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Bills Digest

No. 57 2000–01

Family and Community Services and Veterans'  
Affairs Legislation Amendment (Debt Recovery)  
Bill 2000

ISSN 1328-8091

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Bills Digest  
No. 57 2000–01

Family and Community Services and Veterans' Affairs  
Legislation Amendment (Debt Recovery) Bill 2000

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30 October 2000

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# Family and Community Services and Veterans' Affairs Legislation Amendment (Debt Recovery) Bill 2000

**Date Introduced:** 21 June 2000

**House:** House of Representatives

**Portfolio:** Family and Community Services

**Commencement:** Royal Assent. However, items 3 to 27, 29, 31 to 33 in Schedule 1, items 1 to 15 in Schedule 3 and items 1 to 8 in Schedule 4 commence or are taken to have commenced on 1 January 2001. Some individual measures have specific application dates which are dealt with in the Main Provisions section of this Digest.

## Purpose

To amend social security, family assistance and veterans affairs legislation to revise and standardise debt recovery provisions.

## Background

Welfare overpayments and debts

### Overview

An overpayment occurs when a welfare recipient is paid more than they are otherwise qualified for under the legislation. There are almost an infinite number of circumstances from which an overpayment might arise. Some common examples are:

- An unemployed person receiving newstart allowance commences full-time work, however continues to be paid newstart allowance past the date commenced work
- A sole parent receiving parenting payment – single on the basis that he/she is a sole parent, commences to live in a partnered like relationship, but parenting payment – single is paid past the date the relationship commenced

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- A person receiving rent assistance, on the basis they are paying private rent, ceases to pay rent and rent assistance is paid past the date rent payments stopped, and
- A disabled child, in respect of whom carer allowance is being paid to a parent, ceases to live with and be cared for by that parent, but carer allowance is paid past the date the parent ceased providing care.

These are some common examples, and even within each of these examples, an overpayment may occur for different reasons. Mostly the overpayment occurs, as the payment recipient fails to notify Centrelink in sufficient time, for the payment adjustment to be made. However, an overpayment may also occur in cases where the recipient does notify Centrelink, but Centrelink fails to adjust the payment in time. That latter case is commonly referred to as an administrative error overpayment.

### Administrative Error Debts

For a prolonged period, it was not the practice to recover overpayments, where the reason for the debt was due to administrative error. While debts created by administrative error have always been debts under the *Social Security Act 1991*, discretion was exercised to not pursue recovery; the reason for the debt occurring not being due to the action of the payment recipient. With the passage of the *Social Security Legislation Amendment (Budget and Other Measures) Act 1996*, the discretion to not recover these debts was largely removed and since then they have been recovered.<sup>1</sup>

### Debts – 1993 to 1999

The practice of now recovering administrative error overpayments has lead to an increased number of debts raised and recovered, as illustrated by the following Table.

**Debts raised under the *Social Security Act 1991*<sup>2</sup>**

<i>Year</i>	<i>Total number of debts raised</i>	<i>% variation from preceding year</i>	<i>Total value of debts raised \$m</i>	<i>% variation from preceding year</i>	<i>Average value of debts raised \$</i>
1993/94	343,827	+69.5	343.8	+69.4	999.92
1994/95	Not itemised in the annual report	Not itemised in the annual report	330.2	-3.9	Not itemised in the annual report
1995/96	759,332		385.8	+16.8	508.07
1996/97	904,066	+19.1	519.5	+34.6	574.62
1997/98	934,794	+3.4	571.3	+9.9	611.15
1998/99	1,336,024	+43	805.8	+41.0	602.60

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The Table above shows that in 1998/99, 1,336,024 debts were raised for a value of \$805.8 million. (It should be noted that annual expenditure under the Social Security Act is close to \$43 billion.)

## Recent developments

### **Tax File Number (TFN)**

One of the security mechanisms that have been in place for several years now is the requirement for claimants to provide a TFN. This requirement is now legislatively prescribed in the Social Security Act and qualification for assistance cannot be met without a TFN. The requirements to provide a TFN certainly adds a great deal more rigour to ensuring claimants are who they say they are and also in preventing multiple fraudulent claims.

Use of TFN has been effective in preventing dual or incorrect payments and therefore indirectly decreased numbers of overpayments arising. Equally, use of TFN has aided in the detection of fraudulent and incorrect payments, thereby increasing the numbers of overpayments detected and debts raised.

