WAIVER OF SOCIAL SECURITY DEBTS

*Stephen Argument**

First published in Newsletter No 9 1991.

On 8 July 1991, the Minister for Social Security, Senator Graham Richardson, issued a notice in the following terms:

> Having regard to the importance of recovering public moneys paid in excess of entitlements authorised by Parliament, the longstanding approach under the Commonwealth *Audit Act 1901* to the recovery of debts, the obligations placed on social security recipients by the *Social Security Act 1991* (the Act) to notify changes in their circumstances and the importance of deterring fraudulent activity, and having regard to subsections 1237 (2) and (3) of the Act which require the Secretary of the Department of Social Security (the Secretary) to act in accordance with directions issued by me from time to time, I hereby direct that the power of the Secretary in section 1237 to waive the right of the Commonwealth to recover from a person the whole or part of a debt must, subject to the attached schedule, be exercised in the following circumstances only ...

The notice goes on to set out the circumstances in which debts can be waived by the Secretary. This article will discuss the background to the issuing of this notice as well as the substance of the conditions referred to above.

---

* *Stephen Argument is the Secretary to the Senate Standing Committee for the Scrutiny of Bills. Any views expressed in this article are those of the author.*

Write-off and waiver of debts

Section 251 of the *Social Security Act 1947* (the 1947 Act) gave the Secretary of the Department of Social Security the power to write-off or waive debts owed by social welfare recipients to the Commonwealth under that Act. The relevant debts generally arose as a result of recipients being overpaid, whether as a result of mistake or fraud on the part of the recipient or as a result of so-called 'administrative error'

on the part of the Department of Social Security (DSS).[1] In October of 1988, the Social Security Amendment Bill 1988 was introduced. That Bill contained proposed amendments to s251 of the 1947 Act, the effect of which were to allow the Minister for Social Security to issue directions to the Secretary as to the exercise of his or her discretion to write-off or waive debts. The effect of the amendments was to make such guidelines formally binding both on the Secretary and also the Social Security Appeals Tribunal (the SSAT) and the Administrative Appeals Tribunal (the AAT), should they be required to review a decision by the Secretary.

Though the directions were to be tabled in the Parliament, the amendments made no provision for the Parliament to disallow the directions. Despite suggestions from the Senate Standing Committee for the Scrutiny of Bills that, given their binding effect, not only on the Secretary but also on the SSAT and the AAT, the directions should be disallowable,[2] and in spite of amendments to that effect moved in the Senate by the Australian Democrats, the amendments to s251 were passed into law without any requirement that the Minister's directions be subject to disallowance by the Parliament.[3]

In December 1990, the Social Security Bill 1990 was introduced. This Bill, which was the end result of a considerable period of both drafting and also consultation with interest groups, was a

'Plain English' re-draft of the 1947 Act, intended to repeal and replace the earlier Act. Clause 1237 of the Bill essentially re-stated s251 of the 1947 Act (as amended), though the unclear concept of 'write-off' was omitted. The Bill was passed by the Parliament without amendment to clause 1237, becoming the *Social Security Act 1991* (the 1991 Act) and commencing on 1 July 1991.

Throughout this period, no directions pursuant to either s251 of the 1947 Act or s1237 of the 1991 Act were issued.

In June of 1991, amendments to both the 1947 and 1991 Acts were moved in the Senate to make directions issued pursuant to the relevant sections disallowable instruments for the purposes of s46A of the *Acts Interpretation Act 1901*. This had the effect of rendering any directions subject to disallowance by either House of the Parliament, in a similar manner to the way that regulations are subject to disallowance. Consequently, when the Minister finally issued directions (pursuant to s1237 of the 1991 Act) on 8 July 1991, it was open to either House of the Parliament to disallow those directions. On 6 November 1991, Senator Meg Lees, Deputy Leader of the Australian Democrats, moved in the Senate that the directions be disallowed.[4]

Content of the directions

Before considering the attempt to disallow the directions, it is useful to set out the substance of those directions. As indicated above, the effect of the directions issued by the Minister was to allow the Secretary to waive a debt only in certain prescribed circumstances. Those circumstances are:

(a) where the debt was caused solely by administrative error on the part of the Commonwealth *and* was received by the person in good faith *and* the recovery would cause financial hardship to the person;

