# Background

## Waiver of debts — the discretion confined

Sub-section 1237(1) *Social Security Act* 1991 (Cth) empowers the Secretary, DSS to write off and to waive the Commonwealth's right to recover a debt that is payable under the Act. The difference between waiving a debt and writing it off is that waiver expunges the debt, while write off is a book entry recording that the debt is not presently recoverable for practical reasons. Waiver is a permanent bar to recovery, while writing off a debt does not affect the right of the DSS to recover the debt. (This power was previously contained in s.251(1) of the *Social Security Act* 1947.)

Section 1237(3) of the 1991 Act contains a counterpart provision to s.251(1A) and (1B) of the repealed *Social Security Act* 1947 giving the Minister for Social Security power to give directions relating to the exercise of the Secretary's power to waive debts, and requiring the Secretary to act in accordance with any directions of the Minister 'from time to time in force'. Since the SSAT and the AAT on review exercise the powers and discretions of the Secretary, the tribunals are also bound to exercise their discretion in accordance with the directions.

**The 1991 Notice**

No directions were issued under the 1947 Act, although the process of drafting and consultation was set in motion. In June 1990 the Senate Standing Committee on Legal and Constitutional Affairs completed its report entitled 'Debt Recovery Under the Social Security Act and the Veterans' Entitlement Act'. On 8 July 1991 the Minister for Social Security, Senator Graham Richardson, issued a Notice under sub-section 1237(3). The Notice was notified in the Government Gazette on 24 July 1991 and came into operation on that date.

The question of whether the Notice improperly fettered the tribunals and the courts in their ability to develop and apply their own criteria for waiver concerned the Australian Democrats who on 6 November 1991 unsuccessfully moved in the Senate to disallow the Notice. (Section 1237(3) provides that the Minister's directions are a disallowable instrument, which makes them subject to tabling and disallowance in Parliament.) The disallowance motion was not suppported by the government or coalition and was defeated.

The Minister's Notice limits the discretion of the Secretary and the tribunals in respect to waiver of debts arising under the *Social Security Act* and also debts arising under certain other Commonwealth Acts and Schemes (such as Austudy) which the DSS seeks to recover out of the debtor's current social security payments. It does not affect the discretion to write off debts.

The Notice is in 2 parts. The Notice proper starts with a preamble identifying considerations to which the Minister had regard in giving the Direction. Then follows at paras (a) to (g) an exclusive list of 7 classes of debts which may be waived. The second part comprises a schedule to the Notice, and identifies 2 types of debt which must be waived. These are certain debts of less than $200, and debts which arose due to an under-estimate, made in good faith, of the value of assessable assets the value of which was not readily ascertainable.

**Are the directions valid?**

There is an issue as to whether the Minister's power to give directions extends to the partial prohibition of the exercise of the waiver discretion conferred by Parliament upon the Secretary and the tribunals. The Notice purports to limit that discretion to the 7 specified categories of cases.

The difference between regulating a discretion and fettering it was discussed in *Re Drake and Minister of Immigration and Ethnic Affairs (No. 2)* 2 ALD 634, where the AAT said:

> 'There is a distinction between an unlawful policy which creates a fetter purporting to limit the range of discretion conferred by a statute, and a lawful policy which leaves the range of discretion intact while guiding the exercise of the power' (Brennan J., at 640)

If the Minister had prohibited waiver entirely, the directions would have been invalid, because a statutory power to regulate an action does not authorise its total prohibition (*Swan Hill Corp v. Bradbury* (1937) 56 CLR 757). Partial prohibition is not necessarily inconsistent with a power to regulate; its validity depends on the matter to be regulated and the nature of the partial prohibition (*Blyth District Hospital v S.A. Health Commission* 17 ALD 135, per King C.J., at 140).

