

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, al-

though under Regulation 66 no payment would have been made as his entitlement for that year would have been less than \$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 than \$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.]