

Reporter

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Opinion

Waiver of overpayments

What is the effect of the Minister's directions (under s.1237 of the *Social Security Act 1991*) on waiver of recovery of overpayments incurred before 1 July 1991? Two different views of this technical issue are offered in decisions noted in this issue of the *Reporter*.

In *Bradley* (p.1003), the AAT decided that a debt which arose before 1 July 1991 was an accrued liability; the discretion to waive that liability under s.251 of the 1947 Act was an integral part of the liability; and the discretion was preserved by s.8 of the *Acts Interpretation Act*, despite the repeal of the 1947 Act from 1 July 1991. Accordingly, that discretion should be exercised without regard to the Minister's direction issued in July 1991 under the 1991 Act.

In *Edwards* (p.1004), the AAT agreed that s.8 of the *Acts Interpretation Act* preserved a debt, which had been created under the 1947 Act, after the repeal of that Act. But s.8 did not preserve the Secretary's discretion under the 1947 Act to waive recovery. The discretion could only be exercised under legislation in force at the time of its exercise and could be limited by any of the Minister's directions in force at the time. However, once the discretion was exercised, any review of that exercise should be conducted in accordance with the legislation and any directions in force when the discretion was first considered.

From the perspective of consistency, there is a strong argument for applying

the current Minister's directions on waiver to any exercise of the waiver discretion, no matter when the original overpayment arose. Legal analysis could be developed to achieve that result.

No doubt we have not heard the last of this debate. The number of pre-1 July 1991 overpayments is large enough to create continuing problems for the AAT; and the interaction between the 1947 Act, the 1991 Act, the transitional provisions and the *Acts Interpretation Act* is sufficiently complicated to keep a battery of lawyers and administrators happily engaged for months, if not years.

Assurance of support debts

How do the Minister's directions impact on recovery of assurance of support debts? In *Flores* (p.1000), the AAT followed *Bradley* and held that the directions could not apply to a debt which had arisen before the 1991 Act came into operation.

On the other hand, the AAT in *Vuong* (p.1001) applied the May 1992 direction, having decided that the wording of the July 1991 direction was inapplicable to assurance of support debts.

In both cases, the AAT found sufficient reasons to waive recovery: in *Flores*, the reasons were found largely in administrative failings on the part of the DSS; while in *Vuong*, a combination of administrative errors and confusion and the fact that several people relied on *Vuong* for employment persuaded the AAT to waive recovery.

[P.H.]

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