It is relevant that the final category in para. (g) is open-ended, allowing the discretion to operate in exceptional cases not falling within the preceding paragraphs. It is not so much the existence of a policy excluding certain cases that is objectionable, but the overly rigid adherence to the policy without regard to the merits of individual cases (*British Oxygen Co. Ltd v Board of Trade* [1971] AC 610). The existence of the final exceptional category goes a considerable way towards satisfying that objection.

**Must the specified debts be waived?**

In relation to the 7 classes of debts listed in the Notice proper, the Minister directs that 'the power . . . to waive . . . must . . . be exercised in the following circumstances only'. On one reading this may mean that, once the specified circumstances are found to exist, there is no residual discretion not to waive (as the Federal Court said in *Beadle* (1985) 26 *SSR* 321 of the repealed ss.102(1) and 105R of the 1947 Act). If the Minister had wished to confine waiver to the designated classes of case while leaving a discretion not to waive even in those cases, he could have achieved that result by substituting 'may' for 'must' in the Direction.

A difficulty with this reading is that it blurs the distinction between the debts dealt with in the Notice proper and those in the Schedule that 'must be waived'. Furthermore, the subject to which 'must' refers is not the Secretary, but the Secretary's waiver power. No person is directed to do or refrain from doing any act.

A preferable interpretation of the Direction is that 'must' qualifies 'only' and does not require that any case falling within paras (a) to (g) necessarily be waived. It is suggested therefore that the Direction should be read as meaning that the Secretary's power to waive *may* be exercised in the specified classes of case and in those classes of case only. The decision-maker therefore has a residual discretion not to waive a debt even if it falls within one or more of paras (a) to (g).

**How does the notice narrow the discretion?**

The 1983 Federal Court decision of *Hales* (1983) 47 ALR 281 is most often cited as the source of the criteria for exercise of the waiver discretion prior to the Notice. In *Ward* (1985) 7 ALN N66 the AAT distilled 7 considerations from *Hales*:

1) The fact that the applicant had received public monies to which he or she was not entitled;
2) the way in which overpayment arose, whether as a result of innocent mistake or fraud;
3) the financial circumstances of the prospective defendant;
4) the prospect of recovery;
5) whether a compromise is offered;
6) whether recovery should be delayed if there is a prospect that the circumstances of the person who received the overpayment may improve; and
7) compassionate considerations and the fact that the Act is social welfare legislation and any financial hardship which may result from an action for recovery must be considered.

The Notice substitutes for the multi-factor approach in *Hales* a checklist of independently sufficient grounds for waiver. Two of the grounds, paras (b) and (d) allow the Secretary to waive the balance of a debt that has been compromised for a partial payment. In many of these cases the compromise would be a bar to recovery at law, on the basis of issue estoppel or the defence of accord and satisfaction. Waiver of the balance simply recognises the reality of the debt's non-recoverability at law and finalises the matter between the parties.

Debts that have been written off temporarily can eventually be laid to rest by waiver under para. (c) after 6 years (by which time the limitation period for recovery in Part 5.3 may have expired). While it is DSS practice to review all written off debts at prescribed intervals, there is no reason why a debt could not be written off permanently rather than waived. Since write off is no bar to recovery, a permanently written off debt could always be pursued at a later date if the prospects for recovery improved.

The classes of case likely to be most often in contention will be those in paras (a) — debts caused solely by Commonwealth error, (d) — debt taken into account in custodial sentence, (f) — set-off for notional entitlement to family allowance, and (g) — special circumstances.

**Para. (a): Debts due to Commonwealth error**

Overpayments commonly arise due to a combination of client error and Departmental error. Social security administration relies heavily on DSS clients to notify relevant information concerning their financial and domestic circumstances. These obligations are often poorly understood by clients, who rely on DSS guidance as to what precise information is required. Clients in good faith may seek to meet their notification obligations by providing information which is, however, incomplete or incorrect. In some cases, this may be due to inadequate instructions in forms provided to them for the collection of information.

