English language in written and oral forms, and stated that he had trouble filling out the claim form for AUSTUDY. Le said that he thought that question 20 on the form he had completed which requested income details for the 1989 year, applied only to income after the date of his claim, and not as the form actually indicated by question 19, for the entirety of 1989. Le stated that he thought that 'expected' in question 20 meant money he would earn in the future, and it was not his intention to work in 1989 as he was concentrating on his full-time study.

The overpayment

The AAT decided that as a matter of law, Le was obliged to take account of income received, and he had been overpaid. This included income from Smorgons and Greer, although the AAT found he could not be expected to foresee his employment with Greer at the time he filled out the AUSTUDY claim form. In deciding that Le had been overpaid, the AAT also found that it was not the AUSTUDY claim form that obliged the declaration of income, but the relevant legislation and regulations, that is, the *Student and Youth Assistance Act 1973*.

The AAT found that Le was aware of his obligations to disclose income to the DEETYA, and that he should have declared the income already received from Smorgon on his claim for AUSTUDY. Despite Le's problems with the English language, he had sufficient comprehension of it to understand that the words 'expect to' denoted some future time, and that Le's belief that it did not include income prior to claim was mistaken. The AAT commented on the two questions on the AUSTUDY claim form which were the subject of appeal, that is questions 19 and 20, under which Le was expected to declare his income. The AAT considered that the wording of question 20:

> 'could cause some confusion and it might be understood to refer to income received after the date that the claim form is completed, having regard to the presence of the words 'expect to'. The language of question 20 suggests to me that the applicant anticipates students completing the claim form in the year prior to the academic year for which assistance is sought.'

(Reasons, para. 21)

In turning to how question 20 should be read, the AAT commented that:

> 'Question 20 however should not be read in isolation from question 19 which directs applicants to 'give details for the period 1 January 1989 to 31 December 1989 in question 20'. It directs disclosure of income for the whole of the 1989 calendar year. Question 20 asks a question as to expectations of income only. It does not direct disclosure as does question 19 and the information sought as evidenced by the words "do you expect" is different from the information directed to be given by question 19.'

(Reasons, para. 21)

The waiver

The AAT turned to the issue of whether or not the overpayment should be waived. It could not find any administrative error by the DEETYA in relation to the wording of question 19 or 20 on the AUSTUDY claim form. The AAT described the wording of question 20 as inelegant, particularly if the form is completed after the 1989 year has commenced, but that the requirements in question 19 could not be overlooked. On this basis the AAT decided that the overpayment could not be waived, and that Le should repay the overpayment to the DEETYA.

Formal decision

The AAT affirmed the decision under review

[B.M.]

AUSTUDY: student workload

ILOSTE and SECRETARY TO DEETYA (No. 11169)

Decided: 16 August 1996, by E.K. Christie.

Background

Iloste sought review of a decision of the SSAT which affirmed the DEETYA's decision that he should not be paid AUSTUDY in 1995 because he was not a full-time student.

The facts

It was not in dispute that in 1995 Iloste satisfied the criteria for independent status under the AUSTUDY Regulations. He was then in the fifth year of study for the Bachelor of Architecture degree course at Queensland University of Technology (QUT), a course described by QUT as being of a duration of '6 years, part-time'. The course provided for prescribed periods of 'Approved Employment' to be undertaken each year in combination with academic studies. Students could reduce the duration of the course by undertaking the final 3 years of the course on a full-time basis. This would involve taking additional subjects to raise their workload to full-time and would normally be done where the student had difficulty obtaining 'Approved Employment' and was granted a dispensation from such employment from QUT. Iloste undertook and successfully completed 32 credit points in each semester of 1995, which represented two-thirds of the full-time workload of 48 credit points each semester. In the 1992, 1993 and 1994 academic years, Iloste had undertaken the 'Approved Employment' component of his course with an architectural firm and had worked 37.5 hours a week. During these 3 years he had studied 15 hours a week at QUT for the academic component of the course.

The legislation

Regulation 34 of the AUSTUDY Regulations prescribes the workload for tertiary students and provides that a tertiary student must study full-time, and that to be a full-time student, they must be enrolled in and undertake at least three-quarters of the normal amount of full-time work for a period as set out in regulation 35. In Iloste's case, the relevant provision was subregulation 35(1) which provides that for a HECS designated course, the standard student load determined by the student's institution for the purposes of HECS is the normal amount of full-time work; and that the normal amount of full-time work for a semester is 0.5 of the standard student load. Sub-regulation 36(1) permits the workload requirement of regulation 34 to be reduced to two-thirds of the normal amount of full-time work where a student undertakes a lower workload because of the requirements of the student's institution or because of a written direction from the academic registrar or other equivalent officer of the institution.

