

EQUITABLE IDEA

INEQUITABLE STING

Gus Bernardi

The Actual Means Test falsely constructs a family's wealth base.

In late 1996 Senator Amanda Vanstone, Federal Minister for Employment, Education and Training, was questioned in the Senate as to the Actual Means Test (AMT). This test was the response of the Department of Employment, Education and Training (DEETYA) to requests for an equitable basis for targeting Austudy to those in need. It had been formulated under the Labor Government and was implemented by the incoming Liberal Government.

Senator Vanstone was confident of the AMT's effectiveness to stop income-rich families from gaining access to Austudy. In replying to questions about the AMT, Senator Vanstone asserted that it 'has been quite effective in catching out families about whom, I do not believe, if the circumstances were made public anyone would say, "yes, that family's children deserve Austudy"'.¹ At this point she presented the Senate with a 'real' family, which she referred to under the pseudonym the Wright Family, as an example of a welfare rort caught out by the effectiveness of the AMT. The story was taken up by the *Daily Telegraph* under the headline **Millionaires on Welfare** (25 September 1996). Senator Vanstone was to later admit that the Wright family was fictional and that she had inadvertently been misled by her Department.

This article traces how legislation designed to ensure that a public benefit in the form of an Austudy allowance would only go to those in most need came to operate against them.

If there is one lesson to be learnt from this saga it is that a system like DEETYA's AMT generates its own reality which subverts the 'real'.²

Background: Austudy's uncaught rort

Before the AMT, a student's eligibility for Austudy was based on three means tests: the assets test, income test and the student's own personal income. While the first operated as a sudden-death-cut-off, the second operated to gauge the quantum of eligible entitlement, and the student's personal income was also considered in determining the final entitlement. For instance, for a non-AMT applicant applying as a dependent student in 1997, if their family's net asset base was \$405,960 or less (excluding the family home), they proceeded to the income test where a family income of \$23,350 allowed for the maximum allowance, with a \$1.00 reduction for every \$4.00 over this family income, cutting off until the benefit cut out.

The assets and income tests had tight threshold levels in place. However, there was evidence indicating that some children from wealthy families were obtaining access to Austudy. In a study based on DEETYA's own Austudy database, Dr Bob Birrell found in 1994 that '36 per cent of the eligible age group attending private secondary schools were Austudy recipients, including 12 per cent of those attending the expensive category of such schools'.³ The problem which DEETYA was later to acknowledge, did not lie with the

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threshold levels (already stringent) but with the income tax laws on which the assets and income tests rested.

For most applicants whose families derived income solely from wages and salaries (PAYE taxpayers), the taxable income disclosed for Austudy purposes was a reliable indicator of the amount of money the family had at its disposal in a given year. This was not always the case when the family's income came from sources outside PAYE. In those circumstances, the *Income Tax Assessment Act* allowed for taxable income to be legally minimised through complex financial arrangements (for example, through loss declarations, trusts and private companies). Hence, on the assets and income tests, students from advantaged backgrounds were able to pass themselves off, on paper at least, as coming within the Austudy threshold levels.

The Actual Means Test: the rort trap

While the Regulations framing the AMT are complex, the idea behind it is straightforward. DEETYA realised the inadequacy of using income as defined by the tax system as an appropriate measurement of real income for non-PAYE applicants. The solution DEETYA presented is that for certain categories, referred to as 'designated', a better assessment of an applicant's actual means is not by income, but rather by looking at the other end of the money cycle — outgoings, or in the language of the AMT Regulations, the designated family's 'total expenditure and savings'⁴ for the Austudy year (1 January-31 December). Although the Regulations are unlimited in their definition of 'total expenditure/savings', DEETYA interpreted actual means as being 'the private or domestic expenditure and savings of all members of an assessable (designated) family in the year of study'.⁵ This extends to the applicant, the parents or spouse, and the applicant's siblings who are between the ages of 16 and 21.⁶ In effect, DEETYA requires a designated applicant to disclose, as accurately as possible, the family's incurred expenditure, and also to make an estimate of expected expenditure and savings for the year of Austudy.

