

the debts of pensioners to whom they may owe money. Neither the existence of the debt alleged to arise between the pensioner and the DSS nor the debt alleged to arise between the third party and the pensioner need be proved in Court.

Sub-section (7) also presents difficulties. It provides:

'Where, apart from this sub-section, money is not due or repayable on demand to a person unless a condition is fulfilled, the money shall be taken, for the purposes of this section, to be due or repayable on demand, as the case may be, notwithstanding that the condition has not been fulfilled.'

This would seem to allow the DSS to require a third party to pay it money which will only become due to the pensioner on the fulfilment of a condition. This is an extraordinary provision. Perhaps it empowers the Department to recover a gambling 'debt' before the horse wins or the lottery is drawn! Clearly, there needs to be some clarification as to the meaning of the term 'condition' in this provision and what types of situations might be covered by the provision.

While the DSS does need the power to recover overpayments these new provisions appear to go too far in protecting the DSS at the expense of the pensioner and any person who has a financial connection with a

pensioner. In effect the provisions place the DSS outside the well worked out procedures for the recovery of debts that aim to protect all parties in the matter.

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Legislation

The *Social Security and Veterans' Entitlements Amendment Bill 1987* gives effect to the changes announced in the May economic statement. The Bill includes the following changes to the *Social Security Act*:

- section 23 is to be replaced with a new explanation of permanent incapacity for work in relation to invalid pension. A person is now to be regarded as permanently incapacitated for work if the degree of incapacity is not less than 85% and at least 50% of that permanent incapacity is directly caused by a permanent physical or mental impairment of the person.

This amendment appears to be directed to the problem of to what extent non-medical factors should be considered when determining permanent incapacity. The new criteria will arguably make it more difficult to qualify for invalid pension where non-medical factors play an important part in causing the incapacity.

- the introduction of an income test for family allowance. The allowance will be affected for those people whose income exceeds the income threshold of \$50,000.

- the period of postponement of unemployment benefit will be increased to 13 weeks where the person is unmarried, under 21 and has ceased undertaking a full time course of education, after 1 September 1987. This provision does not apply to a person who has been at any time in full-time employment for a total period of not less than 13 weeks. Persons over 21 who leave full-time study must wait six weeks for unemployment benefit.

- a new s.135TD empowers the Secretary to recover debts due to pensioners from third parties. A fine of \$2,000 or one year's imprisonment or both or a fine of \$10,000 for corporations may be imposed for non-compliance with a notice served under this section.

- a new s.135TF empowers the Secretary 'for the purposes of the Act' to require a person to provide the DSS with such information or documents as the Secretary requires, or to appear before a DSS officer at a specified time and place to answer questions. This power to gather information specifically includes the power to require persons employed in Commonwealth or State government departments or authorities to provide information.

- overpayments not repaid within three months and that exceed \$50 shall incur an additional amount (up to \$515) calculated by adding \$15 plus 10% of the debt remaining after three months.

- to qualify for supporting parent's benefit the person must now have a 'dependent child under the age of 16 years'.

- a new s.17(4) empowers the Secretary to divulge information acquired by the DSS to any person, including other government authorities, where the Secretary certifies that it is necessary in the public interest to do so in a particular case or in a class of cases.

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Opinion

Definitional issues feature in this issue of the *Reporter*. In *Williams* the AAT determined that a medical condition was either 'temporary', in which case it qualified the person for sickness benefit, or 'permanent', where the person became eligible for invalid pension. There was no halfway house of 'indefinite' conditions under this scheme. Indeed, an indefinite medical condition was more properly described as a permanent condition.

In *Mahfouz* the applicant was claiming family allowance for a period spent overseas. The AAT had to decide whether the absence of the applicant and his family from Australia was 'temporary' or 'permanent'. The Tribunal referred to the Federal Court decision in *Hafza* where it was noted that a temporary absence could become an indefinite although not a permanent absence. Although arguably a sensible conclusion was reached in *Mahfouz* the inconsistency in the reasoning when contrasted with the meaning given to 'permanent' in *Williams* is apparent. The legalistic response that they are concerned with different issues bears little credence. Rather, this illustrates the problem with eligibility criteria that rely upon strict notions such as 'permanent' or 'temporary'.

In *Read* the Federal Court decided that the definition of 'income' in s.6(1) of the *Social Security Act* included 'capital'. The distinction

between income and capital receipts which exists in income tax law was not part of the definition in that section. This was followed in *Zolotenki* where a war restitution payment was regarded as income for the purposes of the Act. A similar decision was reached in *Kelleners*.

In *Nemaz* the AAT decided that an Italian social security pension was 'income' under the *Social Security Act*. That pension was from a contributory fund although the payments related to the person's wages rather than their contributions. In *Evans* a United Kingdom war disability pension which was designed to compensate the recipient for interference with normal living was regarded as 'income', following the Federal Court decision in *Read*.

The arbitrary nature of the DSS guideline which assumes a 2.5% annual rate of income from property for the purposes of the assets test received some criticism from the AAT in *Cahoon* and *Allman*. In the latter decision the Tribunal referred to Farm Survey Reports produced by the Bureau of Agricultural Economics which indicated anything but a 2.5% return in certain areas of farming activity. Given the comments in that decision one wonders whether the 2.5% guideline should be replaced by more flexible and relevant criteria.

B.S.

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