SOCIAL SECURITY OVERPAYMENTS AND DEBT RECOVERY

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CONTEXT

It is important to understand the history of the social security legislation, and other contexts such as the language of "error", "overpayment", "debt" and "fraud", to fully understand the social and legislative basis of social security debt recovery today.

Legislative History

Social Security Act 1947

In the *Social Security Act 1947* (the 1947 Act), overpayments and debt recovery were dealt with in two sections in Part XXI "Miscellaneous":

- s 246 "Recovery of overpayments"
- s 251 Write off, Waiver, &c"

Section 246(1) states:

> (1) Where, in consequence of a false statement or representation, or in consequence of a failure or omission to comply with any provision of this Act, an amount has been paid by way of pension, allowance or benefit under this Act which would not have been paid but for the false statement or representation, failure or omission, the amount so paid is a debt due to the Commonwealth.

Section 246(2) provides for recovery by deduction from a current social security payment where "an amount has been paid by way of pension benefit or allowance under this Act that should not have been paid". Subsection (2) and (2A) extended this recoverability to certain other payments, including under the *Veterans' Entitlements Act 1986,* prescribed educational scheme and assurances of support.

Section 251 provided a broad discretion for the Secretary to waive a debt "that is payable by the person under or as a result of this Act" and also provided for write off of classes of debt specified by the Minister by notice in the Gazette, determinations by the Minister which give directions relating to the Secretary's waiver power,]o and a 6 year limitation period on commencement of recovery action by legal proceedings (*Re Green and SDSS* [1988]).

These two, relatively economical, sections gave rise to a considerable body of case law developed by the Federal Court and the AAT. Prominent cases explored the various elements of the sections, including:

- "in consequence of" - the failure or omission need not be the dominant or effective cause of the overpayment: *Director-General of Social Services v Hangan* [1982] (FFC);
- "false statement or representation" or "failure or omission to comply" – this is not confined to an knowing or intentional failure to comply: *Re Babler and Director-General of Social Services* [1982]; *Re Pepi and Director-General of Social Security* [1984]
- principles of administration of s 246 - *Re Taylor and SDSS* [1986].
- principles as to the discretion to waive: in *Director-General of Social Services v Hales* [1983], the Full Federal Court gave guidance as to the exercise of the discretion which were widely adopted and comprised:
  (a) the fact that the applicant has received money to which he was not entitled;

(b) the way in which the overpayment arose whether as a result of innocent mistake or fraud;
(c) the financial circumstances of the prospective defendant;
(d) the prospect of recovery;
(e) whether a compromise is offered;
(f) whether recovery should be delayed if there is a prospect that the circumstances of the person who received the overpayments\ may improve;
(g) compassionate considerations and the fact that the Act is social welfare legislation and any financial hardship which may result from an action for recovery.

There were a great many AAT decisions on the application of the *Hales* principles which were helpful at the time, but now are not usually cited as more recent cases consider the specific provisions of the successor to the 1947 Act, the *Social Security Act 1991*.

Social Security Act 1991

The *Social Security Act 1991* (the 1991 Act) repealed the 1947 Act on 1 July 1991. It was intended to be a "plain English" rewrite of the 1947 Act with very little change in underlying legislative policy. The intent of the rewrite was discussed in the DSS *1990-91 Annual Report*:

> The Act is a clear English rewrite of the 1947 Act. The language used should make the meaning of any particular provision apparent to the reader. The reader aids are designed to assist with any readability problems in areas of the Act which deal with complex policy matters.
>
> The rewrite of the 1947 Act did not involve any major policy initiatives and its financial impact is negligible. The new legislation reflects existing policy.
>
> The Act contains a Reader's Guide to explain how the Act is arranged and how the other reader aids can help in reading the Act and finding one's way through the legislation.
>
> Other innovations include:
>
> - an index of defined words and phrases and groups of definitions according to subject matter in the definitional part of Chapter 1 to facilitate accessibility;
> - the use of modules, points and method statements where a step-by-step approach is required, such as in rate calculators;
> - the location of the modules for each of the 20 types of Social Security payments in one Chapter (Chapter 2). Each module is now almost totally self-contained to enable a reader to find out everything he or she needs to know about a particular pension, benefit or allowance;
> - the simplification and reorganisation of individual provisions so that they appear in a logical order, with all provisions which relate to a particular topic now being located together;
> - the insertion of notes throughout the text which act as signposts to assist the reader in locating relevant provisions quickly and set the context for the provision and explain references to other Acts;
> - the use of tables to replace complex formulae and textual provisions; and
> - where cross-reference to other provisions occurs, brief descriptions of those provisions together with their section numbers.

The new Act was less successful than its policy makers and drafters envisaged, for a number of reasons:

- The introduction of "plain English" was generally welcomed, however the drafters were less experienced in this form of drafting than is the case today. Drafters have learnt many useful lessons about "plain English" and the structure of legislative provisions in the 25 years since the commencement of 1991 Act.
- The policy makers and drafters attempted to create an Act which allowed an individual beneficiary to go to the legislation on their particular payment and, supposedly, find a self-contained statement of their rights and obligations. This approach failed completely as it

led to a large amount of legislation repeated for each payment type in Chapter 2 - the original 1991 Act comprised 1,364 sections and its first printing by CCH exceeded 1,000 pages of closely spaced text.

- The 1991 Act has been constantly and extensively amended ever since its commencement, for a number of reasons including targeting and re-targeting of benefits, Budget initiatives, labour market initiatives, etc. For many years, it was very difficult to obtain an accurate, up-to-date consolidation of the Act, however this has now been achieved through vast improvements in IT and the construction of the *ComLaw* web site.

The Full Federal Court commented adversely on the drafting of the 1991 Act in *Blunn v Cleaver* [1993] and this criticism was echoed by Spender J in *Jackson v SDSS* [1997] where Spender J said:

> The Act is admittedly complex. In *Blunn v Cleaver* (supra), the Full Court made it plain, particularly at 127-129, that the drafting of the Act produced a disconformity with the genuine objects of legislation in this area and the legitimate expectations of persons affected by such legislation.
>
> The Court, however, has to do the best it can in the discharge of its statutory obligation. The situation in the present case is complicated by the fact that it is likely that the factual circumstances thrown up by the present proceeding was not in contemplation of the legislature at the time when the provisions which are meant to govern its determination were enacted.

The consolidation of the administration provisions by the *Social Security (Administration) Act 1999* on 20 March 2000 reduced the overall bulk of the Social Security Law but the problems arising from complexity of drafting still remained. See, for example, the comments of Weinberg J in *SDFaCS v Geeves* [2004] at paragraphs [37] – [40].

