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FACSIMILE TRANSMISSION

TO: Paul Pirani, Branch Head, Legal Services Group,  
Department of Veterans' Affairs

FAX NO: 02 6289 6316

DATE: 24 January 2001

FROM: Elisabeth Wentworth, Legal Counsel

SUBJECT: Bank fees on pensioner's accounts

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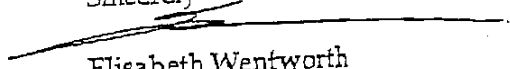
Dear Mr Pirani

Further to our telephone conversation today I have attached extract from ABIO Bulletin no. 23, December 1999, on the question of whether pensions declared 'absolutely inalienable' by statute are subject to bank fees.

I am aware from earlier discussions with the Department that this is an issue which has been raised from time to time. It may be useful to have the published view of this office. It is of course in no way binding but it represents the approach this office takes in relation to this issue and the reasons for our approach. This approach is applied to complaints received from bank customers by us in our role as the alternative dispute resolution scheme for Australian retail banks and their customers.

If you have any queries please do not hesitate to call me on 03 9613 7310.

Sincerely

  
Elisabeth Wentworth

TPI Pensions - s125 Veterans' Entitlements Act - s66 Social Security Act  
- pensions "absolutely inalienable" - whether prevents bank from  
charging fees on account into which pension paid - statutory  
interpretation

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The Ombudsman had to consider recently the question of whether banks are prevented by statute from charging bank fees on pensioner's accounts. The following represents the current view of this office on the question. The reasons are set out in detail to assist users of the Scheme.

#### The Issue

The issue is whether the words "absolutely inalienable" in section 125 of the Veterans' Entitlements Act (the Act) mean that a recipient of a pension may not, by contract or otherwise, agree to bank fees and charges being deducted from a bank account into which the pension is paid. In other words, do the words prevent the bank appropriating monies in a pensioner's account for fees and charges, even if the right to do so is set out in the contract between the bank and its customer? A similar provision appears in the Social Security Act

#### The Statutory Provisions

##### Section 125 of the Act

"125.

- (1) Subject to this Act, a pension, allowance or other pecuniary benefit under this act is absolutely inalienable, whether by way of, or in consequence of, sale, assignment, charge, execution, bankruptcy or otherwise. [our emphasis]
- (2) At the request of the pensioner to whom a service pension, a wife's service pension or a carer's service pension has been granted, or in accordance with the Income Tax Assessment Act 1936, deductions may be made from installments of that pension payable to the pensioner and the amounts so deducted shall be paid to the Commissioner of Taxation for the purpose of enabling the collection of tax that is, or may become, payable by the pensioner.

- (3) *At the request of a pensioner to whom a pension has been granted under this Act, deductions may be made from installments of that pension to meet amounts payable by the pensioner to the Defence Service Homes Corporation under a mortgage securing a loan made by that Corporation to the pensioner or to the pensioner and the spouse of that pensioner."*

### Section 66 of the Social Security Act

"66.

- (1) Subject to subsection (2) and section 1359, age pension is absolutely inalienable, whether by way of, or in consequence of, sale, assignment, charge, bankruptcy or otherwise [our emphasis]
- (2) *The Secretary may make deductions from the installments of age pension payable to a person where the recipient asks the Secretary:*
- (a) *to make the deductions;*
  - (b) *to pay the amounts to be deducted to the Commissioner of Taxation."*

### General Principles

A provision in a statute is to be construed according to established principles of statutory interpretation, found in the common law and also in interpretation statutes such as the (Cth) *Acts Interpretation Act 1901*.

### Relevant Principles of Statutory Interpretation

As a general rule, a Court will always begin the task of statutory construction with the view that words will be given their ordinary meaning, unless the legislature has clearly indicated otherwise<sup>1</sup>. The ordinary and natural meaning of a word may be determined by reference to dictionaries, usually, but not exclusively, the Oxford English Dictionary and the Macquarie Dictionary. If a word is a technical legal word, then its established legal meaning is used unless a contrary intention clearly appears from the context.<sup>2</sup>

The effect of adopting a particular construction may be taken into account by a court in a number of ways:

<sup>1</sup> *Cooper Brookes (Wollongong) Pty Ltd v Cmr of Taxation (Cth)* (1981) 147 CLR 297 at 304-5

