definition was couched in the widest terms, and this was to ensure that public expenditure was directed to those who stand in actual need of income support. The definition was wide enough to embrace receipts of a capital nature as well as income. Therefore the AAT had erred in following *Hungerford* and accepting a narrower definition.

Formal decision

The Federal Court set aside the decision of the AAT and remitted the matter back to the AAT for reconsideration.

[C. H.]

Overpayment: received in good faith

SECRETARY TO THE DEETYA v PRINCE
(Federal Court of Australia)

Decided: 21 November 1997 by Finn J.

The DEETYA appealed an AAT decision that the debt owed by Prince to the Commonwealth should be waived pursuant to s.289 of the *Student and Youth Assistance Act 1973*. This debt was incurred because Prince received AUSTUDY payments to which he was not entitled.

The law

Section 289 of the *Student and Youth Assistance Act* provides that the DEETYA must waive a debt to the Commonwealth if there was administrative error, and 'the person received in good faith the payment or payments that gave rise to the debt'.

Background

Prince received AUSTUDY payments in 1993. He took steps to cancel those payments on 22 December 1993 because he realised he would not be qualified to receive payments in 1994. The DEETYA continued to pay Prince to March 1994 in error. In May 1994 the DEETYA advised Prince that there was a debt which he must repay. Between December 1993 and February 1994 Prince was not aware that he was receiving the AUSTUDY payments. At some stage in February he became aware of the payments, and took steps to have them cancelled.

The AAT's decision

The AAT waived the debt because it found that there had been administrative error, and Prince had received the payments in good faith. The AAT interpreted 'received' as having occurred when the payments were made into Prince's account. The Tribunal found that the payments received up until February 1994 were received in good faith because Prince had been unaware that he was continuing to receive AUSTUDY payments. After Prince became aware that the payments were continuing, the AAT decided that, the fact that Prince had appropriated the moneys was only one of the factors to be taken into account to decide whether or not the money had been received in good faith. Other factors included his attempts to advise the DEETYA so that they would stop paying the money.

'Received in good faith'

Finn J found a clear and culpable error of law in the AAT's decision.

The AAT:

> 'correctly concluded that payments were "received" when they were available for Mr Prince's use and that occurred when they were deposited in his bank account. It likewise correctly noted that the formula "good faith" derives its meaning from its particular context.'

(Reasons, p.4)

In the Court's opinion the question of whether or not the payments were received in good faith was not answered by considering whether Prince acted in good faith towards the DEETYA. 'Its sole concern is with whether a particular state of affairs existed at the time a payment (or payments) is received': Reasons, p.4.

Finn J found that 'received in good faith' was concerned with a person's state of mind when they received the payments. If the person had reason to know that he or she was not entitled to the payment, then the person did not receive the payment in good faith. The person must believe that she or he is entitled to receive the payments.

Prince knew that he was not entitled to receive the AUSTUDY payments, and therefore it could not be said that he had received them in good faith. This was so even though for part of the period he was not aware that payments were being made. Prince was never able to assert that any payments that were made to him by mistake, were ones to which he believed he was entitled.

Formal decision

The Federal Court set aside the decision of the AAT and substituted its decision that the original decision to raise and recover the debt is to be affirmed.

[C.H.]

Overpayment: special circumstances and financial hardship

SECRETARY TO THE DSS v HALES
(Federal Court of Australia)

Decided: 16 March 1998 by French J.

Hales has been receiving the disability support pension (DSP) since 29 August 1991 for chronic fatigue syndrome. Her partner Reddy, commenced employment on 5 March 1994 receiving gross wages of $385.00 a week. Hales commenced working on 26 October 1995 receiving a gross weekly wage of $418.70. On 27 October 1995 Hales told the DSS that she and Reddy had commenced employment. She continued to receive the pension until 21 March 1996 when it was cancelled following a review of her medical condition.

Hales was overpaid DSP of $8740.90 and the DSS sought recovery of that amount. On review the SSAT agreed that Hales had been overpaid $8740.90, and that this was a debt to the Commonwealth. The SSAT decided that so much of the debt that had occurred after 27 October 1995 was attributable to departmental error and thus should be waived. Hales requested review by the AAT who decided that the total amount should be waived.

Notices

Hales received a letter from the DSS on 16 January 1993 telling her that she must inform the DSS within 14 days if her combined income exceeded $76.00 a week. She received a further letter dated 24 March 1993 to that affect, and in a letter dated 22 March 1993 Hales was asked to give the DSS her partner's tax file number. Hales complied with that request.

The AAT's decision

The AAT found that Hales had been overpaid $8740.90, and it was conceded by the DSS that the amount paid after 26 October 1995, $1839.60, should be waived because of administrative error and because Hales had received the payments in good faith. This matter was not disputed by the DSS before the Federal Court.

With respect to the balance of the overpayment of $6901.30, the AAT found that Hales had failed to comply with the notices she had received and had been overpaid DSP under s.1224(1) of the *Social Security Act 1991* (the Act).

