

further into error by frustrating the applicant's two separate attempts to repay the overpayment does not, in my view, change the essential character of the payment as received by the applicant. It was, and remained an amount paid contrary to the Act and which the applicant knew had been paid to him contrary to the Act.'

(Reasons, para. 24)

The DSS had been recovering the debt of \$384 by instalments, and the debt amounted to \$119 at the date of the AAT hearing. The AAT decided it was not cost effective to recover this debt and waived it pursuant to s.1237AAA(1) of the Act.

Formal decision

The AAT set aside the decision under review and waived the remainder of the debt.

[B.M.]

Practice and procedure: joinder of parties

SCOTT and SECRETARY TO DSS
(No. 11188)

Decided: 24 July 1996 by J. Dwyer.

Mrs Scott had asked the AAT to review the decision of the SSAT to affirm a DSS decision not to grant her a disability support pension (DSP). On 24 May 1996 her husband, Scott asked to be joined as a party to the proceedings.

The law

The application by Mr Scott to be joined as a party was made under s.30 (1A) of the *Administrative Appeals Tribunal Act 1975*. That section provides:

'Where an application has been made by a person to the Tribunal for a review of a decision, any other person whose interests are affected by the decision may apply in writing, to the Tribunal to be made a party to the proceeding, and the Tribunal may, in its discretion, by order, make that person a party to the proceeding.'

The AAT decided that there were two steps to this process. The first involved the AAT deciding whether Scott was a person whose interests were affected by the decision, and the second, whether it should exercise the discretion to join Scott as a party to the proceedings.

Person whose interests are affected

Scott submitted that there were financial and medical reasons why his interests were affected by this decision. His financial interests were affected because he and his wife were forced to live on his

DSP which was paid at the married rate. Mrs Scott had been receiving the special benefit but it had been cancelled. The financial pressure meant that stress was being placed on Scott which affected his heart condition. The DSS argued that Scott was in no different position than any other partner of a recipient of a social security benefit.

The AAT quoted from the decision in *Control Investments Pty Ltd and Australian Broadcasting Tribunal* (1980) 3 ALD 74, and stated that to determine whether a person's interests had been affected required consideration of that person's particular interest. 'The interest affected need not be a legal interest but there must be some definable relevant interest': Reasons, para. 11. The interest in any particular case would be influenced by the type of decision under review. The AAT concluded that Scott was a person whose interests were affected by the decision not to grant his wife a DSP. The interest was not legal but Scott's financial interests were affected.

The discretion

The AAT cited *Control Investments* for the proposition 'a finding by the Tribunal that a person is an interested person does not necessarily mean that the person is entitled to be joined as a party to the proceeding': Reasons, para. 13. The duty to join a person as a party to a proceeding will be limited by the AAT's duty to provide a fair hearing and to deal with matters as expeditiously as possible. A person will only be joined if the person's interests are substantial and significantly different from the other party to the proceeding. The AAT concluded in this case that Scott's interests were substantially similar to his wife's. Scott could still be called as a witness for his wife and he could explain his particular situation.

Formal decision

The AAT refused Scott's application to be joined as a party to the proceedings.

[C.H.]

Freedom of information: 'dob in' letter

HAYES and SECRETARY TO DSS
(No. 11221)

Decided: 6 September 1996 by J.A. Kiosoglous.

Hayes sought review of a decision of a Freedom of Information Review Officer of 4 April 1995, which had exempted from release a certain document pursuant to s.37(1)(b) of the *Freedom of Information Act 1983* (the *FoI Act*).

Hayes had been granted access to all documents on his file except those pertaining to a letter which had accused him of breaching the provisions of the *Social Security Act 1991*. Hayes was in receipt of a disability support pension and the letter alleged that Hayes went overseas without notifying the DSS, and that he was possibly not medically qualified to receive the pension. There was an allegation that Hayes undertook activities such as painting and car repairs for family and friends, and that he may have received undeclared income.

The law

Section 37(1) of the *FoI Act* provides:

'A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:

- (a) ...
- (b) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, or the non-existence of a confidential source of information, in relation to the enforcement or administration of the law; or ...'

An officer of the DSS had determined that the anonymous letter should be exempt from release under the *FoI Act* because the release of the letter in its original form would probably identify the author because of the handwriting, the information provided, and the spelling and grammatical style used. This also meant that a typed copy of the document could not be released because of the nature of the information, the spelling and the grammatical style.

The DSS investigated the allegations some 21 months after the letter had been received. The investigation concluded that the allegations were incorrect.

The AAT found that the *FoI Act* provided no protection to Hayes, who was the subject of malicious and wrongful allegations. These allegations had caused him considerable distress, were anonymous, and appeared to have been written for the purpose of causing him problems.

