

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 ascer-

tained. 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