

was inappropriate for him to receive both these payments and AUSTUDY.

The AAT found that there was no evidence of administrative error on the part of the DEET, but, following *Van Brummelen and Secretary, Department of Social Security* (1995) 86 SSR 1255, decided that s.289 was broad enough to encompass administrative error on the part of another Commonwealth department. In this case, the Tribunal was satisfied that the Department of Defence's failure to advise Harrison that he was receiving the DFRREAS payments amounted to administrative error, but that Harrison had contributed to the error by failing to make adequate enquiries to ensure that he was not receiving such payments. As a result the administrative error was not the sole cause of the overpayment of AUSTUDY to Harrison and s.289 could not apply.

The AAT considered whether to exercise the power to write off the debt pursuant to s.287. In considering whether or not to exercise this discretion the Tribunal noted that, customarily, the AAT took into account the factors set out by the Federal Court in *Director General of Social Services v Hales* (1983) 47 ALR 281. In this case, Harrison's circumstances could not be regarded as dire or desperate, and he had contributed to the overpayment by failing to make proper enquiries to ensure he was not in receipt of DFRREAS payments. As a result the Tribunal declined to exercise its discretion to write off the debt.

Formal decision

The AAT affirmed the decision under review.

[A.T.]

Workload; waiver of overpayment

NICHOLAS and SECRETARY TO DEET
(No. 10648)

Decided: 12 January 1996, by E.K. Christie.

Nicholas sought review of a decision of the Student Assistance Review Tribunal (SART), which affirmed the decision of the Department of Employment Education and Training (DEET), that he was not eligible for AUSTUDY benefits in

2nd semester 1994, which was the final semester of his studies.

The issues

The issues before the AAT were whether Nicholas was entitled to AUSTUDY benefits for 2nd semester 1994, whether he had to repay an overpayment of \$1629, and whether the provisions allowing for waiver of overpayments applied in Nicholas' circumstances.

The facts

Nicholas had been unemployed and in receipt of job search allowance for 12 months, when he commenced study in the Advanced Certificate in Real Estate Management at the Gold Coast TAFE at the start of 2nd semester 1993. He received the same amount in AUSTUDY payments as he had received for job search allowance.

Both the DEET and the SART acknowledged that the Advanced Certificate in Real Estate Management, which was normally undertaken as a 6 semester part-time course, was infrequently taken on a full-time basis. It was not disputed that 3 semesters (or one and a half years) of full-time work had to be undertaken in order to complete the course which comprised 14 subjects over a total of 610 hours of instruction.

On 16 December 1993, the then Minister for Schools, Vocational Education and Training, made a Determination under subparagraph 7(1)(c)(i) of the *Student Assistance Act 1973* ('Determination of Courses for the Purpose of Paying AUSTUDY'). Subsection 6(3) of the Determination provided that an accredited TAFE course or accredited vocational education and training course is not a tertiary course unless, in the case of a course of 1 year or more in duration, it involves at least 12 hours a week of instruction (including work experience) if undertaken full-time. According to the 'Explanatory Statement' associated with the Determination, it was to have retrospective commencement from 1 January 1993, but no student would be disadvantaged by any loss of rights or be subject to any new liabilities. Nicholas' course involved 610 hours of instruction over one and a half years study, normally taught in 3 semesters, each of 16 weeks duration. This equated to a mean of 12.7 hours of instruction a week which complied with the requirements of subsection 6(3) of the Determination.

Nicholas had undertaken 5 subjects representing 260 hours of instruction in 2nd semester 1993 and 4 subjects representing 175 hours of instruction in 1st semester 1994. In 2nd semester 1994, Nicholas undertook 4 subjects repre-

senting 125 hours of instruction following the grant of an exemption to him for the 5th subject which involved 50 hours of instruction. Nicholas became aware that he would be granted the exemption for the 5th subject (because of previous study in another course) at the beginning of 1994. He had advised the DEET of the exemption, although he was uncertain as to the time or person advised.