The AAT's approach

The AAT referred to *Patman v Fletcher's Fotographics Pty Ltd* (1964) 6 IR 471, in which the NSW Court of Appeal decided that a sequence of legislative provisions should be interpreted in the appropriate sequence rather than as discrete provisions. The AAT agreed with this approach and decided that regulation 36 must be interpreted and applied in the light of the requirements for full-time workload provided for in regulations 34 and 35 rather than as a discrete regulation without reference to the regulations preceding it. The normal amount of full-time work for the fifth year of the Bachelor of Architecture at QUT was 48 credit points. Iloste did not meet the requirement of three-quarters of the normal workload because he had undertaken only 32 credit points. Although Iloste's workload of 66.6% represented slightly over two-thirds of the normal workload, he could not take advantage of the concession provided by regulation 36 as he

had not undertaken the reduced workload because of QUT's usual requirements or because of a specific direction from an appropriate officer. Iloste had the opportunity to meet the three-quarter workload by increasing the academic component of the course and decreasing his hours of 'Approved Employment', but he had chosen to continue to combine full-time employment and part-time study.

The AAT considered that 'in an era of . . . alternative teaching and learning strategies . . .' the 'Approved Employment' component of the course should be considered in relation to the determination of full-time workload, and agreed with the decision of Davies J in *Harradine v Secretary, DSS* (1988) 19 FLR 463 (in the context of the *Social Security Act 1991*), that it is the character of the study rather than the time spent in lectures and tutorials which will determine whether, in respect of any particular period, a person is engaged in a course of education on a full-time basis. However, to be considered, the 'Approved Employment' component of the course had to be assigned a 'unit' rating compatible with the rating for the academic component of the course. In Iloste's case, although 'Approved Employment' was part of the structure of the Bachelor of Architecture course, it had no assigned subject code, no credit point rating or assigned contact hours relative to the academic component of the course. Consequently, the AAT had no alternative but to find the 'Approved Employment' component could not be considered as part of Iloste's workload for the purposes of regulation 35. The AAT noted that commencing in 1996, 'Approved Employment' had a subject code and total rating of 60 credit points for the final 3 years of the course and suggested that, as a result, Iloste could be eligible for AUSTUDY. Leave was reserved for Iloste to make a new application if the need arose.

Formal decision

The AAT affirmed the decision under review.

[S.L.]

SSAT decisions

Important note: Decisions of the Social Security Appeals Tribunal, unlike decisions of the Administrative Appeals Tribunal and other courts, are subject to stringent confidentiality requirements. The decisions and the reasons for decision are not public documents. In the following summaries, names and other identifying details have been altered. Further details of these decisions are not available from either the Social Security Appeals Tribunal or the Social Security Reporter.

Social Security

Job search allowance: 'homeowner'; security of tenure

B and Secretary to DSS

Decided: 13 August 1996.

In late 1995, the Bs moved to a farm property owned by a partnership. The partnership consisted of members of B's extended family; B only had a twelfth share. Previously, the property had been let at commercial rates to non-family members. The Bs entered a verbal agreement with the partnership that the Bs would pay $110 a week rent; and until B found employment in the area, he could work for 12 hours a week on the property in lieu of paying rent.

B had expected to find work within 3 months of moving to the property. However, this did not eventuate, and the local employment market was very poor. After some months, B was approached by the partnership with a view to paying rent from 1 July 1996 regardless of his employment status.

B applied for job search allowance on 9 February 1996. His application was rejected by the DSS on the basis that he was a homeowner, and his assets exceeded the threshold above which the allowance was not payable.

The SSAT distinguished between B's interest in the land as a one twelfth partner in the partnership that owned it, and his interest by virtue of the verbal tenancy agreement with the partnership. It followed the AAT decision of *Reyes* (1993) 77 *SSR* 1116, and held that B's share in the partnership, while it entitled him to a share in the proceeds of the property, did not give him any right to occupy the property. This right could only arise under the tenancy agreement.

The SSAT noted the AAT decision of *Johnston and Repatriation Commission* (decided 31 May 1994), in which a lease was held to guarantee sufficient security of tenure because the house concerned was owned by a company, and the tenants were the sole shareholders and two of the three directors — and therefore very unlikely to evict themselves. Here, by comparison, the landlord was not controlled by the tenants; the property had always been let commercially; there was not a minimum term to the lease; and the landlord had indicated that the terms of the lease would be enforced — which meant that as the Bs could not pay (unless their appeal was successful), they would probably be asked to leave.

The SSAT concluded that even with B's interest in the partnership taken into account, the tenancy agreement did not in the circumstances guarentee the Bs reasonable security of tenure. Therefore they were not 'homeowners' as that expression was defined in s.11(4) of the *Social Security Act.* The (higher) 'non-homeowner' threshhold applied to them, and as the Bs' assets did not exceed this level, B was not precluded from job search allowance under the assets test.

AUSTUDY

Secondary study: failure in previous years; circumstances beyond student's control

A and SECRETARY TO DEETYA

Decided: 9 August 1996.

A migrated to Australia in 1985, speaking no English. She attended secondary school from years 8 to 12. She attempted (and failed) Year 12 in 1990 and 1991. In 1996, she again enrolled in Year 12. Her application for AUSTUDY was rejected under Regulation 32(1) on the grounds that she had already undertaken secondary study at that level in two previous years.

The SSAT accepted that in the years leading up to 1990 and 1991, and particularly in those years, language difficulties and, more particularly, ethnic and cultural differences during that difficult time of adolescence, left her very self-conscious, lacking in self-esteem and so-