

suffered from asthma and had to use Ventolin and Becotide daily. He also had a muscular problem with his left eye, which hindered his ability to do clerical work because it affected his reading ability. He suffered from diabetes and stomach ulcers, both of which were treated adequately by medication, although his diabetes made it difficult to control his weight.

Continuing inability to work

The AAT considered Garner's medical conditions in relation to whether he was able to work for 30 hours or more a week. The DSS conceded that Garner had a 20% impairment rating, and agreed that 'continuing inability to work' was the only issue in contention. The AAT found that Garner suffered from back pain which prevented him from carrying heavy weights, sitting or standing for long periods and repetitive bending. The

AAT noted that Garner agreed that he could work for 20 hours a week in guitar playing, and a further 8 hours as a courier. He had had no evidence to suggest that he could not work 30 hours a week. In the light of this, the AAT found that Garner did not have a continuing inability to work.

Formal decision

The decision under review was affirmed. Garner was not eligible for the DSP.

[W.M.]

Student Assistance Decisions

Waiver: administrative error and special circumstances

SECRETARY TO THE DEETYA
and O'ROURKE
(No. 11413)

Decided: 1 November 1996 by T.E. Barnett.

The DEETYA sought to recover an overpayment of AUSTUDY of \$6965.50 from O'Rourke. This was on the basis that he was a New Zealand citizen and he had been absent from Australia for more than 2 months in the previous 12 months.

Background

O'Rourke arrived in Australia from New Zealand as a permanent resident in December 1990. He commenced university in 1994. Later that year he learned that his father in New Zealand was seriously ill. He enquired with the DEETYA about whether his departure for New Zealand would affect his AUSTUDY entitlement and was told that it would not. He then spent 4 months in New Zealand.

The overpayment

Regulation 4(1) of the AUSTUDY Regulations relates to citizenship. It allows a New Zealand citizen who has permanently settled in Australia to retain entitlement to AUSTUDY as long as the person is not absent from Australia for more than 2 months in the preceding 12 months.

As O'Rourke was absent for 4 months during 1994 he was wrongly paid AUSTUDY in 1995.

Waiver — administrative error and good faith

The AAT accepted that O'Rourke had been given the wrong advice by the DEETYA. However, it was not satisfied that the debt was attributable solely to administrative error because O'Rourke could have made his own inquiries from the AUSTUDY Handbook.

As a result the AAT did not waive the debt under s.289 of the *Student and Youth Assistance Act 1973*.

Waiver — special circumstances

In considering whether the debt should be waived pursuant to s.290C of the *Student and Youth Assistance Act 1973* the AAT was satisfied that O'Rourke did not make any false representations and did not fail to comply with any provisions of that Act.

The AAT listed the special circumstances which it felt existed in O'Rourke's case. These included:

- his extreme financial circumstances;
- the inquiries he made with the DEETYA before leaving Australia;
- the wrong advice he received and followed to his detriment;
- his reasons for going to New Zealand, namely, his father's illness;
- his success in carrying out the study requirement of an AUSTUDY recipient so that the AUSTUDY scheme had not been thwarted;
- the stress which he had suffered, because of Commonwealth error, which had an effect on his studies;
- his long period of financial hardship following the breakdown of his AUSTUDY entitlements.

In considering whether it was more appropriate to waive than to write-off the debt the AAT was of the view that write-off is most appropriate where an overpayment has occurred because of a fault on the part of the recipient. It said that

O'Rourke was not significantly at fault, he did not receive money which he did not deserve under the AUSTUDY scheme and the Commonwealth had not been financially disadvantaged in any substantive sense.

The AAT concluded that it was appropriate to waive the debt in these circumstances.

Formal decision

The AAT affirmed the decision of the SSAT dated 31 May 1996.

[A.A.]

AUSTUDY: isolated student

R.A. BARRETT and SECRETARY
TO THE DEETYA

S. BARRETT and SECRETARY
TO THE DEETYA
(No. 11590)

Decided: 5 February 1997 by M.D. Allen and I.R. Way.

The two applications for review were heard together.

R.A. Barrett sought review of a decision of the SSAT which affirmed a decision of the DEETYA to cancel payment of the Away From Home Living Allowance, and to raise an overpayment of \$1088.74, being AUSTUDY paid in 1995.

S. Barrett sought review of a decision to raise and recover an overpayment of \$2203.04, being AUSTUDY paid to her at the Away From Home rate in 1993.

The issue

Both cases, which concerned a brother and sister, turned on whether the principal home of their parents was isolated