tacted when the decision was being reviewed.

The AAT heard evidence from the officer who had recorded the information that she possibly made a mistake, but it was unlikely. The AAT concluded that the officer did not make an error.

Unreasonable disclosure

The AAT then referred to s.41 of the FOI Act which states that a document is exempt if disclosure would involve the unreasonable disclosure of personal information about any person. The AAT decided that even though the informant had not stated that the information was to be kept confidential when provided, under s.41 it must consider whether it would be unreasonable to disclose information about the person now that the person had expressed a desire to keep that information confidential.

Henry told the Tribunal that apart from the 'dob-ins' she had been pestered by prank calls, had her home broken into and complaints made to the welfare office in her country town.

The AAT decided that there was a two-step process involved under s.41. First, whether releasing the information would involve the disclosure of personal information about the person, and second, whether any disclosure would be unreasonable. The information concerned was the person's name and address, and so the AAT found that the information was indeed personal.

In a number of cases the Federal Court had decided that unreasonable disclosure had public interest considerations at its core. That is, exempting the information from disclosure was in the public interest, and would serve the purpose of the legislation. The DSS argued that it relied on the public to assist it in the proper administration of the *Social Security Act 1991*. According to the Federal Court, if the information to be disclosed was not relevant to the affairs of government but would disclose personal information, then disclosure would be unreasonable. The AAT concluded that it would be unreasonable to release the information.

The AAT advised Henry to make a formal complaint to the police about the harassment.

It noted that the DSS had failed to comply with s.59A(3) of the Act requiring the DSS to advise the person whose personal information was the subject of an FOI claim, if a matter was taken on review to the AAT.

Formal decision

The AAT affirmed the decision under review.

[C.H.]

Student Assistance Decisions

AUSTUDY debt: recovery from bankrupt; waiver of interest and late payment charges

CANE and SECRETARY TO THE DEETYA
(No. 13245)

Decided: 2 September 1998 by D.P. Breen.

Background

The DEETYA sought to recover two overpayments of AUSTUDY occurring in 1994. In 1994, both Elton and Ellis Cane were students, Ellis, in year 12 and Elton, the eldest, studying business/journalism at university. The previous year, on 9 May 1993, their parents were declared bankrupt after a business failure. The debts arose because in completing the AUSTUDY application forms, parental income estimates for the financial year 1992/93, were given as 'nil', whereas the parents had in fact drawn $47,000 in wages prior to the bankruptcy. Mr and Mrs Cane had written that their income would be 'nil' on the advice of an officer at either the DSS or the DEETYA, after they had indicated to the officer that they were bankrupt. Both Ellis and Elton received the maximum rate of AUSTUDY based on the parental income estimate of 'nil'. As Ellis was under 18 years of age at the time, his AUSTUDY was actually paid to his parents and a debt was raised against them in the amount of $3333.20. It was also determined that Elton owed a debt of $4647.69 representing the whole of the AUSTUDY payments received in 1994.

The SSAT decided on 8 May 1997 to vary the decision of the DEETYA in that it determined that, for the purposes of the AUSTUDY parental income test, no account should be taken of an amount of $1041, being the amount of job search allowance paid to their father in the 1992/93 financial year and that no late payment penalties or interest charges ought to be applied to either debt. The matter was remitted to the respondent to re-calculate the debts in accordance with the terms of the SSAT decision. The effect of this re-calculation would be to reduce each overpayment debt by a small amount.

Both parties appealed to the AAT. The DEETYA appealed against that part of the SSAT decision reducing the overpayment debts whilst the Cane brothers appealed to extend the waiver to the entirety of each overpayment. It was not in dispute that the overpayments had in fact occurred and that these were debts pursuant to s.40 of the *Student and Youth Assistance Act 1973*.

Recovery from a bankrupt

The overpayment of AUSTUDY in respect of Ellis Cane arose at a time when the parents, to whom the AUSTUDY was paid, were bankrupt. The AAT noted that, like any other debt attributable to a bankrupt person, it could only be recovered via the formula prescribed in Part VI of the *Bankruptcy Act 1966*. Section 108 provides:

> 'Except as otherwise provided by this Act, all debts proved in a Bankruptcy rank equally and, if the proceeds of the property of the bankrupt are insufficient to meet them in full, they shall be paid proportionately.'