Social Security Law and *Family Assistance Law*

On 20 March 2000, the *Social Security Act 1991* was restructured into five separate Acts:

Social Security Law

- *Social Security Act 1991*: Chapters 1, 2, 3 and 5 continued in force but with a lot of duplicate provisions in Chapter 2 moved into a single Administration Act
- *Social Security (Administration) Act 1999*: Essentially administrative provisions set out in Chapters 6, 7 and 8, and duplicated provisions in Chapter 2, were moved to this Act and consolidated in a logical format.
- *Social Security (International Agreements) Act 1999*: Part 4.1 and the Scheduled International Agreements were moved into this Act.

Family Assistance Law

- *A New Tax System (Family Assistance) Act 1999*: Family payments were moved to this new Act and provisions concerning childcare were added.
- *A New Tax System (Family Assistance) (Administration) Act 1999*: This Act deals with family assistance and child care administration issues.

The restructure did not affect the overpayment and debt recovery provisions in Chapter 5 of the 1991 Act, however offences were moved to Part 6 of the SS Administration Act. The FA Administration Act included Parts dealing with overpayments, debt recovery and offences in similar (but not the same) terms as those in the social security law.

Developments in Chapter 5 of the 1991 Act: 1991 - 2017

Chapter 5 of the 1991 Act has seen a number of significant amendments since its commencement on 1 July 1991, including:

The *Social Security (Budget and Other Measures) Legislation Amendment Act 1993* (No 121/1993) repealed the original s 1237 and inserted new ss 1236A, 1237 and 1237A with

effect from 24 December 1993. The new sections attempted to restrict waiver to certain prescribed circumstances but were poorly drafted. In *Lee v SDSS* [1996], the Full Federal Court held that cases already determined by the Department and subject to review should be considered under the repealed waiver provisions.

The *Social Security Legislation Amendment (Carer Pension and Other Measures) Act 1995* repealed the existing waiver provisions (ss 1236A, 1237 & 1237A) replacing them with 8 new sections (ss 1236A - 1237AAD) intended "to provide more consistency and flexibility" in the waiver arrangements. In particular, new s 1237AAD restored waiver in "special circumstances" provided the debt did not arise "knowingly" from a false representation, and new s 1237AAC extended waiver in relation to notional entitlement to certain other benefits.

The *Social Security Legislation Amendment (Budget and Other Measures) Act 1996* made significant amendments to the debt recovery provisions, including repealing and substituting a new s 1223 "Debts arising from lack of qualification, overpayment etc.". After this date, a debt was due to the Commonwealth if an overpayment was made on or after 1 October 1997 because the recipient was not qualified for the payment *or* because the amount was not payable. Clause 105(1) in Schedule 1A included a savings provision which provided that the amendments did not: affect the operation of Parts 5.2 or 5.3 before 1 October 1997; extinguish the amount of any debt arising before 1 October 1997; or prevent recovery of any outstanding debt.

The *Family and Community Services and Veterans' Affairs Legislation Amendment (Debt Recovery) Act 2001* (No 47/2001) with effect from 1 July 2001, introduced measures to strengthen the debt recovery processes of the Department of Family and Community Services and the Department of Veterans' Affairs. The amendments made all overpayments (for any reason) recoverable and revised the arrangements for penalty interest, administrative charges and recovery of amounts paid in error directly from financial institutions.

The *Commonwealth Reciprocal Recovery Legislation Amendment Act 1994* (No 68/1994), commencing on 1 July 1994, amended Chapter 5 as part of a scheme to facilitate the reciprocal recovery of overpayments arising from the social security, student assistance and veterans' entitlements income support schemes.

The *Budget Savings (Omnibus) Act 2016* included a significant number of Budget savings measures and three measures affecting debts which commenced on 1 January 2017: (i) application of a new interest charge to outstanding debts owed by former recipients of social welfare payments who have failed to enter into, or have not complied with, an acceptable repayment arrangement (Sch 12); (ii) introduction of departure prohibition orders in new Part 5.5 of the Act (Sch 13, Pt 1); and (iii) removal of the 6-year limit on debt recovery (Sch 13, Pt 2).

The Importance of Language

In considering social security overpayments and debt, it is important to be very clear about the language used as there is a political and public confusion about this language, often conflating "debt" and "compliance" or similar terms with "social security fraud". In this paper, I suggest a careful use of language in the following terms:

"overpayment"	An overpayment occurs where a customer receives an amount of payment higher than that authorised by the legislation. This may occur though official error, customer error, timing issues, omission or deception.
"debt"	A social security or family assistance debt arises where the legislation provides that a customer owes a debt to the Commonwealth because of receipt of an overpayment, imposition of penalty interest, recovery of an advance or other reason. Not all overpayments result in a debt, particularly under the former 1947 Act and the adjustment provisions of the family assistance law, and not all

	debts are recoverable.
"error"	Overpayments may occur because of error by Centrelink ("administrative error"), by a customer, or a combination of causes.
"compliance" activities	This is a general term used by DHS to describe its processes for prevention and identification of overpayments.
"non-compliance"	This refers to failure to comply with a statutory obligation, usually (but not necessarily) with some connotation of knowing or reckless conduct.
"serious non-compliance"	"Serious non-compliance" is used by DHS as a general description of fraudulent or associated behaviour (see, for example, *Annual Report 2015-16*, p119).
"fraud"	This is an activity which is an offence under the social security law, the family assistance law or criminal legislation such as the *Criminal Code* and the *Crimes Act 1914*. An offence may be committed under Part 6 of the *Social Security (Administration) Act 1999* if the relevant conduct is false, misleading or reckless.

In a *Canberra Times* article "Welfare crackdown a $270m flop: report" by Noel Towell on 1 March 2017, the reporter, DHS and the Minister for Human Services used varying language in relation to compliance measures:

- The reporter was reporting on an Audit Office report which found that "Government efforts to crack down on welfare have fallen hundreds of millions short of target" because "compliance" efforts had fallen $270 million short of a target of $790 million;
- DHS disagreed with the Audit Office findings, claiming that it had delivered savings of $998 million from seven new compliance measures, putting it ahead by $210 million;
- The Minister noted that the Audit Office and DHS had used different accounting measures. The Minister said that "the overall anti-welfare fraud effort was going very well" (reporter's language). The Minister was then quoted: "Across all fraud and compliance activities, the Commonwealth realised $3.9 billion in savings since 2012, with the 10 measures delivering savings of $1.4 billion against a target of $1.07 billion, exceeding the target by 35 per cent".

In this example, the language used is "crack down", "compliance" efforts, "new compliance measures", "anti-welfare fraud effort", "all fraud and compliance measures" and "measures delivering savings". Each of them has a different shade of meaning and could be quite properly applied to different resource expenditures and different savings targets.

Associate Professor Lisa Marriott illustrated the relevance of language about welfare payments in a recent seminar at the ANU Crawford School. She described variations in language used in the context of social welfare and taxation in New Zealand where "benefits fraud" totalled $NZ 24.17 million in 2014-15, whereas tax fraud, described euphemistically as "tax position differences", totalled $NZ 1,200 million. The disparity between New Zealand taxpayers and social welfare recipients was further emphasised by the fact that, in 2011-12, Inland Revenue wrote off $NZ 435 million of tax debt (54.1% of penalties and 11.6% of all debt) whereas the Ministry of Social Development wrote off $NZ 6 million of social welfare debt. I suggest that the Australian experience around tax evasion and write off is reasonably similar to the New Zealand position, however the amount of social security debt waived in Australia probably is relatively much higher because of our legislative provisions, particularly Part 5.4 of the 1991 Act.