<sup>2</sup> *Barker v R* (1983) 153 CLR 338

- If the practical consequences of a particular construction are curious and unlikely to have been intended by parliament, then that construction ought not to be adopted;<sup>3</sup>
- Mere inconvenience of result will not of itself be a ground for departing from the ordinary and natural sense of a word, but that inconvenience of result may assist the court in concluding that an alternative construction which is reasonably open is to be preferred;<sup>4</sup>
- If the effect of a particular construction will be to render meaningless a provision in the same statute, the Court will assume that it was not Parliament's intention to do so;<sup>5</sup>
- If the intention of Parliament is to override common law rights, that must be done clearly and unambiguously;<sup>6</sup>
- If the ordinary meaning of a word will lead to a result that is manifestly absurd or unreasonable, extrinsic material may be used in ascertaining the meaning;<sup>7</sup>
- In the interpretation of "beneficial" statutes, such as those relating to war service entitlements, any ambiguity in its provisions should be resolved by advancing the remedy which the statute appears intended to be resolved;<sup>8</sup> and
- It will be assumed that common law rights are not to be affected, unless there is a clear and unambiguous statement to the contrary in the statute.<sup>9</sup>

#### Definitions of "Inalienable"

1. Inalienability in property law is a "characteristic of a right or benefit that the courts will not allow the holder to transfer to another"<sup>10</sup>.

<sup>3</sup> Capricornia Electricity Board v John M Kelly (Builders) Pty Ltd (1990) 71 LGRA 256 at 262-3

<sup>4</sup> Cooper Brookes (Wollongong) Pty Ltd v Cmr of Taxation (Cth) (1981) 147 CLR 297

<sup>5</sup> Smith v R (1994) 181 CLR 338 at 348

<sup>6</sup> Sargood Bros v Commonwealth (1910) 11 CLR 258 at 279

<sup>7</sup> (CTH) Acts Interpretation Act 1901 s15AB(1)(b)(ii)

<sup>8</sup> Holmes v Permanent Trustee Co of New South Wales Ltd (1932) 47 CLR 113 at 119.

<sup>9</sup> Bishop v Chung Bros (1907) 4 CLR 1262 at 1273.

<sup>10</sup> Butterworths Encyclopaedic Australian Legal Dictionary.

2. Inalienable; "That which is not transferable. For example, pensions and other social security benefits are inalienable...as are the rights of a citizen."<sup>11</sup>
3. Inalienable; "not alienable; that cannot be transferred to another".<sup>12</sup>
4. Alienation of income in a taxation context means "The transfer by one person to another, of the right to receive income".<sup>13</sup>

The definitions are concerned with transfer. If something is inalienable it cannot be transferred to another. The context in some of the definitions is a right to something, in others it is the thing itself. In the context of section 125, the question remains what is it that cannot be transferred? When referring to a pension, is the statute referring to the entitlement to receive the money or the money itself?

#### Definitions of Pension

A pension, according to the Macquarie dictionary is from the Latin *pensio* - payment, and means:

- a fixed periodical payment made in consideration of past services, injury or loss sustained, merit, poverty etc
- an allowance or annuity.

The Concise Oxford Dictionary defines pension as:

*"a regular payment made by a government to people above a specified age, to widows, or to the disabled..."*

Using the ordinary meaning of pension then, section 125 would mean that the payment cannot be transferred to another.

Does this also mean that the money received by way of pension cannot be transferred? The answer to this question depends, in part, on whether, and for how long, the money paid by way of pension retains the character of a pension.

<sup>11</sup> *Butterworths Encyclopaedic Australian Legal Dictionary*

<sup>12</sup> *Macquarie Dictionary*, see also *Concise Oxford Dictionary* "that cannot be transferred to another."

<sup>13</sup> *Norman v FCT* (1963) 109 CLR 9.

### *Judicial Consideration of the Issue*

The issue raised by the complaint has not been considered by an Australian Court. A similar issue was considered however by 2 judges of the English King's Bench Division in *Jones & Co v Coventry* [1909] 2 KB 1029.

The case concerned retired pay of an officer of the Army under the Army Act 1881. Section 141 of that Act rendered void any assignment of or charge on retired pay. This had the effect of making the retired pay, or pension as it was described by the Court, "inalienable". The question was whether a garnishee order could attach to the credit balance of an account into which the pension was paid.

