

to settlement, however, the settlement funds had been released to Anderson. The DSS then sought recovery from Anderson.

Anderson requested the DSS to review the matter and to disregard the compensation payment on the ground of special circumstances. An authorised review officer varied the decision by increasing the debt to \$26,375.30. Anderson appealed to the SSAT, which decided that there was no debt as the compensation should be disregarded because of the special circumstances of the case. The DSS then appealed to the AAT for a review of the decision.

#### The issue

The issue was whether in the special circumstances of the case, the whole or part of the compensation payment received by Anderson should be treated as not having been made.

#### The legislation

The AAT referred to s.17 of the Social Security Act 1991 which contains the definition of compensation and provides that a disability support pension or a so-

cial security benefit are payments affected by compensation. The AAT also referred to s.17(3) which provides that the compensation part of a lump sum compensation payment is 50% of the payment where the payment is made in settlement of a claim.

It also referred to s.1184 which empowers the Secretary of the DSS to treat the whole or part of the compensation payment as not having been made if it is appropriate to do so in the special circumstances of the case.

#### Special circumstances

The AAT was satisfied that under the legislation the DSS could raise a debt of \$26,375.30 against Anderson.

As to whether special circumstances could be found to exist, the AAT referred to the case of *Beadle v Director General of Social Security* (1985) 7 ALD 670, as the most useful basis for consideration of that term. That case considered that 'special' referred to circumstances that were uncommon, unusual or exceptional but were not required to be unique.

The AAT found that Anderson's dissatisfaction with legal advice received from his solicitor and the amount of legal costs paid by him, did not constitute special circumstances. However, the AAT found that it was appropriate to treat the whole of the compensation as not having been made because it found as a fact that Anderson was seriously and genuinely suicidal. The AAT said that Anderson's aggression, distress and sense of hopelessness were demonstrated during the hearing. The AAT also heard from Anderson's treating psychologist and accepted his evidence that he suffered from a severe depression by reason of his chronic pain and a severe personality disorder.

The AAT concluded that it was satisfied that the circumstances of Mr Anderson were 'special' as they were markedly different from the usual run of cases.

#### Formal decision

The SSAT decision was affirmed.

[G.H.]

## Student Assistance decisions

### AUSTUDY: meaning of full-time workload

SECRETARY TO THE DEETYA  
and STOJANOVIC  
(No. 11846)

**Decided:** 9 May 1997 by B.H. Burns.

The DEETYA sought review of a decision of the SSAT which had set aside the decision that Stojanovic was ineligible to receive AUSTUDY in Semester 1 of 1995 and that a debt of \$4220.54 was recoverable from her.

#### The facts/circumstances of the case

In 1995, Stojanovic was in the second year of the Bachelor of Nursing at the University of South Australia. She was unable to undertake the normal second year program because she had to repeat a subject she had failed in the first semester of her first year. She had a HECS loading of 0.250 in Semester 1 and 0.500 in Semester 2. Looking over the academic year as a whole, her HECS loading was 0.750, which represented 75% of the normal full-time workload for a year of the course. On this basis, she was designated as a full-time student by the university.

On her AUSTUDY (Continuing) Application form, she indicated that she was a full-time student in 1995 and would be studying at least 1 year-long subject. She was paid at the independent rate during Semester 1 of 1995. An enrolment check conducted between the DEETYA and the university in June/July of 1995 indicated that she was not a full-time student in Semester 1 because her HECS loading for that semester was only 0.250.

#### The legislation

Regulation 34 of the AUSTUDY Regulations requires a student to be enrolled in at least three-quarters (75%) of the normal amount of full-time work for a period as set out in regulation 35. Regulation 35(1)(a) provides that, for a year of the course, the normal amount of full-time work is the standard student load determined by the institution for the purposes of HECS. Regulation 35(1)(b) provides that, if the course is a HECS designated course, the normal amount of full-time work for a semester of the course is '0.5'. Regulation 36 provides for a reduction to two-thirds (66%) of the normal workload if the student cannot meet the normal workload because of the institution's requirements, or a direction or recommendation from the academic registrar or equivalent officer. Regula-

tion 36 cannot apply to more than half of an academic year.

#### The issue

The critical issue was whether the workload test is a year-long test, a semester-long test, or both.

The DEETYA submitted the workload test is a semester-long test. It argued that Stojanovic did not meet the requirement of 75% of the normal course workload for Semester 1 of 1995 because her HECS loading of 0.250 represented only 50% of the normal course workload. Although the DEETYA conceded that the concession in regulation 36 applied to Stojanovic in Semester 1 because her failure of a subject in the first year of her course meant that she was unable to meet the university's usual course requirements in 1995, her HECS loading in that semester did not satisfy the reduced test of 66% of the normal workload in that semester (that is, a HECS loading of 0.325). However, her HECS loading of 0.500 in Semester 2 represented 100% of the normal course workload. Therefore, she was eligible for AUSTUDY in Semester 2 only.

Stojanovic submitted the workload test is a year-long test which may be applied across a full year so that if the student meets the HECS loading threshold of 0.750 (or 0.666 if the regulation 36

concession applies), they meet the test for a normal full-time workload, regardless of how that workload is divided between semesters.