DHS Compliance Activities

The DHS *Annual Report 2015-16* at 3.3 reported on Social Security and Welfare Programme Compliance. This covered social security and family assistance payments.

DHS reported on early intervention compliance activities, including the Online Compliance Initiative (OCI), in the following terms.

Table 45: Social welfare payments compliance activity

	2013-14	2014-15	2015-16	% change
Interventions	869,082	923,462	987,895	+7.0
Reductions in payments	77,272	52,100	69,921	+34.2
Fortnightly savings in future	$19.2 million	$18.2 million	$21.7 million	+19.2
Prevented outlays	$51.8 million	$61.4 million	$63.7 million	+3.7
Debts raised	101,351	126,134	210,009*	+66.5
Total debt value	$283.6 million	$362.1 million	$694.6 million*	+91.8

* The introduction of the Strengthening the Integrity of Welfare Payments—Employment Income Matching budget measure saw an increased focus on addressing historical overpayments. This compliance activity has resulted in a high incidence of debt and has subsequently contributed to a significant increase in debt savings from the 2014–15 financial year.

DHS also reported on the total number of social welfare debts raised.

Table 49: Debts raised from customers receiving social welfare payments

	2013-14	2014-15	2015-16
Number of debts raised	2,230,894	2,350,131	2,439,431
Amount raised	$2.2 billion	$2.5 billion	$2.8 billion

DHS reported on the amount of customer debt recovered, including data on the modest proportion of debts that are recovered using commercial agents; usually this involves debtors who are no longer customers of DHS Centrelink.

Table 50: Social welfare customer debt recovered

	2013-14	2014-15	2015-16
Total debts recovered	$1.27 billion	$1.43 billion	$1.54 billion
- amount recovered by contracted agents	$124.8 million	$131.3 million	$144.7 million
- percentage of total recovered by agents	9.9%	9.2%	9.4%

Fraud

In 2015-16 DHS referred 980 social welfare cases to the Commonwealth Director of Public Prosecutions (CDPP) compared to 1,366 referrals in 2014-15. The DHS *Annual Report 2015-16* includes little other statistical data on social security fraud.

The Commonwealth Director of Public Prosecutions *Annual Report 2015-16* stated that the CDPP dealt with 1246 summary defendants and 29 indictable defendants referred to them by DHS Centrelink in that financial year.

In a 2012 article, (now) Professor Grainne McKeever studied social security fraud in the UK and Australia. Her findings are an interesting reflection on social security "fraud".

> In the UK levels of error – both claimant and official error – outstrip levels of fraud. The National Audit Office notes that in 2010-11, £1.2 billion was estimated by the Department for Work and Pensions to be lost to fraud, £1.2 billion to customer error and £800 million to official error, out of a total of £153.6 billion spent on benefits. (NAO 2011)
>
> In Australia levels of "non-compliance" – the combined figure for error and fraud – is $536 million (out of an $87 billion benefits bill), of which $113.4 million is customer debts identified through fraud investigations (ANAO 2010: para 7).

CHAPTER 5 - OVERPAYMENTS AND DEBT RECOVERY

Chapter 5 of the 1991 Act (ss 1222 – 1237) replaced s 246 and s 251 of the 1947 Act and was originally structured in four Parts:

- Part 5.1 "Effect of Chapter"
- Part 5.2 "Amounts Recoverable under this Act"
- Part 5.3 "Methods of Recovery"
- Part 5.4 "Non-Recovery of Debts"

Part 5.5 “Departure Prohibition Orders” was inserted by the *Budget Savings (Omnibus) Act 2016* (No 55/2016), commencing on 1 January 2017.

Chapter 5 Comprises a Code

In *Walker v SDSS* [1995], the Full Federal Court held that Chapter 5 of the 1991 Act is a code providing for the recovery of social security payments. Drummond J pointed to the contribution of s 1222 to this conclusion:

> The table contained in sub-section (2) lists the sections of the Act under which recoverable debts arise; against each section there is listed the means of recovery, generally but not invariably by “deductions”, “legal proceedings” and “garnishee notice”. A column in the table identifies the particular sections of the Act that prescribe each such recovery method. The opening words of sub-section (1) are a strong indication that Chapter 5 contains an exclusive statement of how the Commonwealth can recover social security payments of the kind listed in that sub-section.
>
> . . .
>
> Chapter 5, however, does in my opinion reveal an intention to state, in an exclusive way, how the Commonwealth can recover certain kinds of overpaid benefits. Chapter 5 commences with the statement in s 1222 of its intended operation, which included the identification of those social security and other payments which are recoverable by the Commonwealth, and lists the procedures to be followed by the Commonwealth in recovering each class of payment. The Chapter then defines these recovery procedures and makes provision for recovery in two other ways (viz., by instalments and by consent deductions). It concludes with provisions empowering the Secretary to forego the Commonwealth’s entitlement to recovery of such payments. In my opinion, the opening words of s 1222(1) and the structure of Chapter 5 show that it is a code which prescribes the exclusive methods whereby recovery can be lawfully effected of those social security and other benefits listed in s 1222(1).

In *Coffey v SDSS* [1999], the Full Federal Court dealt with a converse situation. In that case, the applicant brought an action in the Federal Court alleging that a social security debt had been wrongly raised against him and seeking recovery of the amount plus interest. The Full Federal Court held that the Court did have jurisdiction to entertain the claim under s 39B(1A) of the *Judiciary Act 1903* because that Act confers jurisdiction on the Court in matters "arising under a law made by the Parliament". However, the Court held that to allow the action would be an abuse of process because the Social Security Act provides a comprehensive and multi-level process for review of decisions under the Act and the applicant had availed himself fully of that review process.

This decision that the Act comprises a Code has contemporary relevance. One example arose in the course of the Online Compliance Intervention (OCI) (colloquially known as “Robodebt”) where some community agencies became concerned that the Department of Human Services (DHS) had sold the debts to external collection agencies and that they were harassing social security clients in an attempt to maximise their return from the purchase. In the event, DHS gave assurances that the two external agencies, Probe and Dun & Bradstreet, were simply acting as agents for the Department, which is probably within the parameters of Part 5.3, either as an element of “legal proceedings” or in the general course of administration of the Act. It is unlikely that a social security debt purchased by a third party would have any basis for recovery under Chapter 5.