Darling J. was of the opinion that;

*"pension, when it has been paid to the person entitled to receive it, ceases any longer to be pension; it has lost its character of pension, just like dividends which, after payment, lose the character of dividends. It becomes part of the pensioner's ordinary money. I think, therefore, that this sum of 6l.13s.8d., which was the balance of pension monies paid to the bank and credited by the bank to the defendant's account, had lost its character of pension, and accordingly it does not come within the provisions of s. 141 of the Army Act, 1881. It became an ordinary debt due from the bank to the defendant and can be attached under garnishee order."*

Jelf J. agreed with Darling J. In His Honour's opinion the Master before whom the case had previously come had correctly stated the legal position when he said:

*"I hold that when once the money reaches the officer's banking account it ceases to be impressed with the character of pension; the only concern of Parliament being to see that the money reaches the officer and is not intercepted on its way to his hands or account."*

The decision in *Jones v Coventry* is consistent with giving the words "pension" and "absolutely inalienable" in section 125 their ordinary meaning but a restricted application - a pension is a payment that cannot be transferred to anyone else but once the payment is made to the pensioner, it ceases to be pension and becomes money in the hands of the pensioner or a credit in the pensioner's bank account which is in turn a debt due from the bank to the pensioner.

### *Does Jones v Coventry Determine the Issue?*

*Jones v Coventry* is not determinative of the issue here. This is because:

1. Although Australian Courts are free to follow relevant English decisions which are not in conflict with decisions of Australian Courts, English decisions are not binding on Australian Courts.
2. *Jones v Coventry* does not appear to have been considered by an Australian Court.
3. While a decision on particular words will bind inferior courts on the construction of those words in similar facts, comments made by judges on the construction of statutes while of help, guidance and respect, cannot absolve the duty of the court to exercise an independent judgment.<sup>14</sup>

The decision, and the analysis of the relevant legal principles by the judges in that case, do not appear, however, to be in conflict with any later decision of an Australian Court. Thus, while not binding, the decision is, in the view of this office, reasonably persuasive.

The principles of statutory interpretation have also, however, been considered.

### *Applying Principles of Statutory Interpretation*

#### The "purpose" test

The long title of the Act is:

*"An Act to provide for the payment of pensions and other benefits to, and to provide medical and other treatment for, veterans and certain other persons, and for other purposes."*

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<sup>14</sup> *Ogden Industries Pty Ltd v Lucas* (1968) 118 CLR 113 at 127, referred to in Halsbury's Laws of Australia [385-150]

The purpose of the Act is to provide for the payment of pensions to veterans. A large part of the Act is concerned with establishing who is entitled to a pension and in what amount. Section 125 is consistent with an intention to ensure that only those who are entitled to a pension receive it. The stated purpose of the Act does not however appear to provide guidance on the question in issue here.

"Pension" is not defined other than to mean a pension under Part II or Part IV.

#### The other words used in section 125

Following the words, "*absolutely inalienable*" there are some examples given - "*whether by way of or in consequence of, sale, assignment, charge, execution, bankruptcy or otherwise.*"

Although examples in a Commonwealth statute are not to be taken as exhaustive,<sup>15</sup> the examples may give an indication of the intended meaning of "*absolutely inalienable*".

Each of the examples used are events which could prevent the pensioner from ever coming into possession of the pension or would allow another person to have an interest in the pension itself. They are not, apparently, concerned with the use to which the money is put once it is received.

#### Consideration of the result

If section 125 means that pension payments cannot ever be transferred to another, even after they have been paid to the pensioner, that would appear to have the result that a pensioner could not by agreement use pension payments to pay obligations under contracts entered into by the pensioner, such as the payment of bills or pay for services or even necessities. That would be a manifestly absurd result, which is unlikely to have been intended by parliament.

Section 125 can be given a more limited application, namely that pension payments can be transferred to another but only after they are received by the pensioner. That interpretation would preserve the right of the pensioner to receive the payment and would prevent funds being diverted away from the pensioner before receipt. The question would then be, when is the pension received by the pensioner - when it is paid into a bank account, or when it is actually received into the hands of the account holder?

<sup>15</sup> (CTH) Acts Interpretation Act 1901 s15AD(a)



If *Jones v Coventry* is followed, the pension would be protected until it was paid into any relevant bank account but not after. Under the analysis in that case, it would no longer be protected for two reasons;

- It had been received; and
- It had ceased to be pension (and so was not covered by the statutory provision in any event).

If this is so, then, provided bank fees were debited to the account *after* the payment was credited to the account, the fees would be a matter of contract between the account holder and the bank.

