

concession applies), they meet the test for a normal full-time workload, regardless of how that workload is divided between semesters.

A further issue was whether the subjects 'Applied Science 1' and 'Applied Science 2' constituted a full-year subject or whether they were two consecutive semester-long subjects.

#### Year-long subjects

The Tribunal found that, because the subjects had different codes, separate credit loads and HECS loadings, and each had a duration of one semester, the subjects were separate, semester-long subjects and Stojanovic had erred in describing them as a 'year-long subject' on her AUSTUDY application form.

#### The workload test

In the Tribunal's view, regulations 34 and 35 might be said to be somewhat ambiguous as to their meaning because 'at first blush' these regulations do not specify, in express terms, whether a student must satisfy either the semester test or the year test or both. The Tribunal considered that regulation 34(3) provided the key to resolving the ambiguity. Regulation 34(3) defines a student as not full-time in a period if the amount of work they are undertaking in that period is less than three-quarters of the normal amount of full-time work for *that* period (emphasis as shown in Reasons, para. 37). Regulation 35 sets out two periods, a year and a semester. It was quite clear that, in the context in which it appears, the word 'a' in regulation 34(2) has the meaning 'any'.

The Tribunal decided that, for a tertiary student to be eligible for AUSTUDY benefits for a year of a course incorporating two semesters, they must (subject to the regulation 36 concession) enrol in and undertake at least three-quarters of the normal amount of full-time work for that year and each semester of the course. For a tertiary student to be eligible for AUSTUDY for a semester of a course, they must (subject to the regulation 36 concession) be enrolled in and undertake at least three-quarters of the normal amount of full-time work for a semester, and it is not necessary for such a student to satisfy the year-long test. (Emphasis as shown in Reasons, paras 39-40).

In Stojanovic's circumstances, because she failed the semester test, she was ineligible for AUSTUDY during Semester 1 and the moneys paid to her during that period constitute a debt due to the Commonwealth which is recoverable.

#### Waiver?

The Tribunal decided the debt could not be waived for administrative error under

s.289 of the *Student and Youth Assistance Act 1973* as the debt arose because of the incorrect statements Stojanovic made in her AUSTUDY Continuing Application form. In relation to waiver 'in the special circumstances of the case' under s.290C, the Tribunal approved of the meaning to be attributed to the phrase 'special circumstance' given in the decision of *Beadle and the Director-General of Social Security* (1984) 6 ALD 1, at 3-4. The Tribunal decided that because none of the circumstances of the matter were special, the debt could not be waived under s.290C.

#### Formal decision

The AAT set aside the decision under review and substituted a decision that the sum of AUSTUDY payments made to Stojanovic in Semester 1 of 1995 constituted a debt due by her to the Commonwealth and was recoverable.

[S.L.]



## AUSTUDY: the meaning of relevant date, progress in course

SECRETARY TO THE DEETYA  
and HA  
(No. 11786)

Decided: 18 April 1997 by G. Ettinger.

#### Background

Ha was declared ineligible for AUSTUDY in the second semester of 1995 in relation to her studies for a Bachelor of Commerce at the University of Sydney. The delegate of the Department [then DEET] made the decision on 26 September 1995. The SSAT set aside the DEET decision on 19 June 1996. The DEETYA appealed to the AAT.

#### The facts

Ha enrolled at the University of Sydney in 1992 for a Bachelor of Economics. She transferred to a Bachelor of Commerce starting in 1994 and received credit for the units she had completed.

In 1995 Ha was enrolled in 6 units, 3 per semester, and applied to continue her AUSTUDY for the whole year.

To qualify for the degree required completion of 22 full semester units. The minimum time for completion of the degree was 3 years. At the end of first semester 1995 Ha had completed 3.5

years of study and had to successfully finish semester two to qualify for the degree.

Among her 1995 units, one [Financial Accounting B] in first semester was a co-requisite for another unit [Auditing], which was only offered in second semester. Because of an earlier failure in 1993 [Financial Accounting A — a prerequisite for Financial Accounting B] Ha could not enrol in these units until 1995 and had to do them over two semesters.

The DEET found Ha was ineligible under regulation 41(1)(a)(i) of the AUSTUDY Regulations because she had attempted 3 years of full-time study since the commencement of her course, the minimum time in which she could qualify for the degree was 3 years, and she was only undertaking semester-based subjects.

Ha argued that she was eligible under regulation 41(1)(a)(iii) so should receive AUSTUDY for the whole year.

#### The regulations and issues

The relevant provisions state:

'41(1) A student can get AUSTUDY in a year of study for a tertiary course only if, at the relevant date, the time already spent by the student in full-time study at the level of the tertiary course, is less than:

- (a) if the minimum time for the course is more than one year — the sum of the minimum time for the course plus:
  - (i) half a year, or
  - (ii) if the student is enrolled in a year-long subject — one year, or
  - (iii) if the student's further progress in the course depends on passing a whole year's work in the course — one year ...

41(3) "relevant date" means:

- (a) the start of a semester, or
- (b) if the course is not divided into semesters — the start of the academic year ...'

Two issues faced the AAT: what was the 'relevant date' for the purposes of regulation 41(1) and what was the meaning of the words 'progress in the course'.

#### 'Relevant date'

The DEETYA view was that Ha's application for AUSTUDY had to be assessed separately in relation to the two semesters because she was studying semester-based subjects. According to regulation 41(3) unless a course is not divided into semesters, the relevant date is the start of each semester. At that point she did not have a whole year's work to complete and regulation 41(1)(a)(iii) could not apply.

Ha's case was that regardless of which 'relevant date' was used it was possible to interpret her eligibility on the basis she

needed a year's study to complete her course. The AAT rejected her argument.