Part 5.1 - Effect of Chapter

Section 1222 in Part 5.1 sets out the methods of recovery for the various types of debts recoverable under the Act. The *Recovery methods table* sets out 25 items specifying the debt, the means of recovery and the relevant recovery sections. In almost all cases, the means of recovery is:

deductions (ss 1231 and 1234A); legal proceedings (s 1232); garnishee notice (s 1233); and repayment by instalments (s 1234). An example is item 1

1	1135 (pension loan debt)	deductions legal proceedings garnishee notice repayment by instalments	1231, 1234A 1232 1233 1234

The exceptions to use of these means of recovery are items 12, 14, 18 and 19:

12	1226 (compensation payer and insurance debt)	legal proceedings	1232
14	1226 (compensation payer and insurance debt)	enforcement of security deductions legal proceedings garnishee notice repayment by instalments	1230C 1232, 1234A 1232 1233 1234
18	1230 (garnishee notice debt)	legal proceedings garnishee notice	1232 1233
19	1230 (garnishee notice debt under 1947 Act)	legal proceedings garnishee notice	1232 1233

Section 1222(3) provides that overpayments and debts under certain other Acts may be recovered by means of deduction from the person's social security payment.

Part 5.2 – Amounts Recoverable under this Act

Part 5.2 (ss 1222A – 1230C) specifies the various debts which are raised under the Social Security Act and other legislation and which can be recovered under the Act.

Section 1222A "Debts due to the Commonwealth" provides:

> If an amount has been paid by way of social security payment, or by way of fares allowance under the *Social Security (Fares Allowance) Rules 1998*, the amount is a debt due to the Commonwealth if, and only if:
>
> (a) a provision of this Act, the 1947 Act, the *Social Security (Fares Allowance) Rules 1998* or the *Data-matching Program (Assistance and Tax) Act 1990* expressly provided that it was or expressly provides that it is, as the case may be; or
>
> (b) the amount:
>
> (i) should not have been paid; and
>
> (ii) was paid before 1 January 1991; and
>
> (iii) was not an amount to which subsection 245B(2) of the 1947 Act applied.

Section 1222A had no direct equivalent in the 1947 Act and operates to exclude the possibility that a debt may arise on a basis other than the operation of the *Social Security Law* (or the Fares Allowance Rules or Data-matching Act). One such possibility, whereby a debt could be raised independently of the specific provisions of the Social Security Act, was the principle in *Auckland Harbour Board v R* [1924] AC 318 as stated by Viscount Haldane at 326-7:

> ... no money can be taken out of the consolidated fund into which the revenues of the State have been paid, excepting under a distinct authorisation from parliament itself. The days are long gone by in which the Crown, or its servants, apart from parliament, could give such an authorisation or ratify an improper payment. Any payment out of the consolidated fund made without parliamentary authority is simply illegal and *ultra vires* and may be recovered, by the government if it can ... be traced.

Section 1223 "Debts arising from lack of qualification, overpayment etc." is the key section raising social security debts. Section 1223(1) now provides:

> (1) Subject to this section, if:
>
> (a) a social security payment is made; and
>
> (b) a person who obtains the benefit of the payment was not entitled for any reason to obtain that benefit;
>
> the amount of the payment is a debt due to the Commonwealth by the person and the debt is taken to arise when the person obtains the benefit of the payment.

The effect of this provision, essentially, is that any overpayment of a "social security payment" is a recoverable debt.

Other sections in Part 5.2 deal with other specific types of debts, including:

- s 1223AA "Debts arising from prepayments and certain other payments";
- s 1223AB "Debts arising from AAT stay orders";
- s 1223ABA "Debts arising in respect of one-off payment to carers";
- s 1224C "Data-matching Program (Assistance and Tax) Acts debts";
- s 1227 "Assurance of support debts";
- s 1228 "Overpayments arising under other Acts and schemes": this provision provides for debts under the VEA, the Family Assistance Act, payments under various educational schemes and compensation paid under the *Military Rehabilitation and Compensation Act 2004*, to be recoverable by deduction under the 1991 Act.

These sections quoted are only an illustration of the many debts specifically provided for in the various sections in Part 5.2.

Data Matching

Since 1990, data-matching between Commonwealth Government agencies and the ATO have been conducted under the *Data-matching Program (Assistance and Tax) Act 1990*. Section 1224C was inserted into Part 5.2 by the *Social Security Legislation Amendment (No 3) Act 1992* (No 230/1992) as part of measures intended to make debts identified through data-matching recoverable under the Social Security Act. Relevant cases on social security data-matching include *Re Sawyer and SDSS* [1988], *Re Sawyer and SDSS* [1996] and *Re Frugtniet and SDSS* [2004].

The Data-matching Act specifies many procedures protective of customer interests, including that a programme cycle must be completed within two months of its commencement and that a new cycle cannot begin until the previous one has finished. No more than nine cycles may be conducted each year. During 2015‑16, two complete cycles were conducted for DHS and four complete cycles were conducted for the Department of Veterans' Affairs.

The DHS *Annual Report 2015-16* foreshadowed the cessation of data-matching under the Data-matching Act:

> In 2016-17 the department will undertake an enhanced approach to address compliance risks covered by the Data-matching Program. The new approach will replace the activity governed by the *Data–matching Program (Assistance and Tax) Act 1990* and bring the activity in line with the department's other data matching activity and the OAIC's Guidelines on Data Matching in Australian Government Administration (voluntary data matching guidelines). Programme cycles conducted under the Data-matching Program will be gradually phased out and cease during 2016-17.

Part 5.3 – Methods of Recovery

Part 5.3 provides for various methods of recovery of debts specified as recoverable under Part 5.2. Part 5.3 should be read in conjunction with s 1222 in Part 5.1 which specifies which methods of recovery apply to each kind of debt (discussed above). The primary means of recovery are:

- s 1231 "Deductions from debtor's pension, benefit or allowance;
- s 1232 "Legal proceedings";
- s 1233 "Garnishee notice";
- s 1234 "Arrangement for payment of debt" (repayments by instalments).

The Secretary can also recover funds from a bank where a payment has been made to the wrong person or after a recipient's death (s 1234) and, with consent, by deductions from the social security payment of a person who is not the debtor (s 1234A).

The 1991 Act has no counterpart to a highly unusual provision in the *Social Security Act 1964* (NZ) whereby the partner of a person engaging in welfare fraud can be made jointly liable for a debt where they "knew, or ought to have known" of the fraud (Marriott 2017). This appears to be an open invitation to increased levels of "sexually transmitted debt" as it does not take into account the way that domestic violence and financial duress affects the choices many women realistically have in relation to their partner's financial affairs. Under Australian law, in some cases, a partner may be an accessory to the fraud or may be prosecuted as a joint offender and be subject to a reparation order.

Section 1231 Deduction from Debtor's Pension, Benefit or Allowance

Section 1231 authorises the Secretary to recover debts by deductions from the debtor's social security entitlement.

Section 1232 - Legal Proceedings

Section 1232 provides:

> If a debt is recoverable by the Commonwealth by means of legal proceedings under:
>
> (a) Part 5.2 of this Act; or
>
> (b) the 1947 Act; or
>
> (c) the *Social Security (Fares Allowance) Rules 1998*;
>
> the debt is recoverable by the Commonwealth in a court of competent jurisdiction.

