

The AAT did not reach a concluded view regarding the amount of \$5809 borrowed by Mr and Mrs Duscher to partially finance the costs of Angela's college fees and books because, following the deduction of the amount of her AUSTUDY financial supplement, even if the amount of the loan was included, the Duschers' actual means would not increase above the actual means of the notional parent. However, the AAT did comment that the DEETYA's decision not to take account of the repayments of \$1798.16 made by Mr and Mrs Duscher during the period of eligibility, whilst

according with commonsense, may well not have accorded with the Regulations since, presumably, the funds for the repayment came either from their accumulated savings or income: Reasons, paras 59-60.

The AAT noted that the scholarship awarded to Angela had not been taken into account by the DEETYA, an approach which it said also accorded with commonsense. The AAT raised the question of whether the amount of the scholarship could come within reg.12N(3) which requires the Secretary to impute a fair market value to a transaction en-

gaged in by a person, other than the parent or a member of his or her family, for the benefit of the parent of a member of his or her family. Since the Secretary was not pursuing inclusion of this sum, and the AAT had not been provided with sufficient information about this aspect of the matter, it did not reach a concluded view on this issue.

#### Formal decision

The AAT affirmed the decision under review.

[S.L.]

## Federal Court

### Newstart allowance: direct evidence of misstatement

SECRETARY TO THE DSS v DANIELSON  
(Federal Court)

**Decided:** 23 December 1996 by Cooper J.

The DSS appealed against the decision of the AAT to set aside a DSS decision to raise and seek recovery of a debt owed by Danielson to the Commonwealth. The DSS had raised and sought recovery of a debt of \$1166.54 pursuant to s.1224 of the *Social Security Act 1991* (the Act).

#### The issue

The AAT had found that there was no evidence before it on which it could find that Danielson had made a false statement or representation as required by s.1224 of the Act before a debt can be raised.

The court noted that whether or not there is evidence of a particular fact is a question of law (see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321).

#### The facts

Danielson was paid newstart allowance (NSA) between 30 June 1992 and 18 November 1992. In the same period she was employed as a casual housemaid working on average 4 days a week 4-5 hours a day. She was paid weekly in cash, and supplied with payslips.

Danielson was required to lodge a fortnightly continuation of benefit form

with the DSS setting out her gross income for the previous 14 days. The gross income set out in the form is entered into a computer, and the rate of NSA is calculated automatically. Danielson was paid on each Wednesday and she lodged her forms with the DSS every second Monday. She was required to calculate her gross income for the previous 14 days, and could not rely on her payslips, which simply set out her gross income and not the hours worked.

The usual practice of the DSS was to destroy continuation forms after a certain period. When the DSS came to calculate the overpayment, the forms were not available. The DSS relied on the rate of NSA actually paid to Danielson to calculate the overpayment, by reversing the calculation to ascertain how much had been entered into the computer as gross income. The DSS then compared the amounts entered with Danielson's payslips, and decided that she had been overpaid. It concluded that Danielson had under-declared her gross income.

#### The AAT decision

The AAT decided that on the material before it (no continuation forms) there was simply 'no evidence' as to what Danielson had declared. For there to be an overpayment, the DSS must show that Danielson had made a false statement. Because the forms had been destroyed there was no basis for making a finding that she had made a false statement. It was not open to the AAT to infer a false statement had been made. The AAT rejected the argument put by the DSS that it should infer that Danielson had entered her net fortnightly income based on her payslips when completing the forms.

#### Evidence

The DSS submitted that there was evidence that continuation forms had been lodged declaring Danielson's income, and these forms had been processed. Danielson had been paid NSA based on the declaration of earnings in the forms, and a simple calculation would recall what amount had been declared as income. Therefore there was evidence as to what Danielson had declared as income.

It was argued for Danielson that the AAT's reasons had indicated that there was insufficient evidence not 'no evidence'.

The Court found that the AAT had erred in finding that there was 'no evidence' of the amount Danielson had declared as income in her forms. There was evidence, namely:

- (a) Danielson admitted receiving NSA during the relevant period;
- (b) she completed the forms and declared an amount of gross income; and
- (c) that income was entered into the DSS computer and the rate of NSA was calculated and paid to her.

For s.1224(1) to be satisfied, the DSS must first establish that Danielson made statements or representations, and what those statements or representations contained. Without the forms there is no direct evidence of the statements, etc. This does not mean that there is no evidence of a fact. It is possible:

'to infer the existence of a particular fact from the existence of a series or number of other facts which taken together, suggest that the existence of the particular fact in question is more probable than not.'

(Reasons, p.9)

Therefore it was open to the AAT to find that because Danielson received a certain amount of NSA each fortnight she

must have declared a certain gross income.

Cooper J found that there was a body of evidence that was capable of sustaining an inference as to the amount declared as gross income. It was up to the AAT to decide if this inference should be drawn. The next step was to decide if the statements made by Danielson were false, and as a result she had been overpaid. Because Danielson was paid on a Wednesday and completed forms for the DSS every second Monday, 'it was impossible to prove, by direct evidence, the amount of income actually earned': Reasons, p.11.