The 'designated' category refers to parents of dependent students or partners of independent students who are either self-employed⁷ or have an interest in a trust, or an interest in an unlisted company or partnership or are in receipt of overseas assets and income. Business migrants are also included as 'designated'. From 1997, DEETYA has extended the test to include people earning exempt income (for taxation purposes) or who are involved in tax minimisation arrangements, and independent students (students without a partner and not dependent on their parents).

In seeking to extrapolate an actual means base from incurred and expected expenditure and savings throughout the Austudy year, the AMT requires complete disclosure from an applicant. Since data-matching tools are limited and imprecise, and to hedge against applicants underestimating their expenditure, the AMT Regulations allow departmental officers to make 'fair market' adjustments whenever a reasonable suspicion arises. To arrive at a 'fair market' value DEETYA is empowered to compare an applicant's disclosed expenditure figures with Australian Bureau of Statistics (ABS) data. If a significant discrepancy is found, the expenditure is adjusted accordingly.⁸ This extends to third party transactions 'engaged in by a person, other than the family member, for the benefit of a member of the family'.

The central mechanism for determining eligibility under the AMT provisions is one of comparison between the AMT

applicant, known as 'designated', and a fictional applicant, known as 'notional', who is to reflect the same circumstances as the designated applicant. It is the actual means of the notional applicant which become the benchmark for determining eligibility. This benchmark is structured and calculated according to a formula which is to reflect the after tax income of the notional family.⁹

If the actual means of the designated applicant's expenditure/savings falls within the notional family's after tax income, the student will then have their entitlement assessed. For 1996 applicants the determination of entitlement, if the family's actual means were below the benchmark, was not based on their family's actual means but on the parent's 1994/1995 taxable income.¹⁰ From 1997, the method for determining Austudy (if the family's actual means were below the benchmark figure) was tightened by determining entitlement by the family's expenditure as calculated by the AMT. To prevent the administration of this means test from having its officers spend time and resources tracing the sources of expenditure, and ascertaining whether the source came from debts, trust, assets, savings, or third-party gifts, DEETYA considered the source of expenditure as irrelevant (as with the Tax Department). According to DEETYA's estimates, the effectiveness of the AMT has brought a saving of 17.8 million in 1995, 27.6 million for 1996-97, and a predicted saving of 60.3 million for 1997-98.¹¹

On the surface, the AMT appeared to be an ingenious approach to closing a significant Austudy loophole. After two years of operation has the AMT 'caught' the 'millionaire Wright families'? It is one contention that the AMT has not caught millionaire students passing themselves off as income poor, but rather has attributed a high level of actual means to families in real need. This has occurred because of the AMT's flawed design and flawed method for establishing a designated family's actual means or expenditure/savings.

The AMT: creating its catch to trap

'Designated interest'

The AMT provisions do not specify the type of 'interest' which a designated parent, spouse or independent student must have in an overseas asset, a proprietary company, an unlisted public company, or a trust. To ascertain whether an applicant has such an 'interest', DEETYA has redefined the scope to include interests which may have no financial benefit for the person involved,¹² for example, a beneficiary under a will who derives a nominal benefit.

The AMT makes an assumption that having an 'interest' in a business structure, or being outside the PAYE tax regime, allows for greater manipulation of one's income. This might be the case where the commercial interest is generating income, but not where there is either no income, or there is a significant liability over the business, or where the commercial interest, in the form of a partnership or trust or company, is dormant. By treating the financial position of the commercial interest as irrelevant, the AMT penalises Austudy applicants who have a business interest from which they derive little or no income even though they are wholly, if not significantly, reliant for their major income on PAYE sources. Particularly affected are the majority of primary producers who are not sole traders (who are exempt) but in family partnerships or who fall within any of the other designated categories.¹³ Business migrants who are deemed 'designated' regardless of when they migrated are also unfairly targeted.