Nicholas explained that he was given initial advice on the structure of his course by the head of the Real Estate Division of the Gold Coast TAFE who told him that to be eligible for AUSTUDY, a full-time student would need to undertake 15 hours of study a week over the whole semester and that at least 5 subjects had to be undertaken. These eligibility requirements were repeated to him by both the DEET and CES. As a result of this advice, Nicholas had completed 5 subjects comprising 260 hours of instruction in 2nd semester 1993, leaving a balance of 9 subjects comprising 350 hours of instruction to be completed over the 1st and 2nd semesters of 1994. He said he would not have been able to complete the workload remaining after 2nd semester 1993 in a single semester in 1994 due to timetabling constraints affecting availability of subjects/staff, workload impositions and personal difficulty with coping.

Sometime late in December 1993, Nicholas again contacted the head of the Real Estate Division of the Gold Coast TAFE to seek advice as to his eligibility following the Minister's Determination of 16 December 1993, and was advised he would not be affected by it. Similar advice was also given by an unidentified officer in the AUSTUDY office. However, sometime after commencement of the 2nd semester 1994, he was advised that he was ineligible for AUSTUDY for that semester because his workload was less than full-time, and that he had incurred an overpayment as a result. The senior authorised person who made the decision stated that:

'from the information provided you are only undertaking 100 hours in semester II of 1994. As this represents only 32% of the normal amount of full-time work, assistance is not payable ...'

Nicholas contended that fairness and equity required that, in order to determine his appropriate full-time workload, the 350 hours remaining for completion in the final 2 semesters of his course should be apportioned equally at 175 hours a semester given the requirement when he commenced his course that he enrol in 5 subjects/15 hours instruction a week. Otherwise, apportionment introduced after he had commenced his

course represented retrospective application of a new rule which the DEET was obliged to notify him of. He said that neither the DEET nor the TAFE had provided him with accurate and timely information as to his eligibility. He also contended that, in the circumstances, any overpayment incurred should be waived.

The legislation

Sub-regulation 33(2) of the AUSTUDY Regulations provides that a tertiary student must be undertaking a tertiary course approved for the AUSTUDY scheme at a higher education institution or TAFE institution in Australia. Sub-regulation 34(1) provides that a tertiary student must study full-time, which is defined in sub-regulation 34(2) to be at least three-quarters of the normal amount of full-time work. Regulation 35 stipulates the normal amount of full-time work for various courses. In the present case, sub-regulation 35(2) which applies to non-HECS designated courses, and sub-regulation 35(3) which deals with the normal workload for a semester of non-HECS designated courses, were relevant. According to sub-regulation 35(2)(b), if the institution does not specify an amount that a full-time student should typically undertake, the normal amount of full-time work for a year of the course is the amount calculated using the formula:

'total work of course

total length of course

where:

"total work of course" is the total amount of work of the course'

Sub-regulation 35(3)(b) provides that the normal amount of full-time work for a semester of courses to which sub-regulation 35(2)(b) applies is half the normal amount of full-time work for a year of the course.

Regulation 36 provides for workload concessions for academic and vocational reasons and provides for the workload requirement in regulation 34 to be reduced to two-thirds of the normal amount of full-time work if the student cannot meet the usual requirement of three-quarters of the normal amount of full-time work, because of the institution's usual requirements for the course, or because of a direction to the student from the academic registrar or equivalent officer.

Regulation 41 provides that a student undertaking a course of more than 1 years duration can get AUSTUDY for the minimum time of the course plus half a year or one year, depending on the student's circumstances.

Section 289 of the *Student and Youth Assistance Act*, deals with waiver of the

whole of a debt owed to the Commonwealth where the debt arose solely because of an administrative error made by the Commonwealth, and the person received the payments giving rise to the debt in good faith.

