

the required 12-month period. Hence the AAT found that Hayes was properly notified of the debts. The AAT said that Hayes had not knowingly made a false statement or representation. In addition, the AAT accepted that Hayes had probably notified the DEETYA of her resumption of full-time employment.

Special circumstances?

Although the AAT accepted that Hayes' financial circumstances were straitened, this was not sufficient to amount to special circumstances. The AAT also accepted that the protracted nature of her dispute with the DEETYA was stressful, but found that this did not amount to special circumstances.

However, the AAT found that the DEETYA's actions in refusing to issue revised group certificates, which prevented her from recovering overpaid tax, did constitute special circumstances warranting a waiver of part of the debt. A waiver was found to be more appropriate than a write-off.

The AAT determined that if an ATO assessment of her entitlement to a tax refund was not made within 6 months of Hayes requesting a reassessment, due to the DEETYA's failure to issue revised group certificates, then an amount equivalent to her refund entitlement should be waived.

The decision

The decision was affirmed subject to the following proviso: if her entitlement to a tax refund was not assessed within 6 months of her request to the ATO for a reassessment, and this was due to the DEETYA's failure to issue revised group certificates, then the debt must be partially waived.

[H.B.]

AUSTUDY: progress rules

KELLY and SECRETARY TO THE
DEETYA
(No. 13564)

Decided: 21 December 1998 by
S.A. Forgie.

Kelly applied for AUSTUDY in 1998 to undertake the fourth year of a law degree. She had also previously completed 2 years of an arts course. AUSTUDY was granted on 9 January 1998 and Kelly received a payment of \$568.69. On 24 January 1998 Kelly was advised that she

was not eligible for AUSTUDY in 1998 because her previous studies amounted to the minimum time needed to complete her law course plus an additional year. A debt of \$568.69 was raised as a result, and subsequently a late payment charge and interest was added to the debt. The decision that Kelly was ineligible and owed a debt to the Commonwealth was affirmed by the SSAT.

At the hearing of the matter in the AAT a number of submissions were made on behalf of Kelly.

Estoppel: failure to provide documents

It was argued that Centrelink had failed to comply with s.1261 of the *Social Security Act 1991* in that it did not forward a statement of reasons to the National Convenor of the SSAT after Kelly applied for review. The SSAT should therefore have found in Kelly's favour, and the AAT should not consider Centrelink's submission at all. Because Centrelink had not complied with s.1261 it lost the right to be heard.

The AAT pointed out that s.1261 contained a directory rather than a mandatory rule. The AAT was bound by the rules of natural justice and this included a duty to ensure that each party is given a reasonable opportunity to present their case. The AAT did not have inherent power by which it could find there was any remedy available to Kelly in relation to Centrelink's failure to meet the requirements of s.1261.

Estoppel: Centrelink's duty to provide information

It was also argued that Centrelink was estopped from denying Kelly AUSTUDY in 1998. Centrelink had information which clearly indicated that if she enrolled in a combined Arts/Law course, she would be eligible for payment and it was submitted that Centrelink had a public duty to advise as to eligibility. Kelly subsequently enrolled in the combined course on 20 July 1998 and it was submitted that as all of her study was part and parcel of the same course, that is, the combined course, she should be paid for the entire 1998 year.

The AAT pointed out that it was the role of the academic institution, not Centrelink to give advice to students about which course to take. Moreover, Centrelink was bound to determine the claim as it was made. A decision maker could not lawfully determine the claim as if different facts had existed or on the basis that certain events could take place at a later time.

Material to be taken into account by the Tribunal

On behalf of Kelly it was asserted that the Secretary could not rely at the AAT hearing on any reasons for decision other than those relied upon by the original decision maker. The AAT said that its role was to review the decision on its merits, not the reasons for the decision, but the actual decision itself. It followed that the Secretary was not bound to base argument upon the reasons of the original delegate or the delegate considering the matter on review.

The progress rules

The AAT applied regulation 41 of the AUSTUDY Regulations which provides:

'(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; or
- (b) if the minimum time for the course is one year or less — the minimum time.

(1A) In determining time already spent in full-time study, the following time is not to be counted:

- (a) study time during which the student was ineligible to get AUSTUDY, or benefit under the Tertiary Education Assistance Scheme, because of the application of present or former rules under these Regulations in respect of academic progress;
- (b) study time in a subject from which the student withdrew, if the educational institution did not record the withdrawal from the subject as a failure;
- (c) study time for a qualification of a foreign institution, except a qualification of the same standing as the degree of Master or Doctor at an Australian institution.

(1B) In determining time already spent in full-time study, the time taken by the student to complete a course is taken to be no longer than the minimum time in which the course could have been completed.

...

(3) In this regulation:

"minimum time" means:

- (a) the minimum time needed to complete the course at pass level; and
- (b) any additional honours years that the student has undertaken or is undertaking in the course;

"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; or

(c) if, after a semester has started, a student who is not studying a year-long subject changes his or her enrolment and starts studying a year-long subject — when the change occurs; or

if, after a semester or academic year has started, a student's enrolment is changed and no longer includes a year-long subject — when the change occurs.'