A real AMT example*

Brian is one of six children in the Smith family. Brian has been denied Austudy because of the AMT. The Smith family has six children. Both parents are in receipt of social security payments. Mr Smith is in receipt of job-search and Mrs Smith receives family and parenting allowances. On legal advice the Smiths set up a partnership after their marriage to preclude previous spouses from accessing their assets. According to DEETYA the benchmark for the family is \$33,799. However, their disclosed expenditure is \$36,560.

Included in the Smiths' expenditure was \$7,430 in the section 'other real estate expenditure' for a house which they currently rent out but have been trying, unsuccessfully, to sell for the past three years. All income received from the rental property goes to paying the mortgage on the rental property. Unlike families who use such arrangements as an investment, the Smith family, is burdened by the property. Quite clearly, if they were to lose their tenants their bank would have no option but to reclaim the property. They are also burdened by a substantial mortgage on their current residence.

How can the Smith family be deemed to merit public assistance by the Department of Social Security but not Austudy by DEETYA? The answer lies within the AMT's own design flaws, in particular: the definitions it provides for the category of 'designated', expenditure/savings, third party transactions; the manner in which it allows for ABS figures to be applied to an applicant's circumstances; and finally its calculation of the notional family's after tax income. Taken together, these AMT operations act to inequitably raise a family's actual means and so construct a material advantage where there is none, as with the Smiths.

* Thanks to the office of Peter Andrew MP for providing this example.

The undefined nature of actual means on 'total expenditure/savings'

The Regulations define actual means in an open-ended way. DEETYA has not added certainty to the problem. While publicly the Department's position is to include only personal expenditure/savings, its submissions before the Administrative Appeals Tribunal (AAT) demonstrate a legal inconsistency. In its submission in *Re DEETYA and Marchant* (1997) 2(8) SSR 115 it argued that if the ordinary meaning was given to 'total expenditure/savings', 'it would lead to manifestly absurd and unreasonable results'. However, in *Re DEETYA and Duscher* (1997) 2(7) SSR 101, and *Re Hammond and DEETYA* (unreported, 27 November 1996) it argued for the ordinary meaning to be given.

To add to the above uncertainty, the AAT accepted the ordinary meaning approach in *Marchant*, while accepting the personal/business distinction in *Duscher* and *Hammond*. Expenditure/saving is on the one hand given an unlimited ambit which can include expenditure/savings which provide no benefit to the family, and on the other, a more limited ambit where only personal but not business expenditure/savings is considered. However, even if this latter approach appears to be equitable it breaks down when a family's business expen-

diture is not so easily severable from its personal expenditure. This is particularly the case with primary producers. In one AAT case, a farmer was using the rental income of another property to hedge against the vagaries of primary production. The AAT, in accepting and applying DEETYA's definition of actual means, found that for an expenditure to be business in nature it must form a major activity of the business (*Re Van Doorn and Van Doorn unreported*, 11 December 1996). In this case, the rental income was taken as not forming a major activity despite the fact that it was used to sustain the family and the business against a drop in farm income.

Third party transactions which benefit a family member

While the Regulations require any third party transaction which brings a benefit to the applicant or member of their family to be declared, they provide no guideline as to what is meant by 'benefit'. Nor do they delimit the scope of a 'benefit'. With other definitions, DEETYA has arbitrarily moved the parameters to include third party transactions where expenditure is of a commercial nature which in any way fulfils a dual commercial and domestic purpose or enhances domestic lifestyle.¹⁴ Therefore, for example, gifts made by grandparents to the applicant's siblings who are aged over 16 are included. Scholarships received by the applicant or his/her siblings aged under or over 16 can also fall within the AMT.¹⁵

Source of expenditure irrelevant

By treating the source behind the expenditure as irrelevant the AMT calculates welfare benefits (including Austudy), either incurred or expected, as part of a family's actual means which is a measurement of a family's wealth. This result did not escape Natasha Stott Despoja, Democrat spokesperson on education, who observed that 'in putting the test together, the Coalition has taken a leaf out of catch-22. If you are poor enough to receive Austudy, you logically include this in your estimates; yet if you do, you are likely to be denied Austudy because it will push you over the computer's benchmark. It is ludicrous' (*SMH*, 6 February 1997). This unsatisfactory situation was corrected in late 1996¹⁶ but it was not till late March 1997 that Senator Vanstone ensured that the AMT guidelines acted in accord with the AAT finding.

