The AAT then considered whether it should write-off or waive the debt. When considering write-off the AAT considered Hales' financial circumstances and the prospects of recovery of the debt. Hales' financial circumstances were not considered comfortable, but nor were they straitened. Hales and Reddy had the capacity to repay the debt in modest instalments. The AAT then considered the waiver provisions, and found that Hales' evidence had shown her to be completely credible, and the AAT accepted she honestly believed that when she supplied the tax file number to the DSS she had done all that was necessary to comply with the DSS notices. 'Her failure to comply with section 132 of the Act was not done knowingly': Reasons, p.3.

With respect to special circumstances, the AAT found that Hales' disease affected her ability to comprehend and deal with letters from the DSS. She had provided Reddy's tax file number as requested and had received no further notices. Hales had an honest belief that she had done all that was necessary to comply with the DSS requirements. Hales was gradually recovering her physical and mental health and engaging in full-time work. It was important that no further stress be placed on her.

The law

Section 132 of the Act enables the DSS to give to a person a notice which requires that person to advise the DSS of a change in circumstances. Section 1223 states that if an amount had been paid to a person by way of social security payment, and the person was not qualified for that payment, and the amount was not payable, then the amount paid is a debt due to the Commonwealth. Section 1224 states that if a person has been paid a social security payment and failed or omitted to comply with a provision of the Act, the amount so paid is a debt to the Commonwealth. According to s.1236 the DSS may decide to write-off a debt. The waiver provisions are contained in s.1237, and include s.1237A(1) dealing with waiver arising from administrative error, and s.1237AAD which provides for waiver in special circumstances.

> '1237AAD. The Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that:
>
> (a) the debt did not result wholly or partly from the debtor or another person knowingly:
>
> (i) making a false statement or false representation; or
>
> (ii) failing or omitting to comply with a provision of this Act or the 1947 Act; and
>
> (b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and
>
> (c) it is more appropriate to waive than to write off the debt or part of the debt.'

Waiver

According to French J the DSS must be satisfied that the three conditions specified in paragraphs (a), (b) and (c) of s.1237AAD are met. If they are, the DSS is not necessarily obliged to waive the debt. 'In some cases the satisfaction of the three conditions may be sufficient to persuade the Secretary (the DSS) to waive without reference to any further matter': Reasons, p.8. The Court stated that the concept of special circumstances is broad and it may include financial circumstances. French J did not accept that there cannot be special circumstances for the purposes of s.1237AAD(b) unless there is also financial hardship. The Explanatory Memorandum states that financial hardship of itself is not sufficient reason to waive the debt.

> 'The evident purpose of s.1237AAD is to enable a flexible response to the wide range of situations which could give rise to hardship or unfairness in the event of a rigid application of the requirement for recovery of debt. It is inappropriate to constrain that flexibility by imposing a narrow or artificial construction upon the words.'

(Reasons, p.8).

The Court accepted that the facts which led the AAT to conclude that Hales had not misled the DSS could also be relevant when considering special circumstances. French J dismissed the DSS argument that there was no medical evidence before the AAT which would lead it to conclude that Hales' condition may become worse if she is required to repay the debt. Hales herself gave evidence, as did her employer. This evidence indicated that Hales was not coping with the stress related to recovery of the debt.

The DSS also argued that once the AAT had found that write-off of the debt was not appropriate, it could not conclude that it was more appropriate to waive than write off the debt. The Court found that the proper construction of this paragraph would be that it is more appropriate to waive the debt rather than write it off. Finally the Court noted that the Tribunal's reasons for decision should not be scrutinised in minute detail. It was not appropriate for an administrative body to have to write a detailed exposition in its reasons for decision.

Formal decision

The Federal Court dismissed the DSS appeal against the decision of the AAT.

[C.H.]

AUSTUDY: living away from home; 'special weather conditions'

THE SECRETARY TO THE DEETYA v BARRETT (Federal Court of Australia)

Decided: 15 April 1998 by Tamberlin J.

The DEETYA appealed against the AAT decision that Barrett and her brother were entitled to be paid AUSTUDY at the living away from home rate.

The facts

Barrett was a secondary student in 1993, and her brother was a student in 1995. Barrett was paid AUSTUDY at the higher rate in 1993 and an overpayment of $2203 was raised. Her brother was denied the higher rate of payment in 1995. The Barretts had claimed that they would be unable to travel to school for 20 or more school term days a year because of the weather conditions. The road from their home was gravel and became impassable to ordinary traffic after 12.5 mm of rain. If a 4-wheel drive vehicle was used the road deteriorated and also became impassable. Evidence was given to the AAT that long-term rainfall records showed that more than 12.5 mm of rain fell on more than 20 days a year.

The law

Regulation 77 of the AUSTUDY Regulations provides that a student is qualified for the living away from home allowance if the student is isolated because the parent's home is isolated. According to Reg. 78(1) the parent's home is isolated if the principal home of the student's parents is located where 'it is likely that the student would be unable to travel to the school for 20 or more school-term days in the year because of special weather conditions'.