(b) in respect of the remainder of a debt, where it is cost-effective for the Commonwealth to accept a lump sum of money (not less than 80% of the debt) and the person does not have the capacity to repay a greater proportion;

(c) where a debt has been written-off on the ground of lack of means on the part of the person or the inability of DSS to locate the person and where those circumstances remain after six years;

(d) where a court has indicated that it imposed a longer custodial sentence in view of the person's inability or unwillingness to repay the debt;

(e) where DSS has settled a civil action for less than the full amount of the overpayment, the difference can be waived;

(f) where qualification for Family Allowance is accepted as existing (though not actually paid) in respect of a period in which a pension, benefit or allowance has been overpaid, the amount of Family Allowance that would have been payable (in the three years prior to the end of the period in which the overpayment has been made) is to be deducted from the overpayment;

(g) where, in the opinion of the Secretary, special circumstances apply, such that the circumstances are extremely unusual, uncommon or exceptional (as discussed by the Federal Court in *Beadle v Director-General of Social Security*[5]).

The schedule to the Minister's notice also states that certain debts 'must' be waived, namely:

(1) a debt which is, or is likely to be, less than $200, as long as it is not (a) a debt arising out of the payment of an unemployment benefit or a jobsearch or newstart allowance which could be deducted by instalments pursuant to s1223 (1) of the 1991 Act, or (b) a debt arising out of the payment of a family or child disability allowance or a double orphan pension which could be deducted from such allowance or pension pursuant to the same subsection; and

(2) a debt which is owed by a person whose annual rate of pension, benefit or allowance is calculated under the assets test provisions of the 1991 Act and where a) the debt arose because the person (or, in the case of a couple, his or her partner) underestimated in good faith the value of particular property (including that of his or her partner) *and* b) the value of the particular property was not readily ascertainable.

The motion to disallow the directions

In moving her motion to disallow the directions, Senator Lees told the Senate that, in her opinion, the directions were 'yet another attempt by this Government to fetter the discretionary power of courts and tribunals.'[6] The Senator went on to say:

> Indeed, it represents, as the Welfare Rights Centre in Sydney has accurately noted, an attempt to bind independent tribunals with administrative directions which carry a political agenda.[7]

Senator Lees went on to note that, over a period of time, the AAT and the courts had suggested that a number of factors were relevant in exercising the discretion to waive debts, the intention being 'to lay down broad principles around which the discretion can be exercised, taking into account all the individual factors in each specific case.'[8] The Senator noted that the criteria most often referred to with approval by the AAT were those laid down by the Federal Court in 1983, in *Director-General of Social Services v Hales*.[9] Senator Lees summarised those factors as follows:

(1) the fact that a person has received public monies to which he or she was not entitled;

(2) the way in which the overpayment arose, whether by innocent mistake or fraud;

(3) the financial circumstances of the person;

(4) the prospect of recovery;

(5) whether a compromise is offered;

(6) whether recovery should be delayed if there is a prospect that the person's financial conditions might improve; and

(7) compassionate considerations, bearing in mind that this is social welfare legislation.[10]

Senator Lees stated that in her discussions with various interested parties about the directions she had been unable to find anyone who believed that 'these well established judicial principles did not provide an appropriate balance between [DSS] and its clients.' She further stated that there was 'simply no evidence that the current system of occasionally waiving debts is not working.'[11]

The Opposition parties in the Senate did not support Senator Lees' motion for disallowance of the directions. Speaking against the motion, Liberal Senator Kay Patterson noted that Senator Lees' concerns mirrored concerns put forward to the Welfare Rights Unit in a letter to the Opposition spokesman on Social Security, Senator Richard Alston, dated 2 October 1991. Senator Patterson told the Senate that that letter set out four particular concerns: that the direction (a) would fetter the discretion of tribunals to waive debts; (b) would substantially narrow the circumstances in which debts could be waived; (c) was based on the false premise that tribunals had gone soft on the recovery of debts and were not interested in deterring fraud; and (of lesser significance for the purposes of this article) (d) paid insufficient regard to the special circumstances of assurance of support debts.[12] Senator Patterson proceeded to refute the arguments put forward by the Welfare Rights Unit.