By disregarding the source of expenditure, the AMT inequitably penalises applicants who have had to supplement their income with debt. The AMT assumes that since debt shows a capacity to afford a good or service it is indicative of wealth. In reality expenditure and income rarely balance. Given the vagaries of modern living most people find that while their income is fluctuating from year to year, their expenditure must be maintained at a relatively constant level to meet day-to-day living costs. The difference between income and expenditure is usually covered over by debt (e.g. loans, overdrafts or mortgage repayments over the principal home). A loan taken out by a farmer to supplement a child's education is treated by DEETYA as an expense. That a debt can be included in a family's actual means has been affirmed in the AAT where a small business person who had an income of \$10,691, but a debt of just under \$40,000, which had been secured over the family home so as to sustain the running of his business, was assessed as having a total expenditure/savings of over \$50,000. This resulted in his son being refused Austudy (*Van Doorn*).

By treating debts as contributing to a family's actual means, the AMT provisions have no mechanism for prevent-

ing 'double accounting' (calculating both the principal loan and its repayments). DEETYA's 1996 Policy Manual was silent on this issue. It was not until March 1997, that a guideline was issued which arbitrarily differentiated between capital and consumer goods and services. Thus where a loan is for the principal family home, expenditure for the year of the AMT is the repayment. For other loans the expenditure is the purchase price paid for the year of the AMT. The AMT Regulations also fail to provide any guideline on the apportionment of an expense. DEETYA's response is to disallow the apportionment of an item over more than one year.¹⁷ For example, if a car cost \$10,000 and it was claimed that it will have a useful life of five years, one-fifth (i.e. \$2000) as expenditure could not be claimed for the current year.

Use of ABS figures

Since the AMT relies on applicants' honesty, DEETYA was concerned that people would respond to the AMT by 'salami slicing' their actual means, that is, by revising their expenditure downward, once they realised they needed to get below the benchmark. While, as noted, the Regulations, require the Department to attribute a 'fair market' value where there is 'reasonable suspicion' that the expenditure is understated, they provide no mechanism for doing so. In devising a means for countering 'salami slicing' the Department relies on ABS data. An applicant's expenditure details are automatically compared by computer with average household expenditure data. Where there was a significant discrepancy the Department imputed or substituted the disclosed expenditure for a 'corrected' version. Such an approach was indifferent to the applicant's particular circumstances, and failed to take into account a drop in the family's expenses throughout the year.¹⁸ Thus in one example, a family with a gross parental income of \$30,500 had their expenditure revised by the Department to \$62,000. In late March 1997, new guidelines were issued to cease the automatic use of ABS data to revise an applicant's disclosed expenditure figures, but only, in 'the first instance'.

The notional formula

The notional formula which determines the benchmark on which eligibility is determined is, according to DEETYA, a 'fair and objectively measurable benchmark against which to assess a designated family's entitlement to Austudy'.¹⁹ However, while the Regulations were amended to allow for the Medicare Levy to be included in the calculation of the notional after tax income from 1997, DEETYA excludes from this calculation Department of Social Security rent assistance, guardian allowance, taxable income from the students themselves, and the taxable income from any sibling aged 16 or over. Further, this tax base only allows for \$610 in family payments for each dependent child, which does not accommodate families in the position of the Smith family which receives \$5000 in family payments for their four dependent children under the age of 16 (see boxed insert).