Section 251 of the 1947 Act set a limitation period of 6 years on the initiation of "proceedings", a term of some ambiguity. The 1991 Act avoided this problem by specific reference to "legal proceedings" where this is the intention, and "action under this section", where some other action is contemplated (see for example s 1231A(2)(a)).

Section 1233 - Garnishee

If a social security debt is recoverable by the Commonwealth, s 1233(1) provides that "the Secretary may by written notice given to another person … require the person to whom the notice is given to pay the Commonwealth" where that person holds or may subsequently hold money for or on account of the debtor.

A person who fails to comply with a notice under s 1233(1) commits an offence with a penalty of imprisonment for 12 months (provided the person is capable of complying with the notice). Section 1233(7) states that this section applies to money in spite of any law of a State or Territory (however expressed) under which the amount is inalienable.

The Department is entitled to use s 1233 to apply a payment of arrears of benefit to a pre-existing overpayment: *Walker v SDSS* [1995] per Spender J. In garnisheeing the payment of arrears to Mr Walker, the Department drew a manual cheque which was then deposited personally into Mr Walker's bank account by a Departmental employee. The garnishee notice was already in force and served on the bank before deposit, ensuring the effectiveness of the process.

In a later appeal to the Full Federal Court in *Walker v SDSS* [1997], the Full Federal Court ultimately held that the garnishee should stand. In its decision, the Full Court discussed whether the Department's actions had denied natural justice to the applicant by failing to give him an opportunity to be heard on the issue of garnishee or notice of the intention to garnishee. The Court (Drummond & Mansfield JJ), drawing a parallel to the collection of tax by attachment of debts, held that there were good reasons why s 1233 should not be construed as requiring the Secretary to comply with the rules of natural justice in deciding whether to serve a garnishee notice.

In *Re King and SDSS (1994)*, substantial amounts of money had been credited to a loan account in the name of the applicant, without his knowledge, by a discretionary family trust; the credits appeared to be part of a tax minimisation scheme established by his father. Evidence before the Tribunal showed that the son was beneficially entitled to the sum of $97,321 standing to his credit in the trust and that the trust held more than $600,000 in cash on deposit. The Tribunal noted that this would appear to be an appropriate case for use of the garnishee power to recover a social security debt of $17,713.63.

Effect of Bankruptcy on Recovery of a Debt

Decisions under the 1947 Act suggested that a social security debt could be recovered by deductions from payments (*Taylor v SDSS* [1988]). However, in *SDSS v Southcott* [1998], the Federal Court held that the Department had no power to recover a social security debt from a debtor by way of garnishee because the debt raised under former s 1224(1) was replaced by a right to prove in bankruptcy and former s 1224(2) could not operate because that subsection was premised upon the existence of "a debt due to the Commonwealth under subsection (1)". North J distinguished *Taylor* on the basis of the different wording of the relevant section in the 1947 Act. While *Southcott* specifically related to garnishee, the reasoning can be extended to other forms of recovery such as proceedings and deduction from payments.

Debts owed prior to bankruptcy are debts provable in bankruptcy and it is not open to Centrelink to make determinations for waiver in respect of those debts. In *Re Klewer and SDFHCSIA* [2008], Centrelink recovered from the applicant part of a debt that was incurred prior to bankruptcy. The Tribunal held that it could not waive the pre-bankruptcy debt but it could waive that part of the debt that arose after the bankruptcy was declared.

In *Re Caudell and SDEEWR* [2008], one of the applicants went into bankruptcy after the SSAT decision but before the AAT proceedings. On the basis of s 58(1) of the *Bankruptcy Act 1966*, the Tribunal held that it had no power to continue with the appeal from that applicant. See also *Re Cook and SDEWR* [2007] and *Re Barber and SDFHCSIA* [2008] to similar effect, relying on s 60 of the Bankruptcy Act. In *Re* Cook, the Tribunal noted that the applicant may have a right of review if the Secretary commenced recovery action for the debt, after his discharge from bankruptcy, on the basis that the debt was "incurred by means of fraud" (s 153(2)(b), Bankruptcy Act).

The current approach to bankruptcy is illustrated by *Re SDFaCS and Grindlay* [2005] where the respondent was overpaid parenting payment of $12,895.21 because of her husband's income. The Tribunal held that the debt was divisible and that the respondent was responsible for the overpayments which accrued after the date of her bankruptcy. The amount which accrued before her bankruptcy ($597.53) was provable under s 82 of the Bankruptcy Act and was no longer recoverable under the Social Security Act (in the absence of fraud).

Debts incurred by fraud

In *Re SDSS and Malaj* [1993], the Department was seeking recovery by garnishee pursuant to s 1233 of the 1991 Act of a debt which wholly arose under the 1947 Act. The respondent argued that he had been released from the debt by operation of s 153 of the Bankruptcy Act. The Tribunal held that the debt was incurred by fraud and thus his discharge from bankruptcy did not release him from his debt to the Commonwealth because of s 153(2)(b). This provision states that the discharge of a bankrupt from bankruptcy does not release the bankrupt from "a debt incurred by means of fraud ...". Note that the Department cannot commence recovery action until after the debtor is discharged from bankruptcy (*Re Civitareale and SDFaCS* [1999]).

Part 5.4 – Non-Recovery of Debts

Part 5.4 "Non-recovery of debts" (ss 1235 – 1237AB) provides for write off and waiver of debts. The sections in this Part are:

- s 1235 "Meaning of *debt*" (debt recoverable under Part 5.2, the 1947 Act, an international social security agreement and the Fares Allowance Rules);
- s 1236 "Secretary may write off debt;
- s 1237 "Power to waive Commonwealth's right to recover debt";
- s 1237A "Waiver of debt arising from error";
- s 1237AA "waiver of debt relating to an offence";
- s 1237AAA "Waiver of small debt";
- s 1237AAB "Waiver in relation to settlements";
- s 1237AAC "Waiver where debtor or debtor's partner would have been entitled to an allowance" (applies only to an entitlement of family payment, family allowance, parenting allowance and parenting payment);
- s 1237AAD "waiver in special circumstances";
- s 1237AAE "Extra rules for waiver of assurance of support debts";
- s 1237AB "Secretary may waive debts of a particular class".

Legislative History – Write Off and Waiver

Under the 1947 Act, in s 251 (and earlier s 240), the Secretary was given a general discretion to waive or write off debts. The exercise of this discretion was shaped by principles developed by the Full Federal Court in *Director-General of Social Services v Hales (1983),* discussed above.

Section 251 of the 1947 Act in essence was replaced by two sections in the 1991 Act, s 1236 dealing with write off of debts, and s 1237 dealing with waiver. Section 1237 included a provision, s 1237(3), which empowered the Minister to give directions relating to the Secretary's power to waive debts. A similar provision was included in the 1947 Act, but no Directions were ever issued under that Act.

