he were directed to seek compensation for his work-related injury, this would breach the privilege against self-incrimination. He had previously been paid compensation for that injury in the name of Williams and now would have to apply in the name of Ryan. It would also be argued for Ryan that there was no longer an entitlement to compensation. The AAT noted that compensation payments had been suspended because of lack of medical certificates and not because of loss of entitlement as such. If Ryan was to reapply, a full investigation would be made of his entitlement to compensation payments. The AAT concluded that it was reasonable for Ryan to apply for compensation so that those investigations could be carried out.

Self-incrimination

The AAT referred to *Reid* v *Howard* (1995) 69 ALJR 863 where the High Court had found certain orders of the Supreme Court (NSW) invalid because they had purported to override the privilege against self-incrimination. This could only be overridden by the express words of a statute. Section 1164 of the Act did not expressly override the privilege. The AAT was referred to other judgments where it had been decided that where the privilege against self-incrimination was not abrogated by clear words, a court might still find an intention to override the privilege.

It was submitted that there was no intention here that Ryan incriminate himself. The AAT was referred to s.132 of the Act which provides that a notice may be given to a person requiring that person to give certain information to the DSS. Ryan had been required to inform the DSS that he was receiving compensation payments from 1992. He did not comply until 1995. This may be an offence under the Act pursuant to s.1346. According to his counsel Ryan had not appeared at the AAT because of the possibility of self-incrimination under the *Social Security Act*. To ask Ryan to apply for compensation would be tantamount to asking him to apply for prosecution under both the *Social Security Act* and the relevant compensation legislation.

The AAT concluded after considering all the evidence that it was reasonable that Ryan be required to apply for further workers' compensation payments. The AAT was guided by the High Court's views in this matter.

Formal decision

The AAT affirmed the decision under review.

[C.H.]

[Editor's Note: It is not clear from the reasons for the decision, how the AAT came to its conclusion. The High Court's view on the privilege against self-incrimination is that this privilege can only be overridden by the express words of a statute. The AAT found that there were no such express words in the *Social Security Act*. Nonetheless it still found that it was reasonable for Ryan to make a claim for compensation even though the possibility existed that this may be an offence.]

Rent assistance: overpayment

BLAKENEY and SECRETARY TO THE DSS (No. 11403)

Decided: 18 November 1996 by G. Ettinger and J.A. Shead.

The DSS raised an overpayment of rent assistance of $7139.50 in respect of the period from 7 January 1988 to 7 January 1993.

The facts

Blakeney's parents located and arranged the purchase of two houses in which Blakeney lived with her two children. She received rent assistance from the DSS in respect of her occupation of both properties.

In 1987 Blakeney was registered as the proprietor of a house in Umina. She believed that the house was put in her name because of her parents' age. Blakeney did not regard herself as the owner of the house, and regularly paid rent to her parents.

Following the sale of the Umina property Blakeney became the registered proprietor of a house in Thornleigh. She and her children lived there and she paid rent to her parents.

Blakeney's parents stated that their daughter did not contribute to the purchase price of either house but paid rent regularly. The houses were mortgaged against the parents' business and the rent paid by Blakeney did not cover the outgoings, which were paid by her parents.

The legislation

The legislation relating to rent assistance changed during the course of the period under review. For the period from 7 January 1988 to 11 June 1989 the provisions of the *Social Security Act 1947* were relevant. That Act was amended as at 12 June 1989 and it applied from then until 30 June 1991. The amendments introduced the concept of 'ineligible property owner'. The *Social Security Act 1991* (the Act) came into effect on 1 July 1991, and was the relevant legislation for the rest of the period under review.

The issues

The AAT considered the following issues:

- whether Blakeney qualified for rent assistance;
- whether she incurred an overpayment of rent assistance;
- whether she was an ineligible home owner at any time during the period; and
- whether there were grounds to waive or write off any overpayment.

Qualification for rent assistance

The AAT did not accept the submission of Blakeney that she held the properties as trustee for her parents. It decided that, as she was the registered proprietor of the properties, then the payments she was making to her parents in the period from 7 January 1988 to 11 June 1989 could not be regarded as rent. As she was not paying rent, she did not qualify for rent assistance.

Ineligible property owner

The AAT assessed whether Blakeney was paying 'rent' after 12 June 1989 in terms of the amended legislation, and whether she was an ineligible property owner. It concluded that the payments were not a condition of occupancy and that Blakeney had security of tenure in the houses. The AAT accepted the DSS submission that Blakeney was an ineligible home owner, and thus was not eligible for rent assistance.

Was the overpayment of rent assistance a debt?

The AAT accepted that when Blakeney informed the DSS that she was paying rent and that she did not own the properties, she had not intended to make untrue statements. However, although her statements were innocent mistakes, she had incurred a debt to the Commonwealth due to the provisions of s.1224(1) of the Act.

Waiver and write off

The AAT considered whether special circumstances existed to enable the debt to be waived or written off. It accepted the submission that Blakeney had accrued rights when she applied for review to the AAT of the decision in September 1993 and that, in accordance with the decision in *Lee v Secretary, Department of Social Security* (1996) 139 ALR 57, the *Hales* factors should be considered.

