

# Student Assistance Decisions

## AUSTUDY: debt and waiver

**HARRIS and SECRETARY TO DSS (No. 10576)**

**Decided:** 6 December 1995 by G. Ettinger.

### Background

Harris was enrolled in a Bachelor of Applied Science (Parks and Wildlife). On 29 November 1993, Harris completed and lodged an AUSTUDY Continuing Application Form. She indicated that she would be studying full-time in 1994. The application for AUSTUDY was approved. Harris undertook three subjects in first semester 1994 and was a full-time student. In second semester she undertook two subjects. In January 1995, a Department of Employment, Education and Training (DEET) officer decided that Harris was not eligible for AUSTUDY in 2nd semester 1994 and raised a debt.

### The issues

Did Harris satisfy the workload requirements to be eligible for AUSTUDY payments in 2nd semester 1994? If she did not, has Harris incurred a debt to the Commonwealth? Did the debt arise solely because of administrative error? Should the debt be waived?

### The legislation

The relevant legislation is the *Student and Youth Assistance Act 1973* and AUSTUDY Regulations 34, 35 and 36. In order to qualify for AUSTUDY benefits a student must study full-time. AUSTUDY regulation 34(2) defines a full-time student as one who is enrolled in and undertaking at least three-quarters of the normal workload. Regulation 35 provides for certain circumstances where the threshold can be reduced to two-thirds of the normal full-time workload.

Section 289 of the Act gives the Secretary the power to waive the debt. Section 289(2) says that the Secretary must waive the debt if the debt arose solely because of an administrative error made by the Commonwealth and the person received in good faith the payment or payments that gave rise to the debt.

### Workload requirements

Harris agreed that she was not eligible for AUSTUDY in second semester and that Regulation 35 did not apply. Harris was paid \$3344 during second semester 1994.

The Tribunal held that this was a debt to the Commonwealth.

### Administrative error and waiver

It was accepted that Harris received the AUSTUDY payments in good faith. The issue was whether the debt arose solely because of administrative error.

Harris submitted that in May 1994 she telephoned and notified the DEET of her change of circumstances on at least two occasions. She requested information about cancelling her AUSTUDY payments and was told that she would continue to be eligible as she would be completing her final year. She requested confirmation of this advice in writing. This written advice was never received. Harris argued that on the basis of this incorrect advice, the debt arose solely due to administrative error. Harris submitted that she received the same advice when she contacted the Department in January 1995. She was concerned with the accuracy of information she gave to AUSTUDY, and she understood her responsibilities. The Tribunal accepted that Harris, as a final year student, had dealt often with the DEET and was aware of their procedures.

The DEET submitted that the issue hinged on whether the telephone calls claimed to have been made in May 1994, were in fact made. It was acknowledged that DEET officers were not required to identify themselves, nor to record telephone calls.

The DEET further submitted that even if the calls were made, the issue was still whether an administrative error was made, and whether this was the sole reason for the debt arising. The DEET focused on inconsistencies in Harris's evidence. It submitted that Harris was obliged to notify the DEET in writing of her change of circumstances. As she did not do this, the debt did not arise solely due to administrative error.

The Tribunal found that Harris 'probably made certain calls to DEET in May 1994 and January 1995': Reasons, para. 71. But the Tribunal also found considerable inconsistencies in Harris's evidence, particularly in relation to the issue of whether incorrect advice was given by the DEET.

The Tribunal considered that Harris 'had an obligation, pursuant to s.48 of the Student Act and Regulation 110, to inform DEET in writing of the change in her workload for second semester 1994':

Reasons, para. 73. The Tribunal found that Harris's 'failure to advise DEET in writing of her change in circumstances, means that she is unable to successfully claim that the debt arose solely because of an error on the part of the Commonwealth': Reasons, para. 74.

### Formal decision

The decision under review was affirmed. The matter was remitted to the Department for consideration of the method and timing of recovery of the debt.

[M.A.N.]

[Author's note: Section 289 has been amended from 1 January 1996 to include 'special circumstances' as a ground for waiver.]

**DAVIDSON and SECRETARY TO DSS (No. 10654)**

**Decided:** 16 January 1996 by K. L. Beddoe.

Davidson sought review by the AAT of a decision of the Student Assistance Review Tribunal (SART) that Davidson was not eligible to receive AUSTUDY payments in 1994, and thus a debt had been incurred.

### The facts

Davidson was a full-time student in 1993. Before he received his examination results, he had intended studying full-time in 1994. Davidson received a claim form from the Department of Education Employment and Training (DEET), which he completed on the basis that he would be studying full-time in 1994. After he received his examination results, Davidson changed his mind and enrolled in one subject only for the first semester in 1994. This meant that he was studying part time. Davidson was paid AUSTUDY from 1 January 1994 until mid February 1994.