The Minister issued a Notice under s 1237(3) on 8 July 1991, taking effect from that date, and on 5 May 1992, this Notice was revoked and replaced with a new Notice taking effect from 18 May 1992. The Full Federal Court in *Riddell v SDSS (1993)* ultimately determined that the Guidelines were invalid as they improperly fettered the broad discretion in the section. In consequence, the principles developed in *Hales* continued to guide the exercise of the discretion until legislative amendments in 1993 (*Social Security (Budget and Other Measures) Legislation Amendment Act 1993*), in 1996 (*Social Security Legislation Amendment (Carer Pension and Other Measures) Act 1995* and in 1997: *Social Security Legislation Amendment (Budget and Other Measures) Act 1996* (1 October 1997). The 1996 and 1997 amendments were relatively beneficial, so there has not been difficulties around retrospectivity.

The write off and waiver provisions have remained fairly stable since 1997 and a considerable body of cases now discuss the various provisions, making reference to the *Hales* Principles and cases under the 1947 generally of historic interest only.

Write Off of Debts

Section 1236, in its current form, provides:

> (1) Subject to subsection (1A), the Secretary may, on behalf of the Commonwealth, decide to write off a debt, for a stated period or otherwise.
>
> (1A) The Secretary may decide to write off a debt under subsection (1) if, and only if:
>
> (a) the debt is irrecoverable at law; or
>
> (b) the debtor has no capacity to repay the debt; or
>
> (c) the debtor's whereabouts are unknown after all reasonable efforts have been made to locate the debtor; or
>
> (d) it is not cost effective for the Commonwealth to take action to recover the debt.

In *SDSS v Hodgson* [1992], the Federal Court described the meaning of "write off":

> The power to "write off" a debt stems from s 1236 of the 1991 Act. It seems that the expression "write off" is used in an accounting sense, that is to say that action is taken to write off an existing liability in the accounting records of the Commonwealth dealing with social security: *cf AGC (Advances) Ltd v Commissioner of Taxation* (1975) 132 CLR 175. So used, the expression does not impact upon the liability of the person overpaid, although, as a practical matter, once a debt has been written off, it is unlikely that recovery would be pursued. (at 37 FCR 42)

A Note at the end of an earlier form of s 1236 explains the meaning of write off in the following terms:

> Note: if the Secretary writes off a debt, this means an administrative decision has been made that, in the circumstances, there is no point in trying to recover the debt. In law, however, the debt still exists and may later be pursued.

Amendments by the *Social Security Legislation Amendment (Budget and Other Measures) Act 1996*, which commenced on 1 October 1997, substantially restricted the ambit of the write-off powers under the Act. The end result of this is that write off is not particularly useful to most recipients as the debt will be recovered from their payment in an amount which usually is manageable for the customer. Write off may still be important for a debtor who is not currently on benefit.

Waiver - Administrative Error

Section 1237A(1) "Waiver of debt arising from error" provides:

> (1) Subject to subsection (1A), the Secretary must waive the right to recover the proportion of a debt that is attributable solely to an administrative error made by the Commonwealth if the debtor received in good faith the payment or payments that gave rise to that proportion of the debt.
>
> Note: Subsection (1) does not allow waiver of a part of a debt that was caused partly by administrative error and partly by one or more other factors (such as error by the debtor).

Section 1237A(1A) provides that subsection (1) only applies if:

> (a) the debt is not raised within a period of 6 weeks from the first payment that caused the debt; or
>
> (b) if the debt arose because a person has complied with a notification obligation, the debt is not raised within a period of 6 weeks from the end of the notification period;
>
> whichever is the later.

The key elements of this waiver are:
"attributable solely to";
"administrative error"; and
"received in good faith".

In *SDEETYA v Prince* [1997], a student cancelled his entitlement to AUSTUDY in December but payments continued to be made for several months thereafter. After 6 weeks, the student became aware of the continuing payments and contacted DEETYA repeatedly in an attempt to have the payments stopped. Payment was finally cancelled after the student's MP contacted DEETYA on his behalf. The Federal Court held that the money was not received in good faith at any time (even before he became aware of the payments) because he knew he had no entitlement to AUSTUDY.

Prince has been consistently followed and applied in a great many cases since 1997.

Waiver – Special Circumstances

Section 1237AAD reinstated waiver in "special circumstances" provided:

- the debt did not result from the debtor or another person knowingly making a false statement or representation, or failing to comply with the Act (s 1237AAD(a));
- there were special circumstances (other than financial hardship alone) that made it desirable to waive (s 1237AAD(b)); and
- it was more appropriate to waive than to write-off the debt (s 1237AAD(c)).

The addition of "knowingly" makes it clear that the provision is not intended to catch situations such as in *McAuliffe v SDSS* [1991] and *Re King and SDSS* [1994] where objectively the statements were untrue but this was not known to the debtor.

In *SDSS v Hales* [1998], French J discussed the breadth of the discretion in s 1237AAD:

> The concept of special circumstances is broad. A constellation of factors, including financial circumstances, may fall within it. The express exclusion of financial hardship alone as a special circumstance is an indicator that it would otherwise be included. This gives some measure of the range of circumstances which will qualify as special. But as a matter of grammar and ordinary logic, the exclusion of financial hardship alone as a special circumstance does not mandate its inclusion in the range of matters constituting such circumstances for the purpose of enlivening the Secretary's discretion. …
>
> The evident purpose of s 1237AAD is to enable a flexible response to the wide range of situations which could give rise to hardship or unfairness in the event of a rigid application of a requirement for recovery of debt. It is inappropriate to constrain that flexibility by imposing a narrow or artificial construction upon the words. It may be that there will be few cases in which the Secretary will be satisfied that there are special circumstances in the absence of financial hardship. It may be that there are few cases in which having found special circumstances to exist, the Secretary would exercise the discretion to waive in the absence of financial hardship. But to anticipate the limits of the categories of possible cases by imposing on the language of the section a fetter upon its application which is not mandated by its words, is to erode its useful purpose. (at 82 FCR 162)

In *Hales*, the Court observed that: "the exclusion of financial hardship alone as a special circumstance does not mandate its inclusion in the range of matters constituting such circumstances for the purpose of enlivening the Secretary's discretion" (at 82 FCR 162) and also rejected the Secretary's argument that, if it was not appropriate to write-off a debt, the Tribunal was precluded from waiving the debt.

There have been differences of opinion in the Tribunal about whether a notional entitlement to another payment could be relevant special circumstances. In *Oberhardt v SDEEWR* (2008), Spender J held that notional entitlement "should not be excluded from the range of relevant

considerations in deciding whether there are "special circumstances" to waive a debt under s 1237AAD.