The Regulations also do not stipulate the manner in which the notional tax base is to be calculated. A solicitor and member of the Social Security Appeals Tribunal (SSAT) observed to me that while the Taxation Department allows for income splitting, DEETYA, in seeking to maintain a high benchmark, treats this tax component as the income of one person. Moreover, the notional formula compares two different variables. The basis of the estimate for the designated parent is on future expenditure. The basis for a notional parent is on income which is determined by an income tax



assessment. In other words, 'a comparison is attempted between the future expenses which are indefinite and vague and an actual amount which is easily proven by the production of an income tax assessment notice. The latter necessarily is evidence of income received at least six and up to 18 months beforehand'.²⁰

DEETYA and the coming of the AMT storm

As early as November 1996, an internal DSS review of the scheme concluded it to be illegal.²¹ The extent of the AMT problems and the inability of DEETYA to resolve them is highlighted by the Department's inability to finalise AMT guidelines for 1997. With recourse only to draft guidelines, DEETYA officials were exercising their discretion within an administrative framework which did not promote consistency and correctness. Since the draft AMT guidelines were not available to the public, students and their representatives, found it difficult to assess the legality of DEETYA's administrative determinations.

The AMT case file continued to expand. In 1997 over 115,000 students were affected by AMT determinations. Given this, it was to be only a matter of time before student advisers from the various university campuses began to raise concerns over the operation of the AMT. The Student Financial Advisers Network was amazed, after obtaining confirmation from a DEETYA official, to find that the AMT would only disregard HECS if it was deferred. On the issue of imputing ABS values, Donna Baines, from the Students Representative Council, University of Sydney, asked 'would it be the student/family's responsibility to establish they are exceptionally thrifty or perhaps good at growing their own food?'.²² The cases were showing that a significant number of students who did not have the actual means, in real terms, to survive without Austudy, were now being penalised because their partners or spouse were connected to a paper entity. Things became even more Kafkaesque when DEETYA requested and encouraged the National Union of Students through its regional students representative councils to forward their submissions detailing concerns with case examples of AMT inequities.

Tony Abbot MP, Secretary to Senator Vanstone, in response to community concerns, acknowledged that there were problems with how the AMT calculated a family's actual means, but blamed the previous Labor Government for failing to 'appreciate the administrative complexity of the scheme'. He added 'to meet our pre-election commitment, Minister Vanstone has initiated a review of the operation of the Actual Means Test'. In response, DEETYA commis-

sioned the Federal Ombudsman to report on the operation of the AMT. The report and its recommendations have not been made public.

Concerns over the AMT were also raised by certain SSAT members who observed that the poor drafting of the AMT had given rise to a host of anomalies which 'would be laughable were it not for the fact that it is impacting so adversely on hard-pressed families'.²³

Inundated by complaints from farmers, politicians were finding that an esoteric piece of legislation was becoming politically explosive. Julie Austen, Assistant Director of the National Farmers' Federation, had already brought to the attention of Senator Vanstone and Tony Abbot the havoc which the AMT was causing to primary producers. David Hawker, Liberal Member for Wannan, Victoria, announced that he would lobby his government to get a fairer Austudy deal for country families. Noting that country people are two-thirds less likely to receive a tertiary education, he deplored how the AMT provisions were denying ordinary Australians assistance for their children's tertiary education. Similar concerns were voiced by Queensland MP Bill Taylor, and National Party MP Paul Neville, and by non-coalition politicians, such as, the Independent Member for Calare NSW, Peter Andren, and Democrat spokesperson for Education, Natasha Stott Despoja.

It was not long before the AMT was too contentious an issue to be ignored by Minister Vanstone. In light of the criticisms, she conceded that there were 'some complaints' about the AMT, and though there had been 'some problems' her Department was 'trying to fix them'. She instructed her Department not to address the legal issues behind the public reaction, but rather to deploy additional telephone advisers to assist students and their parents to fill in their forms correctly. The pressure to take decisive action intensified with the NSW Farmers Federation calling on Senator Vanstone to scrap the AMT (*SMH*, 18 February 1997).

