cause the retirement plans of Feyer and her husband had been delayed by nine months. The Tribunal noted that while the economic loss may have been notional, Feyer suffered considerable inconvenience and distress as a result of the negligence of the DSS.

The AAT also considered the application of 'compensation for detriment caused by defective administration' (CDDA). The guidelines include the following:

> 'The Secretary may approve a compensation for detriment caused by defective administration (CDDA) payment subject to the limitations below after an application for compensation under Finance Direction 21/3 has been refused.'

In fact, paragraph 4.3200 of the Guide suggests that where a payment under Finance Direction 21/3 has been refused, alternative entitlements to compensation (CDDA or act of grace payments) should, as a matter of course, be considered by the delegate.

The AAT strongly recommended that the DSS consider favourably the making of a CDDA payment to Feyer.

Formal decision

The Tribunal affirmed the decision under review.

[A.B.]

Disability support pension: qualification not within 3 months of application

SECRETARY TO THE DSS and ANCIN-FERNANDEZ (No. 12704)

Decided: 12 March 1998 by D.W. Muller.

Background.

Ancin-Fernandez arrived in Australia in 1988 at the age of 33 years, had limited English and no qualifications. She undertook some house cleaning and child care work, and in February 1996 applied for disability support pension (DSP), claiming lumbar disc degeneration, headaches and pelvic adhesions. She was assessed as having a 10% impairment in respect of her back, but her other conditions were not rated and on 25 March 1998 her claim was rejected. On appeal to the SSAT, this decision was set aside.

Meanwhile, in May 1996 Ms Ancin-Fernandez underwent a laminectomy, which was not successful, and her back pain continued. She re-applied for the DSP on 8 January 1997 and was subsequently rated as having an impairment of 35%. Her health conditions at that time included back and neck pain since 1991, depression, a left wrist ganglion operated on in 1995, constant lumbar pain, right sciatica and pain in her left arm. Ancin-Fernandez was granted DSP with effect from 8 January 1997.

The law

It was not disputed that Ancin-Fernandez was qualified to receive DSP from January 1997 — the issue was whether she was qualified to receive payment with effect from the date of her first application in February 1996.

The relevant legislation is contained in s.100(3) of the *Social Security Act 1991*, which provides:

> 'If:
>
> (a) a person lodges a claim for a disability support pension; and
>
> (b) the person is not, on the day on which the claim is lodged, qualified for a disability support pension; and
>
> the person becomes qualified for a disability support pension sometime during the period of three months that starts immediately after the day on which the claim is lodged;
>
> the person's provisional commencement day is the first day on which the person is qualified for the pension . . . '

The provisional commencement day

The AAT accepted that Ancin-Fernandez' health had deteriorated during 1996 to the point where she qualified for the DSP by the time the SSAT heard her application in December of that year. However, to be qualified on her original application of 9 February 1996, the AAT held she would have to qualify within 3 months of that date — that is, on or before 9 May 1996. There being no evidence that she qualified between 9 February and 9 May 1996, the AAT set aside the decision of the SSAT.

Formal decision

The decision of the SSAT was set aside and, in lieu, the AAT determined that Ancin-Fernandez did not qualify for DSP on her application dated 9 February 1996.

[P.A.S.]

Student Assistance Decisions

AUSTUDY: actual means test

IARIA and SECRETARY TO THE DEETYA (No. 12679)

Decided: 5 March 1998 by S.M. Bullock.

Background

Caterina and Concetta Iaria applied for AUSTUDY for 1996. They were both studying at the University of Western Sydney but at different campuses. The DEETYA assessed a benchmark, for both Caterina and Concetta, for the notional family of the same size as the Iaria family to be $34,049. The DEETYA review officer assessed the Iarias' actual means to be $83,256. As a result Caterina and Concetta were not eligible for AUSTUDY in 1996. The family's actual means was reassessed in August 1997 to be $68,081.40.

The issues

Did the actual means test preclude Caterina and Concetta from being eligible to receive AUSTUDY in 1996? In particular, should certain expenditure be classified as business or investment related?

The legislation

The relevant regulations under the *Student and Youth Assistance Act 1973* are 12K, 12L, 12M and 12N. These regulations provide for an 'actual means test'. Regulation 12K provides that if a student has a parent who is a 'designated parent' he or she will not be entitled to receive living allowance unless the Secretary is satisfied that the 'actual means of the designated parent are less than, or equal

to the after tax income of a notional parent'. Regulation 12L sets out who is a designated parent and regulation 12M details what is the after tax income of a notional parent.

Regulation 12N(1) defines what are the 'actual means of a designated parent':

> 'For the purposes of subregulation 12K(1), the actual means of a designated parent for the period of eligibility are taken to be the total expenditure and savings made in that period by the parent and his or her family.'

Business or investment expenditure

There was no dispute between the parties. Mr Iaria was self-employed and a 'designated parent' for the purposes of the regulations. Similarly there was no dispute as to the benchmark figure assessed by the DEETYA.

