT was whether Kaddous should receive disability support pension (DSP) at the single or married rate. A decision to reduce his DSP from the married to single rate was affirmed by both the authorised review officer and the SSAT.

**Background**

Kaddous had received DSP at the single rate since 1988. He was completely blind in one eye, half the retina was missing in the other, and he had a significant hearing impairment. He also had severe learning disabilities. The AAT was unable to establish whether he had an intellectual disability.

In January 1997, he travelled to Egypt to marry. In March 1997, he returned to Australia without his new wife as she could not obtain an entry permit or residency due to her disabilities. His wife, Mikhail, wore hearing aids and had asthma, in addition to a lung dysfunction which required medication and physiotherapy. The DSS exercised its discretion to continue to pay Kaddous at the single rate. As Mikhail was unemployed and overseas, the DSS determined that Kaddous and Mikhail were not able to pool their resources.

Mikhail arrived in Australia on 22 June 1998. An assurance of support had been signed by Dr Ramzy, a cousin of Kaddous. In the assurance of support, Ramzy undertook to repay to the Commonwealth any social security payments to Mikhail during her first two years in Australia.

On 28 July 1998, the Department reduced Kaddous' rate of DSP from the single to the married rate. Kaddous, through his father, Mr Farid Kaddous, submitted that the reduction of DSP rate had caused great financial strain to Kaddous and his family. He submitted that his son had suffered depression and frustration following the long separation from his wife and he was still under psychiatric care.

Kaddous and his wife lived with his father and mother. His father told the AAT that they were in considerable debt due to their support of Kaddous and his wife. His evidence was that they were reluctant and embarrassed to ask the man who had signed the assurance of support for money to support the family. To date, the family owed Ramzy about $2000 for loans and $1000 for the purchase of a sewing machine for Mikhail. Although she had been granted permanent residency for five years, she was still subject to the assurance of support until she could be naturalised in two years time.

**The legislation and the policy guidelines**

Section 4(2)(a) of the *Social Security Act* provides that a person is a member of a couple for the purposes of the Act if he or she is legally married to another and is not living separately and apart from that person on a permanent or indefinite basis. Section 24(1) provides the Secretary with a discretion to decide that a person be treated as not a member of a couple for the purposes of the Act.

The policy guidelines about s.24(1) stated that the discretion should only be exercised in 'strictly limited situations'. Guideline 36.501 indicated that the discretion was intended to be exercised where the couple could not enjoy the pooling of resources that normally occurred in a marital relationship. Guideline 36.502 indicated that whilst it was not possible to list all the situations in which it would be necessary to exercise

the discretion, the reasons for the decision should always relate to the nature of the marital relationship. It also stated that financial hardship alone was not a sufficient reason to exercise the discretion. It would only be exercised if the marital situation was unusual, uncommon or abnormal. The guideline provided that the whole of the circumstances must be examined before deciding to regard someone as not a member of a couple.

**The issue**

The AAT had to decide whether the circumstances of the marital relationship were 'unusual, uncommon or abnormal' so as to warrant treating Kaddous and Mikhail as not a married couple for the purposes of the payment rate of DSP.

**Submissions**

The Department argued that there were no grounds to warrant the exercise of the discretion conferred by s.24(1). The AAT commented that financial hardship alone was not a sufficient reason to regard a person as not a member of a couple. The AAT referred to *Hawkins* (1997) 2(8) *SSR* 109 where Hawkins and his Filipino wife had no assets, income, earning capacity or financial resources to pool as their only income was his DSP. As the AAT found that Hawkins' wife was in a position of 'extreme impecuniosity' due to her inability to lawfully earn any income, the Tribunal was satisfied that there did exist grounds warranting that Hawkins be regarded as not a member of a couple. However, the AAT stated that in this case the financial difficulties experienced by the Kaddous family did not amount to 'extreme impecuniosity'.

The AAT stated that it had considered the disabilities of Kaddous. However, the AAT indicated that it had to take into consideration the legal obligations of Dr Ramzy who had signed the assurance of support. Due to the assurance of support, and due to Mikhail's possible entitlement to a pension income, the AAT said that Mikhail had access to financial resources that could be pooled. The AAT was not satisfied that Kaddous should be treated as if he were not a member of a couple.

**Formal decision**

The decision under review was affirmed. Kaddous would be paid DSP at the married rate.

**[H.B.]**

# Reduction of newstart allowance: whether resignation was reasonable

**BENDER and SECRETARY TO THE DFaCS (No. 19990119)**

**Decided**: 8 March 1999 by E.K. Christie.

Bender was a 54-year-old man who lived in Tennant Creek. From 1986, he had been mainly employed as a cleaner, maintenance worker and caterer. From 8 to 12 December 1997, he was employed as a cleaner at the Tennant Creek Hotel. He resigned this job as he was dissatisfied at the reduced hours available to him and the lack of an assurance as to the continued availability of work.

Bender told the AAT he had an oral agreement to commence work as a cleaner at the hotel 7 days a week for 35 hours a week. He said he arrived at the hotel to find that his allocated work had already been done. He had been unable to obtain a concrete reassurance that his work hours would be guaranteed. He told the AAT he resigned as this represented an 'intolerable situation'.

**The issue**

The AAT had to decide whether it was reasonable for Bender to have resigned his job as a cleaner due to the uncertainty of his hours and the continued availability of work. At issue was whether his newstart allowance should be reduced for breach of his activity agreement.

**The legislation**

Section 628 of the *Social Security Act 1991* provides that a person's newstart allowance may be reduced where they are unemployed due to their voluntary act, and the Secretary is not satisfied that this voluntary act was reasonable.

**Submissions**

The Department argued that it was not reasonable for Bender to resign his job. The Department contended that there were other avenues available to him. For example, he could have continued to work and looked for an alternative job or he could have negotiated further with his employer. Bender argued that, in a small, remote town, it was important to maintain his reputation as a good cleaner. He said that if the work was performed by another, it might affect his reputation as a reliable and thorough worker.

The AAT conceded that Bender had to be careful to protect his reputation so as to ensure his future employment prospects, especially given his limited work skills in a remote area. The AAT was satisfied that his unemployment was not due to an unreasonable act.

**Formal decision**

The AAT set aside the decision. It was not unreasonable for Bender to have resigned his job in these circumstances. Bender would not be penalised for breach of the activity test. Bender's newstart allowance would not be reduced by 18%.

**[H.B.]**

# Newstart allowance: carries on a business; deductions

**HAYNES and SECRETARY TO THE DFaCS (No. 19990062)**

**Decided**: 5 February 1999 by B.H. Burns.

Haynes appealed against 2 decisions of the SSAT affirming decisions of the delegate of the Secretary, to raise and recover a debt of newstart allowance of $1247.75 for the period 4 July 1997 to 28 August 1997 and to raise and recover a debt of newstart allowance of $589.90 for the period 29 August 1997 to 9 October 1997.

Haynes was a registered tax agent, who, while in receipt of newstart allowance, conducted his own accountancy business and also did work for H&R Block. Haynes notified his income from both these sources on the fortnightly form he completed for his newstart allowance. In providing this information, Haynes consistently provided figures representing his total net income, after deductions for business losses and outgoings.

Section 1072 of the *Social Security Act 1991* (the Act) states that a person's ordinary income for the purposes of the Act is the 'person's gross ordinary income from all sources . . . calculated without any reduction, other than a reduction under Division 1A'.