The National Party, including Deputy Prime Minister Fischer, called for a review of the scheme. In tracing these developments, political reporter Glenn Milne of the *Australian* observed (17 February 1997) that John Howard was personally confronted with the effects that the AMT was having on regional families by Bill Taylor. Milne notes, that 'Howard was sufficiently impressed to set up another meeting between Vanstone and backbenchers dedicated to Austudy alone'. At that meeting, one staffer described Vanstone as 'audibly groaning'. She accused her fellow country MPs of being lazy by shifting the Austudy problem to her rather than dealing with it at a local level. Further, she declared that the Austudy matter was a 'non-problem'. Such dismissive remarks fuelled a strong backbench reaction with serious calls for a limited ministerial reshuffle to have Senator Vanstone replaced.

Two days after this meeting Senator Vanstone bowed to intense backbench pressure. In her press release she admitted that a bureaucratic bungle had occurred and apologised for the Department 'getting it wrong'. Kate Hannon, the reporter covering this admission said Coalition backbenchers reported a rural backlash with over 60,000 students having called the AMT hotline because they were confused by the rules (*Daily Telegraph*, 1 February 1997).

In streamlining the guidelines by which the AMT is applied Senator Vanstone's action resolved certain glaring administrative inequities. Anticipated Austudy was not to be included as an expenditure. Applications which had been

amended by the applicant when incorrect information had been inadvertently reported were to be accepted. However, the approach which DEETYA was to take on loans²⁴ and the use of ABS figures to impute expenditure when underestimated was less clear.²⁵

The AMT aftermath

The new directives issued by Senator Vanstone appear to have achieved their purpose: the impending storm has abated for the media and for certain politicians. Yet the problems which have been canvassed remain. In not considering what lies behind 'expenditure', the AMT falsely constructs a family's wealth base.

At the time of writing this article DEETYA is yet to release its final version of the 1997 Policy Guidelines for the AMT. The implications are serious. How is the public to know on what grounds the AMT is assessed? How are departmental officers to know on what grounds to exercise their discretion since the Regulations do not define 'expenditure/savings'? Professor Carney questions the legality of DEETYA's interpretation of expenditure as being 'personal', and not 'business' for AMT purposes. Although the AAT has not challenged this approach, this may not be the case if challenged in the Federal Court.²⁶

Conclusion

It is undeniable that the Austudy Regulations before the introduction of the AMT allowed for a benefit designed for the disadvantaged to be exploited by those best able to manipulate their paper income. The AMT sought to stop this rort. However, the AMT was poorly drafted so that the test worked in reverse to income tax minimisation schemes. Where the latter seek to create a paper fiction of real need, the AMT operates to create a paper fiction of real wealth. Both approaches fail to arrive at a 'real' wealth base on which to base determinations for Austudy entitlement.

Moreover, the administration of the test by DEETYA highlights DEETYA's disregard for Austudy recipients. The drafting itself was legally inept. The implementation of the AMT showed a cavalier attitude. The legal basis for using ABS figures to hedge against 'salami slicing', together with the definition of expenditure along a personal/business axis was based on doubtful legal grounds.

The situation has been compounded by DEETYA's disregard for SSAT and DSS legal opinion which had alerted it to the underlying AMT problems. Though the Department did move to have the Regulations changed in mid-1996, the changes were cosmetic, leaving the underlying problems unchanged. Further, the submissions which the Department itself requested from student representative groups and other concerned parties, such as the Federal Farmers' Federation were not taken up. Instead, the Department sought to avoid addressing the problem through a combination of secrecy and by specious legal argument against a group which it knew had insufficient resources to challenge its authority.

Mounting case evidence exposed the inequities which the AMT was generating. DEETYA continued to press on regardless presenting the AMT as an effective and fair method for determining whether non-PAYE applicants had hidden wealth. It took a public and political campaign, mainly from rural Australia, to have Senator Vanstone openly admit that something was wrong. However, a brilliantly staged 'back-down' was no more than a side step. The AMT remains with its core mechanisms unchanged.

The Department is unrepentant. Applicants are still being told that their debt means that they have access to greater wealth. If you were to think that the AMT saga has left DEETYA embarrassed by its incompetence, think again, for the AMT is now being touted as a wonder welfare rort catcher. There is even the suggestion that the AMT be adopted by the Department of Social Security.

