the provisions of the legislation changing the law. If the decision does not involve accrued rights or liabilities, then the law as amended at the date of the AAT's decision would apply.

Accrued rights?
Section 8 of the *Acts Interpretation Act 1901* was also relevant when considering which law applies. It provides that an Act which repeals a section does not affect an accrued right or liability, unless a contrary intention is expressed in the repealing Act. In *Cirkovski and Secretary, DSS* (1992) 67 *SSR* 955, the AAT discussed the repeal of the *Social Security Act 1947* and its replacement by the *Social Security Act 1991*, and concluded that a claimant for a pension had an accrued right to that pension until the claim was determined. In *Esber* v *Commonwealth of Australia and Anor* (1992) 106 *ALR* 577, the High Court said that Esber had the right to have an application to the AAT determined pursuant to a repealed Act. The AAT decided that it must look to the repealing legislation to see whether the amended provisions were meant to operate retrospectively.

The AAT first considered whether Jin had any accrued rights to have the debt waived. It decided to adopt the conclusions in *Secretary, DSS and Edwards* (1992) 70 *SSR* 1004, in which it was stated that the discretion to waive a debt is a power to be exercised by the Secretary and not a right, and therefore not preserved by s.8 of the *Acts Interpretation Act*. In this case, however, the delegate has considered whether to exercise the discretion to waive the debt, so that:

> 'the delegate is under an obligation to take into account and to reach a decision taking into account those appropriate matters. Miss Jin has a corresponding right that he do so. This is an accrued right.'

(Reasons, para. 26).

As Jin had an accrued right, the AAT considered whether ss.1236A, 1237 and 1237A (the new sections) were intended to apply to all debts whenever they were incurred. Section 1236A focuses on debts being incurred, and not on the exercise of the discretion. If the discretion has been exercised in the past, then the new sections do not apply.

> 'the new sections 1237 and 1237A apply to any exercise of the discretion when it is a fresh exercise of the power.'

(Reasons, para. 30).

The new sections did not apply to Jin because this was not a 'fresh' exercise of the discretion to waive the debt, but a review of the past exercise of the discretion.

The evidence
Jin trained as a doctor in China, and practised as an acupuncturist in Australia. While negotiating with the Immigration Department about her residence permits, she was advised by an officer of that department that she could stay in Australia, and that she would not be sent back to China. In hospital after the birth of her son Jin was advised by the staff to claim SPP. She stated on the form that she could stay in Australia permanently, relying on the information given to her by the Immigration Department officer. Under cross-examination Jin admitted to having some knowledge of the social security system, as she had applied for a health card before the birth of her son. She also stated that she knew she was not a permanent resident by the end of 1989, although she did not think she had to tell the DSS this. There was some evidence before the AAT that Jin had been living in a 'defacto relationship' for part of the period she was receiving SPP, although Jin denied this. The man Jin was supposed to be living with had told the Immigration Department that he had lived with Jin in Canada from October 1991 until January 1992, and in Australia from July 1992 until June 1993.

The AAT found that Jin had made contradictory statements to the DSS and the Immigration Department. Her lack of fluency in English might explain this in part. Jin knew that permanent residence had not been granted to her by 1989, but thought that she could stay in Australia. After the birth of her son Jin had health problems and was desperate for assistance. The AAT noted that Jin had advised the DSS of her true residence status on 1 July 1989. A file note of that date recorded that Jin had permanent residence status, that is, she had applied for this. The DSS should have followed up this advice and clarified Jin's residence status. Jin's financial status at the time of the hearing was unclear as she was not in receipt of a social security benefit.

The AAT took into account the general principle that a person should not be entitled to retain public money to which the person was not entitled, when considering whether to exercise the discretion to waive in Jin's favour. The AAT took all the above matters into account, and decided that recovery of the debt after Jin advised the DSS of her true status on 1 July 1989, should be waived.

Formal decision
The AAT decided that the decision under review should be set aside and substituted for it the decision that repayment of the debt incurred after 1 July 1989 be waived.

[C.H.

Cancellation of wife pension: never a resident

CIMINO and SECRETARY TO DSS
(No. 9329)
Decided: 25 February 1994 by M.T.E. Shotter.

Mrs Cimino had never been a resident of Australia. In August 1990 she was granted wife pension after the DSS invited her to make a claim because her spouse had claimed an Australian pension under the reciprocal agreement between Australia and Italy. In August 1992 the DSS cancelled the wife pension because changes to the legislation required some element of residency to satisfy eligibility for payment of Australian pensions. Cimino contended that having been granted the pension under earlier legislation, subsequent legislation could not remove her right to continue to receive the pension.

The AAT looked at the initial issue of retrospective application of current legislation. The AAT accepted the established precedent that the law to be applied is the law at the date of the decision *(Costello and Secretary, Department of Transport* (1979) 2 ALD 934). The AAT also referred to the decision of *Secretary to DSS and Hodzic* (1992) 69 *SSR* 994 which indicated that the present Act has retrospectivity to decisions made under previous legislation. The AAT concluded that 'Mrs. Cimino has no accrued rights under earlier legislation because it is not so stipulated under the current Act': Reasons, para. 8.

