



## Opinion

### More retrospectivity conundrums

This issue of the Reporter finds the AAT wrestling with the problem of determining the extent of retrospective operation of changes to the *Social Security Act 1991*. When legislation affecting rights is repealed or amended, difficult questions sometimes arise as to whether a person has an accrued right that survives a change to the law. The answer depends on whether the person had a 'right', whether the right accrued before the change in the legislation, and whether the amending or repealing Act evinced an intention that the accrued right should not survive. That intention need not be stated expressly but may arise by implication from the terms of the Act.

In *Cimino* (p.1167) the AAT rejected an argument that Cimino, having been granted wife pension, had an accrued right to continue receiving it after changes to the legislation rendered her no longer qualified for it.

A much more troublesome retrospectivity issue relates to the new provisions restricting the discretion to waive recovery of a debt to the Commonwealth: ss.1236A, 1237 and 1237A of the Act, which commenced operation on 24 December 1993. Although s.1236A provides that the provisions of ss.1237 and 1237A are to be applied 'to all debts, whenever incurred', the AAT seems to be willing to go to considerable lengths

to avoid applying the amended waiver provisions.

In *Nassif* (page 1165) the AAT, applying the reasoning in *Allinson* (1994) 79 SSR 1145, concluded that Nassif had a right to have his case for waiver considered under the law in force at the time that he lodged his application for AAT review. His right accrued at the time of lodgment, which was before the new provisions came into effect. The accrued right would survive the change in the law unless a contrary intention could be found; s.8 *Acts Interpretation Act 1901*. None was found, on examination of the terms of the amending Act.

In *Jin* (page 1166) the AAT arrived at a similar outcome by a more circuitous route. The AAT adopted the view in *Edwards* (1992) 70 SSR 1004 that the discretion to waive a debt is a power to be exercised by the Secretary and not a right. But in exercising that power the Secretary was under a duty to take account of relevant matters, and Jin had 'a corresponding right that he do so'. Section 1236A, which makes ss.1237 and 1237A applicable to 'all debts whenever incurred' did not express a contrary intention, the AAT said. This is because it relates to the incurring of debts and not to the exercise of the waiver discretion.

[P.O'C. & C.H.]

## In this Issue

### AAT decisions

- Jurisdiction to reopen a case and vary an AAT decision  
*James...1162*
- Application for reinstatement  
*Manoli...1162*
- Stay application  
*Heron...1163*
- Overpayment: income from a family trust  
*King...1163*
- Age pension: overpayment  
*Umanski...1164*
- Age pension: validity of recipient notification notice and issue of departure certificate  
*Moe...1165*
- Overpayment: discretion to waive  
*Nassif...1165*
- Waiver of debt: which law applies?  
*Jin...1166*
- Cancellation of wife pension: never a resident  
*Cimino...1167*
- Additional family payment: cancellation after absence from Australia  
*McGrath...1168*
- Newstart allowance: activity agreement  
*Bartlett...1169*
- Child disability allowance: child's behavioural problems  
*Kelly...1170*
- Disability support pension: evidence of ability to work  
*Boskovic...1171*
- Disability support pension: application of impairment tables  
*Bell...1171*
- Disability support pension: impairment  
*Gicevski...1172*  
*Phengsavanh...1173*

### Background

- Departure certificates: shouldn't they be going now?  
*Sandra Koller...1174*
- Changes to breach provisions affect long-term unemployed  
*...1176*

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**Editors:** Pam O'Connor, Christine Heazlewood

**Contributors:** Peter Hanks, Regina Graycar, Mary Anne Noone, Bev Webb, Helen Brown, Brian Simpson, Pam O'Connor, Christine Heazlewood, Bill Mitchell,

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