The overpayment

Section 1224 of the *Social Security Act 1991* (the Act) provides:

> (a) an amount has been paid to a recipient by way of social security payment; and
>
> (b) the amount was paid because the recipient or another person:
>
> (i) made a false statement or a false representation; or
>
> (ii) failed or omitted to comply with the provision of this Act or the 1947 Act;
>
> the amount so paid is a debt due by the recipient to the Commonwealth.'

The DSS sought to rely on s.1224(1)(b)(ii) to show that the overpayment of age pension was a debt because Dingli had failed to comply with a provision of the Act. This was on the basis that she did not notify the DSS, in response to the September 1993 notice, that her and her husband's combined income exceeded $76 a week.

The AAT rejected that argument on the basis that the Dinglis' combined income already exceeded $76 a week and thus no event occurred which Dingli had to notify the DSS about.

The AAT did, however, find that the overpayment was a debt pursuant to section 1224(1)(b)(i) of the Act on the basis that Dingli had made a false representation about her husband's employment status in the claim form. By leaving the relevant question blank she conveyed the impression that her husband was not working.

Waiver

The AAT first considered whether the debt should be waived due to administrative error under s.1237A of the Act. It stated that the DSS had made an administrative error in processing Dingli's claim without requesting her to complete the questions which she had left blank. However, the debt was not solely due to administrative error because it was also attributable, in part, to Dingli's failure to complete the whole of the claim form.

The AAT then considered whether the debt should be waived due to the existence of special circumstances pursuant to s.1237AAD of the Act. The first requirement of that section is that the debt did not result from the debtor knowingly making a false representation.

The AAT considered whether Dingli had knowingly made the false representation in her claim form. It decided that Dingli understood the question in the claim form and had deliberately chosen not to disclose her husband's employment details in the hope of obtaining a financial advantage for herself. In view of this and the fact that the AAT did not feel that there were any special circumstances in Dingli's case the debt could not be waived.

Write off

The AAT finally considered whether the debt should be written off pursuant to section 1236 of the Act. As the debt was being recovered from Dingli by withholdings from her pension the AAT concluded that it was not appropriate to write off the debt.

Formal decision

The decision under review was affirmed.

[A.A.]

Student Assistance Decisions

AUSTUDY: whether prior degree the normal requirement?

PETERKIN AND OTHERS and SECRETARY TO THE DEETYA (No. 11552)

Decided: 20 January 1997 by D. Chappell.

Background

The cases of 6 students were heard together as their fact situations were either identical or analogous. The 6 students were completing the degree of Bachelor of Veterinary Science. Five of the students had completed a Bachelor of Science (Honours) degree before commencing Veterinary Science. The sixth student had completed a Bachelor of Applied Science (Agriculture).

The Faculty of Veterinary Science at the University of Sydney has two mutually exclusive categories of entry: one for school leavers and one for students with previous tertiary experience. The six students gained entry under the second category.

The 6 students had received AUSTUDY up until end of 1994 but were deemed ineligible in 1995. The students sought review of a decision of the SSAT that they were ineligible for AUSTUDY in 1995.

The issue

The issue was whether completion of the students' previous degrees should be treated as the normal requirement for admission to the Bachelor of Veterinary Science?

The legislation

The relevant AUSTUDY Regulations made under the *Student and Youth Assistance Act 1973* are regulations 41 and 47:

> '41.(1) A student can get AUSTUDY in a year of study for a tertiary course only if, at the relevant date, the time already spent by the student in full-time study at the level of the tertiary course, is less than:
>
> (a) if the minimum time for the course is more than one year — the sum of the minimum time for the course plus:
>
> (i) half a year; or
>
> (ii) if the student is enrolled in a year-long subject — one year; or
>
> (iii) if the student's further progress in the course depends on passing a whole year's work in the course — one year
>
> (3) In this regulation:
>
> 'minimum time' means:
>
> (a) the minimum time needed to complete the course at pass level: and
>
> (b) any additional honours years that the student had undertaken or is undertaking in the course.'

The parties agreed that the students were ineligible unless regulation 47 applied.

> '47. For the purposes of subregulation 41(1), no account is taken of a course completed by a student if completion of the course is the normal requirement for admission to the student's current course (unless the current course is a Master's qualifying course).'

Is completion of a prior degree 'the normal requirement for admission'?

The students submitted that the completion of their first degree was 'the normal requirement' under regulation 47. The normal requirement was to satisfy either of the categories of entry. There are other 'special' admission requirements available to students. They argued that 'normal' does not mean 'most common' so it is irrelevant that more students are admitted straight from school. Finally they submitted that the legislation should be interpreted beneficially.

The Department submitted that each word in the phrase 'the normal requirement' was significant. If there was a choice of methods of admission, whether

one method was 'a' normal requirement was not satisfactory nor if there was a choice could fulfilling one method be interpreted as a 'requirement' as it was not mandatory.

The AAT accepted that each word in the phrase 'the normal requirement' is significant. The AAT distinguished the case of *Secretary, DEETYA and Wilkinson* (unreported, AAT No. 11118) on the basis that it only considered 'a' normal requirement. The AAT considered that 'requirement' suggests a need or obligation, or a condition that must be complied with: *Gray and DEET* (1996) 2(3) *SSR* 40.

