

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

the school fees directly to the school. The decision to send Rivett to the school was made alone by the father. This was part of the Family Court Order in respect of child maintenance arrangements.

Issue

The issue was whether the payment of school fees by the father amounted to a payment of maintenance received 'on behalf of' a dependant and should be included as income of the mother in applying the parental income test under the AUSTUDY Regulations.

The legislation

Regulation 86(2) of the AUSTUDY Regulations deals with parental income for the purposes of calculating AUSTUDY benefits. Regulation 86(2)(c) states:

'an amount received:

- (i) by, or on behalf of, the parent for the maintenance of the parent or of a dependant of the parent;
- (ii) by a dependant of the parent for the maintenance of the dependant.

'On behalf of'

There was agreement between the parties that the payment of school fees by the non-custodial parent constituted the payment of maintenance for Rivett. The issue was whether the amount of school fees could be said to be received by either the mother or the child. Additionally it was submitted by Rivett that the money could not have been received 'on behalf' of the mother because the mother had no relationship with the school. The AAT considered that the essential point related to the meaning and scope of the words 'on behalf of'. The AAT referred to two relevant High Court decisions: *King v Portus: ex parte Federated Clerks Union of Australia* (1949) 79 CLR 428 and *R v Toohey: ex parte Attorney-General* (Northern Territory) (1980) 45 CLR 375. These cases found that the phrase 'on behalf of' has no strict legal meaning and the context and subject matter will be determinative. The AAT looked at the purpose of the AUSTUDY Regulations and the fact that the income of the custodial parent is taken into account and not that of the non-custodial parent. The AAT concluded that it was irrelevant that the decision to send Rivett to the private school was not made by the custodial parent:

'The fact is that the amount was paid for an essential element of [Rivett's] maintenance (i.e. her education) and it should be characterised as a payment being made "on behalf of" the custodial parent.'

(Reasons, para. 13)

The AAT also considered that the word 'received' should not be given a

narrow application so as to preclude moneys not paid directly into the hand of the [custodial] parent or dependant.

Formal decision

1. The decision under review was set aside.
2. The decision of the DSS to raise and recover a debt of \$1180.70 in respect of AUSTUDY paid to the respondent in the 1994 year, and the decision to pay AUSTUDY at a reduced rate in the 1995 year, were re-instated.

[M.A.N.]

Assets: land owned overseas; whether actual means test applicable

SECRETARY TO THE DEETYA
and D. & M. SLADE
(No. 11789)

Decided: 21 April 1997 by K.L. Beddoe.

Background

The respondents applied for AUSTUDY in 1996. Their applications were initially refused on the basis of the application of the actual means test (AMT), then were granted for a brief period as the respondents' mother held a Health Care Card. Eligibility was subsequently reviewed and again refused on the basis of the AMT. The family's actual means were found by the DEETYA to be \$49,073, in excess of the relevant thresholds for each child.

The issue

The respondents' mother owned real estate in Western Samoa, gifted to her by her father in 1975, and valued at \$AUD45,000.

The principal issue concerned whether the land in Western Samoa owned by the mother of the respondents should be deemed an 'asset' for the purposes of the application of the AMT and so the determination of eligibility for AUSTUDY.

The legislation

The AMT applies where a student has a 'designated parent'. This term is defined in Regulation 12L to mean a parent who (among other things) '... (b) has an interest in: (I) an asset located outside Australia ...'

Section 12K(1) of the *Student and Youth Assistance Act 1973* provides that

a student who has a designated parent is ineligible for Austudy unless the actual means of the parent is less than or equal to the after tax income of a notional parent.

Meaning of asset

The AAT accepted the evidence that the mother of the respondents was the owner of real estate in Western Samoa, and that the relevant property was not village land nor leased or subject to any charges to other persons. The AAT noted that 'asset' is not defined in the AUSTUDY Regulations for the purposes of regulation 12L, and concluded that an 'asset' should be construed as '...any proprietary right available for payment of debts ...': Reasons, para. 39. As such, an 'asset' would exclude an article having no commercial value, a right incapable of liquidation or conversion to the financial benefit of the owner, or a property subject to a charge or trust for the benefit of another person.

The AAT concluded that the respondents' mother did have an interest in an asset outside Australia — the land in Western Samoa — and was therefore a 'designated parent' for AUSTUDY purposes. In turn the application of the AMT to the family's situation was appropriate.

Treatment of loan

The AAT considered the evidence of the father of the respondents regarding the actual expenditures of the family for the calendar year 1996, and accepted that the family had lived beyond its means in that year and had survived by borrowing \$6000 and selling two motor vehicles. Noting that the purpose of the AMT was '...to establish the financial capacity of a family rather than have regard to the family's taxable income as assessed for taxation purposes', the AAT concluded that '...financial capacity is to be measured by the amount of expenditure and by the amount saved for the relevant year ...' and is '...not reflected in an amount borrowed but rather in the repayment of [any] loan': Reasons, para. 28. The AAT, therefore, reduced by \$6000 the family's total actual expenditure to reflect the amounts borrowed by the family during 1996. This brought the family's actual means below the relevant benchmark figures.

Formal decision

The AAT affirmed the decision of the SSAT that the Slades' actual means were less than the after tax income of a notional parent.

[P.A.S.]