The AAT then considered whether it should write-off or waive the debt. When considering write-off the AAT considered Hales' financial circumstances and the prospects of recovery of the debt. Hales' financial circumstances were not considered comfortable, but nor were they straitened. Hales and Reddy had the capacity to repay the debt in modest instalments. The AAT then considered the waiver provisions, and found that Hales' evidence had shown her to be completely credible, and the AAT accepted she honestly believed that when she supplied the tax file number to the DSS she had done all that was necessary to comply with the DSS notices. 'Her failure to comply with section 132 of the Act was not done knowingly': Reasons, p.3.

With respect to special circumstances, the AAT found that Hales' disease affected her ability to comprehend and deal with letters from the DSS. She had provided Reddy's tax file number as requested and had received no further notices. Hales had an honest belief that she had done all that was necessary to comply with the DSS requirements. Hales was gradually recovering her physical and mental health and engaging in full-time work. It was important that no further stress be placed on her.

The law

Section 132 of the Act enables the DSS to give to a person a notice which requires that person to advise the DSS of a change in circumstances. Section 1223 states that if an amount had been paid to a person by way of social security payment, and the person was not qualified for that payment, and the amount was not payable, then the amount paid is a debt due to the Commonwealth. Section 1224 states that if a person has been paid a social security payment and failed or omitted to comply with a provision of the Act, the amount so paid is a debt to the Commonwealth. According to s.1236 the DSS may decide to write-off a debt. The waiver provisions are contained in s.1237, and include s.1237A(1) dealing with waiver arising from administrative error, and s.1237AAD which provides for waiver in special circumstances.

> '1237AAD. The Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that:
>
> (a) the debt did not result wholly or partly from the debtor or another person knowingly:
>
> (i) making a false statement or false representation; or
>
> (ii) failing or omitting to comply with a provision of this Act or the 1947 Act; and
>
> (b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and
>
> (c) it is more appropriate to waive than to write off the debt or part of the debt.'

Waiver

According to French J the DSS must be satisfied that the three conditions specified in paragraphs (a), (b) and (c) of s.1237AAD are met. If they are, the DSS is not necessarily obliged to waive the debt. 'In some cases the satisfaction of the three conditions may be sufficient to persuade the Secretary (the DSS) to waive without reference to any further matter': Reasons, p.8. The Court stated that the concept of special circumstances is broad and it may include financial circumstances. French J did not accept that there cannot be special circumstances for the purposes of s.1237AAD(b) unless there is also financial hardship. The Explanatory Memorandum states that financial hardship of itself is not sufficient reason to waive the debt.

> 'The evident purpose of s.1237AAD is to enable a flexible response to the wide range of situations which could give rise to hardship or unfairness in the event of a rigid application of the requirement for recovery of debt. It is inappropriate to constrain that flexibility by imposing a narrow or artificial construction upon the words.'

(Reasons, p.8).

The Court accepted that the facts which led the AAT to conclude that Hales had not misled the DSS could also be relevant when considering special circumstances. French J dismissed the DSS argument that there was no medical evidence before the AAT which would lead it to conclude that Hales' condition may become worse if she is required to repay the debt. Hales herself gave evidence, as did her employer. This evidence indicated that Hales was not coping with the stress related to recovery of the debt.

The DSS also argued that once the AAT had found that write-off of the debt was not appropriate, it could not conclude that it was more appropriate to waive than write off the debt. The Court found that the proper construction of this paragraph would be that it is more appropriate to waive the debt rather than write it off. Finally the Court noted that the Tribunal's reasons for decision should not be scrutinised in minute detail. It was not appropriate for an administrative body to have to write a detailed exposition in its reasons for decision.

Formal decision

The Federal Court dismissed the DSS appeal against the decision of the AAT.

[C.H.]

AUSTUDY: living away from home; 'special weather conditions'

THE SECRETARY TO THE DEETYA v BARRETT (Federal Court of Australia)

Decided: 15 April 1998 by Tamberlin J.

The DEETYA appealed against the AAT decision that Barrett and her brother were entitled to be paid AUSTUDY at the living away from home rate.

The facts

Barrett was a secondary student in 1993, and her brother was a student in 1995. Barrett was paid AUSTUDY at the higher rate in 1993 and an overpayment of $2203 was raised. Her brother was denied the higher rate of payment in 1995. The Barretts had claimed that they would be unable to travel to school for 20 or more school term days a year because of the weather conditions. The road from their home was gravel and became impassable to ordinary traffic after 12.5 mm of rain. If a 4-wheel drive vehicle was used the road deteriorated and also became impassable. Evidence was given to the AAT that long-term rainfall records showed that more than 12.5 mm of rain fell on more than 20 days a year.

The law

Regulation 77 of the AUSTUDY Regulations provides that a student is qualified for the living away from home allowance if the student is isolated because the parent's home is isolated. According to Reg. 78(1) the parent's home is isolated if the principal home of the student's parents is located where 'it is likely that the student would be unable to travel to the school for 20 or more school-term days in the year because of special weather conditions'.

The AAT's decision

The AAT was satisfied that there was 'more than a remote possibility in any one year that the Applicants [the Barretts] would have been unable to travel to school for 20 or more school days in the year because of special weather conditions': Reasons, p.8.

The DEETYA argued that 'likely' meant more than a remote possibility, and that the AAT had given no meaning to the term 'special'. It was also argued that there must be a causal connection