References

- Senate Estimates Committee Hansard, 23 September 1996.
- For an examination of how administrative systems generate their own reality see Saul, John Ralston, *Bastards: The Dictatorship of Reason*, Penguin, 1992.
- 'Austudy Dependence Amongst Students in Australia', (1994) 2(4) *People and Place*.
- Statutory Rules 1995 No.132 Austudy Regulations (Amendment) 8 June 1995 Subreg. 12N(1); 12U.
- The Actual Means Test, AUSTUDY — 1997. The Actual means Test Explained', DEETYA, p.7.
- Originally the expenditure of an applicant's brother(s)/sister(s) from the age of 16 to 21 was caught by the AMT without any regard to whether this expenditure/savings was from earnings outside the family unit. Under Statutory Rules No. 245 Austudy Regulations (Amendment) Subreg. 12N(1A) and (1B), 12(1A) and (1B), 12ZA(2) and (3), this gross inequity was rectified to a degree by excluding from a family's actual means expenditure and savings earned from income of a students siblings aged 16 and over from employment outside the family and its business structures, and maintenance paid by a designated parent, spouse or student and boarding costs incurred by isolated families (up to \$5274).
- In 1996 DEETYA exempted primary producers who were obtaining Drought Relief Payment or on a Farm Household Support Scheme. This exemption was to be inserted in Statutory Rules N.245, Subreg 12G(1)(b) and (c).
- 'AMT Imputation Data — A Brief Overview' from the Social Security Administrative Appeals Tribunal, Student Assistance: Actual Means Test — Issue Folder No.8.
- The benchmark formula for the notional family is $[(PI + DC) - T] + FP$ where: *PI* means the maximum income of the notional parent; *DC* means the total amount of any deductions for children of that notional parent that under regulation 87 would be applicable; *T* means the amount of income tax (before rebates, if any) that would notionally be assessable on $(PI + DC)$; this was to include the Medicare levy from 1997 (Austudy Regulations Statutory Rules N.245 Austudy Regulations (Amendment) Subreg 12M, 12T, 12Z); and *FP* means the total amount of family payment (at the maximum rate) that would be paid under Part 2.17 of the *Social Security Act 1991* in respect of the children of the notional parent. Subregs 12M; 12T; 12Z; 12ZE provide similar formulas for the after tax income for the notional spouse, and independent student without a spouse.
- DEETYA's 1996 Austudy 'Policy Manual', Ch 11, 'How the Actual Means Test Works (issued 26.10.96) p.137.
- 1995-96 Budget Statement, Budget Paper No.1, p.88 and 1996-97 Budget Statement, Budget Paper No.1, p.88.
- DEETYA in its 1996 Austudy 'Policy Manual', ref. 10 above, interpreted 'interest' to include express or declared trusts, presumed or implied trusts, a non-discretionary trust, and discretionary trust p.134. This interpretation further included beneficiaries of named trusts, a trustee of a deceased estate under a will. SSAT, ref. 8 above.
- As to whether the operation of the exemption provided in sub-reg 12L(d) in conjunction to sub-reg 19(2) operates to exclude primary producers who also have partnerships, in *DEETYA and Marchant* (2 December 1996 Adelaide S96/200) the AAT held that 12L(1) defines a designated person by alternatives. Julie Austen, Assistant Director of the National Farmers' Federation in her submission to Senator Vanstone observed '80 per cent of dairy and broadacre farm businesses are family owned partnerships, while sole traders comprise only 11 per cent of the industry. Given that the partners are most likely to be parents in the family unit trying to support and educate the children, there is inconsistency in the different treatment of farm business structures.' The Federation further observes that 'partnerships in farming are established primarily to reflect the division of labour and investment; the return on that labour and investment; and the high levels of capital required to operate a farm. Their objective is not to avoid tax.' Unpublished Submission 24.2.97.
- DEETYA, ref 10, above. Such third party transactions included: rent fee accommodation provided by a relative; goods and services provided by barter or cash in hand by, for example, family company shareholders, i.e. grandparents; vehicles owned, leased or rented by third parties (e.g. companies or trusts) on behalf of any assessable family, and vehicles provided for business and private use by an employer (e.g. as part of an employee's salary package); school fees paid by a family trust, grandparent or employer as a fringe benefit were to be included in full; investments maintained by third parties on behalf of assessable family members.
