Full-time work for a year or a semester

Gray argued that the word 'and' used between reg. 35(1)(a) and (b) was a co-ordinate conjunction. That is, the words in paragraphs (a) and (b) describe alternative tests and alternative periods. A student is required to satisfy only one of those tests to qualify for AUSTUDY. Gray submitted that if this were not so and the student had to satisfy the two tests, it would produce an absurd result. There would be no role for paragraph (a) because if a student had a 50% workload in each semester of the year, they would be working full-time. Also, a student would not know until the completion of the second semester that they were full-time throughout the year because it would only be at the completion of the second semester that the student would know that their workload for second semester had been 50%.

The DEETYA argued that the word 'and' had its normal cumulative meaning. That is, to be qualified for AUSTUDY, the student had to satisfy both tests. Otherwise, a student could complete the requirements for a full-time course in one semester, do nothing for the second but still receive the AUSTUDY. The DEETYA argued that reg. 35 acted as a definition section for reg. 34. To calculate a student's workload on a yearly basis would not give effect to reg. 34(1) that the student must study full time. Parliament's purpose was for a full-time student to work consistently over the entire year. The Regulations made specific provisions for when students became ill or for vacation periods. This supported the conclusion that the Regulations required the student to be in full-time study for the whole year. Regulation 35(1)(a) applied to those courses that were conducted over a year and were not divided into semesters.

According to Hill J, the Regulations lacked clarity and were ambiguous.

> The legislation and regulations made under it fulfil a socially desirable purpose. Education and the support of those who desire to undertake it are important to our society. The Regulations which have been adopted to flesh out the Act should not be given a narrow interpretation so as to defeat this social policy. But this having been said, the Regulations must be interpreted by reference to the Act and the context in which the Act was enacted.

(Reasons, para. 20)

The Court found that it was unlikely that the two requirements in reg. 35(1)(a) and (b) were there to prevent the possibility of a person completing a full-year course in one semester. Such a situation would be extremely rare given the requirements to complete assignments, sit examinations and attend the course throughout the year.

Hill J accepted that the word 'and' when it appears in legislation and joins two requirements, usually means that those requirements are cumulative. This is not always the case and will depend upon the particular context. The Courts will prefer a construction of a statute that does not render some words used by Parliament as superfluous. Hill J stated that the explanation for reg. 35(1)(a) and (b) is to be found in the context provided by the Act and the Regulations. Section 7 of the Act requires a student to be enrolled in a relevant course and either undertaking or proposing to undertake that course. There is a distinction between a student who is enrolled in a relevant institution for the whole year and a student who is enrolled for something less than a whole year. The distinction is also evident in reg. 35, which operates to define reg. 34. Regulation 34(1) requires a tertiary student to be studying full-time. Regulation 34(2), (3) and (4) then defines what is meant by full time in this context, and this is done by reference to the concept of a student workload. Regulation 35(3) refers to non-HECS courses that do not run for a full year. The workload is calculated by reference to semesters. Regulation 35(2) refers to full-year courses that are not HECS courses. This same distinction is apparent in reg. 35(1)(a) and (b).

> Para (1)(a) is directed to a course which is a full year course and stipulates a period that is the whole year. While para 1(b) does not say so expressly (it does, however, refer to 'a semester of a course') it would seem logical that it operate to give effect to the same dichotomy, being not applicable both to full year and part year courses, but rather applying to the case of a course which is not a full year course covered by para (1)(a). Where it applies, the period to be adopted is a semester.

(Reasons, para. 29)

Regulation 34 when defining what is meant by the requirement that a student study full-time, requires there to be found 'a period' as set out in reg. 35. Although words in the singular can be read in the plural, there would be difficulty in reading the words 'that period' in reg. 34 as 'those periods'. This would suggest that the regulation contemplated one, not two periods. Also, there is no sensible reason why students enrolled in HECS designated courses should be treated differently from those in non-HECS designated courses. If reg. 35(1) were to be interpreted the way the DEETYA proposed, then paragraph 35(1)(a) would be otiose.

To decide whether Gray is entitled to AUSTUDY in December 1996, it is first necessary to establish the course he is enrolled in. In this case it is a HECS designated course. It must then be determined whether the HECS course is a full-year course. If it is, then reg. 35(1)(a) will apply. It is then necessary to establish what the institution determines is the standard student workload. If the student is enrolled in subjects which amount to at least three-quarters of that standard student workload, the student will be entitled to AUSTUDY benefits providing the student undertakes those subjects.

Formal decision

The appeal by the DEETYA was dismissed.

[C.H.]

AUSTUDY: assets test

OVARI v SECRETARY TO THE DEETYA
(Federal Court of Australia)

Decided: 7 October 1999 by Gyles J.

The Ovaris, who are brothers, appealed against the AAT decision that they were not entitled to continue to receive AUSTUDY benefits in 1996 because of their parents' income.

The facts

The DEETYA rejected claims for AUSTUDY by the Ovaris in 1996 on the basis that their parents' means exceeded the means test limit. They sought review of that decision and the SSAT set aside the original decision and substituted a decision that the Ovaris were entitled to AUSTUDY. This decision was appealed to the AAT, but before it could be heard, the DEETYA varied its original decision so that the Ovaris' claim was rejected not only on the basis of their parents' means but also on the basis of their parents' assets.