The TFN does not insure against the cash economy, ie. situations where there is collusion between two parties to exchange labour for cash, without declaring the transaction and activity to the tax office and/or Centrelink.

### **Data matching**

Data matching commenced to be introduced in the late 1980s and early 1990s.

Originally, data matching was achieved administratively with Cabinet direction and authorisation. The *Data Matching Program (Assistance and Tax) Act 1990* now provides the legislative basis for data matching.

Data matching between agencies has become a primary arm of fraud detection and now is made much faster and cheaper by bigger, larger, faster and cheaper computing facilities and databases within agencies. Since data matching was introduced it has been incrementally expanded and enhanced, with the latest advances proposed in the 2000-2001 Budget. In the 1998-99 year, data matching accounted for 339,415 out of a total of 361,842 debts raised from reviews, ie. 93.8%. (source F&CS 1998-97 Annual Report, pg 212). Most of the more recent advances in data matching are designed to identify avoidance in terms of undeclared earnings.

While data matching between agencies, eg. tax, Centrelink and immigration, does go a long way towards reconciling records between agencies and therefore identifying fraud where individuals are providing conflicting information to different agencies, it, like the TFN, does not deal with the cash economy. Where individuals are not providing information to any agency, data matching does not identify this type of avoidance.

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In short, the advent and expanded use of data matching has been a significant contributor to increased number of overpayments detected and debts raised.

### **Optical Surveillance**

One of the more recent, and controversial, initiatives aimed at identifying incorrect payments is optical (video or still camera) surveillance. An Optical Surveillance Pilot was conducted during 1997/98. The pilot was undertaken by private surveillance firms under control of Centrelink staff.<sup>3</sup> It was subject to 'stringent privacy safeguards' and guidelines issued by the Privacy Commissioner.<sup>4</sup> Since then optical surveillance has been used as an aid to detect fraud and overpayments. However, it is costly and, as it has only been conducted on a selective case-by-case basis, it would seem that its contribution to the increased number of overpayments detected and debts raised can only have been minimal.

Further background to the various measures will be discussed below.

## **Main Provisions**

### Schedule 1 – Amendments to the Social Security Act 1991

#### **Basic Debt Provision**

The scale of the debt recovery task facing Centrelink is indicated by the numbers of debts raised and the amounts involved. Centrelink raised a total of 1,336,024 new debts in 1998–99 with a value of \$805.81 million. In the same year they recovered \$649.4 million through cash payments and deductions from payments.<sup>5</sup>

**Item 7** reformulates the basic debt creation provision.

#### **Background**

Subsection 1223(1) provides that a debt arises where 'an amount was paid to a person' and 'the recipient was not qualified or the amount was not payable to the recipient'. It applies only to social security payments on or after 1 October 1997. There are exceptions and extensions. For example, where duplicate instalments have been made in respect of the same payment, the additional amounts are debts (section 1223(2A)). Where an amount was paid based on incorrect use of the rate calculator (ie an administrative error) the difference between that amount and the correct amount is a debt (section 1223(5)). Similarly, where a payment is made because of a false statement, misrepresentation or breach of the Social Security Act (ie contraventions of the Act), it is a debt (section 1224).

One particular concern relates to a possible disjunction between the description of a person who was paid ('an amount paid to a person') and a person for whom the amount was payable ('the recipient was not qualified or the amount was not payable to the recipient').

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Hypothetically, a payment may be made to a person who was not the original applicant. Theoretically, 'recipient' may refer to the original applicant as opposed to the payee. The entitlement question ('qualification' and 'payability') only focuses on the situation of the 'recipient'. Thus, if the original applicant was 'qualified' for the payment and the payment was 'payable', then it might not be recoverable even though it was paid to another person.

This concern may arise where there is a mistake in which the identity of the payee and the applicant are confused.<sup>6</sup> It may also be in issue where there has been a mistake regarding an applicant's direction or authorisation that the payment be made to another person.<sup>7</sup>

Another concern relates to the retrospectivity of certain determinations. A determination is deemed to have effect until it is superseded by a later determination. Certain determinations do not operate retrospectively. Thus, where an initial determination is incorrect, a subsequent determination may not be able to rectify the situation. The result is that payments under the incorrect determination may not be recoverable. Arguably, this is an undesirable result particularly in cases involving computer or administrative errors.<sup>8</sup>

#### Proposed Amendment

The new **proposed subsection 1223(1)** restates the basic rule, focusing on the right to 'obtain the benefit of a payment'. This allows separation of questions regarding who was paid (the person who 'obtains the benefit') from questions regarding who was entitled to the payment ('qualification', 'payability' and 'administrative or computer error', etc).