The AAT's decision

The AAT was satisfied that there was 'more than a remote possibility in any one year that the Applicants [the Barretts] would have been unable to travel to school for 20 or more school days in the year because of special weather conditions': Reasons, p.8.

The DEETYA argued that 'likely' meant more than a remote possibility, and that the AAT had given no meaning to the term 'special'. It was also argued that there must be a causal connection

between the inability to travel and the 'special weather conditions'.

'Likely'

Tamberlin J stated that the Regulations were designed to provide a benefit to students as stated in the Preamble to the *Student and Youth Assistance Act 1973*, and thus it should be interpreted beneficially. A number of previous Federal Court judgments on the meaning of 'likely' in other Acts had decided that 'likely' referred to 'a real not remote possibility'. Because the Regulations are beneficial legislation the Court preferred an interpretation that promoted the object or purpose underlying the Regulations.

This meant a broader interpretation than set out in the cases if possible. 'It is also important to bear in mind that the predictive assessment called for in the present circumstances is whether it is 'likely' that a student would be unable to travel to school because of special weather conditions': Reasons, p.8. Because of the difficulty of predicting the weather it was 'more fitting to speak in terms of a possibility that is more than remote': Reasons, p.9.

'Special weather conditions'

According to Tamberlin J the word 'special' had to be read in context. It signified an event or circumstances which was 'out of the ordinary or normal course': Reasons, p.9, or as had been stated in *Beadle and D-G of Social Security* (1984) 6 ALD 1, 'circumstances that are unusual, uncommon or exceptional'. It was argued by the DEETYA that there was nothing 'special' about the weather conditions. This was the usual pattern.

The Court decided that:

> 'the reference to "special" weather conditions in sub-item (5) means weather conditions on some days of the year which are special in the sense that the rainfall might be expected to be such that a student is unable to travel to school over 20 or more school term days.'

(Reasons, p.10)

The question to be answered is whether there are days in the year that are so unusual that compared to other days in the year the Barretts may not be able to travel.

'Because of'

It was argued by the DEETYA that there had to be a causal connection between the 'special weather conditions' and the inability to travel. The Court accepted that this was correct, but found that the AAT had stated that there was such a connection.

It was also argued by the DEETYA that it was the nature of the road, and not the weather which caused the inability to travel. Tamberlin J disagreed saying that 'the provision calls for a consideration of the access which is in fact available and not of potentially better access': Reasons, p.11.

Formal decision

The Federal Court dismissed the appeal of the DEETYA.

[C.H.]

SSAT Decision

Important note: *Decisions of the Social Security Appeals Tribunal, unlike decisions of the Administrative Appeals Tribunal and other courts, are subject to stringent confidentiality requirements. The decisions and the reasons for decisions are not public documents. In the following summaries, names and other identifying details have been altered. Further details of these decisions are not available from either the Social Security Appeals Tribunal or the Social Security Reporter.*

Newstart allowance: calculation of the debt

AB and Centrelink Delegate to the DSS

Decided: 6 May 1998

AB incurred an newstart allowance debt of $1508.18 from September 1996 to April 1997. Centrelink raised a debt on the basis AB had not advised in his fortnightly forms of his part-time employment, nor of his earnings. AB maintained that he worked as a trainee or volunteer and the money he received was not his wage.

The SSAT had before it details of the money paid by AB's employer which would generally be for the week ending Friday. But it was clear that AB did not work regular times or regular days, and his income fluctuated significantly. AB's fortnightly forms did not coincide with the payment periods of his employer.

The SSAT found that there were discrepancies between the information provided by the employer and that disclosed by AB. It did not accept that AB was a volunteer (as he had claimed), and nor did it accept that the moneys paid to him were for expenses (s.8 exempt income).

The ARO had calculated the debt by reducing the weekly payment paid by the employer to a daily rate in respect of each day of the relevant benefit fortnight. The SSAT had no hesitation in finding that AB had objectively made false statements in his fortnightly forms. There was a debt to the Commonwealth (s.1224). The difficulty for the SSAT was how the debt should be calculated. It noted that the ARO had followed the internal (DSS) instruction issued on 21 April 1997. This purported to follow the Federal Court in *Danielson* (1996) 2(7) *SSR* 103. The SSAT found that the guideline was not consistent with the remarks made by the judge. These remarks were not essential to the decision in *Danielson*, and so not strictly binding. However they are highly influential. Danielson was a casual employee whose income fluctuated. She was paid on a Wednesday and her fortnightly benefit period commenced on a Monday. Given, the above, the Court found it difficult to contemplate how the DSS would be able to calculate the overpayment. The SSAT decided not to follow the DSS's guideline but to follow the reasoning in *Danielson*, and set the matter aside with directions that Centrelink should recalculate the debt if it could obtain accurate information on AB's income in each benefit fortnight. Otherwise there was no debt.

[C.H.]