Having considered Blakeney's personal circumstances the AAT decided that it was not able to exercise the discretion to find special circumstances to justify the waiving of the debt.

Formal decision

The decision under review was affirmed.

[A.A.]

Student Assistance Decisions

AUSTUDY: waiver; administrative error/special circumstances

GERHARDT and SECRETARY TO THE DEETYA

(No. 10941)

Decided: 17 May 1996, by S.A. Forgie.

Background

Mr S. and Miss K. Gerhardt (brother and sister) sought review of decisions of the SSAT which had affirmed the DEETYA's decisions that the level of their parent's income made each of them ineligible for AUSTUDY in 1993, and made Miss Gerhardt ineligible from 1 October 1994 to 31 December 1994. As a result of their ineligibility, Mr Gerhardt had been overpaid of $6178.93 during 1993 and Miss Gerhardt had been overpaid $2929.77 during 1993 and $768.50 during 1994.

The facts

On their 1993 AUSTUDY applications, the Gerhardt children had shown parental income for the 1991-92 financial year of $605 for their father and a loss of $42,577 for their mother. Copies of their parents' Notices of Assessment from the Australian Taxation Office (ATO) were attached to their applications. The Notice of Assessment for their father stated his taxable income was $605 and that $82,523 Exempt Foreign Salary and Wages had been taken into account to calculate the tax payable on his taxable income.

On Miss Gerhardt's Continuing Application Form for AUSTUDY for 1994, in relation to the 1992-93 financial year she had shown 'Australian and overseas taxable income' $610 and 'loss nil' for her father, and a loss of $48,749 for her mother. Copies of her parents' Notices of Assessment were attached which confirmed that her father's taxable income was in the amount stated in her application, and also stated that $69,149 Exempt Foreign Salary and Wages had been taken into account to calculate the tax payable on his taxable income.

The issue

The issue in relation to both Mr Gerhardt and Miss Gerhardt was whether the DEETYA should waive its right to recover the whole or part of the amount of AUSTUDY overpaid to them.

The evidence

The applicants' mother, Mrs Gerhardt, had completed the AUSTUDY forms in each year in accordance with instructions in the 1990 Application Guide and Information Booklet. In the notes to parents and guardians it was stated that the total taxable income should be given for the relevant financial year, and that original Notices of Assessment from the ATO should be attached. It was also stated that income earned overseas or in an external territory, whether taxed or not, should be included, and that if it was not taxed in Australia, a statement showing the total amount in the local currency less allowable deductions for local taxation purposes should be attached and 'we will convert the amount to Australian currency'. Mrs Gerhardt believed she had completed the applications in accordance with these instructions.

In 1993, at her request, Mrs Gerhardt had been provided with a 1993 Application Guide. The notes in relation to parental income, which she said she would have read, differed somewhat from the 1990 Guide. A further guide accompanied the AUSTUDY application form. At page 13 of this guide was a statement in relation to income earned overseas or in an external territory which was similar to the relevant note in the 1990 Guide and Information Booklet.

In relation to her children's 1993 AUSTUDY applications, Mrs Gerhardt said she had not provided a separate statement about her husband's overseas income, because she believed the necessary information was contained in his Notice of Assessment from the ATO, a copy of which (for the relevant financial year) was attached to each of her children's AUSTUDY applications. She had not been specifically asked to provide a separate statement, and expected the assessor would take the overseas income into account from the Notices of Assessment.

In 1994, Miss Gerhardt applied for Continuing AUSTUDY. Under the heading 'How do I calculate my parent's income?' in the 1994 Information Booklet it was stated that details of the student's parents' taxable income as well as any income earned and taxed overseas should be given. A section indicating how to calculate 'adjusted family income' provided four specified items which had to be added together before relevant deductions could be applied. Two of the items included were 'taxable income of your parents' and 'any overseas income'. The notes to the application form contained a statement in relation to income earned overseas which was similar to the relevant note in the 1990 and 1993 application guides, and set out the requirement of an attached statement in relation to such income if it had not been taxed in Australia. Proof of income in the form of an Australian or overseas Taxation Notice of Assessment or tax return for the 1992-93 financial year was also required to be attached to the application.

It was argued that Mrs Gerhardt had provided details of her and her husband's income in accordance with relevant instructions in the Guides, and had not tried to hide her husband's overseas income. That information appeared in his Notices of Assessment, copies of which were provided to the DEETYA. Although Mrs Gerhardt conceded that she had made an error in failing to attach a statement regarding the overseas income, she argued the assessor had also made an error in failing to take the overseas income shown on her husband's Notice of Assessment into account. It was submitted that her contribution to the error would have been very small.

The legislation

The AAT noted that provisions relating to waiver were first included in the *Student and Youth Assistance Act 1973* by the *Student and Youth Assistance (Youth Training Allowance) Amendment Act 1994*. The waiver provisions, operative from 1 January 1995, were in ss.288-290. As a result of s.43, when read with the definition of student assistance overpay-