A debt arises where a person 'obtains the benefit' of a payment without being entitled to obtain that benefit.<sup>9</sup> A person is not entitled to 'obtain the benefit of a payment' where it was made by mistake as a result of computer or administrative error, the recipient was not qualified to receive the payment, the payment was not payable, or the payment was made as a result of a false statement, misrepresentation or breach of social security law (**proposed section 1223(1AB)**).

Where there has been computer or administrative error, a payment may become a debt whether or not the determination which authorised the payment had legal effect and whether or not a retrospective amending determination could have been issued (**proposed section 1223(1AC)**). In addition, where there has been such an error, the restrictions on the retrospective operation of determinations are to be disregarded (**proposed paragraph 1223(1AE(a))**). Moreover, the Secretary is specifically empowered to make retrospective rate reduction and cancellation or suspension determinations (**proposed paragraphs 1223(1AE(b) & (c))**).

A payment will not be a debt if the person who obtains the benefit does so via, at the direction of or with the authorisation of the person who *is* entitled to the benefit (**proposed section 1223(1AA)**). Nor will it be a debt where it arises as a result of an event or change in circumstances for which there was no requirement to notify the Secretary (**proposed section 1223(1AD)**).

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The current provisions relating to duplicate instalments and overpayments are repealed (**item 8**). The administrative error provisions are incorporated into the basic debt recovery rule (**proposed paragraph 1223(1AB(a))**). Both issues are also addressed in a new provision which ensures that whole payments and part payments are equally recoverable (**item 9**).

**Item 10** repeals the current provision relating to debts arising from contraventions of the Social Security Act (section 1224). These debts are covered in the basic rule (**proposed paragraph 1223(1AB(d))**). **Item 11** restates a provision relating to joint and several liability in respect of such contraventions (section 1224AB) to remove an obsolete reference to section 1224.

#### Application

**Items 7 to 10** apply to payments made on or after 1 January 2001. **Item 11** applies where the relevant conviction occurs on or after 1 January 2001.

#### Penalty Interest

**Item 12** reformulates the current provisions relating to interest on debts associated with repayment agreements.

#### Background

Section 1229 provides that persons who have social security debts or assurance of support debts<sup>10</sup> may be charged interest if they do not enter into negotiations or (reasonable) agreements to pay the debts. Debtors may be notified and asked to repay the debts. They must then be given 21 days to pay the debt, or to enter into negotiations or agreements. If they do not pay the debt or enter into an agreement within 14 days, interest may be charged immediately.<sup>11</sup> The interest is also a debt to the Commonwealth.<sup>12</sup> Once an agreement is entered into, interest is no longer charged. Repayments are applied first against the debt and only against the interest component when the debt is fully paid.

The Explanatory Memorandum refers to a loophole arising in relation to agreements that lack *bona fides*. As indicated, once an agreement has been entered into, interest is no longer charged. This is despite the fact that there is no guarantee that the person will make repayments in accordance with agreement. He or she may be able to ignore the debt, pending repeated notices or other recovery action, without incurring any interest.

Provision is also made for methods of recovery for interest debts (subsection 1229(9)) and for waiver of interest depending on the debtor's circumstances (subsection 1229(3)).

#### Amendment

**Item 12** inserts **proposed sections 1229–1229AB**. The new **proposed section 1229** clarifies the requirements regarding debt notices. Debtors must be notified whenever a debt exists that has not been fully paid. Debtors must be given 21 days to pay the debt, or

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to enter into an arrangement under **proposed section 1234** (see below). If they do not pay the debt or enter into an arrangement, subsequent notices may be given. A debtor is liable to pay interest if:

- having received a subsequent notice, he or she fails to pay the debt or enter into an arrangement, he or she is liable to pay interest (**proposed subsection 1229A(2)**), and
- having entered into an arrangement, he or she fails to make a payment and is given a written notice that interest will be charged (**proposed subsection 1229A(3)**).

Broadly, the interest liability arises either 90 days after the initial notice or 21 days after the subsequent notice, whichever is the later (**proposed subsection 1229A(4)**). The interest payable is a debt to the Commonwealth (**proposed subsection 1229A(5)**).