Given that s.82 of the Bankruptcy Act provides that 'all debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at the time of bankruptcy . . . are provable in his or her bankruptcy', the AAT concluded that the only method the Commonwealth had of recovering the debt against the parents was through the normal mechanism of the *Bankruptcy Act 1966*. It was not a debt which could be given priority under s.109 of that Act. As the parents had been discharged from bankruptcy they were also discharged from the obligation of re-paying the AUSTUDY debt. In the absence of a finding against the integrity

of Mr and Mrs Cane, there was nothing in either the *Student and Youth Assistance Act 1973* or the *Bankruptcy Act 1966* that would enable the DSS to recover the overpayment made in respect of Ellis Cane.

Waiver and administrative error

The AAT accepted the Canes' evidence that the forms had been completed in good faith following advice received from a DSS officer. However, the AAT also had before it a letter from the DEETYA to Ellis Cane dated 19 January 1994 which stipulated that his entitlement as set out in the letter was a provisional assessment until his parent's actual financial details for the financial year 1992/93 were confirmed. It was indicated that a taxation notice of assessment would need to be provided. This did not occur until 1995 because Mr and Mrs Cane did not know that they were obliged to pay tax as bankrupts and there was a resultant delay in lodging tax returns. The AAT was of the view that this delay contributed to the error causing the overpayment, and the overpayment could not, therefore, be said to be solely the result of administrative error. However, the DEETYA did neglect to further pursue the taxation notices of assessment, and, had it done so, this would have dispelled the Cane's false belief that tax returns did not have to be lodged due to their bankruptcy. This would have prevented the accrual of interest and late payment charges. Therefore the AAT waived that part of the debt owed by Elton Cane representing these charges, as being due solely to Departmental error.

Formal decision

For the debt raised in respect of Ellis Cane, the decision under review was set aside and in substitution the AAT determined that although the parents of Ellis Cane were indebted to the Commonwealth in the sum determined by the SSAT, the debt was not recoverable.

In regard to the debt raised against Elton Cane, the decision under review was varied, the AAT finding that Elton Cane was indebted to the Commonwealth in the sum determined by the SSAT and that as the separate component of the alleged debt, namely the accrual of interest and late payment charges arose solely as a result of departmental error, that component of the claimed debt was waived.

[A.T.]

AUSTUDY: independent living allowance; age requirements

HUGHES and SECRETARY TO THE DEETYA (No. 13132)

Decided: 27 July 1998 by C.G. Woodard.

The issue and legislation

The principal issue in this matter concerned entitlement to independent living allowance. Regulation 68 of the AUSTUDY Regulations was amended with effect from 1 January 1997, to provide that a student is qualified for the independent rate of AUSTUDY when they turn 25 years, unless the student had received the independent rate in 1996 because they had turned 22 years. (Regulation 68 had previously provided that a student qualified as independent at 22 years of age). Regulation 58(6) further provides that

> '(6) . . . an application cannot be considered if it is lodged after 31 December in the year for which the application is made . . .'

The background

Hughes did not apply for AUSTUDY in 1996, having been advised by a university financial counsellor to do so after he turned 22 years in December 1996. In November 1996 he left Australia for language study in China. In late December 1996 he became aware of the above change to the AUSTUDY regulations. His parents in Australia contacted the DSS on his behalf, but were told that Hughes would need to personally lodge his 1996 application. Had he applied, Hughes would have been entitled to AUSTUDY at the independent rate from 20 December to 31 December 1996, although under Regulation 66 no payment would have been made as his entitlement for that year would have been less that $1000.

Hughes applied for AUSTUDY for 1997 at the independent rate soon after his return from China. The DSS rejected his application in April 1997 because Hughes had not reached the prescribed age of 25 years, and had not been in receipt of AUSTUDY in 1996.

The AAT's decision

The AAT concluded that age is an absolute qualification for AUSTUDY. Hughes had not applied for AUSTUDY in 1996, and so did not receive it. Because he was under 25 years in 1997, he was not entitled to receive AUSTUDY at the independent rate in 1997.

In passing, the AAT noted that the DSS could have been more proactive to ensure that those students affected by the change in regulation were not disadvantaged. The AAT commented that:

> 'It is regrettable that the Department was not also proactive to ensure that a change in regulations made near the end of the year would not disadvantage those students. . . who are responding to definition of the national interest by undertaking intensive study of difficult languages in Asia during long vacations . . . every effort should be made to assist those clearly entitled under beneficial legislation to get their applications in by the deadline.'

(Reasons, para. 13)

The AAT also commented on the application of Regulation 66 which provides that no AUSTUDY is payable where a student's entitlement is less that $1000 a year, concluding that

> 'it cannot have been the intention of the legislation to disqualify applicants (to receive AUSTUDY at the independent rate in 1997) . . . merely because they happened to be born in the last one or two months of the year.'

(Reasons, para.16)

Formal decision

The AAT affirmed the decision under review.

[P.A.S.]