- In 1996, without any statutory basis for doing so, DEETYA excluded from the AMT bona fide gifts from third parties given solely for education purposes, not exceeding in full-year terms \$6000 for students within the family, other than, the student applying for Austudy. This also extended to scholarships or fees waived because of hardship: DEETYA's 'Austudy Policy Manual', ref 10, above, p.148. In 1997 DEETYA allowed for no concession made for gifts for educational purposes: SSAT, ref.8, above, p.4. In *Duscher*, DEETYA had taken a scholarship awarded to the applicant's sister as not coming within the AMT. Yet, while accepting this approach as a commonsense approach the AAT noted, that there is 'however, a real question whether that amount should be regarded as having been expended by the family within the meaning of 12N(3)', that is whether a scholarship can be described as a 'transaction engaged in by a person'.
- In *Duscher* while DEETYA submitted that expected Austudy was not taken into account as they were not expended, it argued, that the Austudy supplementary loan should be taken into account. In this case Amanda Duscher's sister Angela had taken out the \$7980 Austudy Supplementary loan. DEETYA had calculated this loan into the family's actual means. On this point the AAT while accepting DEETYA's argument that the source of expenditure is irrelevant for the AMT, held that both expected Austudy and the Austudy Supplementary Loan are not to be factored into expenditure, nor repayments made on the Austudy Supplementary Loan.
- In *Duscher* the AAT found that the Regulations fail to differentiate between loan repayments and the principal loan, therefore allowing for double dipping. However, it accepted DEETYA's approach which was to take the principal and not the repayments on a loan that related to education. Yet, the AAT added, that 'whether or not it accords with the Regulations is a different matter'.
- Such an exercise of discretion raises the issue of whether DEETYA is acting *ultra vires*. In *Green v Daniels* (1977) 51 ALJR 463-470, the High Court held that before a departmental official exercises their discretion they 'must be satisfied that the circumstances exist to which of these criteria refer', in other words, that the official apply the guidelines in light of the applicant's circumstances. The issue has been left unresolved before the AAT. In *Re DEETYA and Kylie Martin and Matthew Martin*, 9 December 1996, the household expenses as provided by the family amounted to \$100 a week: \$60 for food and \$40 for household expenses with no expenditure on clothing, videos or magazines. The Department had provided ABS figures for the minimum living expenses for a family of three. The AAT accepted the ABS figures on the ground that 'although this amount is below the average it is not so far below that it is unrealistic. It is noted that in 1996 DEETYA calculated expenditure details by arbitrarily allotting Current Market Values for each expenditure item (principal home, investments, vehicles, education, living expenses). For example, a CMV of 2.5% over the family home was taken as the family's expenditure for this item. However, the calculation did not consider whether the family home was owned outright, burdened with a mortgage, or leased. This again raises the issue as per *Green v Daniels*.
- DEETYA's Policy Manual 1996, ref. 10, above, p.136.
- Personal Communication from Stephen Hodgers an SSAT Member.
- Senator Kim Carr (ALP) asked for the report to be tabled in parliament but Senator Vanstone refused: see Senate Hansard, 4 March 1997, pp.1059-62. The conclusions of the report were leaked and published in the *Age* on 3 March 1997.
- Student Austudy adviser. Unpublished Submission to DEETYA on AMT Review dated 18.6.96.
- From transcript of interview with Prof. Terry Carney on ABC 7.30 Report 4.2.97. Also *Australian*, 6 February 1997.
- The changes do not assist cases such as *Hammond* and *Van Doorn*.
- While the new directive to have DEETYA accept an applicant's expenditure is commendable, it is ambiguous, since it only refers to the 'first instance'. In other words, where the Department believes that the expenditure figure is too low it may yet again impute figures but this time at the review stage.
- Personal communication.