The current arrangements for waiver of interest are elaborated in **proposed section 1229AA**. The Secretary may waive interest on the outstanding amount of a debt either wholly or with respect to a particular period. The waiver may apply to a period before or after the waiver determination. (The *intention* is that the Secretary may waive the interest on the amount of a debt outstanding at any point in time. However, the *effect* may be that the waiver may only apply to interest on the amount of a debt outstanding when the waiver decision is made.) The waiver may be conditional and will be invalidated where conditions are breached (from the date of the breach). The Minister must issue written guidelines for the operation of these provisions (**item 14** which replaces the existing provision with **proposed section 1229C**).<sup>13</sup> The guidelines are disallowable instruments.

**Proposed section 1229AB** seeks to introduce an administrative charge for debts that attract interest (\$100). The charge is automatically levied when a person first becomes liable to pay interest. It would seem to apply in respect of *each and every debt*, whether it arises from an overpayment or unpaid penalty interest or administrative charges.

#### Application

**Item 12** applies to debts owed prior to 1 January 2001, provided the debtor had not been given a notice under section 1229, and to debts arising after 1 January 2001. If the debtor had been given a notice then the existing sections 1229 and 1229A continue to apply. See generally **item 34(4)**.

#### Repayment by Instalments

Debts may be recovered by deductions from social security payments (of the debtor or another person by consent), legal proceedings or garnishee notices (section 1230C).

**Item 23** deals with the current 'repayment by instalments' provision.

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## Background

The Secretary may allow a person to pay a debt by instalments (section 1234). However, in the general recovery provision, no allowance is made for recovery of debts via 'repayment by instalments'. As a result, in theory, while the Secretary may *allow payment* of a debt by instalments, he or she may not be able to *enforce recovery* by that method.

## Amendment

**Item 23** repeals the current 'repayment by instalments' provision in section 1234. In its stead **proposed section 1234** provides that the Secretary may enter into an 'arrangement' with a person for the payment of a debt. **Item 16** amends section 1230C to provide that the recovery methods include repayment by instalments under a section 1234 arrangement.

(Clearly, various arrangements may be made under **proposed section 1234**. However, it seems that recovery will only occur in respect of an arrangement, or a component of an arrangement, which involves 'repayment by instalments'.<sup>14</sup> The width in this provision allows for arrangements involving non-payment for a period or payment as and when money becomes available. Strictly speaking, these 'arrangements' are not recoverable.<sup>15</sup>)

These provisions apply to social security payments and veterans pensions and allowances.

## Time Limits for Recovery Action

**Items 17 and 20 to 22** update and extend the application of time limits for recovery action.

## Background

Generally, recovery action, by deductions, legal proceedings or garnishee notices must commence within 6 years of the time when the debt arose (sections 1231(2A) (deductions), 1232(2) (legal proceedings) and 1233(7A) (garnishee notices)). However, where a debt has arisen because of a false statement, misrepresentation or breach of Social Security Act, recovery action may commence within 6 years of the time when an officer became aware of the circumstances leading to the debt (sections 1231(2B) (deductions), section 1232(3) (legal proceedings) and section 1233(7B) (garnishee notices)).

In 1999, the Social Security Act was divided into three parts:

- *Social Security Act 1991*
- *Social Security (Administration) Act 1999*, and
- *Social Security (International Agreements) Act 1999*.

Together these Acts comprise 'the social security law', a phrase which has been introduced into the Social Security Act.<sup>16</sup> The legislative restructure commenced on 20 March 2000.

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#### Amendment

**Item 17** updates a reference to a 'debt arising under this Act' to take account of the restructure. A generic reference is thus divided into two categories: debts under the Act 'as in force immediately before 20 March 2000' and debts 'under the social security law'.

**Items 20 to 22** apply this updated *generic* expression to the *specific* time limit extensions listed above. Thus, where, *for whatever reason*, a debt arises under the Act 'as in force immediately before 20 March 2000' or 'under the social security law', deductions, legal action and garnishee notices may commence within 6 years of the time when an officer became aware of the circumstances giving rise to the debt. These amendments effectively apply the time limit extensions beyond circumstances where there has been a false statement, misrepresentation or breach of Social Security Act.

