course. On each occasion, he stated the officer checked the computer and told him that he was entitled to continue receiving JSA. On the second occasion he showed the officer his student card, which showed that he was a full-time student. Cheng explained to the AAT that he thought it was acceptable to say he was not a full-time student because his face-to-face contact was less than 15 hours a week. If he had been aware that his course would be classified full-time by the DSS he would have changed to the part-time course, or withdrawn from the course altogether. Since Cheng's JSA was cancelled he had commenced part-time work and his wife had commenced full-time work.

Cheng's wife gave evidence. She was also enrolled full-time in the Masters course, and had completed it at the same time as her husband, even though she had worked full-time from August onwards. Cheng's wife was able to confirm that they had attended the DSS office twice, but she was vague when recalling exact details of what they had been advised.

**The issues**

The AAT identified the issues in this matter as:

- whether Cheng was 'enrolled in a full-time course of education';
- whether there was a debt to the Commonwealth pursuant to s.1224 of the *Social Security Act 1991*; and
- whether any debt should be waived pursuant to s.1237 of the Act.

**Enrolled in a full-time course of education**

The AAT found that there could be no dispute that a Masters of Arts in Chinese Studies was a 'course of education'. The issue was whether this was full-time. The AAT had been referred to the Federal Court decision of *Harradine v Secretary to the DSS* (1989) 25 FCR 35 which had been followed by the AAT in *Secretary to the DSS and Cheary* (1993) 71 *SSR* 1019. In both cases it was noted that there was no definition of 'full-time course of education' in the Act. The AAT quoted from a recent AAT case of *Lander and Secretary to the DSS* (1996) 2(3) *SSR* 38 in which it was decided that whether a course could be categorised as a full-time course of education would depend on a number of matters, including how the university categorised the course. Other matters to take into consideration would be the hours of tuition and study, whether lectures were held during normal working hours, and the hours a particular student actually devoted to study. The AAT noted that whilst the University's categorisation of the course was important, it should not lose sight of the individual characteristics of each case.

In this matter the AAT found that the Master of Arts course was a 'full-time course of education' under the Act. It found the University's classification to be significant, because it was based on the classification under the HECS scheme. This was a consistent means of assessing all courses within the institution. Unlike in *Cheary,* the classes were held during normal working hours and relied on use of the University's facilities. The course was designed to require a number of hours of private study. Cheng had told the Tribunal that he was aware that his course was full-time according to the University, and he had paid full-time fees.

**The debt**

Pursuant to s.1224 of the Act, Cheng owes a debt to the Commonwealth if as a result of a false statement or false representation, JSA was paid to him during the relevant period. The AAT relied on the Federal Court decision of *McAuliffe v Secretary to the DSS* (1991) 23 ALD 284 noting that for the statement to be false it must be untrue in fact. 'Liability . . . is not dependent on proof that the statement or representation was deliberately or intentionally untrue': Reasons, para. 34. In this matter the AAT was satisfied that Cheng and his wife both knew that the course was full-time when Cheng answered 'no' to the question on the JSA form. As a result JSA was paid to Cheng when he was not qualified to receive it.

**Waiver**

Because Cheng's debt was outstanding at 1 January 1996, the AAT was able to apply the amended waiver provisions. It was agreed by Cheng and the DSS that write-off was not appropriate in this matter, because Cheng and his wife were both earning an income.

On behalf of Cheng it was submitted that the debt was due to administrative error, and Cheng had received the payments of JSA in good faith. The AAT accepted that Cheng and his wife had twice gone to the DSS to ask advice about their entitlement. However, the AAT could not be satisfied on the balance of probabilities that the Chengs had given the DSS officers sufficient information for those officers to give Cheng and his wife accurate information in their particular case. Therefore, the debt did not arise solely because of administrative error. Cheng continued to state on his form that he was not enrolled as a full-time student, even after he had paid fees as a full-time student.

The AAT then considered whether there were special circumstances in this case. It followed the Federal Court decision of *Beadle v Director General of the DSS* (1985) 60 ALR 225 when deciding what special circumstances should be. It was not sufficient to show financial hardship alone. It was noted that there was no question of illiteracy, isolation or illness in this case. The submission on behalf of Cheng had stated that he had suffered cultural disgrace after his JSA had been cancelled, because he had been forced to borrow money to survive. Also Cheng had acted in good faith when he had received the money. The AAT stated:

> 'While cultural disgrace should not be underestimated, there was no indication before the Tribunal that it was likely to be permanent.'

(Reasons, para. 41)

The AAT decided that there were no special circumstances in this case.

**Formal decision**

The AAT decided to set aside the decision of the SSAT and substitute its decision that a debt of $2565.41 was recoverable from Cheng.

[C.H.]



# Case management activity agreement: failure to comply with terms

**SECRETARY TO DEETYA and SMITH**
**(No. 11036)**

**Decided:** 24 June 1996 by W. Eyre.

The DEETYA cancelled Smith's newstart allowance on the basis that he had failed to comply with the terms of his case management activity agreement (CMAA). The SSAT set aside the DEETYA's decision to cancel Smith's newstart allowance.

**Background**

On 1 May 1995 Smith signed a CMAA which contained a number of obligations including:

- reporting every 4 weeks to his case manager the list of employers he had contacted and activities undertaken;
- attending the CES 3 times each week, checking the job boards and applying

for appropriate jobs, updating contact date;

- preparing a resumé and attending an information session about a metal fabrication course and, if successful, participating in the course.

The DEETYA contended that Smith had failed to comply with the first 2 obligations.

