

Opinion

Family allowance arrears

Demands for arrears of family allowance, where payment is resumed some time after a prior decision to cancel payments, remain a common subject of appeals. Where a letter notifying of the cancellation decision is not received by the allowance recipient, a considerable time may pass before the recipient notices that the crediting of payments to a bank account has ceased. The DSS refuses arrears unless a request for review is made within 3 months after notice was given of the cancellation decision.

The power of the DSS, SSAT and AAT to direct payment of arrears is limited by the complex provisions governing the date of effect of decisions made following review. These provisions give rise to difficult points of interpretation, some of which have recently been considered by the Federal Court in *O'Connell* (1992) 67 SSR 964 and in *Garratt* (p. 981 this issue).

Gummow J in *Garratt* interprets ss.168(3) and (4) of the 1947 Act to enable full arrears to be paid, regardless of the recipient's delay, provided that the decision to grant or resume payments was not made following a request for review by the Secretary nor as a result of notification of changed circumstances.

This decision will assist a diminishing number of people, since those who re-claimed under the 1991 Act will be subject to arrears provisions which differ significantly from ss.168(3) and (4) of the 1947 Act. For people who re-claim under the 1991 Act, the decision in *O'Connell* is the

more relevant one. That decision also enables payment of full arrears on the setting aside of a decision to cancel, at least in cases where the refusal to pay arrears was appealed within 3 months of notification of that refusal.

While the reasoning in *Garratt* was based upon the wording of s.168, Jenkinson J's decision in *O'Connell* gives little effect to the arrears provisions in the Act. Gummow J in *Garratt* observed that he found *O'Connell* to be of little assistance because of this omission. The DSS has appealed *O'Connell*, and pending a ruling by the Full Court is lodging appeals against decisions of the SSAT which grant arrears in reliance on Jenkinson J's reasoning.

Waiver of debts

The AAT's jurisdiction depends upon the existence of a relevant decision of an officer. In *Salvona* (1989) 52 SSR 695, Lee J said that the AAT might not have power to exercise the discretion to waive a debt when reviewing a decision to seek recovery of the debt, if there was no clear primary decision regarding waiver. Subsequent AAT decisions have generally not accepted that position, treating the questions of waiver and recovery as inextricably linked (see e.g. *Smitherman* (1991) 60 SSR 818, *Pommersbach* (1992) 65 SSR 912, *Campbell* (1992) 65 SSR 914).

Hill J in *Hodgson* (page 982 this issue) has reconciled the two positions in a new formulation which acknowledges that a decision to recover does not necessarily imply a decision not to waive, yet empowers the tribunals to exercise the waiver discretion when reviewing a decision to recover.

[P.O'C.]

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