The AAT recognised that the 6 students would not have been admitted if they had not done their previous 4 years of study but 'it does not follow that any other student would normally be required to complete four years of university to be admitted': Reasons, para. 15.

The AAT noted that there is some support for the view that the *Student and Youth Assistance Act 1973* is beneficial legislation: *Secretary, DEET and Lander* (1996) 2(3) *SSR* 38. However, the AAT concluded that the phrase 'the normal requirement' is of fixed meaning and does not vary according to a particular student's circumstances.

Formal decision

The AAT affirmed the decision under review

[M.A.N.]

AUSTUDY: actual means test; what is included in 'expenditure'?

SECRETARY TO THE DEETYA and MARTIN

(No. 11464)

Decided: 9 December 1996 by S.A. Forgie.

Background

The Department sought review of an SSAT decision which had set aside the DEETYA decision that the 3 Martin children (Kylie, Matthew and Clinton) were ineligible for AUSTUDY in 1996 as a result of the application of the actual means test. The SSAT had decided that the actual means of their designated parent was $26,677.

The facts

In 1996, applications for AUSTUDY were lodged by the Martin's 3 children, Kylie (then aged 19), Matthew (then aged 18) and Clinton (then aged 17 but whose 18th birthday was on 28 October 1996). Mr and Mrs Martin were self-employed in a carpet business. No expenses for the children's education had been included in the Actual Means Test Forms they had completed, as the children would pay those expenses from their AUSTUDY payments and from their own earnings from part-time or casual employment. The DEETYA had returned the forms stating that payments to be made from AUSTUDY should be included. In March 1996, Mr Martin traded in a motor vehicle (purchased prior to 1996) for another motor vehicle worth $3000 plus the sum of $3000 in cash. During 1996, he borrowed $10,000 by using overdraft facilities. Mr Martin's evidence was that between the time of the SSAT hearing in August and the Tribunal hearing in December, the family had to reduce their normal expenditure. He stated that the household expenses of the family were $100 a week for himself, his wife and Clinton and that there had been no expenditure on clothing or entertainment. There had been no other option but to limit expenses given an annual income of $13,500.

The issue

The issue was whether the actual means of the respondents' designated parent were less than, or equal to, the after tax income of a notional parent.

The AAT's approach

The AAT was satisfied that Mr Martin, as a self-employed person within the meaning of regulation 12L(1)(e) and (2), was a designated parent, and that the expenditure of the 'family' as defined in regulation 12N(5) must include that of Mr and Mrs Martin, as well as that of Kylie, Matthew and Clinton. The AAT accepted the Secretary's calculation that the after tax income of the notional parent was $37,431.29 in respect of Kylie and Matthew, and $30,627.21 in respect of Clinton until his 18th birthday on 28 October 1996, and $32,325.81 after his birthday.

In relation to the trade-in of the motor vehicle, the AAT found that although the practical effect of the transaction was to raise $3000 and acquire a cheaper car so that the amount of $3000 was not actually spent to acquire that vehicle, in terms of the contracts entered, they had sold one vehicle for $6000 and purchased another (a Sigma) for $3000. The $3000 spent acquiring the Sigma had to be regarded as expenditure under regulation 12N(1). The fact that the purchase sum was obtained by realising an asset was of no consequence under the Regulations just as it would be irrelevant if that sum had been borrowed using an asset as security for the loan. Similarly it was of no consequence that the purchase represented the Martins' actual means only in the sense of their having a realisable asset. As the Sigma was registered when it was acquired, the only expenses relating to the vehicle during the relevant period were the purchase price of $3000, plus expenditure of $2250 on maintenance and running costs.

In relation to the overdraft of $10,000, the AAT found that as that money was used to pay the family's general living expenses, it should not be viewed as an additional sum that needed to be taken into account.

The AAT referred to its decision in *Secretary, DEETYA and Duscher* (1997) 2 *SSR* 101, and concluded that for the reasons given there, the payments proposed to be made solely from benefits expected to be received as a result of a successful claim for AUSTUDY but not otherwise, should not be included.

The AAT accepted Mr Martin's evidence that the household expenses of himself, his wife and their youngest child Clinton amounted to $100 a week. Although this represented less than the annual amount of $5828 calculated as the minimum living expenses for a family of three by the Australian Bureau of Statistics, it was not so far below the minimum to be unrealistic in the circumstances. The AAT also included total expenditure of $9000 in relation to the children's educational expenditure, which included living expenses for the two older children, Kylie and Matthew. These were expenses funded by the designated parent and the children's part-time earnings.

The AAT found that the total expenditure, and therefore actual means, of the Martin's for the period of eligibility amounted to $31,956. As a result, Kylie and Matthew were eligible for AUSTUDY during all of 1996, and Clinton was eligible after his 18th birthday on 28 October 1996.

Formal decision

The AAT varied the decision under review by substituting the figure of $31,956 as the actual means of the designated parent but otherwise affirmed the decision.

[S.L.]