Smith's evidence was taken from the SSAT's reasons for decision as he did not attend the AAT hearing. Smith acknowledged that he had failed to report to his case manager or to attend the CES 3 times a week. He alleged that he did not understand the importance of the terms of the CMAA as his case manager did not go through it thoroughly with him. He also submitted that the DEETYA should have contacted him earlier about his failure to report regularly. He said that he had lost his copy of the CMAA and that the activities would not have resulted in him gaining employment.

The AAT heard evidence from the case manager that he had explained to Smith the terms of the CMAA, the importance of those terms, and the fact that if he did not comply with them he would be breached.

### The legislation

Section 45(5) *Employment Services Act 1994* provides that a person is not qualified for newstart allowance if, while a CMAA is in force, they fail to take reasonable steps to comply with its terms.

Section 45(6) states that a person is taking reasonable steps to comply with the terms of a CMAA unless they fail to comply with the terms and:

> '(a) the main reason for failing to comply involved a matter that was within the persons control; or
>
> (b) the circumstances that prevented the person from complying were reasonably foreseeable by the person.'

### The AAT findings

The AAT discounted the SSAT's argument that Smith had complied with the substantial terms of the agreement. It found that he had failed to provide a 'List of Employers contacted and activities to case manager' (Reasons, para. 19) and had failed to attend the CES 3 times a week. These were matters which were within his control.

The AAT commented on the serious consequences of non-compliance with a CMAA and said that this resulted in administrators having a great responsibility to ensure that the obligations of the CMAA are fair, are expressed clearly and that the terms and the consequences of not complying with them are adequately explained. In this case the AAT was satisfied that this responsibility had been met by the case manager.

### Formal decision

The decision under review was set aside and in substitution the AAT determined that Smith was not qualified for newstart allowance and that payment of the allowance should be cancelled with effect from 19 July 1995.

**[A.A.]**

## MURRAY and SECRETARY TO DEETYA (No. 11173)

**Decided:** 16 August 1996 by D. Chappell.

### Background

Murray lived in Brungle, a small town located between Tumut and Gundagai. In October 1994 Murray claimed newstart allowance after a substantial period of unemployment. On 23 March 1995 he signed a case management activity agreement (CMAA). The terms of the agreement included clause 2 which lists the following activities:

> 'i I agree to report my efforts to obtain a job to my Case Manager by recording employers I have contacted for work (every 4 weeks)
>
> ii Apply for Social Security advance payment of $750 to pay car expenses including insurance and registration
>
> iii Attend information session for participation in REAP (date to be advised in writing).

Clause 4 of the CMAA reads:

> 'I agree to accept an offer of placement under the New Work Opportunities Program, the New Enterprise Incentive Scheme, the Landcare and Environment Action Program the Jobskills Programs or a job under the National Training Wage Program or JobStart program.'

On 6 April 1995 Murray applied for an advance payment of newstart allowance. The car registration fell due on 4 April 1995.

On 29 March 1995 the DEETYA sent Murray a letter notifying him that he have been selected to participate in a 6 month experience and training initiative. He had to attend an information session on 10 April 1995. Murray attended the information session and interview as required by Employment Assistance Australia. He was informed that the Regional Environment Employment Project (REEP) work program commenced on 1 May 1995 at Tumut Skillshare Centre. He attended briefly on 1 May 1995 but failed to attend the remainder of the program. A breach report was filed on 16 May 1995. On 30 May 1995 the DEETYA cancelled payment of Murray's newstart allowance for a period of 6 weeks.

### The issues

The issues were whether Murray failed to comply with the terms of the CMAA, and whether his newstart allowance was properly deferred for breach of the terms of this CMAA.

### The legislation

The Tribunal commented: 'A tortuous legislative path must be traversed to understand the statutory framework surrounding the circumstances of this case': Reasons, para.12. Two statutes are relevant — *Employment Services Act 1994* (ESA) and *Social Security Act 1991* (SSA). The case management system is covered by the ESA. Chapter 4 of the ESA requires people in receipt of job search or newstart allowances to enter into a CMAA. Continuing qualification for such allowances is dependent on compliance with certain requirements of the ESA. Power to cancel for non-compliance is found in the SSA.

Section 45(5)(b) of ESA provides that a person is not qualified unless the person is taking reasonable steps to comply with the terms of the agreement. Section 45(6) states:

> 'For the purposes of paragraph(5)(b) a person is taking reasonable steps to comply with the terms of a CMAA unless the person has failed to comply with the terms of the agreement and:
>
> (a) the main reason for failing to comply involved a matter that was within the person's control; or
>
> (b) the circumstances that prevented the person from complying were reasonably foreseeable by the person.'

Section 593 of the SSA sets out the qualifications requirement for newstart allowance. The relevant section is s.593(1)(b) which states that the person must satisfy the activity test. Section 601(5) of SSA provides that if a person fails to take reasonable steps to comply with the terms of a newstart activity agreement, the person cannot be taken to satisfy the activity test. Section 45(8) of ESA provides that a reference to a newstart activity agreement is a reference to a CMAA. Section 601(6) of SSA duplicates the provisions in s.45(6) of the ESA.

If a person fails the activity tests, s.630(1)(c) of the SSA provides for a non-discretionary deferment period for qualification for payment for a period of 6 weeks. Section 6601 provides for the Secretary to determine that the allowance be cancelled or suspended.

### Failure to comply

The DEETYA argued that Murray failed to take reasonable steps to comply with his CMAA by not participating in the REEP program. Consequently he did not