

**SOCIAL SECURITY**

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Including SSAT Decisions

**Opinion**

**Social security debts and notional entitlements**

The Commonwealth may waive its right to recover social security debts in certain prescribed circumstances. The provisions allowing waiver are set out in Part 5.4 of the *Social Security Act 1991* (the Act).

At present, the Act limits the circumstances in which the Commonwealth's right to recover debts can be waived on the basis of a debtor's notional entitlement to another payment during the period in which the debt was incurred. Section 1237AAC specifically addresses this issue, although it is of limited operation. This section requires the Secretary to waive the right to recover a debt where the debtor, or the debtor's partner, had an unclaimed right to Family Payment, Family Allowance, Parenting Allowance or Parenting Payment during the debt period. Section 1237AAC further restricts the scope of waiver for notional entitlements by limiting the amount that may be waived to the amount of the unclaimed payment that would have been payable no more than three years before the date the overpayment ceased. This means that if a person were overpaid Newstart Allowance over five years but would have been entitled to Parenting Payment throughout the entire debt period, an amount equivalent to only three

years worth of the Parenting Payment to which she or he was notionally entitled may be waived from the debt.

In the case of Parenting Allowance and Parenting Payment, the scope of s.1237AAC is even narrower. This is because s.1237AAC(4) prohibits the waiver of a debt on the basis of a person's notional entitlement to another payment where the debt arose from the debtor or another person *knowingly* making a false statement or representation, or failing or omitting to comply with the Act.

Section 1237AAC is obviously of no assistance to those who may have had a notional entitlement to payments other than the four payments mentioned above. The only avenue for taking into account notional entitlements to other payments is to invoke s.1237AAD. This section allows for waiver where a person's circumstances are found to be 'special'. To gain the benefit of this section a debtor needs to prove that the debt was not incurred 'knowingly', that his or her overall situation constitutes 'special circumstances' and that it is more appropriate to waive rather than write off the debt.

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The following is an example of a case in which a person's notional entitlement to an unclaimed payment was taken into account in conjunction with other 'special' circumstances. In the case of *SDSS and Bitunjac* 52 ALD 674, a woman incurred substantial debts when she failed to notify the then Department of Social Security that her children had been taken into state care. The Commonwealth sought to recover the entire amount of Sole Parent Pension and Family Allowance that Ms Bitunjac, the respondent, received whilst her children were out of her care. The Tribunal found that the respondent did not knowingly fail to advise that her children had been taken into state care, given her mental state and irrational perception of her circumstances. In considering whether special circumstances existed in her case, the Tribunal was 'swayed' by the fact that the respondent would have had an entitlement to either Sickness Allowance or Disability Support Pension if she had immediately disclosed the change to her circumstances to the Department. The Tribunal found that there were also several other factors in her case that made her overall circumstances 'special', including: the forcible removal of her children; physical abuse of her by her ex-partner; her psychiatric condition; and her financial hardship.

Now, this leaves those who cannot satisfy the Secretary that their overall

circumstances are 'special', or who 'knowingly' failed to comply with the Act, without any basis to argue that their debts be waived according to a notional entitlement to another payment. Let us consider a hypothetical situation: John is an ABSTUDY recipient, who has ceased studying, and started looking for work. He did not advise Centrelink that he was no longer in full-time study. John knew that he should have notified Centrelink of this, but he had some personal issues to deal with and reasoned that if not for ABSTUDY, he would in any case be entitled to Youth Allowance. A debt was raised from the date his studies ceased and he was transferred to Youth Allowance. John's debt cannot be waived under s.1237AAC; nor can his debt be waived under s.1237AAD, even if John's overall circumstances were 'special', as he knowingly failed to comply with the Act. The Commonwealth is not out of pocket in these circumstances, yet John must still pay back the entire debt. And therein lies the unfairness in John's case, as in many other cases — the Commonwealth is asking to be paid back money it would have in any case been obliged to pay to John, had he made a claim for Youth Allowance. John, on the other hand, is in effect without any income support at all during the relevant period.

It is clear that merely expanding s.1237AAC so that it becomes applicable to all social security payments will not rectify the unfairness of the current waiver provisions. In its present form, s.1237AAC does not cover those with a notional entitlement to Parenting Allowance or Parenting Payment who knowingly failed to comply with the Act. A more comprehensive provision would therefore need to do more than merely expand s.1237AAC so that it encompasses notional entitlements to the entire range of income support payments. Given that the Commonwealth is not out of pocket where a debtor had a clear notional entitlement to another payment, whether or not that debtor knowingly failed to comply with the Act or presents a special case ought to be irrelevant. Surely a decision maker's priority when raising a social security debt ought to be whether or not the Commonwealth is in fact out of pocket as a result of the debtor's non-compliance with the Act. If the Commonwealth is not out of pocket, then there is little justification for applying additional criteria to determine whether regard can be had to the debtor's notional entitlements to another social security payment.

**Dianne Anagnos**

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## Administrative Appeals Tribunal

### **Compensation preclusion period: special circumstances; mental health**

**WOODS and SECRETARY TO  
THE DFaCS  
(No. 2002/267)**

**Decided:** 22 March 2002 by  
W.J.F. Purcell.

#### **Background**

Woods, who was 62 years of age, was involved in a motor vehicle accident in May 1991 and suffered, subsequently, a work accident in 1997. She received an interim workers compensation payment of \$18,701.21 on 30 August 2000 and, on 17 July 2001, settled the balance of her claim, including \$26,900.00 to redeem li-

ability to pay periodic compensation, for a total amount of \$31,859.01.

Woods had been informed that, as a result of settlement, she would be precluded from benefit, and she was referred to a financial adviser who saw her on 12 July 2001. On the basis that she would receive \$31,859, the financial adviser conferred with a Centrelink officer and a preclusion period was calculated at 28 weeks.

Weekly compensation payments ceased on 1 August 2001 and on the same day Centrelink calculated a preclusion period of 44 weeks from 2 August 2001 to 5 June 2002, based on the total payments of \$50,560.22. A letter was sent on 2 August 2001, and Woods received the lump sum compensation payment on about 2/3 August 2001.

Woods said that she had calculated that, on the basis of the financial adviser's advice, her lump sum would last for 28 weeks at a budgeted rate of \$600 a

week. She says that she continued under this impression until she received correspondence from Centrelink, forwarded on by Australia Post to her new address, in October 2001. However, the documentary evidence disclosed that Woods was in contact with Centrelink on 1 August 2001 regarding her application for age pension, and subsequently on 10 August 2001, regarding the amount of the compensation lump sum and the length of the preclusion period. As Woods had been treated for some years for depression and pain and was a poor historian, the AAT did not consider that there was any attempt on her part to mislead nor to exaggerate her health and monetary problems.

#### **Expenditure**

Because of the injuries she suffered in 1991 and subsequently in 1997, Woods' ability to earn had been severely reduced. The sequence of injuries, com-