Dictionary definition of 'course' as being 'a systematised or prescribed series, a course of studies, lectures, medical treatments etc.' and 'customary manner of procedure; regular or natural order of events'. In a doctoral research program there is usually no series of lectures but there is a customary manner of procedure within the confines of the academic discipline relevant to the research.

The AAT interpreted the program of education undertaken by Murfet as falling within the term 'full-time course of education'. Had Murfet changed his enrolment to part-time he would have been eligible.

Formal decision

The AAT affirmed the decision under review.

[B.W.]

Overpayment of family allowance supplement: estimate of income

SECRETARY TO DSS and HARTNETT

(No. 8633)

Decided: 1 April 1993 by H.E. Hallowes.

Background

Eva Hartnett had resigned from her employment on 6 July 1989. On 10 July 1989, she claimed Family Allowance Supplement (FAS) for her three children and advised that her taxable income for the tax year ended June 1988 (the 'base year of income') was $15,118, while her partner's income for the same period was $38,716. As this would have rendered her ineligible for payment of FAS, she lodged an estimate of combined income for the tax year 1989-1990 which was $16,000. This was at least 25% less than the income in the base year and FAS was granted from 13 July 1989. At the end of the calendar year, she returned a further form on which she was advised that payment in 1990 would usually depend upon the income for the 1988/1989 year. However, the form made provision for changes and asked whether the combined income for the current year (1989/1990) was both at least 25% lower than it had been for 1988/89 and below the income threshold (in her case, below $17,998). Hartnett ticked yes to both options. As it turned out, notices of assessment for the year ended 1989 indicated a combined income of $58,152 while the assessed income for the year ended June 1990 was $27,728. The latter was revealed to the Department on 30 November 1990 when the Department received a notice of assessment for Hartnett's partner.

As a result of that advice, on 3 December 1990, the Department advised Hartnett that FAS was no longer payable, and on 5 December 1990, she was advised that she had been overpaid an amount of $6751.50. Hartnett asked the SSAT to review that decision. The SSAT set aside the decision and sent it back to the Department with a direction that the overpayment was limited to payments of FAS made in the period 10 July 1989 to 31 December 1989; that no additional amount (penalty) should be added to the debt under s.246(3) of the *Social Security Act* 1947 and that repayment of any amounts still owing in respect of the 1989 period should be effected by means of withholdings of family allowance. It was against this decision that the Department appealed to the AAT.

The legislation

The relevant events, including the decisions to cancel FAS and to raise the debt, occurred prior to the repeal of the *Social Security Act* 1947 and the coming into effect of the 1991 Act from 1 July 1991. Therefore, the SSAT applied the 1947 Act.

Section 73 set out the basic qualification for FAS. The rate of FAS payable to Hartnett was calculated by reference to s.74B(3) which provided that a person may request payment by reference to an estimate for the 'current year of income' if the taxable income in that year is at least 25% less than that in the base year of income. Section 72(2) provided that where no assessment had yet been issued for the current year, an estimate could be lodged. Section 74B(6A) explained the circumstances in which an eligible reduction in income had occurred.

Section 74B(5) provided that where a payment was made by reference to an estimate, and the notice of assessment subsequently issued indicated that the estimate was less than 75% of the assessed amount, payments in excess of what would have been paid had the estimate been correct were taken to be a debt due to the Commonwealth.

Which period?

The SSAT had decided that any debt covered only the period to the end of 1989 but the AAT disagreed and found that Hartnett's 'most recent estimate' of her taxable income for the year ended 30 June 1990 was her estimate of $16,000 and that this was not restricted to the period ending 31 December 1989. The AAT decided that this was an estimate for a year of income, not an allowance period, by reference to s.72(2). Accordingly, the AAT decided that, since the estimate was less than 75% of the assessed amount, there was a debt due to the Commonwealth under s.74B(5) for both periods, i.e. 1989 and 1990 which was recoverable under s.246(2) (i.e. withholdings of allowance).

Recovery of the debt

The AAT first agreed with the SSAT that this was not a case in which it was appropriate to add an additional amount (penalty for late payment) to the debt and stressed that Hartnett had not made any false statement or representation. Indeed, it was conceded by the Department that when she lodged her claim, her allowance was correctly granted on the information then available. The AAT commented:

> 'It is frequently only with the benefit of hindsight that debts become apparent. It is no easy matter to correctly apply the legislation which deals with 'Base year of income', 'Income threshold', 'Notifiable event', 'Notional notifiable event', 'Relevant taxable income'. 'Last year of income', 'Year of income' and estimates across allowance periods.'

(Reasons, para. 19)

Although Hartnett did not ask the SSAT to review the decision until the 1947 Act had been repealed, the decision to raise the debt had effect as if it were a decision under the 1991 Act. The SSAT had set aside the decision under review and directed a change in the period for which there was a debt. However, with respect to the remainder of the debt, that SSAT had decided not to waive or write off the debt.

The AAT, applying the decision in *Re Bradley* (1992) 70 *SSR* 1003, decided that consideration of the discretion to waive the right of the Commonwealth to recover the debt was not dependent on the Minister's May

1992 direction on waiver, made under s.1237(3) of the 1991 Act. This led the AAT to apply the principles in *Hales* (1983) 13 *SSR* 136 to the question of waiver. However, it noted that the result would be the same, if the Minister's direction were applied.