Under the *Hales* criteria, the degree to which Departmental error, omissions or failures contributed to the circumstances in which the over-payment arose was admitted as a factor relevant to waiver. Under para. (a) of the Notice, a debt can only be waived if it was caused 'solely by administrative error on the part of the Commonwealth, and was received by the person in good faith, and recovery would cause financial hardship to the person'.

The single-cause requirement significantly narrows the discretion. In cases where both Departmental and client error contributed to the overpayment, para. (a) will apply only if the Departmental error operated as a *novus actus interveniens*, breaking any causal nexus between the client error and the making of the overpayment. This was the line of analysis taken (in a different context) in *Greenwood* (1991) 64 *SSR* 897. The cases which lend themselves to this type of argument are comparatively few. Alternatively, Departmental error may give rise to 'special circumstances' bringing the case within para. (g) (see discussion below).

Although para. (a) refers to 'the debt', it may not be necessary to show that the total debt was caused solely by Departmental error. The sum claimed by the Department may comprise a number of overpayments, of which only some arose in circumstances that meet the strict causal requirement in para. (a). If each payment made without entitlement constitutes a separate debt, para. (a) may be applied to any discrete overpayment comprised in the aggregate. This is consistent with the approach that has been taken to recovery of debts where the limitation period has expired in relation to some but not all of the overpayments.

**Para. (d): Custodial sentence**

Para. (d) allows the debt to be waived 'where a court has indicated that it imposed a longer custodial sentence because of a person's inability or unwillingness to repay a debt'. This category is narrowly defined. It will not avail a client who received a non-custodial sentence, nor a client who failed to get a 'discount' because of the absence of the mitigating factor of having made arrangements for the repayment of the debt. There may be evidentiary problems for those clients who were sentenced by a court whose proceedings are not transcribed.

Finally, it will not help in cases where the sentencing judge or magistrate failed to make explicit the basis on which the length of sentence was determined. In *Letts* (1984) 23 *SSR* 269 and *Colmer* (1988) 45 *SSR* 578 the AAT found no evidence that the trial judge determined the length of sentence on the assumption that the defendant would not have to repay the debt, and was not prepared to infer that assumption from the fact that no reparation order was sought by the prosecution.

**Para. (f): Set-off for notional entitlement**

In some cases where a person has been receiving a DSS benefit without entitlement, the debtor seeks to off-set other unclaimed DSS benefits against the overpayment. For example, a person overpaid unemployment benefit due to undisclosed casual earnings might have been entitled, had he/she disclosed those earnings, to receive family allowance supplement in lieu of benefits. The AAT has refused to allow a notional set-off for unclaimed benefits in cases where the debtor has acted fraudulently (see e.g. *Duncan* (1988) 43 *SSR* 551; *Atkinson* (1986) 33 *SSR* 415) or where the person's entitlement to the unclaimed benefit is uncertain (*Smith* (1991) 62 *SSR* 860).

Para. (f) of the Notice confines the availability of notional set-off to one kind of unclaimed payment, namely family allowance and then only for a period of 3 years up to the end of the period of the overpayment. It appears that set-off for family allowance payments was allowed on the basis that entitlement was more readily determined than in the case of other DSS benefits.

In the case of persons who were overpaid because they innocently received a DSS benefit to which they were not entitled while having an untested entitlement to an alternative

benefit, the 'inappropriate claim' provisions in the 1991 Act may provide a set-off. For example a woman who claims and receives job search allowance while unqualified for it may later be granted sole parent pension from the date of the JSA claim if she was qualified for it at that date (see s.255(2), and corresponding provisions in modules relating to other types of payments).

**Para. (g): special circumstances**

The final category of case where waiver is permitted are those cases where 'special circumstances' apply being circumstances that are extremely unusual, uncommon or exceptional as discussed by the Federal Court in *Beadle v Director-General of Social Security* (1985) 7 ALD 670.