The AAT reviewed the varied decision and decided that the Ovaris were not entitled to AUSTUDY in 1996 because of their parents' assets. The AAT found that the Ovaris had assets of just over $400,000 and so exceeded the limit of $393,750.

The law

The AUSTUDY Regulations define assets in reg. 14(1), as any kind of property

whether in Australia or elsewhere unless that property is expressly excluded. According to reg. 13(1A) the assets of the family included the assets of the student and the student's parents. Regulation 15 provided that the principal home was an excluded asset.

The principal home

The Ovaris lived in the family home in a suburb of Canberra. It was a four-bedroom, brick veneer home on a normal block of land. The AAT valued the property at $205,000. The DEETYA had found that 55.3% of the property should be regarded as not part of the principal home. This left the value of the principal home at just over $109,000 and the remainder as an asset. The AAT adopted this finding. It stated that because the Ovaris claimed 53.3% of the expenses associated with running the home as a tax deduction for running their business, 53.3% of the building was associated with the business and not the principal home.

Gyles J rejected this argument and stated that Regulation 15 does not allow for an apportionment of the value for the principal home. The definition of principal home was inclusive only and did not allow for division of the property.

> In my opinion, once a property is found to be the principal home of a relevant person, then no right or interest which that person has in that home is to be included in the person's assets for the purposes of the assets test. It is not to the point that business activities may be conducted from the home.

(Reasons, para. 12)

The Court noted that the claim for business expenses was under a separate statutory regime and did not apply to the AUSTUDY Regulations. Different considerations might apply if a person was living in a commercial building, which was also being used for a commercial enterprise. However, this was not the situation here.

Intra-family loan

Although it was not necessary, the Court went on to consider the further assets of the family. One was a loan from one member of the family to another member which had been included as part of the assets of the family. However, the liability for the loan was not included when valuing the assets. Regulation 14(4) includes in assets any money owed to a person but not any interest on that money. There does not seem to be any provision allowing for deduction for liabilities from assets.

The AAT had found that there was a partnership between the parents and the children. Gyles J noted that if this was so, there could be no loan but merely an advance from one partner to another which would be entered into the partnership accounts. The court then said:

> In the event, it seems to me that, to avoid absurdity, reg. 14(4) should be read as relating to money owed by any person other than a member of the family as defined by reg. 13(1A).

(Reasons, para. 21)

Averaging

The final point dealt with by the Court involved valuing assets over the whole year. Originally the Ovaris had claimed AUSTUDY in January 1996. The DEETYA had valued the assets of the family at that date. By the time the AAT came to value the assets it was 1997. The AAT decided to value the assets by averaging the assets over the total year. It arrived at one calculation for the value of the assets applicable for the whole year.

The court disagreed with this methodology, stating in para. 23 'there is simply no such thing as an average value of an asset over a year which is relevant to this statutory purpose'. The Court stated that the AAT should have valued the assets at the date the Ovaris claimed AUSTUDY. The parties would then need to decide when the assets needed to be revalued during the year according to how the asset values had changed.

Formal decision

The Federal Court set aside the decision of the AAT and substituted its decision that the Ovaris were each eligible for AUSTUDY in 1996.

[C.H.]

AUSTUDY: actual means test

SECRETARY TO THE DEETYA v POLMEER
(Federal Court of Australia)

Decided: 14 April 1999 by Dowsett J.

The DEETYA appealed against an AAT decision that when calculating the equivalent family income, the actual means of the family is taken to have been generated in equal proportions by both parents.

The facts

Aaron Polmeer was a student who received AUSTUDY in 1996. In November 1996 he lodged an application form to be paid AUSTUDY in 1997. His parents operated a business in partnership. For income tax purposes they split the income from their business between them. The family's actual expenditure for 1997 was $27,260. This meant their actual means was this amount, and the notional family benchmark for comparison was $29,804. When the appropriate formula was applied, the equivalent family income was $30,504.

The AAT decision

At the AAT Polmeer had argued that the equivalent family income for his family was incorrect because it was based on the premise that one person had generated the actual family means of the family. This meant that the tax component of the formula was higher than was actually the case. Because two people had generated the income, there were two tax thresholds.

The law

Regulations 12J, and 12K of the AUSTUDY Regulations provide that a student will not be entitled to receive AUSTUDY unless the actual means of the parent who was a designated parent, is less than the after-tax income of a notional parent. The term 'designated parent' is defined in reg. 12L and includes self-employed persons and a partner in a partnership.

Regulation 12M defines the 'after-tax income of a notional parent' and commences with the income which a parent could receive without disqualifying their child from AUSTUDY. To this is added a notional amount in respect of the cost of supporting dependent children and a notional amount for tax. A further sum is added representing family payments.

According to reg. 12K this notional figure is compared with the actual means of the designated parent to decide whether the student is qualified for AUSTUDY. In general terms the actual means are the total expenditure and savings made in the relevant period by the designated parent and the family (reg. 12K).

Once the student has qualified for AUSTUDY, it is necessary to calculate the rate payable. For the student of a designated parent the rate is calculated pursuant to reg. 87A which sets out a formula. One of the amounts to be calculated for use in the formula is 'T' which means:

> The amount of income tax (including Medicare levy, but before rebates, if any) that would notionally be payable by the parent to achieve an after-tax income of (AM-FP).

(Reasons, para. 8)

What is meant by 'T'

It was not in dispute that Polmeer's parents were designated parents and that he was