After outlining the family's precarious financial circumstances, and Hartnett's partner's medical condition, the AAT decided not to waive the right of the Commonwealth to recover the debt, and not to write off the debt. However, it suggested that if their circumstances changed, she should seek a fresh exercise of the discretion.

Formal decision

The AAT varied the SSAT decision by deciding that Hartnett had been overpaid FAS between 13 July 1989 and 29 November 1990. The AAT also substituted 'family payment' for the reference to 'family allowance' in para. c of its decision, dealing with recovery of the outstanding debt by means of withholdings.

[R.G.]

Waiver: assurance of support debt

SECRETARY TO DSS and SARACIK

(No. 8525)

Decided: 8 February 1993 by P.W. Johnston, K.J. Taylor and S.D. Hotop.

Background

In October 1985 Ivan Saracik signed an Assurance of Support to sponsor his parents' entry into Australia. Under the Assurance he agreed, inter alia, that if special benefit was paid to them, he undertook to repay those funds. The Assurance was expressed to have effect for 10 years from the date of signature or to the date that Australian citizenship was granted to the person(s) being sponsored.

Saracik's parents entered Australia on 9 April 1986. Mrs Saracik commenced employment but this terminated on 30 April 1988 and on 9 May 1988 she applied for special benefit. The Department sought information from the Department of Immigration, Local Government and Ethnic Affairs regarding the existence of an Assurance of Support, and received advice on 28 June 1988 that an Assurance had been entered into and that Mrs Saracik had been approved for Australian citizenship on 15 June 1988.

She was granted special benefit with effect from 9 May 1988, and this was advised to her in writing on 4 July 1988. However, no mention was made of any possible liability which could result because of the Assurance. From that time, Mrs Saracik continued to be paid special benefit but the debt raised by the Department related only to payments made in the period 9 May 1988 to 13 July 1988 as Mrs Saracik became an Australian citizen on 14 July 1988.

Mr Saracik was advised by letter dated 12 February 1992 that he owed the Department an amount of $1894.56 representing special benefit paid in the period 9 May to 13 July 1988.

Saracik asked the Social Security Appeals Tribunal to review the decision.The SSAT waived the Commonwealth's right to recover the debt pursuant to paragraph (g) of the Ministerial Determination dated 8 July 1991 issued under s.1237(3) of the *Social Security Act* 1991. The Department then asked the AAT to review the decision of the SSAT.

Jurisdiction

Doubt was raised about the AAT's jurisdiction to review the decision to recover the debt. The AAT noted that an Assurance of Support debt was a debt 'under' the 1947 Act which, by virtue of s.1235 of the 1991 Act, is included as a debt within chapter 5 (the recovery provisions) of the 1991 Act. Therefore it is recoverable (and hence able to be waived) under the 1991 Act. Accordingly, the AAT held that the decision to recover the debt, and the decision of the ARO affirming it on 7 April 1992, were decisions under the 1991 Act being made in respect of debts recoverable under chapter 5 of that Act. They were also reviewable by the SSAT by virtue of s.1247 and by the AAT pursuant to s.1283 of the Act.

Liability

The AAT noted that at the time Saracik signed the Assurance of Support, regulation 22 of the *Migration Regulations* in force at that time provided that an amount paid by way of special benefit to a person who is the subject of an Assurance of Support is a debt due and payable to the Commonwealth by the person who gave the assurance. These regulations were subsequently repealed and replaced with regulations having similar effect in 1989.

Saracik had signed an Assurance under Reg. 22 and the AAT was 'satisfied as a matter of legal liability that, since special benefit was paid to Mrs Saracik during the period 9 May 1988 to 13 July 1988, a debt was and remains payable, by virtue of Reg. 22(1) (now replaced by Reg. 165 of the *Migration Regulations*), by the respondent to the Commonwealth in the amount of $1894.56': Reasons, para. 24. On that basis, the AAT held that the decision that there was a debt due to the Commonwealth should be affirmed.

Waiver

The AAT then went on to consider whether the decision of the SSAT to waive the debt was the correct or preferable decision and was divided on this issue, which was decided by majority.

The majority decision (P.W. Johnson and S.D. Hotop)

The majority first decided that the SSAT had been correct in relying on s.1237(1) of the 1991 Act as the source of the power to waive since the decision to recover was made under the 1991 Act, not the 1947 Act. While uncertainty had been raised about the applicability of the 1991 Ministerial Direction to Assurance of Support debts, the majority decided that whether the discretion was at large and only constrained by considerations of the kind recognised by the Federal Court in *DGSS v Hales* (1983) 13 *SSR* 136 or whether it was confined by either of the Ministerial Determinations made under the 1991 Act, if the AAT found that special circumstances exist which are extremely unusual or exceptional, the discretion could be exercised in Saracik's favour.

The majority noted that the SSAT's decision had centred around the fact that Saracik had no chance to provide support under the Assurance in lieu of payment to his mother because he was not advised that such a debt had commenced to accrue in May 1988. The Department had argued that special benefit was payable to Mrs Saracik independently of the existence of the Assurance, but the majority found that argument 'completely untenable'. While it was noted that some earlier AAT decisions 'might have lent some credence to that submission' (for example, *Re Blackburn* (1981) 5 *SSR* 53; *Re Takacs* (1982) 9 *SSR* 88 and *Re Abi-Arraj* (1982) 8 *SSR* 82), later decisions of the AAT have rejected that view (see *Re Pikula* (1990) 56 *SSR* 752).