

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. Kiefel 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