

## Opinion

### DSS asks AAT not to apply the Guide

In *Elliot* (p.1184) the DSS found itself in the unusual position of urging the AAT to depart from DSS guidelines. The guideline imposed a minimum time requirement for apportionment of family payments between two adults who shared the care and control of a child on an alternating basis. Ms Elliot had the care of the children for only 26% of the time, less than the 30% threshold required for her to receive a share of the family payment. Her former partner appealed the decision of the SSAT to grant her a proportionate share of the family payment. The DSS and Ms Elliot as joint respondents to the appeal successfully argued that the guideline should not be applied and that the SSAT's decision should be affirmed.

#### Retrospective laws

The last issue of the *Reporter* noted that the AAT was increasingly concerned with retrospectivity issues; that is, whether an application is to be determined under the law as it presently stands or as it stood at an earlier date in the history of the matter. This issue includes two major contributions on the question. The Federal Court in *Kratochvil* (p.1190) held that the December 1993 amendments which inserted the new ss.1237 and 1237A should be applied whenever a decision maker exercises the power to waive debts, not only in cases where the application for review was made after the amendments commenced. The decision offers little

guidance on retrospectivity issues arising under other provisions of the Act.

In *Haughey* (p.1188) the AAT undertook a comprehensive review of the decided cases and in a lucid decision concluded that Haughey had upon lodging an application for review accrued a right to have his case determined in accordance with s.1184 as it stood at the date of the original decision.

#### Informal delegation

The *Social Security Act 1991* vests all powers and discretions in the Secretary, but Parliament clearly did not intend the Secretary to personally make all the decisions. Section 1299 provides for powers to be expressly delegated to officers by means of a signed instrument. But can an officer exercise the Secretary's powers without a formal delegation under s.1299?

In *Alvaro* (1993) 77 SSR 1123 an officer to whom no formal delegation of power had been made decided that there was a recoverable debt under s.1224. The AAT said that the decision was invalid because the officer was not authorised to make such decisions. On appeal to the Federal Court, Von Doussa J said that a formal instrument of delegation was not required for all types of decisions. The Secretary may be able to exercise certain powers by acting through the agency of others without resorting to s.1299. No formal delegation was needed for an officer to be authorised to make a decision under s.1244, a decision which involved a factual inquiry rather than the exercise of broad discretions.

[P.O'C.]

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