This amendment may cause problems as the general application of the time limit extension (**items 20 to 22**) conflicts with the general time limit reservation (section 1231(2A)). It is worth noting that, in relation to debts under the family assistance scheme (which may be repaid by deductions from social security payments), the general reservation and extension arrangement is preserved.<sup>17</sup> It is also worth noting that, in relation to debts that are solely attributable to administrative errors, a separate limitation period applies. Such debts must be 'raised' within 6 weeks of when the debt arose (section 1237A). Officers are effectively required to be 'aware of the circumstances giving rise to the debt' within 6 weeks, nullifying any impact of the time limit extension for recovery action. It is unclear whether the proposed amendments will affect this.

#### Automatic Deductions

##### Background

A wide range of debts may be deducted from social security payments (subsection 1231(1)). But there is no specific provision for deductions to be made from payments in arrears. In most cases, each payment is reduced by a certain amount until the debt is repaid (subsection 1231(2)). This amount is determined by the Secretary (subsection 1231(1A)). If a payment is a 'pension bonus', an amount may be determined which effectively accounts for the whole of the payment (ie the recipient forfeits the whole of the bonus).<sup>18</sup>

##### Amendment

**Item 18** allows debts to be recovered by deductions from payments in arrears. **Item 19** provides that the Secretary may determine the deduction amount in respect of ordinary payments, pension bonuses and arrears payments. That amount may be set so that a recipient forfeits the whole of a pension bonus or arrears payment (or ordinary payment if the recipient consents) provided the effect does not result in severe financial hardship.

#### Recovery from Financial Institutions

**Item 24** provides for recovery of debts directly from financial institutions.

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## Background

Currently, while provision is made for deductions, legal proceedings and garnishee notices, no provision is made for recovery of debts directly from recipients' accounts. This may disadvantage the Commonwealth especially where the payment has been or will be discontinued (for example, where the recipient has died but the payment has continued). In these circumstances, there may be little scope for deductions and there may be significant delays or costs associated with garnishee notices or legal proceedings.

## Amendment

**Item 24** inserts **proposed new section 1234AA** which provides that the Secretary may require a financial institution to repay amounts directly from private accounts. The requirement may extend to amounts that have been paid into the incorrect account or into the account of a deceased recipient. The financial institution does not have to make good any shortfall in the account balance. But it is an offence for the institution not to comply with a request which carries a fine of 300 penalty units. (One penalty unit is currently \$110.)<sup>19</sup> There does not appear to be any requirement to give notice to the account holder.

## Offsetting Debts from Other Government Assistance

Section 1234A provides that one person's debt, whether it arises under the Social Security Act or other specified assistance Acts, may be offset against deductions from another person's social security payment (with consent). **Item 25** amends the section to include debts arising under the *A New Tax System (Family Assistance) (Administration) Act 1999*.

There is no provision for offsetting debts arising elsewhere in the social security law (eg debts arising under the *Social Security (International Agreements) Act 1999*).<sup>20</sup>

## Writing Off

### Background

The secretary may write off debts in some circumstances. One circumstance is where debts are irrecoverable, for example where the time limit for deductions, etc has expired (para 1236(1A)(a)). Another is where a debtor is not receiving a social security payment and recovery action would not be cost effective (para 1236(1A)(d)). Another is where the debtor has no capacity to repay the debt (para 1236(1A)(b)) (A debtor will be taken to have a capacity if a debt could be recovered by deductions from a social security payment without causing severe financial hardship to the recipient (section 1236(1C)).)

### Amendment

**Item 26** removes a redundant reference in paragraph 1236(1A)(d). As indicated this provision allows write off where a debtor is not receiving a social security payment *and* recovery action would not be cost effective. But if a debtor *was* receiving a social security payment, recovery would *always* be 'cost effective' (by virtue of automatic deduction).<sup>21</sup>

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Thus, it is unnecessary to ask whether a debtor is receiving a payment – the only question that needs to be asked is whether or not recovery action is 'cost effective'.

To complement the provisions for offsetting family assistance debts against social security debts payments, **item 28** provides that debts are irrecoverable for the purposes of para 1236(1A)(a) when the time limit for recovery of family assistance payments has expired. (As indicated, the time limits applying to recovery of family assistance payments are currently the same as those currently contained in the Social Security Act.) **Item 30** includes arrangements for deduction and offsetting under the *A New Tax System (Family Assistance) (Administration) Act 1999* for the purposes of subsection 1236(1C).