### Full-time student

Regulation 34(4) of the *AUSTUDY Regulations 1994* provided that a student could be paid AUSTUDY for the first 2 weeks of a semester, if the student undertook at least three-quarters of a full-time load on at least one day in the 2-week period. Davidson was only ever enrolled in one subject in 1994, and therefore

could not take advantage of this provision.

#### Waiver

The AAT decided that there was no basis for paying Davidson AUSTUDY in 1994, and therefore there was a debt to the Commonwealth of the payments made in January and February. According to the University calendar Davidson needed to be enrolled in 6 to 8 subjects to be regarded as a full-time student. Because of his results Davidson had had doubts about his ability to undertake the course. He had sought advice from his teachers and then decided to do one subject only in 1994.

The AAT found that an error had been made by the AUSTUDY office because the office had assumed that Davidson had continued to be eligible for AUSTUDY payments in 1994. It was not clear to the AAT why the office should make that assumption, considering that the information available to the office indicated that Davidson had completed 6 subjects of a course of 8 subjects. (The course was for one year only.) The AAT found that 'the payments were caused by that mistake': Reasons, para. 9. The AAT concluded that for this reason the debt should be waived.

#### Formal decision

The AAT affirmed the decision that debt was owed to the Commonwealth but directed that the debt be waived.

[C.H.]

[Editor's Note: The AAT did not decide that Davidson had received the money in good faith, the second limb of the test to waive a debt set out in s.289(2) of the *Student and Youth Assistance Act 1973*].

## AUSTUDY debt: administrative error; waiver and write-off

HARRISON and SECRETARY TO  
DEET  
(No. 10571)

Decided: 5 December 1995 by T.E. Barnett.

Harrison sought review of a decision made by the Student Assistance Review Tribunal (SART), that he was ineligible to receive AUSTUDY in 1993 because he was in receipt of payments from the Defence Force Ready Reserve Education Assistance Scheme (DFRREAS) from 1 January 1993 to 31 July 1993. As a result the SART affirmed a decision made by a delegate of the Department of Employment Education and Training (DEET) to raise and seek recovery of a debt of \$3588, being AUSTUDY payments received by Harrison during the period 1 January 1993 to 31 July 1993.

#### The facts

Harrison entered into the Defence Force Scheme in late 1991. The scheme involved one year of full-time training at full pay, which Harrison completed in 1992. Following this, participants were required to meet an annual commitment of 50 days a year for 4 years as a part-time soldier, which entitled them to be paid an annual commitment bonus of \$1500. They were also eligible to receive a DFRREAS payment of \$90.00 a week, to be paid monthly, if they undertook an adult secondary course or a full time tertiary course which was approved under AUSTUDY, on being demobilised after the first year.

Harrison gave evidence that he became dissatisfied with the scheme during 1992, and that while he had initially indicated to the Army on relevant forms his intention to undertake further study after 1992, as the year progressed he completed the appropriate form by indicating that he did not want to pursue the DFRREAS option. In November of 1992 he enrolled to study year 12, and in February of 1993 he applied for AUSTUDY in the belief that he would not receive DFRREAS payments.

No payments were made by the Department of Defence to Harrison until May 1993 when he received a lump sum which he believed to be payment for a

three-week course he had attended as part of his 50-day part-time training requirement. Thereafter, he received payments on a sporadic basis made directly into his bank account, and for the most part he was unaware that the payments had been made. He received no notification from the Department of Defence that the payments were being made, or what they were for. He believed they were for attendances at seminars held by the Department of Defence from time to time. He did not think these payments had to be declared for AUSTUDY purposes because the Army had advised that any salary paid was tax exempt. It was not until July 1993 that he became aware he was receiving DFRREAS payments, at which time he advised the Department of Defence to terminate the payments. That Department, however, had no record of Harrison advising that he would not pursue the DFRREAS option or of his advice in July 1993 to terminate the payments.

#### Was there a debt?

Regulation 21(1) of the AUSTUDY Regulations provides that a student cannot get AUSTUDY if receiving a benefit for education or vocational training from the Commonwealth. The DFRREAS payments were caught by this regulation and the AAT held that the amount of AUSTUDY paid to Harrison during the period 1 January 1993 and 31 July 1993 was an overpayment pursuant to regulation 12E, for the purposes of Part 6 of the *Student and Youth Assistance Act 1973* which deals with the raising and recovery of debts.

#### Waiver and write-off

The Tribunal applied the provisions relating to waiver and write-off set out in ss.289 and 290 of the Act, which came into force on the 1 January 1995. These sections were applicable by virtue of s.288 of that Act which provided that ss.289 and 290 apply to all debts, whenever incurred, that are owed to the Commonwealth and arise under Part 6 of the Act.

Section 289 required a debt to be waived if the overpayment arose solely as a result of an administrative error by the Commonwealth, and if the payments giving rise to the debt were received in good faith.

Harrison argued that there had been administrative error on the part of the Commonwealth because there was a lack of communication between the DEET and the Department of Defence and further, the Department of Defence had not clearly informed him that he was in receipt of DFRREAS payments, nor that it