The DSS had requested that the matter be remitted to the AAT for a final decision to be made, which the Court agreed to do.

#### Formal decision

The court set aside the AAT decision and remitted it to the AAT to be determined according to the law and the Court's reasons. The DSS was ordered to pay costs.

[C.H.]

## AUSTUDY approved courses: meaning of 'course of a type specified'

SECRETARY TO THE DEETYA v LANDER

(Full Federal Court of Australia)

Decided: 11 December 1996 by Burchett, Moore and Sundberg JJ.

Lander's application for AUSTUDY had been rejected on the basis that the course he was undertaking, a Master of Arts (Psychology), was not 'AUSTUDY approved'. The SSAT set aside the decision and substituted a new decision that Lander was eligible for AUSTUDY benefits. The Secretary to the DEETYA's application to the AAT was dismissed, and an appeal was subsequently lodged with the Federal Court.

#### The legislation

Section 7(1)(c) of the *Student and Youth Assistance Act 1973* (the Act) empowers the DEETYA to grant a benefit to a person otherwise qualified who is undertak-

ing or proposes to undertake a 'course of study or instruction that the Minister has determined in writing to be a secondary course, or a tertiary course, for the purposes of [the ] section'.

The relevant ministerial determination No. 1994/1 dated 5 December 1994, provides in paragraph 6 that, for the purposes of s.7 of the Act, a course of a type specified in Schedule 3 and a course specified in Schedule 4 of that determination is a tertiary course. Schedule 3 is headed 'TERTIARY COURSES — GENERAL' and Schedule 4 is headed 'TERTIARY COURSES — SPECIFIC'. The relevant entry in Schedule 3 to be considered in the case before the Court read 'Graduate or postgraduate diploma course for which the entry requirement is an undergraduate bachelor degree or diploma course or equivalent and which is an accredited course'. A master's degree was not listed in Schedule 3 of the determination.

#### The approach of the AAT

The AAT took the view that the meaning of the words 'course of a type specified in . . . Schedule 3' were not clear. It said the Act was beneficial legislation which ought to be construed in a manner favourable to those it was intended to benefit. The AAT then referred to the dictionary meaning of the word 'type' and concluded that the question for determination was whether the Master of Arts (Psychology) course possessed 'the characteristic qualities of, or the particular characteristics which distinguish it as, a graduate or postgraduate diploma'. The AAT referred to the Australian Qualifications Framework, a publication setting out the criteria for defining qualifications based on the general characteristics of education and training provided at each qualification level, expressed as learning outcomes, and the prerequisite knowledge required for candidature at each level. It concluded that the prerequisites for entry to the Master of Arts (Psychology) course matched the description of the pathways qualifying a student for a graduate diploma and that the course also had learning outcomes matching those for such a diploma, rather than the descriptions given for a master's degree course. The AAT accordingly found that the Master of Arts (Psychology) course was a 'course of a type of graduate diploma for which the entry requirement is an undergraduate bachelor degree'.

#### 'Course of a type specified'

The Court concluded that Schedules 3 and 4 shed light on the meaning to be given to the words 'course of a type specified'. As reflected in their headings,

Schedule 3 refers to types of courses and types of institutions, while Schedule 4 refers to particular courses at particular institutions. It is for this reason that paragraph 6 uses the words 'a course of a type specified' when referring to Schedule 3, and 'a course specified' when referring to Schedule 4. Therefore 'a course of a type specified' is one that falls within the general description of courses in Schedule 3. The task for the delegate considering Lander's application for AUSTUDY was to determine whether (a) the Masters of Arts (Psychology) course was an accredited course; (b) an entry requirement for the course was an undergraduate bachelor or diploma course or equivalent; and (c) the successful outcome of the course would result in the award of a graduate or postgraduate diploma. Although the Master of Arts (Psychology) course met the first two criteria it did not lead to the award of a graduate or postgraduate diploma and was not, therefore, a tertiary course for the purposes of paragraph 6 of the determination.

The Court considered that the enquiry engaged in by the AAT was inconsistent with the notion of accreditation contained in the definition of 'accredited tertiary course' set out in the determination, being 'a course conducted and accredited as a tertiary course by [the] institution'. It was inappropriate for a delegate or the AAT to go behind that accreditation.

#### Beneficial legislation

The Court referred to the decision of *Khoury v Government Insurance Office of New South Wales* (1984) 165 CLR 622 at 638 in which it was stated:

'The rule that remedial provisions are to be beneficially construed so as to provide the most complete remedy of the situation with which they are intended to deal must . . . be restrained within the confines of the 'actual language employed' and what is 'fairly open' on the words used.'

The Court considered that, in the context provided by para. 6 and Schedules 3 and 4, the meaning of the words 'course of a type specified' was clear. The words contemplate a course which falls within the descriptions of courses contained in Schedule 3 and the words are directed to the type of course officially sanctioned by the relevant institution and the description given by that institution. The meaning attributed to the language by the AAT was not fairly open.

#### Formal decision

The Court ordered that the decision of the AAT and SSAT be set aside and the decision of the Secretary be affirmed.

[A.T.]