Workload

The AAT decided that, in accordance with regulation 41, Nicholas would have been eligible for AUSTUDY in 2nd semester 1994 provided he met the requirements for full-time workload in regulation 35 or regulation 36. The Tribunal concluded although 2 of his subjects in 2nd semester 1994 had pre-requisites attached to them, the rules of the Gold Coast TAFE did not restrict him from enrolling in these subjects without having first completed the pre-requisites. As a result, he was not able to take advantage of the two-thirds concession in regulation 36 and had to meet the requirement of three-quarters of the normal amount of full-time work in regulation 34. Applying the formula in sub-regulation 35(2)(b) on the basis of 610 hours of instruction over the one and a half years length of the Advanced Certificate in Real Estate Management, the AAT concluded that the normal amount of full-time work for a year of the course would be 406 hours, which according to sub-regulation 35(3)(b), would amount to 203 hours of instruction per semester. Accordingly, Nicholas' workload of 125 hours of instruction in 2nd semester 1994 did not constitute three-quarters of 203 hours (that is, it was less than 152 hours) and he was not eligible for AUSTUDY. The AAT pointed out that even if he had been entitled to the two-thirds workload concession in regulation 36, he would not have met that requirement (which amounted to 135 hours). The AAT therefore affirmed the decision of the SART that Nicholas was liable for the overpayment arising from payment of AUSTUDY to him in 2nd semester 1994.

Waiver

The AAT noted that the error made by the DEET in assessing Nicholas' entitlement, namely the treatment of his course as a 1 year full-time course in which he was undertaking only 100 hours of instruction in 2nd semester 1994, had been corrected by it, and were therefore no longer relevant to the question of waiver of overpayment and administrative error.

In the AAT's view, the key factor relevant to waiver in the present case related to the information and advice given to Nicholas following the grant of exemption for the '5th' subject in 2nd semester 1994.

In respect to the DEET, the AAT noted an obligation appeared to rest on an applicant to make a request, if unsure, as to whether the program of study meets the AUSTUDY definitions of full-time student. This approach has limitations, particularly since the DEET's policy was to require a student who had been granted credit for a subject, to undertake an elective or related subject to make up any resulting shortfall in workload. The AAT noted that the *Notes: 1994 AUSTUDY Continuing Form* provided no information on this specific point. In relation to the Gold Coast TAFE, the AAT concluded that no specific advice was given to Nicholas regarding his continuing eligibility for AUSTUDY when his workload was reduced as a result of the exemption for the '5th' subject, and that advice given in relation to AUSTUDY eligibility generally, was incorrect.

The AAT was satisfied that Nicholas received the 2nd semester 1994 AUSTUDY payment in good faith, having advised the DEET and the TAFE of the exemption before commencing that semester.

The AAT further concluded that administrative error had arisen given that neither the DEET nor the TAFE appeared to have made Nicholas aware of his rights or of the necessity of enrolling in an elective or related subject to ensure his continuing eligibility for AUSTUDY. However, on the basis that the DEET and the Gold Coast TAFE constituted two direct, independent sources of administrative error in relation to his eligibility for AUSTUDY benefits, the cause of the administrative error could not be attributed solely to the Commonwealth. Accordingly, the AAT decided that waiver could not apply in Nicholas' case.

By way of observation, the AAT addressed the issue of the integrity between academic structures and the administration of the Gold Coast TAFE, and suggested that the TAFE improve its practices in relation to provision of written confirmation of enrolment and advice as to any credits offered.

The AAT was also critical of the lack of flexibility in the current form of the AUSTUDY Regulations and the waiver provisions, noting that when the *Student Assistance Act* was passed, the Minister, in his second reading speech stated that the bill:

'... included provisions for machinery whereby administrative decisions may be reviewed and reconsidered by a tribunal, so that an appropriate balance is struck between the requirement of formal legislation and the need for flexibility within the framework of that legislation.'

(Reasons, para. 59)

The process of administrative review was narrow where the Act and the Regulations were framed in such a way that their provisions cannot be construed flexibly and the waiver provisions represent an 'illusory bargain'.

The AAT advised Nicholas to raise the matter with the Commonwealth Ombudsman, to whom it would forward a copy of the decision.

Formal decision

The AAT decided to affirm the decision under review.

[S.L.]