The issue

The AAT decided that there were three essential questions which it must determine to conclude that the letter was an exempt document. These were:

- was the letter a confidential source of information;
- was it properly classified as relating to the enforcement or administration of the law; and
- would the release of the letter disclose the identity of the confidential source, or could it reasonably be expected to do so?

The AAT noted that: 'a source of information is confidential where it is provided under an express or implied pledge

of confidentiality': Reasons, para. 15. The letter in question was unsigned, and there was no address. The AAT accepted that the information was provided with an implied request for confidentiality. The letter was received in confidence by the DSS. Hayes submitted that the letter did not contain confidential information because that information was false. After quoting the decision of *McKenzie v Secretary to DSS* (1986) 65 ALR 645, the AAT found that even if the information provided was false, it does not cease to be exempt under the *FoI Act*.

'It does not matter that the information was deliberately false or mischievous as this does not detract from the confidential nature of the letter'

(Reasons, para. 19)

The AAT accepted that the letter related to the enforcement or the administration of the law. The letter went to whether Hayes was entitled to receive a pension.

Finally, the AAT considered whether the letter would, disclose or be reasonably likely to disclose the author. The AAT concluded that it would because of the particular information, the spelling and the grammar.

Formal decision

The AAT affirmed the decision of the review officer that the document was exempt under the *FoI Act*.

[C.H.]

Student Assistance Decisions

AUSTUDY: independent rate; homelessness

SECRETARY TO DEETYA and
SHEILES
(No. 11141)

Decided: 9 August 1996 by A.M. Blow.

The DEETYA had requested review of a majority decision at the SSAT of 15 August 1995 that Sheiles was qualified for AUSTUDY at the independent rate.

Sheiles was 17 years old at the time of the AAT hearing and did not wish to attend the hearing or be represented.

The facts

Sheiles applied for AUSTUDY for 1995 to undertake his HSC in Wagga Wagga. He was living with his father, his mother having left the family home and moved to Bateman's Bay. In November 1994 Sheiles left Wagga Wagga and moved to Bateman's Bay. He rented a flat which he shared with another person. In January 1995 he applied for AUSTUDY at the independent rate.

Sheiles' father had an alcohol problem, and exhibited violent disturbing behaviour. In his statement to the DEETYA, Sheiles stated that he did not like living at home with his father because he would come home drunk and yell at him in obscene and abusive language. He told

the SSAT that he felt at risk and unsafe living with his father. By the time of the AAT hearing, Sheiles had moved to Sydney and was apparently working for his father. However, there was no evidence that Sheiles was living with his father again. The AAT concluded that it was unreasonable for Sheiles to continue living with his father. There was a serious risk to his well-being as a result of his father's drinking.

Sheiles' mother was boarding with a police officer in Bateman's Bay. They were friends, and the officer allowed Sheiles' mother to share his home. Sheiles stated that the officer did not want him to move in with his mother. The officer wrote two letters in support of Sheiles' application for AUSTUDY at the independent rate. The AAT found that Sheiles:

'could not have lived with his mother at Bateman's Bay because he did not have the permission of the owner of her home to do so, and would have been a trespasser.'

(Reasons, para. 17)

The AAT concluded that Sheiles could not live with either of his parents because of family breakdown.

The law

Regulation 60 of the AUSTUDY Regulations provides that AUSTUDY can be paid at the independent rate. Regulation 67 sets out the different qualifications for the independent rate. One of these is 'homelessness' as described in reg. 74. According to reg. 74:

'A student qualifies as independent through it being unreasonable that he or she live at home, if:

- (a) he or she can not live at the home of either or both his or her parents:
 - (i) because of extreme family breakdown or other similar exceptional circumstances; or
 - (ii) because to do so would be at serious risk to his or her physical or mental well being due to violence, sexual abuse or other similar unreasonable circumstances; and

The issue the AAT had to resolve was whether the family breakdown Sheiles had explained was 'extreme family breakdown'. Sheiles continued to be on reasonable terms with his mother, and his sisters continued to live with their father in Wagga Wagga. It was submitted by the DEETYA that 'extreme family breakdown' involved sexual harassment, domestic violence, criminal activity, psychological abuse, physical neglect, extreme abnormal parental or cultural demands or such similar extreme circumstance. The AAT stated:

'I do not think that such a rigorous view of reg. 74 (a)(i) should be taken. The Act and the regulations are, after all, beneficial legislation. All other things being equal, any ambiguity ought to be resolved in favour of the class of persons intended to be benefited, i.e. students.'

(Reasons, para. 19)

The AAT found that Sheiles' family breakdown was so extreme that he was unable to live with either of his parents. Therefore he qualified for the homeless allowance.

The AAT noted that no stay had been applied for in relation to the SSAT decision to pay Sheiles AUSTUDY at the homeless rate. Nonetheless, the DEETYA had not paid the arrears owing to