If the pension payment were to be inalienable until physically received in the hands of the pensioner, that is, withdrawn from the bank account into which it was paid, the effect would be that a pensioner could not utilise facilities such as direct debit arrangements for payments of bills or for loan repayments. This would, at the very least, be an inconvenient result. It is difficult to conclude that it was one intended by Parliament.

In addition, if a similar interpretation were applied to the same words in the Social Security Act, such a result would be in conflict with the provisions of s67 of the Social Security Act which protects a "saved amount" from a garnishee order but otherwise recognises that a garnishee order may be validly made in respect of a bank account into which age pension is paid. A garnishee order is a form of execution, which in turn is one of the examples given in relation to a pension being "absolutely inalienable".

It does not therefore appear to have been parliament's intention to prevent funds in a pensioner's bank account being paid directly to a third party.

#### *Is There a Distinction Between Bank Fees and Charges and Other Debits to the Account?*

Bank fees and charges are usually applied by the bank to an account under the Terms and Conditions of the Account. The written Terms and Conditions form part of the contract between the bank and its customer. By opening an account the customer is taken to have agreed to the written Terms and Conditions.

The terms and conditions relating to fees and charges are not usually negotiable although the bank may make a commercial decision to waive them in some cases. Those terms and conditions can be varied by the bank provided notification is given to the customer. The requirements for notice of variations are set out in the Code of Banking Practice.

On the face of it, bank fees are in the same category as any other debit to the account which arises as a result of contract.

A complainant raised the argument that bank fees are not paid as a result of any real agreement on the part of a customer. The argument is that there is no real choice involved and so it is an involuntary payment. Another complainant said that the fees effectively reduce the amount of pension which is actually received by the pensioner and for that reason, amongst others, is contrary to the spirit of the Act.

While in practice, there is little choice about the payment of fees once a bank account is opened, the payment of bank fees is essentially a contractual matter between the bank and its customer. There is, notionally, choice about whether to have pensions paid to an account with a particular financial institution, although in practice most pensioners are required to nominate an account into which pension is to be paid in order to receive payment<sup>16</sup>. To that extent, fees are usually unavoidable. But garnishee orders, which result in "involuntary" payment, are not apparently prohibited by the statute so it is difficult to conclude that the fact of a payment being involuntary or unavoidable, of itself, would affect the interpretation of s125.

To the extent that bank fees reduce the amount of money available to a pensioner whose pension is paid into a bank account, that occurs as a result of bank policy to provide for the payment of fees in its contract with the customer and is a relatively recent development. It is difficult to conclude that it was one within the contemplation of Parliament when the legislation was introduced<sup>17</sup>.

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<sup>16</sup> s122A which provides that the Commission may direct that the pension be paid to an account; s122(1A) which provides that if the pensioner has not nominated an account, the pension is not be paid (with some exceptions).

<sup>17</sup> Similar provisions have been in Social Security legislation for most of the 20<sup>th</sup> Century.

Nevertheless, if it were the intention of Parliament to limit a pensioner's freedom to contract once the pension is received, or to put contracts with a bank concerning fees into a special category, that would, in the view of this office, still require a clear and unambiguous statement in the relevant legislation. And if it is the case that once a pension is paid into a bank account it loses its character as a pension, then the statute does not apply in any event to what happens next.

### Conclusion

The view of this office is that section 125 of the Act does not prevent a pensioner's account being debited with bank fees provided those fees are charged in accordance with the Terms and Conditions of the account. The reasons for this view are as set out above and are in summary that:

1. The Act is concerned with ensuring that a pension is paid to a person entitled to receive it, and only to that person, except in very limited circumstances<sup>18</sup>.
2. The Act, and in particular s 125 is concerned with *payment* of a pension to a pensioner, rather than with the *use* to which it is put after receipt.
3. The application of the principles of statutory interpretation to the relevant words in s 125 lead, on balance, to a conclusion that s 125 does not prevent use of pension payments once received.
4. The Act does not clearly and unambiguously limit a pensioner's freedom to contract once a payment is received.
5. Bank fees are paid as a result of the contract between a bank and its customer.
6. Although not binding, *Jones v Coventry* is persuasive on the issue of whether pensions retain their character as pensions in any event once paid into a bank account. If they do not, there is a strong argument that the provisions of section 125 of the Act will no longer apply.

As is mentioned above, this issue has not apparently been considered by an Australian Court. It may be, of course, that a court would reach a different view. Nevertheless the above may be of assistance as indicating the view of this office.

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<sup>18</sup> s125 (2) & (3). See also s.122