Late lodgment of application

GORDON and SECRETARY TO DEET
(No. 10707)

Decided: 2 February 1996, by M.D. Allen.

Background

Gordon sought review of a decision of the SSAT which affirmed the DEET decision that she was not eligible for arrears of AUSTUDY from 1 January 1994 to 13 April 1994, because she had not lodged her application before the closing date.

The legislation

Sub-regulation 58(1) of the AUSTUDY Regulations provides that an application for AUSTUDY for a full-year course beginning before 1 July must be lodged by 31 March. According to sub-regulation 58(2), if the application is lodged after that date, AUSTUDY is only payable for the period after it has been lodged. However, sub-regulation 58(4) provides that an application can be considered if the student has taken reasonable steps to ensure that it would be lodged in time, and sub-regulation 58(5) provides that an application can still be considered if the student lodges the application as soon as

practicable after he or she is no longer prevented from doing so by circumstances beyond his or her control.

The facts

Gordon's father was, at all times, the person who arranged for his daughter's AUSTUDY application to be made and was the person who then had the conduct of the reviews of the decision to not pay her arrears. At his request, the AAT review was dealt with 'on the papers'. There was no dispute that the AUSTUDY application was lodged on 14 April 1994; the only factual matters of relevance were the reasons for late lodgment.

Gordon had explained to the SSAT that the reason for the late lodgment of his daughter's AUSTUDY application was his concern that, as a result of fluctuations in his and his wife's income, she might incur an overpayment of AUSTUDY in 1994. He was a self-employed insurance assessor and his earnings depended on the work he obtained from week to week. He said his concern about an overpayment occurring resulted from a statement on the 1994 AUSTUDY application which said that AUSTUDY entitlement would be reassessed if parental income in the current (1993-1994) financial year exceeded parental income in the previous financial year (1992-1993) by 25% or more. It appears that he delayed lodging his daughter's AUSTUDY application until he was satisfied that the amount of his income for the 1993-1994 financial year was likely to result, at worst, in a small and manageable overpayment of AUSTUDY.

Circumstances beyond applicant's control

The AAT agreed with the SSAT's finding that Gordon had delegated responsibility for her AUSTUDY application to her father and that she was not permitted to exercise any independent discretion in the matter. Whether this delegation had occurred with the consent or acquiescence of Gordon, or as a result of her being overborne, she had effectively appointed her father as her agent and depended on him to advise her as to her best

interests. It was noted that Gordon was only aged 18 at the relevant time, and had not left home. The AAT noted that in *Axsentieff v Nominal Defendant (Queensland)* [1978] Qd R 16, the Full Court agreed that it was adequate for an unsophisticated school boy to refer solely to his father to make enquiries on his behalf. The AAT was satisfied that Gordon took all reasonable steps to ensure her application would be lodged in time by requesting her father to act on her behalf, or acquiescing in his decision to do so.

The AAT said it was also clear that she was prevented from lodging her application for AUSTUDY in time by her dependence on her father. As a result, her own independent discretion was overborne, and thus circumstances beyond her control prevented her from lodging her application in time.

Formal decision

The AAT decided to set aside the decision under review and substitute a decision that Gordon was entitled to payment of AUSTUDY as and from 1 January 1994.

[S.L.]

[**Author's Note:** The above decision is consistent with the decision of the AAT in *Hollole and Secretary, DEET* (decided 21 August 1992), although the decision was not referred to. In *Hollole*, the AAT said the question under sub-regulation 58(4) is not whether a parent, acting as agent, took reasonable steps, but whether the student took reasonable steps. In *Hollole*, the AAT also discussed whether the phrase 'can be considered' which appears in sub-regulations 58(4) and (5) was a plain English equivalent to 'deemed to have been received by the closing date' which appeared in the pre-1991 version of the AUSTUDY Regulations, or whether that phrase was intended to indicate there was a discretion to be exercised. Without deciding that issue, the AAT in *Hollole* concluded that if discretion was involved, there was sufficient reason for it to be exercised in Miss *Hollole's* favour.]