The AAT following an earlier decision in *Iovino and Secretary, DEETYA* (No. 11514, 24 December 1996), agreed the 'relevant date' was the beginning of second semester 1995 on the basis Ha was studying semester-based subjects. If this was the case, regulation 41(1)(a)(iii) could not apply.

#### 'Progress in the course'

Argument centred around the proposition that regulation 41(1)(a)(iii) only applied to students where progress was assessed on a yearly basis and not on either a semester or subject basis.

Ha's case was that her studies in 1995, which on completion would qualify her for graduation, could constitute 'further progress in the course' and a 'whole year's work' could comprise separate units in two semesters.

DEETYA argued regulation 41(1)(a)(iii) was only meant to apply to courses, such as medicine, dentistry and veterinary science, where permission to do later years is subject to passing the work in an earlier year.

The AAT relied on the wording of regulation 41 and the provisions of the 1995 AUSTUDY Policy Manual in determining the intended application of the regulation.

Para 4.3.13 of the Manual states:

'A full year of additional assistance is available if:

- progress in the student's course is calculated on the basis of a whole year's work (e.g. medicine), or
- progress in the student's course is calculated on a subject basis, and at least one year-long subject is being undertaken at the present time.

A semester of additional assistance is available if:

- progress in the student's course is calculated on a semester basis, or
- progress in the student's course is calculated on a subject basis, and the student does not undertake year-long subjects during the period.'

After quoting the above the AAT noted:

'I consider that these Guidelines add support to the Applicant Department's contention that regulation 41(1)(a)(iii) is only intended to apply to students whose progress is assessed on a yearly basis, rather than on a semester or subject basis.'

(Reasons, para. 38)

Reliance was placed on three decisions of the AAT. In *Iovino* (above) and *Secretary, DEETYA and Tseylin* (No. 11627, 21 February 1997) in which approval was given to the 'preferred interpretation' of regulation 41(1)(a)(iii)

given in *Sweet and Secretary, DEET* (No. 8907, 10 August 1983) where it was stated (in para. 23 of that decision):

'Regulation 41(1)(a)(iii) requires the interpretation of the phrase "further progress". The phrase is not to be construed as referring to completion of the course. Different words would have been used if this were the intention. It refers to a situation where the subjects being undertaken by the student are such that certain subjects must be passed as a whole year's work in the course ... The University Calender [in this matter] notes that the rules require completion of all subjects of each year before enrolling for subjects of the following year of study... That, in my view, is the sense in which sub-paragraph 1(a)(iii) of Regulation 41 is to be construed. The paragraph would have applied, if appropriate to the third year of a four year degree, but cannot, in my view, apply to the final year of study for a degree.'

#### Formal decision

The decision of the SSAT was set aside and substituted with a decision that Ha was ineligible for AUSTUDY after semester one 1995.

[P.W.]

## Actual means test: primary production

### SECRETARY TO THE DEETYA and GAMLEN (No. 11763)

**Decided:** 10 April 1997 by K.L. Beddoe.

The DEETYA rejected Gamlen's application for AUSTUDY in 1996 on the basis that his parents were designated parents and that the actual means of the designated parents exceeded the after tax income of a notional parent.

#### Who is a designated parent? — partnership

After a brief review of the AUSTUDY Regulations relating to the actual means test (AMT), the AAT considered whether Gamlen's parents were designated parents.

Regulation 12L defines who is a designated parent. It includes a parent who is a partner in a partnership (regulation 12L(1)(e)).

The AAT noted that the income tax returns submitted in respect of Gamlen's parents showed that they were partners in a primary production business. The partnership, of which Gamlen's parents were 2 of 4 partners, carried on a business of breeding and grazing cattle on a 200-acre

block of land owned by the partners. The partnership also owned a 30-acre block on which three houses had been built. Two of the houses were occupied rent-free by the partners, the other was rented out. The AAT was satisfied that Gamlen's parents were operating as a partnership in that business.

The AAT found that Gamlen's father also carried on a cattle breeding and grazing business on an adjoining 360-acre block of land owned jointly by Gamlen's parents. The income from that business was treated by the Taxation Department as assessable income of the father only. In view of that the AAT decided that there was no partnership in respect of that income.

#### Who is a designated parent? — primary producers

The AAT determined that the business of breeding, grazing and selling cattle was a classic example of primary production. It went on to consider whether Gamlen's parents should be excluded from the definition of 'designated parents' due to the operation of regulation 12L(1)(d). This excludes from the definition self-employed people who are primary producers to whom regulation 19(2) applies.

Regulation 19(2) is concerned with the operation of the assets test and has the effect of disregarding 50% of a person's interest in the value of a business if the person or his spouse is wholly or mainly engaged in a business which is owned by the person or which is a partnership in which the person is a partner. The AAT considered whether Gamlen's parents were wholly or mainly engaged in either the partnership or in the father's own business. It defined 'wholly or mainly' to mean that '...the engagement in the relevant business must be either exclusive of other income producing activities or more substantial or significant than the engagement in other income producing activities': Reasons, para. 35.

The AAT reviewed Gamlen's parents' income from primary production for the 1995 and 1996 years and concluded that as the parents were required to earn income away from the farm (due in part to drought conditions), they were not engaged wholly or mainly in primary production.

The AAT stated that it did not accept that regulation 12L(1)(d) applies only to 'self-employed sole-trader farmers'. It believed that a partner engaged wholly or mainly in primary production does fall within regulation 19(2) and thus within regulation 12L(1)(d).

#### The application of the actual means test

The AAT then reviewed the actual means for Gamlen's parents for 1996. It deter-