#### Application

**Items 28** and **30** apply to debts that arise after Royal Assent. See generally **item 34(4)**.

#### Waiver

##### Background

In addition to writing off, the Secretary has the power to waive debts in various circumstances. One circumstance is where the Secretary and the debtor reach an 'agreement for part-payment in satisfaction of the outstanding debt'. The agreed amount must be equal to the present value of the outstanding debt as if it was paid in instalments determined by the Secretary. In effect, the part-payment is a full-payment taking account of the loss that would occur with repayment by instalments through inflation and interest.

There are two other conditions (sub-section 1237AAB(5)):

- the debtor must not be able to repay more than the agreed amount, and
- the debt could not ordinarily have been recovered within 12 months.

##### Amendment

**Item 32** removes the additional conditions. In effect, part-payment agreements may be reached even where the debtor is able to pay more than the agreed amount. They may also be reached in respect of debts that could have been repaid within 12 months.

## Schedule 2 – Amendments to the Social Security (Administration) Act

### Background and Amendment

**Item 1** deals with the automation of decision making. The intention is that a computer program may be used to make any of the decisions that may be made by the Secretary under the social security law. **Proposed section 6A** provides that a computer program may be used for any 'purposes' for which the Secretary may make a 'decision' and that

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'decisions' made by the 'operation' of a computer program are deemed to be decisions made by the Secretary.

Section 123 of the *Social Security (Administration) Act 1999* provides that determinations regarding social security payment eligibility and payability are effective until they are revoked or until there is a change in the prescribed circumstances. To avoid uncertainty, **item 2** ensures that such determinations cease when the recipient dies.

#### Application

As indicated above, **item 1** commences on Royal Assent. **Item 2** applies to determinations in force and determinations made after Royal Assent (**item 3**).

### Schedule 3 – Amendments to the Family Assistance (Administration) Act

**Schedule 3** amends the *A New Tax System (Family Assistance) (Administration) Act 1999* largely to duplicate the debt recovery provisions discussed above.

#### Amendments

- **Item 3** duplicates **Schedule 1, item 12** (debt notices, penalty interest, waiver of interest, administrative charges).
- **Item 5** duplicates **Schedule 1, item 14** (guidelines).
- **Item 7** duplicates the *effect* of **Schedule 1, item 19** (automatic deductions which result in forfeiture of ordinary payment by consent).
- **Item 8** duplicates **Schedule 1, item 23** (repayment arrangements) (Note that **proposed section 91** refers to section 82 which was recently amended to include a reference to 'repayment by instalments'.<sup>22</sup>)
- **Item 9** duplicates **Schedule 1, item 24** (recovery from financial institutions)
- **Item 10** duplicates the effect of **Schedule 1, item 26** (ie, as the deduction process is automated, recovery will always be cost effective where deductions can be made. Where deductions cannot be made debts are irrecoverable at law: **item 11**), and
- **Item 16** duplicates **Schedule 2, item 1** (use of computer programs to made decisions).

#### Application

The items in **Schedule 3** have the same application dates as the corresponding items in **Schedule 1 (item 17)**.

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## Schedule 4 – Amendments to the Veterans Entitlements Act

**Schedule 4** amends the *Veterans Entitlements Act 1986* to duplicate the above provisions.

### Amendment

- **Item 5** inserts a provision which allows for recovery by instalments.
- **Item 6** removes a penalty interest provision in relation to veterans entitlements debts.
- **Item 7** inserts **proposed sections 205AAA–205AAE**. Essentially these sections duplicate **Schedule 1, item 12** and **Schedule 3, item 3** (debt notices, penalty interest, waiver of interest, administrative charges). While the headings refer to 'debts', the sections use the expression 'recoverable amounts' consistently with the Veterans Entitlements Act.
- **Item 8** duplicates **Schedule 1, item 24** and **Schedule 3, item 9** (recovery from financial institutions).

### Application

The items in **Schedule 4** apply *similarly* to the corresponding items in **Schedules 1** and **3**. **Items 6** and **7** apply in relation to 'recoverable amounts' arising on or after 1 January 2001. In relation to 'recoverable amounts' arising before this date, the application of **items 6** and **7** depends on whether the recipient was:

- receiving a veterans or social security payment on 1 January 2001
- liable to pay the equivalent of penalty interest on 1 January 2001, and
- had repaid part of the 'recoverable amount' before 1 January 2001.

