

cepted that Phillips was ordered to leave in the anger of the moment, but his parents then stuck to that position and refused his genuine requests to be allowed to return home.

#### Extreme family breakdown?

The AAT agreed with the SSAT's view that when a family member is denied access to the family home, there is extreme family breakdown in relation to that family member. The Tribunal agreed with the observations in *DEET and Sheiles* 44 ALD 401, that the Act and Regulations were beneficial legislation and any ambiguities should be decided in favour of the student. Although tension between parents and adolescent children is common, when it reaches the point that a child is ordered to leave the family home and that situation persists over a period of months, that is exceptional and as far as that child is concerned it amounts to extreme family breakdown.

#### Formal decision

The AAT affirmed the decision under review.

[S.L.]

## AUSTUDY overpayment: income, eligible termination payment, child support

HORVATH and SECRETARY TO THE DEETYA  
(No. 12457)

**Decided:** 3 December 1997 by F. Smith.

The DEETYA sought to recover \$6172.83 from Horvath. It maintained that he was overpaid AUSTUDY in 1993. The SSAT affirmed the decision and Horvath appealed to the AAT.

#### The facts

On 26 January 1993, Horvath ceased work with the State Electricity Commission of Victoria and received a voluntary redundancy package of \$30,881. On 15 February 1993 he completed an AUSTUDY application form in which he estimated his 1993 income as 'nil'. On 30 August 1993 he lodged an AUSTUDY

eligibility check form and again declared that his 1993 income was 'nil'.

In 1996 the Australian Taxation Office advised the DEETYA that Horvath's taxable income in the 1993-94 financial year was \$37,292. When the DEETYA sought clarification, he provided details of his eligible termination payment and his child support obligations and payments. The DEETYA sought repayment of \$6172.83. Horvath argued that it should not be repaid because his termination payment did not constitute income as he paid it to his wife and family. He paid out \$13,947.26 on 26 July 1993 and \$14,000 on 26 April 1994. These two payments were made pursuant to consent orders of the Family Court of Australia dated 18 February 1994. The consent orders were a property settlement with his former wife.

#### The legislation

The *Student and Youth Assistance Act 1973* and the regulations pursuant to this Act provide for the repayment of overpayments. Section 290C provides that in special circumstances the repayment of the debt may be waived. Regulation 83(1)(a) defines student income as 'taxable income within the meaning of s.6(1) of the *Income Tax Assessment Act 1936*'. According to regulation 83(3) maintenance payments are to be deducted from a 'student's income'.

#### The issues

Horvath argued that his AUSTUDY should not be repaid as the lump sum did not constitute income because he paid it to his former wife. The AAT had to determine whether the two lump sum payments were maintenance payments and therefore to be deducted from Horvath's income. In addition, Horvath argued that if his eligible termination payment was income, then the debt should be waived due to special circumstances. The DEETYA submitted that the money was income, was not part of any maintenance arrangement and that no special circumstances existed which warranted waiver.

#### Determinations

In considering whether the two lump sums were maintenance, the AAT referred to *Cameron and Secretary to the DSS* (1990) 54 SSR 772. In that case the AAT indicated that, regardless of the terms and definitions used in the *Family Law Act* and *Child Support (Assessment) Act*, the AAT must separately determine the meaning of terms such as 'maintenance' in the *Social Security Act*.

Neither the Act nor the Regulations defined 'maintenance' for the purposes

of AUSTUDY. The AAT referred to the definitions in a number of dictionaries. It determined that maintenance consisted of *regular payments* for the purpose of maintaining the children and former spouse in 'good condition'. Because the definition implied regular payments, the context of regulation 83(3) does not imply inclusion of one-off lump sum payments made pursuant to consent orders for a property settlement.

The AAT found that the eligible termination payment was income even though it was used to pay a Family Court property settlement. In considering whether the debt should be waived, the AAT had to decide if there were special circumstances in this case. The Tribunal referred to *Beadle and Director General of the DSS* (1984) 26 SSR 321 and asked whether there were unusual, uncommon or exceptional circumstances such that it would be unjust, unreasonable or inappropriate to pursue the debt. The AAT found that there were no such special circumstances warranting a waiver.

#### Decision

The AAT affirmed the decision under review.

[H.B.]