The legislation
Section 147 sets out the qualification provisions for wife pension and in addition s.155 states that a claim is not a proper claim unless the woman is an Australian resident and in Australia on the day on which the claim is lodged. Section 7(2) defines Australian

resident. Section 1208 provides that a scheduled international agreement will override provisions of the Act.

Section 1215(2) provides:

'Subject to subsection (3), if a woman:

(a) has never been an Australian resident: and

(b) was in receipt of:

(i) wife pension; or . . .

under the *Social Security Act 1947* before 1 July 1991; and

(c) is in a specified foreign country on 1 July 1991;

she is not disqualified from that pension from 1 July 1991.'

The AAT also referred to Article 7 of the Agreement Between Australia and The Republic of Italy Providing for Reciprocity in Matters Relating to Social Security.

Eligibility

The issue was whether Cimino was eligible to continue to receive an Australian wife's pension even though she had never resided in Australia and did not qualify for the pension under the current legislation.

The AAT noted that Cimino stated in a departmental questionnaire that she had not been in Australia and concluded that 'under ordinary conditions, this would disqualify Cimino for a wife's pension': Reasons, para 10.

As Cimino claimed the pension under the provisions of the international agreement between Australia and Italy, the AAT went on to consider the relevant sections of the Act and the Agreement. The AAT concluded that, although Cimino satisfied s.1215(1)(a) and (b), no foreign country had been specified at the date of decision and consequently she could not satisfy s.1215(1)(c). She therefore did not qualify for continued payment under that section. Similarly, as she had never resided in the country she did not satisfy the requirements of one year minimum Australian residence for payment of an Australian pension under Article 7 of the international agreement.

Formal decision

The AAT affirmed the decision of the SSAT to cancel the wife pension.

[M.A.N.]

[Note: The question of whether a person has accrued rights under an amended or repealed Act is not determined by looking to see whether the rights are provided for in the current Act. They survive by virtue of s.8 of the *Acts Interpretation Act 1901* unless a contrary intention appears in the amending or repealing Act.]

Additional family payment: cancellation after absence from Australia

McGRATH and SECRETARY TO DSS
(No. 9370)
Decided: 16 March 1994 by D.J.Grimes.

At the time of the hearing Mr McGrath was residing in Fiji and the matter was determined by the AAT without a hearing.

Background

McGrath was in receipt of disability support pension. On 11 September 1992 he obtained a pre-departure certificate, notifying the DSS of an intended absence overseas. In a letter dated 21 September 1992 the DSS advised McGrath that he would be paid a fortnightly rate, consisting of his disability support pension and additional child pension from 24 September 1992 while he was overseas. On 7 January 1993, he and his son left Australia for Fiji. Evidence to the SSAT indicated that McGrath had intended to leave Australia earlier than 7 January 1993 but he was prevented from doing so. On 15 January 1993 McGrath returned to Australia to care for his parents and his son remained in Fiji. He obtained a further departure certificate for himself on 26 February 1993 and returned to Fiji on 3 March 1993.

In a letter dated 16 April 1993 the DSS notified McGrath that he had failed to advise of his departure and his additional family payments would be stopped if he did not attend his departmental office within 14 days. McGrath's entitlement to additional family payment was cancelled from 3 March 1993.

Prior to 1 January 1993, additional child pension was portable. On 1 January 1993, additional child pension ceased to exist and was replaced by additional family payment which is not payable in respect of a child who is outside of Australia: *Social Security (Family Payment) Amendment Act 1992 (No.69 of 1992)*.

The legislation

Section 1069-D2 specifies the requirements for qualification for additional family payment. It provides:

'Subject to the points 1069-D5, 1069-D6, 1069-D7, 1069-D9 and 1069-D11, a person is qualified for additional family payment for a dependent child of the person (an "AFP child") if:

(a) the person and the child are present in Australia and:

(b) the person:

(i) is receiving family payment in respect of the child; or

(ii) . . . and

c) the value of the person's assets does not exceed $363,000.'

The AAT noted two exceptions to the requirement of presence in Australia. The first was that 'if the person leaving Australia with their child/children after 1 January 1993, are paid a pension under an international agreement, then they will continue to receive additional family payment whilst outside Australia': Reasons, para. 12. The other exception is contained in the so-called 'savings provisions' of the Act. 'Schedule 1A.5A allows for additional family payment to be received by persons absent from Australia on 1 January 1993 until such time as they return to Australia': Reasons, para. 13.

Is additional family payment payable?

The AAT found that once McGrath left Australia on 7 January 1993, he 'failed to satisfy the mandatory requirement of presence in Australia embodied in s.1069-D2(a)': Reasons, para. 14. Accordingly he was not eligible for additional family payment. Further, his circumstances did not come within the exceptions to this section. No evidence was before the AAT that McGrath was paid his pension pursuant to an international agreement and as he and his son were present in Australia on 1 January 1993, he did not come within the savings provisions.

The AAT agreed that there was cause for McGrath's confusion and belief that the payment had been unjustly cancelled, 'given the contradictory nature of the advice from the department' Reasons, para 16. The AAT found that McGrath had been incorrectly advised on two occasions about the reasons for cancellation of additional family payments. However,