If the first two points apply, then the provisions repealed by item 6 apply. If the first point applies but the second does not, then neither these provisions, nor those in item 7 apply.

If answer to the first point is no, but the third point applies, then the amendments in item 7 will only apply if the person becomes liable to pay penalty interest after 1 January 2001 or, having already become liable to pay the equivalent of penalty interest, if the person fails to make a payment in accordance with a repayment arrangement after 1 January 2001.

If the third point does apply, then the amendments in item 7 will only apply if the person becomes liable to pay penalty interest after 1 January 2001 *and* the Commission *chooses* to give a notice under **proposed section 205AA(3)**. (Thus, while the Commission is ordinarily required to issue notices, there is a discretion in the transitional arrangements.)

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## Schedule 5 – Amendment of the Safety, Rehabilitation and Compensation Act

Schedule 5 amends the *Safety, Rehabilitation and Compensation Act 1988*. Currently, section 112(3) provides that compensation payable under this Act is not subject to 'attachment' (or garnishment) except in accordance with specified legislation. **Item 1** includes within this list the Social Security Act. Thus, compensation may be garnished for social security purposes (eg, for the payment of a compensation recipient's debt).

## Concluding Comments

### Criminal Code

It is worth noting that, in some circumstances, social security, veterans affairs and family assistance 'debts' may attract criminal liability. Clearly, where a person has been paid or overpaid as a result of a false statement or false representation, they will be guilty of theft if they retain the payment. However, where a payment has been made as a result of departmental error, it is arguable that the recipient will also be guilty of theft or fraud, depending on the recipient's state of mind.

In essence, theft is the appropriation of property belonging to another person without their consent and with the intention of permanently depriving that person of the property. Government payments are usually made by consent. Clearly, this consent will be vitiated where there has been fraud on the part of the recipient. But it may also be vitiated where there has only been a mistake on the part of the government. The mistake may relate to the identity of the intended recipient or the amount of the intended payment. Any mistake as to identity is usually sufficient to vitiate consent. However, a mistake as to the amount of the payment may also vitiate consent. Moreover, the mistake may vitiate consent even if the recipient obtained the payment innocently and did not immediately realise the mistake. While the common law has rejected such a conclusion,<sup>23</sup> it seems to have been accepted in the Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999.<sup>24</sup>

Fraud is essentially obtaining property or financial advantage by deception (with the intention to permanently deprive). Clearly, a person who innocently receives a payment will not be guilty of fraud. However, a person who dishonestly receives a payment, for example by failing to notify a government agency of a change in circumstances, may be guilty of fraud. This result arises by virtue of a provision in the *Crimes Act 1914*.<sup>25</sup> The provision is retained along with the above amendments to the *Criminal Code Act 1995*.<sup>26</sup>

It should be noted that the Social Security Act already contains offences covering the situations described above. However, the maximum penalty is 12 months imprisonment.<sup>27</sup> Under the amendments to the Criminal Code Act, the maximum penalty for theft and fraud in the circumstances described is 10 years.

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## Endnotes

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- 1 See *Bills Digest no. 39, 1996–97*, Social Security Legislation Amendment (Budget and Other Measures) Bill 1996 at <http://www.aph.gov.au/library/pubs/bd/1996-97/97bd039.htm> [25/9/00].
- 2 Notes:
  - Source of data is the Department of Social Security Annual Reports (Department of Family and Community Services Annual Report for the 1998/99 year),
  - The variations from the previous year provided for the 1993/94 year have been obtained from the 1992/93 annual report,
  - The total number of debts raised in the 1994/95 year was not provided in the 1994/95 annual report, rather provided in the 1995/96 annual report, and
  - The average value of debt raised is crudely obtained by dividing the total amount of debt raised by the total number of debts raised. This figure does not include debts raised by the Department of Social Security on behalf of other agencies, ie. includes only debts under the *Social Security Act 1991*.
- 3 Department of Family and Community Services, *Annual Report 1997-98*, at <http://www.facs.gov.au/annualreport/ar2-7003.htm> [30/10/00].
- 4 Ibid. See also Guidelines on Covert Optical Surveillance in Commonwealth Administration, published by the Privacy Commissioner in February 1992 under s27(1)(e) of the *Privacy Act 1988*. The guidelines are general and advisory rather than specific and prescriptive. They require that:
  - 'the decision to conduct surveillance has been taken at an appropriately senior level;
  - there is a reasonable suspicion of unlawful activity;
  - other forms of investigation have been considered and found inconclusive or unsuitable;
  - benefits arising from obtaining relevant information by means of the surveillance outweigh to a substantial degree the intrusion of privacy of the surveillance subjects; and
  - material should be used and disclosed in a manner consistent with the Information Privacy Principles'; The Privacy Committee of New South Wales, 'Invisible Eyes: Report on Video Surveillance in the Workplace', *Report No. 67*, August 1995, section 5.1.1 at [http://www.austlii.edu.au/au/other/privacy/video/51\\_1.html](http://www.austlii.edu.au/au/other/privacy/video/51_1.html) [30/10/00].
- 5 Department of Family and Community Services, *Annual Report 1998-99*, p 213 at <http://www.facs.gov.au/annreport99/html/index.htm> [30/10/00].
- 6 The Explanatory Memorandum gives an example of this, *Explanatory Memorandum*, p 3.
- 7 An applicant may direct or authorise a payment to be made to another person.
- 8 *Explanatory Memorandum*, p 5.
- 9 This occurs irrespective of whether the payment was made on or after 1 October 1997.

