

RESERVE

UNIVERSITY OF N.S.W.

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Opinion

Waiver: the new provisions

On 24 December 1993 the *Social Security (Budget and Other Measures) Legislation Amendment Act 1993* amended the *Social Security Act 1991* by repealing s.1237, the section dealing with waiver, and substituting ss.1236A, 1237 and 1237A. Section 1236A provides that the new ss.1237 and 1237A 'apply to all debts, whenever incurred, owed to the Commonwealth and arising under this Act or under the *Social Security Act 1947*.' Section 1237 allows the Secretary to waive recovery of the whole of a debt but only in certain situations as outlined in the section, and s.1237A allows the Secretary to waive recovery of part of a debt in different situations. The Secretary is also authorised to specify the date of effect of these decisions.

In *Allinson* and *Kratochvil* (p.1146) the AAT decided that the new s.1237 did not apply even though the decisions in both matters were made after 24 December 1993, and in spite of the wording of s.1236A that the new s.1237 applied to all debts 'whenever incurred'. The relevant law was that in force when the applicant lodged the application for review with the AAT. The AAT stated that as s.8 of the *Acts Interpretation Act 1901* preserved accrued rights, and an application to the AAT was a right, an applicant had the right to have a

decision reviewed according to the law in force at the date of the application for review. Section 8 preserves accrued rights unless the amending legislation clearly expresses the intention that it operates retrospectively. The AAT did not consider that s.1236A clearly expressed an intention that the provisions were to operate retrospectively. In *Dennis* (p.1147) the AAT applied the new s.1237A without explanation.

Do the new waiver provisions apply to all possible debts to the Commonwealth 'whenever incurred'? The AAT in *Allinson* and *Kratochvil* concluded that if an application for review was made to the AAT before the 24 December 1993, then the new waiver provisions did not apply. Another possible interpretation is that the Secretary must waive a debt if it falls within one of the particular situations outlined in ss.1237 and 1237A. Recovery of any other debts might be waived at the general discretion of the Secretary. Alternatively, the provisions may apply only to those debts where the decision to raise the debt occurred after 24 December 1993, even though the debt was incurred prior to that date. The DSS has appealed against the decision of *Kratochvil* to the Federal Court, where hopefully the situation will be clarified.

[C.H.]

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