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 falls 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-

mined that their actual means were $27,181. As this exceeded the after tax income of the notional family of $25,990 the AAT concluded that Gamlen was not entitled to AUSTUDY in 1996.

Formal decision

The Tribunal decided that the decision of the SSAT under review should be set aside and the decision of the DEETYA affirmed.

[A.A.]

Actual means test: method of dealing with insurance payout and replacement of asset

WHITTLE and SECRETARY TO THE DEETYA (No. 11778)

Decided: 18 April 1997 by M.D. Allen.

Background

Whittle, his mother and two siblings resided free of rent at a homestead on the property 'Cooinoo' in New South Wales, a property owned by the 'Peter Whittle Family Trust'. Apart from the curtilage of the dwelling the rest of the property was under lease. An elder sister lived away from home and was employed. Whittle lodged an application for AUSTUDY on 12 January 1996. The application was refused due to the application of the actual means test (AMT). After this decision was affirmed by the review officer, the applicant sought review by the SSAT, which also, on 8 November 1996, affirmed the decision.

At the AAT there was no dispute that Whittle's mother was a 'designated parent' for AUSTUDY purposes, and that the AMT was the appropriate basis for determining Whittle's eligibility for Austudy in 1996. Whittle took issue with the DEETYA in the calculation of the family's actual means, in particular in relation to three items of expenditure — the expenses (particularly the rates) paid in respect of the whole of the farm property on which Whittle's family home was situated as this was business expenditure subtracted from the profits made by the Trust from the lease of the property; the insurance payout received in respect of a motor vehicle written off during the relevant year; and a gift from Whittle's sister to meet the balance of the costs of replacing the same vehicle.

The issue

The applicant sought review of a decision of the SSAT on 8 November 1996 that the applicant was not entitled to AUSTUDY in 1996 due to the application of the AMT. The AAT considered three principal expenditures which were in dispute regarding the application of the AMT.

The law

The actual means test provisions are contained in regulations 12H to 12N inclusive of the AUSTUDY Regulations. In particular subregulation (1) of regulation 12N provides that the actual means of a designated parent '...are taken to be the total expenditure and savings made ...by the parent and his or her family'. Subregulation (2) of the same regulation provides that a 'fair market price' is to be imputed to any transaction where the amount expended is believed to not represent such a price; while subregulation (3) provides:

> '(3) If the Secretary reasonably believes that a transaction engaged in by a person, other than the parent of a member of his or her family, is a transaction engaged in for the benefit of the parent or a member of his or her family, the Secretary must impute a value to the transaction ...that the Secretary considers to be the fair market value, as if the parent or member of his or her family had expended the amount.'

For the purposes of this regulation, subregulation (5) provides that 'family' does not include a child who is aged 16 years or more if that child is, among other things, not a full-time student and is independent.

The decision

The AAT considered three principal matters:

- *the treatment of expenses in relation to the whole of the farm property on which Whittle's family home was situated.* The AAT noted that the statement of the family's expenditure included $5000 being loan repayments, and that Whittle had sought to offset against family home expenditure an amount of $3000 being rates paid on the property on which the family home was situated. The AAT noted that both expenditures were in fact paid by the Peter Whittle Family Trust. The AAT concluded that the whole question of principal family home expenditure needed to be reconsidered by the DEETYA. The AAT referred to the decision in *Secretary, DEET and Thies* (No. 11623) and concluded that the value of a 'benefit' should be the 'fair market value' of that benefit and that, therefore, the 'fair market value' for a lease of a house on a country property in the vicinity of Whittle's home, needed to be ascertained. The AAT concluded that loan repayments or payments of rates over the whole of the farm property did not constitute a fair assessment of the family's notional expenditure as, in the first instance, the expenditure by the Trust on rates did not necessarily translate as an expenditure by or on behalf of Whittle's parent, while secondly, although an apportionment of the rates paid might be possible, no evidence of an appropriate apportionment had been given.
- *the costs of replacement of the family motor vehicle.* The family vehicle was replaced at a cost of $11,000, of which $6350 was paid by NRMA Insurance Company as proceeds for a vehicle insurance policy. The AAT declined to find that such a payout and its use to replace an asset (a motor car, in this case) constituted an expenditure by a designated parent for actual means test calculation purposes.
- *a gift from a sibling.* The balance of the purchase cost of the replacement vehicle was in this case met by a gift from Whittle's elder sister. The AAT concluded that, as this sister was living away from home and was in employment, she was not for the purposes of Subsection B of Division 1B of the AUSTUDY regulations a member of Whittle's family, and that therefore amounts paid to or for the benefit of Whittle or his family must be calculated as part of the parent's actual means, pursuant to regulation 12N(3).

The formal decision

The AAT directed that the decision under review be set aside and the matter remitted to the DEETYA with directions that Whittle's eligibility for AUSTUDY be recalculated having regard to the AAT's reasons.

[P.A.S.]

AUSTUDY: whether school fees maintenance?

SECRETARY TO DEETYA and RIVETT (No. 11859)

Decided: 14 May 1997 by G.L. McDonald.

Background

Rivett attended a private school as a boarder. Her non-custodial father paid