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- 10 An Assurance of Support or AOS is a financial commitment in respect of certain visa classes under the *Migration Act 1958*. It is an undertaking to indemnify the Commonwealth for any recoverable social security payments made to holders of those visas. See generally Migration Legislation Amendment (Parents and Other Measures) Bill 2000, *Bills Digest No 200, 1999–2000* at <http://www.aph.gov.au/library/pubs/bd/1999-2000/2000BD200.htm> [25/9/00].
- 11 Interest is charged at a rate of 20% per annum or such rate as fixed by the Minister: section 1229B.
- 12 This requirement appears in section 1229(7) and is *restated* in section (9).
- 13 Theoretically, the guidelines could cover any aspect of the penalty interest provisions, but the only obvious discretion which could be subject to the guidelines appears in the waiver provisions.
- 14 While **proposed section 1234** does not make any reference to 'repayment by instalments', the proposed new 'Recovery methods table' in **item 6** lists (the amended) section 1234 as referring to 'repayment by instalments'. **Proposed section 1230C** describes the methods by which debts may be recovered. The only method listed which relates to **proposed section 1234** relates to 'repayment by instalments'.
- 15 Personal Communication, [Mr Dwayne Currie](#), Department of Family and Community Services, Canberra, 20 September 2000.
- 16 Section 23, amended by Schedule 1, item 15 of the *Social Security (Administration and International Agreements) (Consequential Amendments) Act 1999*.
- 17 *A New Tax System (Family Assistance) (Administration) Act 1999*, section 86.
- 18 The pension bonus scheme provides for a one-off tax-free payment to persons who, having qualified for Age Pension, delayed claiming the payment while they continued to work for 960 hours per year. When the person finally retires and claims Age Pension, the pension bonus is incorporated into the first Age Pension payment.
- 19 *Crimes Act 1914*, s 4AA.
- 20 For example, a debt arising from a situation in which one country made payments to a person without taking into account a payment that was accruing to the person from another country: eg: clause 4 of the *Agreement between Australia and Malta on Social Security*, in Schedule 6 to the *Social Security (International Agreements) Act 1999*.
- 21 Although, the Act effectively determines that recovery of debts of less than \$50 will not be cost effective even if deductions can be made. Section 1237AAA(2) effectively requires the Secretary to waive such debts in these circumstances.
- 22 The amendment was inserted by Schedule 2, item 83 of *A New Tax System (Family Assistance and Related Measures) Act 2000*, Act No. 45, 2000 <http://law.agps.gov.au/html/comact/10/6158/0/CM000070.htm> [14/9/00]. An updated version of the Act is available at <http://law.agps.gov.au/html/pasteact/3/3301/top.htm> [14/9/00].
- 23 *Illich* (1987) 162 CLR 110. See also Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 3: Theft, Fraud, Bribery and Related Offences - Report*, December 1995, pp 49–61.

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- 24 See *Bills Digest* ~~No. 105~~*no. 105*, 1999–2000 at <http://www.aph.gov.au/library/pubs/bd/1999-2000/2000BD105.htm> [15/9/00].
- 25 Section 29D. See MCCOC, op cit, p 147.
- 26 Proposed Division 135.
- 27 Section 1350.

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