Part 5.5 - Departure Prohibition Orders

Part 5.5 "Departure prohibition orders" (ss 1240 – 1260) was inserted into the Social Security Act by item 13 in Schedule 13 to the *Budget Savings (Omnibus) Act 2016* (No 55/2016), commencing on 1 January 2017. The measure was intended to protect the integrity of outlays through welfare payments, and encourage welfare debtors to repay their debts, by using departure prohibition orders (similar to the arrangements applying in the child support legislation) to prevent targeted debtors from leaving Australia. Departure prohibition orders will be used for debtors who persistently fail to enter into acceptable repayment arrangements.

Part 5.5 has seven Divisions:

Div 1. "Secretary may make departure prohibition orders" (s 1240);

Div 2. "Departure from Australia of debtors prohibited" (s 1241);

Div 3. "Other rules for departure prohibition orders" (ss 1242 - 1245);

Div 4. "Departure authorisation certificates" (ss 1246 – 1251);

Div 5. "Appeals and review in relation to departure prohibition orders and departure authorisation certificates" (s 1252 – 1255);

Div 6. "Enforcement" (ss 1256 – s1258);

Div 7. "Interpretation" (ss 1259 - 1260).

The Explanatory Memorandum (at p 157) discussed the measure:

Outline of chapter

Schedule 13 of the Bill introduces departure prohibition orders so that, in certain cases where a person does not have a satisfactory arrangement in place to repay their social security, family assistance, paid parental leave or student assistance debt(s), they may be prevented from leaving Australia without either having wholly paid their debt(s) or making satisfactory arrangements to pay. This system will closely mirror the existing departure prohibition order system in place under the *Child Support (Registration and Collection) Act 1988* (Child Support Registration and Collection Act). Targeted debtors will largely comprise ex-recipients of social welfare payments but may also apply to other social welfare payment recipients in limited circumstances.

Background

This Part amends the *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act), *Paid Parental Leave Act 2010*, *Social Security Act 1991* and *Student Assistance Act 1973* to introduce departure prohibition orders to prevent debtors under these Acts from leaving the country. Departure prohibition orders will not be made without consideration of all the circumstances and only where the Secretary believes on reasonable grounds that it is appropriate to do so. Where a departure prohibition order is in force, the Secretary can vary or revoke the order, or can issue a departure authorisation certificate allowing the person to depart the country for a specified period of time.

Departure prohibition orders were introduced into the *Child Support Registration and Collection Act* in 2000. Currently, there are approximately 120,000 child support customers with child support debts. However, there are only some 2,000 departure prohibition orders in place – that is, departure prohibition orders apply to less than two per cent of all debtors. Departure prohibition orders are only invoked when all reasonable administrative actions have been undertaken to recover the child support debt from the paying parent.

While the number of social welfare payment debtors is significantly higher than the number of child support debtors, it is anticipated that the departure prohibition orders will only be issued in the most extreme social welfare payment debt cases.

Departure prohibition orders under the Child Support legislation

Section 1240 is based on and is similar to s 72D of the *Child Support (Registration and Collection) Act 1988* which provides that the Child Support Registrar may make a departure prohibition order (DPO) on grounds similar to s 1240(1)(a)-(c).

In *Whittaker v Child Support Registrar* [2010], Lindgren J discussed the nature and purpose of a DPO:

> 291. … Generally speaking, the terms of s 72D(1) show that a DPO is intended to "ensure" that a person does not depart from Australia without either wholly discharging his or her child support liability or making arrangements satisfactory to the Registrar for its discharge. While a DPO is not security in a proprietary sense, it is security in a broader sense of a procedure designed to prevent recovery being frustrated.
>
> 292. It may be that the present submission is intended to distinguish between a purpose of preventing a particular imminent departure from Australia and a more general prevention of any departure from Australia. In my view even the latter is within para (b) of s 72D(1) [s 1240(1)(c)]. That is to say, that paragraph is satisfied if the Registrar believes on reasonable grounds that it is "desirable" to make the DPO for the purpose of "ensuring" (a strong word: see *Troughton v Deputy Commissioner of Taxation* [2008] FCA 18; (2008) 66 FCR 9 at [20]) that the person does not depart at any time in the future from Australia for any foreign country without first discharging the child support liability or making arrangements satisfactory to the Registrar for its discharge.

The DHS *Annual Report 2015-16* reported on the amount of child support debts collected under Departure Prohibition Orders: $6.2 million (2013-14); $6.7 million (2014-15); and 7.9 million (2015-16). It did not provide any other data such as the number of orders.

Departure prohibition orders under the Social Security Act

Section 1240 in Division 1 authorises the Secretary to make a departure protection order (DPO) prohibiting a person from departing from Australia for a foreign country if circumstances set out in paras (a) to (c) apply. Section 1241 imposes a penalty of imprisonment for 12 months for departure from Australia knowingly or recklessly in breach of a DPO.

The *Guide to Social Security Law* at 6.7.2.100 sets out policy for administration of DPOs, however this is little more than a summary of the legislative provisions and does not give a great deal of additional insight to when and how the discretion should be exercised. The Explanatory Memorandum states that DPOs "will only be issued in the most extreme social welfare payment debt cases" and the practicalities of the scheme suggest that this is likely to be the case for reasons including that:

- Many debtors who travel overseas will still be on social security payments. If the payment is fully portable (eg. age pension), debt recovery can be easily achieved by deductions from instalments of payments. Where the payment is portable only for a short period, data matching with the Department of Immigration and Border Protection usually ensures that the recipient's departure overseas is quickly discovered by Centrelink and payment is suspended – a saving to the Department considerably larger than any likely fortnightly repayment amount under Part 5.3.
- A DPO would be more likely where the person is no longer in receipt of income support payments and there are reasonable prospects of recovering the debt through DPO action, for example because the debtor has assets or has prospects of a significant income while overseas. Likely triggers for a DPO will be if the debtor is transferring assets offshore (either directly or indirectly) or they have sufficient resources to live offshore (eg family, assets, employment, business).

Where a DPO has been issued, there will be substantial pressure on the debtor to pay the debt in full, or to negotiate with the Secretary to have a departure authorisation certificate (DAC) issued on one of the grounds in s 1247, or by giving security for the debtor's return to Australia (s 1248).

Appeals and reviews in relation to departure prohibition orders

Section 1252 in Division 5 provides that a person aggrieved by the making of a departure provision order may appeal to the Federal Court or the Federal Circuit Court against the making of the order. Section 1254 provides that the court may, in its discretion: (a) make an order setting aside the order; or (b) dismiss the appeal.

Section 1255(1) provides that an application may be made to the AAT for review of a decision of the Secretary under s 1244 ("Revocation and variation of departure prohibition orders"), s 1247 ("When Secretary must issue departure authorisation certificate") and s 1248 ("Security for person's return to Australia"). Section 1255(2) provides that Parts 4 and 4A of the SS Administration Act does not apply in relation to these decisions. Accordingly, there will be no internal review or social security first review by the Tribunal in departure protection order matters.

