

(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.

Normal requirement for admission

In 1995, when Kruk was admitted to the Bachelor of Medicine course, there were 3 streams of entry: selection based on TER, for 30% of places; selection based on a previous degree, for about 20% of places; and Personal Qualities Assessments Results, including TER or previous undergraduate results, and psychometric testing. In 1998 the Uni-

versity council approved a special program for graduate entrants, a BMed (Graduate), and Kruk was enrolled in this course for her fourth year. There is no difference in the program of study.

The AAT referred to *Baker and Secretary to the DEETYA* (1998) 47 ALD 756, in which Justice Mathews held that Regulation 47 will only apply where the holding of a degree is the standard or

normal precondition for gaining entrance to a degree, rather than one of a number of possible preconditions.

Formal decision

The AAT set aside the decision under review and substituted a decision that Kruk was not qualified for AUSTUDY in 1997.

[A.B.]

Federal Court Decisions

Findings of fact: the AAT's responsibility

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

Decided: 12 February 1999 by Kiefel J.

The DSS appealed against a decision of the AAT that had waived a debt owed by Payne on the basis of administrative error and Payne receiving the payments in good faith.

The background

Payne had been receiving disability support pension since November 1993. She was given a notice by the DSS that she was to advise if her income exceeded a certain amount. Payne notified of increased income and her payments were duly adjusted. In September 1994 she commenced part-time employment but failed to notify of her income. Payne said she notified the DSS in November 1994 but there was no record of this on the DSS's file. The earliest advice the DSS received was a letter in April 1995. The DSS acted upon this advice and adjusted Payne's payments in July 1995.

In July 1997 the DSS raised a debt of \$4024 for the period 6 October 1994 to 29 June 1995. Because Payne had failed to provide information as required by the Act the debt was raised under s.1224 of the *Social Security Act 1991*.

The SSAT accepted that Payne had notified that she had returned to work in November 1994 and thus the debt ran from 6 October 1994 to 21 November 1994 only. The remainder of the debt was waived on the basis that it had been caused solely by administrative error and Payne had received the payments in good faith (s.1237A).

The AAT decision

The AAT affirmed the SSAT's decision and concluded:

'However, as the respondent's [Payne] credibility was not challenged at a lower level and as Mr Muir advised his client [Payne] not to give evidence before me, the Department had no way in which to impugn the credibility of the respondent. Thus, there is no basis whatsoever to justify the Administrative Appeals Tribunal disturbing the findings of fact of the Social Security Appeals Tribunal.'

(Reasons, para. 10)

The AAT observed that the DSS had ample opportunity to challenge Payne's credibility before the SSAT. The SSAT had accepted Payne's evidence that she had not been surprised when her payments were not reduced following her notification in November because her employment was for a brief period, and she assumed the DSS must have averaged her income. The SSAT noted in its reasons that the DSS had also expressed the view in the letter of the Authorised Review Officer that Payne had received the payments in good faith.

The findings of the AAT

The Court found that the AAT failed to analyse and assess the findings of the SSAT particularly after additional argument was put to it that Payne had a history of having adjustments to her pension payments as a result of being employed. Keifel J observed that:

'The question for the Tribunal (AAT) is not whether the decision was correct on the facts before it, or one reasonably arrived at. Its duty to review requires it to make its own assessment and determination.'

(Reasons, para. 15)

The AAT was obliged to consider whether the waiver provisions had been satisfied. The AAT appeared to have accepted that since Payne would not give evidence it had no alternative but to accept the evidence at the SSAT level. The Court found that there was other relevant and cogent evidence before the AAT that went to the credit of Payne that should have been taken into account. The AAT

had misunderstood its function by not considering the question of waiver itself.

Formal decision

The Federal Court set aside the AAT's decision and remitted it back to a differently constituted AAT for reconsideration according to law.

[C.H.]

Discretion to treat as not being a member of a couple

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

Decided: 18 February 1999 by French J.

Boscolo appealed against an AAT decision that there was no special reason for treating him as not being a member of a couple.

Background

Boscolo received the age pension. He married Rodrigo in January 1996 and was paid age pension at the married rate. For some months in 1996 and 1997 Boscolo had to live in Sydney to resolve and then finalise issues relating to the custody of his son from his first marriage.

Since migrating to Australia Boscolo has lived mainly in Western Australia with some periods in Sydney. In 1982 his first wife moved to Sydney to study. Boscolo remained in Western Australia and he and his wife officially separated in 1989 and proceedings were initiated in the Family Court. In the early 1990s they reconciled and in October 1991 Boscolo's youngest son David was born. Boscolo and his first wife separated once