As Kelly was undertaking a Bachelor of Laws degree only at the commencement of the first semester in 1998, that is the course which had to be taken into account, not Kelly's subsequent enrolment in the combined Arts/Law course. As at 1 January 1998, Kelly had spent 2 years in full-time study in the Bachelor of Arts and 3 years in the Bachelor of Laws. The minimum time needed to complete the Bachelor of Laws was 4 years. If she was enrolled in a year long subject, 5 years would be the length of time used in the calculation required under sub-regulation 41(1). As she had studied at the same undergraduate level for 5 years as at 1 January 1998, Kelly was not eligible for AUSTUDY.

Kelly argued that the ameliorating provisions in sub-regulation 41(1A) applied. She submitted that paragraph (a) applied to her situation because as long as she was progressing academically and was ineligible, those years of study could not be counted. The AAT was satisfied that sub-regulation 41 (1A) (a) referred to the progress rules set out in Division 3 of the AUSTUDY Regulations, which makes no reference to the period during which a person receives AUSTUDY, but is concerned with the time spent in a course and courses previously undertaken. The AAT was satisfied that there was no study time during which Kelly was ineligible for AUSTUDY because of the application of the present or former rules under the AUSTUDY Regulations relating to academic progress, that is, that a student must proceed academically in order to be eligible for AUSTUDY. Neither did any of the other concessions to regulation 41 apply.

Waiver of the debt

The AAT was satisfied that the \$568.69 was paid to Kelly due to the error of a Centrelink officer. However, because the debt was raised within 6 weeks of the payment that caused the debt, the debt could not be waived under s.289 of the *Student Assistance Act 1973*. Neither was there any evidence that there was anything in Kelly's situation which took it out of the ordinary or usual range of cases, such that the debt could be waived on the basis of 'special circumstances' under s.290C of that Act.

Late payment and interest charges

As the decision to impose late payment and interest charges was made by a delegate of the Secretary after Kelly lodged her appeal to the AAT, the AAT considered that it did not have power to review that decision. It was a different decision from that to raise and recover the debt, and Kelly would need to pursue a review of the decision to impose the charges separately.

Formal decision

The AAT affirmed the decision of the SSAT.

[A.T.]

AUSTUDY: honours year; undergraduate or postgraduate?

SECRETARY TO THE DETYA and
KRUK

(No. 9900027)

Decided: 20 January 1999 by
R.P. Handley.

Background

A delegate of the Secretary to the DETYA decided that Kruk was not eligible for AUSTUDY in 1997 due to her previous studies. This was set aside by the SSAT deciding that Kruk was eligible. The Secretary appealed to the AAT.

Kruk was an undergraduate student at the University of Newcastle between 1989 and 1991, and was awarded a Bachelor of Science degree in May 1992. In 1992 she completed a Bachelor of Science (Honours) degree. In 1995 she commenced a five year Bachelor of Medicine degree at the University of Newcastle. In February 1997 she lodged a claim for AUSTUDY for 1997, the third year of her Bachelor of Medicine program. This was rejected on the basis that her prior tertiary studies could not be disregarded, and accordingly she was only entitled to AUSTUDY for the minimum length of the course — that is five years — plus an additional year. At the beginning of 1997 Kruk had already completed 6 years of undergraduate study, and was not entitled to AUSTUDY for 1997. The SSAT decided that the Bachelor of Science (Honours) degree was a postgraduate degree, and should not be counted with the other years of undergraduate study completed

by Kruk. She had therefore completed 5 years of undergraduate study and was eligible for AUSTUDY in 1997.

The issues

The issues for the AAT were: was the BSc(Hons) degree a postgraduate or an undergraduate degree; and what is 'the normal requirement for admission' to the Bachelor of Medicine degree at the University of Newcastle?

The legislation

The relevant legislation is set out in Regulations 38, 41 and 47 of the AUSTUDY Regulations.

Regulation 38 states that tertiary courses are grouped for the purposes of AUSTUDY; Group A courses are graduate courses and include postgraduate bachelor degrees with or without honours; Group B courses are undergraduate courses and include bachelor degrees, with or without honours.

Regulation 41 states that a student can get AUSTUDY in a year of study only if at the relevant time the amount of time already spent by the student at the level of the tertiary course is less than the minimum time for the course, plus one year if the student is enrolled in a year-long subject.

Regulation 47 states that no account is taken of a course completed by a student, for the purposes of Regulation 41, if the completion of the course is the normal requirement for admission to the student's current course.

Undergraduate or postgraduate?

Evidence was given by the University Registrar that the University considered the BSc(Hons) to be an undergraduate degree, a continuum of the BSc degree. This is so despite the fact that students are admitted to a BSc degree, and then later in a separate ceremony to the degree of BSc(Hons). The Registrar referred to data collected for the University, and to official University publications, all of which indicated that the BSc(Hons) degree was classified as a undergraduate degree. Other University officials gave somewhat different evidence about how the BSc(Hons) degree was regarded.

The AAT held that the BSc(Hons) was an undergraduate course, giving significant weight to the University's classification of it as such. The Tribunal also took into account the point of entry to the degree, that is whether it is open to all students or only those who already have a degree. It was significant that the BSc(Hons) was seen as an adjunct to the Bachelor's degree.