

the Commonwealth Ombudsman. The letter referred to Cornally's negotiations with the DSS, noting that these negotiations had commenced before the SSAT appeal. Cornally had agreed to repay \$1000 by the end on June 1996, but had only repaid in total \$286.

Cornally had approached the Legal Aid Commission seeking assistance about a further appeal. He was told to apply to the AAT for review of the SSAT's decision. This he finally did. He acknowledged to the AAT that he had been naïve and had made errors of judgment by not coming to the AAT earlier. He had been prepared to come to an agreement with the DSS, but did not accept the SSAT's decision.

The DSS submitted that Cornally was not naïve, and he had been aware of his appeal rights at all times. Case law indicated that an extension of time should not be granted if a person had rested on their rights, there would be prejudice to the other party or to the wider general public, the substantive application had little merit, and whether in all the circumstances it would be fair to grant the extension.

#### The conclusion

The AAT considered the principles outlined above when making its decision.

#### *Resting on rights*

The evidence showed that Cornally had been aware of his right of appeal from the SSAT decision. He chose not to exercise this right, but rather to negotiate with the DSS about repayment of the debt. The only reason Cornally was exercising this right now was because the DSS had commenced proceedings to recover the debt.

#### *Prejudice to the DSS*

As almost 20 months had elapsed since the SSAT decision, the DSS had a reasonable expectation that the matter was finalised. The DSS had already incurred additional expense recovering the debt.

#### *Prejudice to the public*

The effectiveness of the review process would be jeopardised if the extension was granted for the reasons outlined by Cornally. The public should be able to rely on the appeal process being dealt with efficiently.

#### *Merits*

The evidence of Cornally supported the SSAT's finding that Cornally was not unemployed when he was receiving NSA. He admitted that he was working up to 8 hours a day, and argued that because he was earning little money he should be entitled to NSA.

#### *Fairness*

Cornally had not provided a satisfactory reason for lodging his appeal almost 20 months after the SSAT decision.

The AAT pointed out that the original decision to raise the debt had been reviewed on a number of occasions by the DSS, the SSAT and the Minister's office. Before an extension of time could be granted Cornally must satisfy the principles set out above. The AAT said that it was satisfied on the comprehensive reasons of the SSAT that Cornally's substantive case had little merit.

#### Formal decision

The AAT refused to grant an extension of time to lodge the application for review.

[C.H.]

## Student Assistance Decisions

### **AUSTUDY: intellectually disabled student: eligibility**

**WAITE and SECRETARY TO THE DEETYA**  
(No. 12138)

**Decided:** 21 August 1997, by L.S. Rodopoulos.

Waite sought review of a decision of the SSAT which had affirmed the DEETYA's decision that she was not eligible for the pensioner education supplement in 1996.

#### The legislation

Section 7(1)(c) of the *Student and Youth Assistance Act 1973* provides that, to be paid AUSTUDY, a student must be taking a course that has been approved for the AUSTUDY scheme by the Minister. Regulation 26 defines a secondary student as a student doing a secondary course. Regulation 27 provides that a secondary student must study at a second-

dary school or special school, a TAFE institution or a higher education institution. According to regulation 98, a student receiving, amongst other payments, a disability support pension, is not eligible for AUSTUDY but is eligible for a pensioner education supplement (of \$30 a week) provided the student satisfies the normal conditions set out in Chapters 1 and 2 of the AUSTUDY Regulations.

#### The issue

The issue was whether Waite was undertaking a secondary course of study within the meaning of regulations 26 and 27 during 1996 when she was attending Goulbourn Special Developmental School.

#### The facts

Waite suffers from a genetic disorder causing her severe physical and intellectual deficits. She receives disability support pension as well as services under the *Intellectual Disability Services Persons Act 1986* (Vic.).

In 1996, Waite attended Goulbourn Special Developmental School, a recognised secondary school under regulation 27. The school classified her as a full-

care student not involved in study or undertaking any graded secondary (Year 10, 11 or 12) studies. In a 1996 mid-year report she was described as requiring all her basic 'self care' needs to be attended to by staff. The principal said that she is a very seriously and multiply disabled young girl who cannot read or write. She is essentially wheelchair-bound, is in need of total care, requires assistance with toileting (requires her nappy to be changed) and feeding. Her IQ level, in common with the other students attending the school, was below 50. The principal's evidence was that Waite's program at the school had no connection with secondary school studies. Her activities included physiotherapy and sensory stimulation and coactive or assisted participation in the cooking program. He did not recommend her for the pensioner education supplement, nor did he recommend other students for it, because he was concerned that the school might face action by the Department of Education or some other authority if they recommended it when it was not appropriate.