A further issue was whether the subjects 'Applied Science 1' and 'Applied Science 2' constituted a full-year subject or whether they were two consecutive semester-long subjects.

#### Year-long subjects

The Tribunal found that, because the subjects had different codes, separate credit loads and HECS loadings, and each had a duration of one semester, the subjects were separate, semester-long subjects and Stojanovic had erred in describing them as a 'year-long subject' on her AUSTUDY application form.

#### The workload test

In the Tribunal's view, regulations 34 and 35 might be said to be somewhat ambiguous as to their meaning because 'at first blush' these regulations do not specify, in express terms, whether a student must satisfy either the semester test or the year test or both. The Tribunal considered that regulation 34(3) provided the key to resolving the ambiguity. Regulation 34(3) defines a student as not full-time in a period if the amount of work they are undertaking in that period is less than three-quarters of the normal amount of full-time work for that period (emphasis as shown in Reasons, para. 37). Regulation 35 sets out two periods, a year and a semester. It was quite clear that, in the context in which it appears, the word 'a' in regulation 34(2) has the meaning 'any'.

The Tribunal decided that, for a tertiary student to be eligible for AUSTUDY benefits for a year of a course incorporating two semesters, they must (subject to the regulation 36 concession) enrol in and undertake at least three-quarters of the normal amount of full-time work for that year and each semester of the course. For a tertiary student to be eligible for AUSTUDY for a semester of a course, they must (subject to the regulation 36 concession) be enrolled in and undertake at least three-quarters of the normal amount of full-time work for a semester, and it is not necessary for such a student to satisfy the year-long test. (Emphasis as shown in Reasons, paras 39-40).

In Stojanovic's circumstances, because she failed the semester test, she was ineligible for AUSTUDY during Semester 1 and the moneys paid to her during that period constitute a debt due to the Commonwealth which is recoverable.

#### Waiver?

The Tribunal decided the debt could not be waived for administrative error under

s.289 of the *Student and Youth Assistance Act 1973* as the debt arose because of the incorrect statements Stojanovic made in her AUSTUDY Continuing Application form. In relation to waiver 'in the special circumstances of the case' under s.290C, the Tribunal approved of the meaning to be attributed to the phrase 'special circumstance' given in the decision of *Beadle and the Director-General of Social Security* (1984) 6 ALD 1, at 3-4. The Tribunal decided that because none of the circumstances of the matter were special, the debt could not be waived under s.290C.

#### Formal decision

The AAT set aside the decision under review and substituted a decision that the sum of AUSTUDY payments made to Stojanovic in Semester 1 of 1995 constituted a debt due by her to the Commonwealth and was recoverable.

[S.L.]



## AUSTUDY: the meaning of relevant date, progress in course

SECRETARY TO THE DEETYA  
and HA  
(No. 11786)

Decided: 18 April 1997 by G. Ettinger.

#### Background

Ha was declared ineligible for AUSTUDY in the second semester of 1995 in relation to her studies for a Bachelor of Commerce at the University of Sydney. The delegate of the Department [then DEET] made the decision on 26 September 1995. The SSAT set aside the DEET decision on 19 June 1996. The DEETYA appealed to the AAT.

#### The facts

Ha enrolled at the University of Sydney in 1992 for a Bachelor of Economics. She transferred to a Bachelor of Commerce starting in 1994 and received credit for the units she had completed.

In 1995 Ha was enrolled in 6 units, 3 per semester, and applied to continue her AUSTUDY for the whole year.

To qualify for the degree required completion of 22 full semester units. The minimum time for completion of the degree was 3 years. At the end of first semester 1995 Ha had completed 3.5

years of study and had to successfully finish semester two to qualify for the degree.

Among her 1995 units, one [Financial Accounting B] in first semester was a co-requisite for another unit [Auditing], which was only offered in second semester. Because of an earlier failure in 1993 [Financial Accounting A — a prerequisite for Financial Accounting B] Ha could not enrol in these units until 1995 and had to do them over two semesters.

The DEET found Ha was ineligible under regulation 41(1)(a)(i) of the AUSTUDY Regulations because she had attempted 3 years of full-time study since the commencement of her course, the minimum time in which she could qualify for the degree was 3 years, and she was only undertaking semester-based subjects.

Ha argued that she was eligible under regulation 41(1)(a)(iii) so should receive AUSTUDY for the whole year.

#### The regulations and issues

The relevant provisions state:

'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 ...

41(3) "relevant date" means:

- (a) the start of a semester, or
- (b) if the course is not divided into semesters — the start of the academic year ...'

Two issues faced the AAT: what was the 'relevant date' for the purposes of regulation 41(1) and what was the meaning of the words 'progress in the course'.

#### 'Relevant date'

The DEETYA view was that Ha's application for AUSTUDY had to be assessed separately in relation to the two semesters because she was studying semester-based subjects. According to regulation 41(3) unless a course is not divided into semesters, the relevant date is the start of each semester. At that point she did not have a whole year's work to complete and regulation 41(1)(a)(iii) could not apply.

Ha's case was that regardless of which 'relevant date' was used it was possible to interpret her eligibility on the basis she