The Iaria family's financial arrangements were complicated. The AAT heard evidence from Mrs and Mr Iaria, received written evidence from Mrs Iaria's accountant and heard evidence from the family's financial adviser. As well Mrs Iaria sought to reduce various items on the Actual Means Form. She argued that the family had experienced great financial difficulty in 1996 which caused the family to reduce its expenditure in 'many varied and quite drastic ways': Reasons, para. 45.

Mrs Iaria told the Tribunal that Mr and Mrs Iaria formed one part of a partnership with Mr Giuseppe Iaria in the company, Western Building Company Pty Ltd. During 1996, the family lived on money from a Westpac bank loan (mortgaged over the family home), part of which was being used by Western Building Company to renovate and develop a dual occupancy in the Gladesville/Ryde area. The property was completed and sold during 1996. Mrs Iaria argued that the work on the property was part of the business, and was not an investment. Consequently the expenditure associated with this development should not be included in the calculation of the actual means test. During Mrs Iaria's evidence, reference was made to, and financial accounts provided for Iaria Holdings, Western Building Company Unit Trust, and Iaria Family Trust.

Mr Iaria, in relation to the Ryde development, stated that he 'invested money in the scheme and it was a bad return'. In relation to Iaria Holdings, Mr Iaria said that the purpose was to legitimately minimise tax and income and to share profit amongst his family members.

The financial adviser described the financial arrangements surrounding the Ryde/Gladesville property development as in the nature of an 'investments style arrangement': Reasons, para. 41. The family's accountants wrote, 'monies borrowed personally by Mr and Mrs Iaria were used to finance business ventures': Reasons, para. 25.

The DEETYA submitted that the difficulty for the Iaria family was proving that certain amounts expended were spent on business expenses alone. The DEETYA referred to *The DEETYA and Marchant* (1997) 2(8) *SSR* 115 and *McMullen and Secretary to the DEETYA* (unreported).

The AAT concluded that the financial arrangements of the Iaria family were complex. Mr and Mrs Iaria were one half of a partnership in the Western Building Company. In existence also during 1996, was an entity called Iaria Holdings which Mr Iaria described as a useful tool to ensure tax minimisation. Also at the relevant time Mr Iaria was involved in the running of a restaurant. Mr and Mrs Iaria borrowed money from a variety of sources to fund the purchase and development of a dual occupancy property. The principal funding for this venture seems to have come from a loan from the Westpac Bank to Mr and Mrs Iaria who then, on their evidence, provided these funds to the Western Building Company. This loan also provided the family with funds to live during 1996. The AAT found that the expenditure listed on the Actual Means Form as relating to the Ryde property development cannot be properly regarded as business expenditure. Rather 'the expenditure was more in the nature of an investment activity': Reasons, para. 67.

In relation to other expenditure estimates listed in the AUSTUDY applications, the AAT considered them to be extremely low and unlikely to reflect:

> 'a true picture of a family of five. The Tribunal also finds it difficult to accept how the family could have managed on these estimated figures, given the loan repayments required of the family in addition to the running of a restaurant with all its associated costs.'

(Reasons, para. 68)

The AAT decided that the actual means of Mr and Mrs Iaria were not less than, or equal to, the after tax income of a notional parent and, as a result, Caterina and Concetta are not eligible for AUSTUDY in 1996.

Formal decision

The decision under review is affirmed

[M.A.N.]

AUSTUDY debt: administrative error

SECRETARY TO THE DEETYA and COWIE (No. 12741)

Decided: 20 January 1998 by W.J.F. Purcell.

Cowie's parents reconciled in September 1994. When she claimed AUSTUDY in 1995, Cowie estimated her parents' combined income for 1994-95 to be $20,500. This did not include sole parent pension paid to her mother from 1 July 1994 until she reconciled with her husband.

When claiming AUSTUDY in 1996, Cowie advised that her parent's combined taxable income for 1994-5 had been $26,597, and the DEETYA asked Cowie to repay $934.01. On review the SSAT waived the debt.

The law

Section 289(1) of the *Student and Youth Assistance Act 1973* (the Act) provides:

> 'The Secretary must waive the proportion of a debt that is attributable solely to administrative error made by the Commonwealth if the debtor received in good faith the payment or payments that gave rise to that proportion of the debt.'

The SSAT decision

Cowie had told the SSAT that when estimating her parents' 1994-95 income, she had referred to a DEETYA booklet entitled '*AUSTUDY 1995 A Guide to Student Finance*.' At page 39 the booklet stated:

> 'In some cases, however, AUSTUDY won't count the income of one of your parents. If one of your parents died or your parents were divorced or separated before 1 January 1995, and you are wholly or substantially dependent upon only one of them, you need to give details of only that parent's income.
>
> If you move from one parent's care to the other during the calendar year, or if one of your parents dies, you will be reassessed from the date of that change on the income of the parent caring for you.
>
> If your parent has a new partner and you normally live with them you will be assessed on both of their incomes for the 1993-94 financial year from the date the new relationship started.'

The SSAT took the view that Cowie had not made an error or contributed to an error which had caused the overpayment. It had occurred because the DEETYA gave inaccurate information in the booklet, and had not accessed the information on file that Cowie's mother had received a pension from July 1994 to September 1995. The SSAT concluded the overpayment was caused solely by administrative error.