The Federal Court in *Beadle* approved the oft-quoted passage from the AAT's reasons for the decision then before the Court:

> 'An expression such as "special circumstances" is by its very nature incapable of precise or exhaustive definition. The qualifying adjective looks to circumstances that are unusual, uncommon or exceptional. Whether circumstances answer any of these descriptions must depend upon the context in which they occur. For it is the context which allows one to say that the circumstances in one case are markedly different from the usual run of cases. This is not to say that the circumstances must be unique but they must have a particular quality of unusualness that permits them to be described as special.'

The requirements for finding 'special circumstances' have been developed in the context of other provisions in the Act, namely —

- in relation to the discretion to allow payment of arrears for late-lodged claims for handicapped child's allowance and family allowance (under former ss.105(1) and 105R, and 102(1) of the 1947 Act, which have no counterpart in the current legislation); and
- the discretion that now appears in s.1184 (s.156 of the 1947 Act) to disregard part or all of a compensation payment (so as to reduce the recipient's liability to repay the Department and/or to reduce the period of preclusion from receiving certain benefits).

In deciding whether 'special circumstances' exist in particular cases the AAT has considered a number of factors including ignorance of entitlements and of notification obligations, the significance of Departmental error, inappropriate or incomplete advice given by DSS officers or third parties, financial hardship, health problems, and anomalous impacts of legislative change. Where there are several such factors present, the combination may amount to special circumstances even if the factors taken individually do not (*Beadle* (AAT) (1984) 20 *SSR* 210).

An issue to be considered is the extent to which the principles developed in the context of these other provisions are applicable to the waiver discretion, particularly having regard to the paramountcy of the recovery of public monies enunciated in *Hales* and reiterated in the preamble to the Notice. As the AAT warned in *Beadle*, to apply decisions bearing on one type of case to cases of another type 'may well obscure the enquiry that the legislation demands'.

Departmental error has weighed heavily in finding 'special circumstances', even where client default was also present (see e.g. *Corbett* (1984) 20 *SSR* 210 and *Garrety* (1984) 20 *SSR* 213. In a recent case of *Re Sharman and Sec. Dept of Community Services and Health* (1991) 64 *SSR* 904, the AAT decided that Departmental error (a failure to correctly advise) can be 'special circumstances' even if that error is not uncommon. In *VXR* (9 December 1991, see this issue of the *Reporter*, p.914) the AAT commented *obiter* that the Department's failure to notify the assurer that special benefit had been granted to a person who was the subject of an assurance of support, might be sufficiently unusual as to be regarded as a 'special circumstance' for the purpose of para. (g) of the Minister's Notice.

In the context of the discretion in s.1184 (to disregard compensation), the AAT has held that for financial hardship alone to amount to 'special circumstances' the hardship must be exceptional (see *Hajar* (1988) 47 *SSR* 614; *Brodley* (1990) 53 *SSR* 879). In waiver cases before the Notice, financial hardship if recovery were to proceed was treated as a necessary but rarely a sufficient cause for the exercise of the discretion.

**Applying the Notice in review of decisions**

Although the Notice came into force on 24 July 1991, it was not until December 1991 that the AAT handed down the first decisions which took account of it. In *VXR* (1991) 65 *SSR* 914, the AAT (Senior Member R. Balmford and others) decided that it was bound to apply the Minister's Directions when considering waiver of a debt raised by the Department on 15 January 1990 even though the primary decision was made before the Notice came into force. Since waiver involves the exercise of a discretion, the AAT said, there is no accrued right to have one's case considered on the basis that the discretion is not subject to the Minister's Notice: (Reasons, para. 17). A differently constituted tribunal disagreed with this reasoning (*Clark*, p. 915 this issue).

In cases where the Notice precludes waiver by the Secretary, SSAT or AAT, persons advising debtors of their options should remember that s.1237 is not the exclusive source of the Commonwealth's power to waive. The Minister for Finance's power under s.70C of the *Audit Act* still exists and can be exercised in relation to social security debts, although the Finance Guidelines for waiver are no more liberal than those in the Notice.

**[P.O'C.]**