In 1997, Waite enrolled in the Echuca Special Developmental School where

she undertook modified secondary studies. Since her enrolment there, she received pensioner education supplement. All the students at that school who qualify for AUSTUDY under the means test, receive it as the school recommends them on the basis that they are undertaking a secondary course; that is, they are studying academically although their study is modified because of their disabilities. The philosophy of the school is that social and academic skills cannot be separated and the independence and dignity of each student is encouraged, albeit slowly, in a very positive environment. Waite had made significant progress at the school, for example, assisted by her communication board, she ordered her own lunch and indicated when she needed to go to the toilet.

It was noted that apparent inconsistencies as to what was considered to constitute a 'secondary course of study' resulted in some students being eligible and others not because special developmental schools had contrasting policies about what constitutes such a course of study.

#### The DEETYA's position

The critical issue to be determined in assessing Waite's eligibility for pensioner education supplement was whether she was undertaking an approved secondary course. An accredited secondary course is one which offers an accredited secondary qualification to its students. The current procedure for assessing eligibility is based on advice from the principal of the school in question as the DEETYA takes the view that each individual school is in the best position to determine the nature of the care or schooling which it provides tailored to the capacities of its student. The Department was unable to say how familiar a school, in making such recommendations, was with the actual wording of the Regulations. It is probable that schools, such as the Goulbourn Special Developmental School, by not making any recommendations for the pensioner education supplement, had not tested the eligibility of its students.

#### The AAT's approach

It was noted that the programs of the Goulbourn Special Developmental School and the Echuca Special Developmental School reflected differing philosophies as to the activating of the potential of intellectually disabled persons. The AAT stated that the appeal raised a fundamental question as to the correct interpretation of the Regulations, and whether or not the pensioner education supplement was designed to deal with 'financially disadvantaged students'

who have the level of intellectual and physical disability of Waite. This was a matter of policy to be addressed through the appropriate processes. Administrative issues were also raised by the appeal, and the DEETYA indicated that the procedure of relying on the principals' recommendations would be reviewed. Apart from these issues, the Tribunal found that Waite had neither the physical nor intellectual capacity to undertake a secondary course of study as required under the Regulations. The Tribunal came to this conclusion with some concern given that, at the date of the appeal, she was attending Echuca Special Developmental School and was in receipt of the pensioner education supplement.

#### Formal decision

The AAT affirmed the decision under review.

[S.L.]

## AUSTUDY: meaning of 'extreme family breakdown'

SECRETARY TO THE DEETYA  
and PHILLIPS  
(No. 12179)

**Decided:** 3 September 1997 by T.E. Barnett and J.G. Billings.

The DEETYA sought review of a decision of the SSAT which had found that Phillips qualified for AUSTUDY at the independent rate, as it was unreasonable that he live at the home of his parents because of extreme family breakdown or other similar exceptional circumstances.

#### The legislation

Regulation 74 of the AUSTUDY Regulations provides that a student may qualify as:

'independent through it being unreasonable that he or she live at home, if:

- (a) he or she cannot live at the home of either or both of his or her natural or adoptive parents:

  - (i) because of extreme family breakdown or other similar exceptional circumstances; or
  - (ii) because to do so would be a serious risk to his or her physical or mental well being due to violence, sexual abuse or other similar unreasonable circumstances; and . . .'

#### The facts

Phillips had been ordered by his parents to leave the family home due to constant

arguments and confrontations, mainly caused by his failure to comply with the rules of the house which required him to keep his room tidy, cook meals, do the laundry and keep his car tidy in return for free board and lodging while he pursued full-time studies in law at Murdoch University. Phillips said that he had never refused to do the chores and his failure to do so was not intentional but due rather to his lack of organisation and the rigid way in which the rules were applied. There had been trouble between Phillips and his parents over a long period. Matters came to a head when his father, in the course of cleaning Phillips' car following his failure to do so himself, found a bong (an instrument used for smoking marijuana). Phillips was told to leave and find somewhere else to live. It was an anxious time for the family as an elder son was very ill with leukemia. Phillips had not been invited back since leaving the house, and his requests to return had been refused. In cross-examination he agreed that, some years before, he had wanted to leave home because of the difficulty of living in a tense and hostile atmosphere but had stayed due to his lack of resources.

#### The issue

Phillips and the DEETYA agreed that the only issue was whether there was extreme family breakdown as set out in regulation 74(a)(i).

#### The DEETYA'S argument

On behalf of the Department it was argued that, at most, the facts indicated a family breakdown and not an *extreme* family breakdown which was only applicable in cases where there was violence, damage to health, extreme confrontations or, at the very least, an indication that the parties had done their best to resolve the matter, through counselling for example, and that separation was a last resort. To make a finding of extreme family breakdown in Phillips' circumstances would open the floodgates to many potential applicants who would just prefer to live away from home if possible.

#### Findings

The Tribunal found that although Phillips was difficult to live with because of his inability to organise himself, his need to express his independence from his parents, and the demands of his legal studies, his parents showed insufficient recognition of his needs as a university student. The tension between Phillips and his parents was caused by a failure on all sides to understand the other's needs, and an inability to discuss and work out their problems. The AAT ac-