Extended meaning of *Australia* for departure prohibition orders

Section 1260(1) in Division 7 provides that, for the purposes of Part 5.5, "Australia", when used in a geographical sense, includes the external territories. This disapplies the definition of "external Territory" in s 23(1) in Part 1.2 SS Act. Section 1260(2)(b) provides that "external Territory" has the meaning given by s 2B of the *Acts Interpretation Act 1901*, which states:

> ***external Territory*** means a Territory, other than an internal Territory, where an Act makes provision for the government of the Territory as a Territory.

This has the effect of permitting travel to Norfolk Island, Cocos (Keeling) Islands and Christmas Island if a DPO is in force.

Part 6, Social Security (Administration) Act – Offences

Social security offences may be prosecuted under the *Crimes Act 1914* or the *Criminal* Code (Criminal *Code Act 1995*) as an alternative to use of Part 6 of the Social Security (Administration) Act.

Under the Crimes Act, the more serious offences were prosecuted as indictable offences, often under former ss 29B, 29C or 29D of that Act:

> **False representation**
>
> **29B** Any person who imposes or endeavours to impose upon the Commonwealth or any public authority under the Commonwealth by any untrue representation, made in any manner whatsoever, with a view to obtain money or any other benefit or advantage, shall be guilty of an offence.
>
> Penalty: Imprisonment for 2 years.
>
> **Statements in applications for grant of money etc.**
>
> **29C** A person who, in or in connexion with or in support of, an application to the Commonwealth, to a Commonwealth officer or to a public authority under the Commonwealth for any grant, payment or allotment of money or allowance under a law of the Commonwealth makes, either orally or in writing, any untrue statement shall be guilty of an offence.
>
> Penalty: Imprisonment for 2 years.
>
> **Fraud**
>
> **29D** A person who defrauds the Commonwealth or a public authority under the Commonwealth is guilty of an indictable offence.
>
> Penalty: 1,000 penalty units or imprisonment for 10 years, or both.

In *R v Evans* [1998], the NSW Court of Criminal Appeal held that deliberate silence could amount to a "representation" for the purposes of s 29B. The Court noted that:

> Whether failure to disclose information involves, or amounts to a representation, depends upon the circumstances of the case.
>
> Whether suppression of the truth involves suggestion of falsehood is, in any given case, a question of fact. (at 142 FLR 320)

Under the *Criminal Code*, the relevant offences are found in Part 7.3 "Fraudulent conduct" and Part 7.4 "False or misleading statements".

In *Poniatowska v Commonwealth DPP* [2010], the Full Court of the SA Supreme Court held that s 135.2 of the Criminal Code does not support a prosecution for the offence of obtaining financial advantage where there was an omission to comply with a notice given under Part 3 of the *Social Security (Administration) Act 1999*.

> 38. In summary, we are of the view that s 135.2 does not define any duty or obligation relevant to an offence committed by way of an omission. The DPP does not rely on any notice issued to the appellant for the purpose of establishing such a duty; nor was it suggested that the duty was to be found elsewhere in the *Administration Act*. The approach of the *Administration Act* is to provide for the issuing of notices by the department requiring information and to impose a penalty punishable by imprisonment for a failure to comply with such notices. The *Administration Act* does not create a separate "stand alone" obligation. We have explained why we consider that s 135.2 does not impose a relevant obligation.

In *Commonwealth Director of Public Prosecutions v Poniatowska* [2011], the High Court dismissed an appeal. By the time the decision was handed down, the *Social Security and Other Legislation Amendment (Miscellaneous Measures) Act 2011* (No 91/2011) had been enacted, with a retrospective commencement of 20 March 2000. This Act made the debts recoverable, but it does not support the many Criminal Code convictions entered between 12 June 2001 and 14 August 2011 or any subsequent prosecutions based on notices subsequently validated by the Act.

Reparation Orders and Recovery of Debts

It is open to the CDPP to request a sentencing court to impose a Reparation Order either for the amount of the social security debt or the proportion of it covered by the charges. The amount of the order is paid to the Commonwealth. Reparation Orders are not sought in all cases; they seem to be sought more often in more serious cases prosecuted under the Criminal Code. A court may also issue a Forfeiture Order when the convicted person holds assets acquired as a result of committing the offence.

This contrasts with New Zealand practice where Associate Professor Marriot (2017) observed that the Ministry of Social Development (MSD) does not seek reparation orders in social welfare prosecutions stating "Reparation order not sought: the Ministry will recover the full amount of the overpayment directly from the Defendant".

In the case of joint offenders, the reparation order may be made against both parties on a joint and several basis, however the court has a discretion to apportion the loss between co-offenders on the basis of relative culpability or length of offending (*R v Theodossio & Said* ([1998] QCA 421).

A debt which is subject to a Reparation Order may subsequently be waived under Part 5.4 of the Act, however the waiver does not modify the order of the court, which stands with full force. There is some differences in the cases on the 1947 Act about the relationship between waiver and the continuing effect of Reparation Orders, but it was suggested by the AAT in *Re Anderson and SDSS* [1993] that the Secretary should not seek to enforce a recognisance where the applicant, relying on a waiver, did not repay monies in the time specified in her recognisance.

Where the amount of the Reparation Order is less than the total amount of the debt, it is important to look closely at the basis of sentencing and the judge's remarks to see if payment of the amount in the Reparation Order extinguished the whole of the debt (*Re SDSS and Wornes* [1997]). There is now also a specific waiver provision in s 1237AA of the 1991 Act for debts relating to an offence requiring waiver where the sentencing judge has imposed a longer custodial sentence because the offender was unable or unwilling to repay the debt; see the discussion at Part 5.4 above.

The *Memorandum of Understanding Centrelink and Commonwealth Director of Public Prosecutions 1999* states:

> Part 9: Criminal Assets
>
> …
>
> B: Reparation
>
> 9.5 The DPP will seek a reparation order in any case in which a defendant is convicted, or a case is found proven, unless there is some reason why reparation should not be sought in the particular circumstances of the case.
>
> 9.6 Unless otherwise agreed, reparation will be sought for the full amount outstanding in relation to the charges and without specific repayment orders or time frames.
>
> 9.7 Where a case involves more than one defendant, the DPP will, if possible, seek reparation on the basis that the defendants are jointly and severally liable for the debt.
>
> C: Recovering the Proceeds of Crime
>
> The role of the DPP
>
> 9.8 It is part of the DPP's function to pursue and recover the proceeds of Commonwealth crime. The function is not exercised in every criminal case.
>
> 9.9 In deciding whether to exercise its criminal assets function, the DPP will consider whether the following conditions are satisfied:
>
> a) if it is alleged that the defendant obtained a significant financial benefit from the relevant crime;
>
> b) if the defendant owns or controls assets against which recovery action can be taken; and
>
> Either
>
> I) it appears that the normal processes of Commonwealth debt recovery are not available or are likely to be less effective than action by the DPP; or
>
> II) there is a need to co-ordinate recovery action with the criminal process.

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