In relation to the question of the powers of tribunals being fettered by the direction, Senator Patterson suggested that it should not be forgotten that the SSAT and the AAT were tribunals and not courts of law, noting in particular that the SSAT was a creature of the legislation which produced the decisions

that the tribunal was empowered to review. Senator Patterson said:

> It is both illogical and inappropriate that [a body such as the SSAT] should be allowed to develop its own criteria, by way of case law, for reviewing decisions made by DSS. If the waiving criteria had been specified in the Social Security Act from the beginning - a move which the Welfare Rights Unit itself has supported - then these tribunals would have had little or no opportunity to diverge from these criteria. The SSAT and the AAT have only been able to develop their own precedents in relation to waiver decisions because the circumstances in which waivers should and should not be granted have not been clearly defined in the Social Security Act.[13]

Senator Patterson went on to say:

> It must also be remembered that just as [the SSAT and the AAT] are not courts, neither are they an arm of either the Government or the Parliament. It is the role of the Government and the Parliament, and not the responsibility of these tribunals, to decide the circumstances in which debts owed to the Commonwealth should and should not be waived.[14]

On the question of whether or not the direction narrowed the circumstances in which a debt could be waived, Senator Patterson made two main points. First, she noted that the direction had taken up some of the recommendations made by the Senate Standing Committee on Legal and Constitutional Affairs in its 1990 report entitled *Debt recovery under the Social Security Act and the Veterans' Entitlements Act*.[15] In particular, she suggested that paragraph a) of the direction implemented recommendation 13 of that report, which was that where a client receives an overpayment in the honest belief that it is part of his or her entitlement and where that overpayment occurs solely as a result of administrative error or unreasonable delay, then recovery should only be sought if DSS can show that recovery would leave the client in no worse a position than he or she would have been in if the correct payments had been made. Senator Patterson also noted that the offsetting of family allowance payments provided for in the schedule to the directions was in accordance with another recommendation of the Legal and Constitutional Affairs Committee.[16]

The second limb of Senator Patterson's argument was that the directions put into place the very factors relied upon by the Federal Court in *Hales*.[17] These *Hales* factors are largely taken up in paragraph a) of the directions, which refers to the cause of the overpayment and the likelihood of recovery causing financial hardship. It should be remembered, however, that while the Federal Court in *Hales* referred to overpayments for which the 'substantial or dominating cause' was a failure on the part of DSS to perform its functions, the direction refers to debts 'caused solely by administrative error on the part of the Commonwealth'. Further, paragraph a) of the directions imposes the additional pre-requisite that the payments be received by the person in good faith (though, as noted by Senator Patterson, this was in accordance with the recommendations of the Legal and Constitutional Affairs Committee).

Senator Patterson referred to the difference between the directions and *Hales* in refuting the third Welfare Rights argument:

> It is worth noting that one of the major differences between this direction and *Hales* is that the former provides that the debt must be 'caused solely by administrative error on the part of the Commonwealth', while the latter allows for a combination of administrative error and client failure. The question is not so much whether the tribunals have gone soft, but whether it was open for them to go soft in a way that fundamentally contradicted DSS's own guidelines.[18]

Without the support of the Opposition, Senator Lees' disallowance motion was

defeated and the directions continue in force.

Comment

Without wishing to traverse the merits of the arguments put forward by Senator Lees (and the Welfare Rights Unit), on the one hand, and by Senator Patterson, on the other, the history of the directions which are now in force provide an interesting case study on the subject of what has been called 'quasi-legislation'. As section 251 of the 1947 Act and section 1237 of the 1991 stood at various times, they provided the Minister with the power to, in effect, alter the operation of the legislation by issuing guidelines as to how a particular discretion under the social security legislation was to be exercised. Despite having a consequent effect which approached that of a piece of legislation, those directions were to be immune from any sort of review by the Parliament, the body empowered by the *Constitution* to make such legislation. The amendment of the 1947 and 1991 Acts to make those directions disallowable went a long way toward redressing the legislative anomaly which this situation presented.

The motion for disallowance of the directions issued by the Minister in July of 1991 (and the consequent debate) was an example of a 'quasi-legislative' instrument being subject to the kind of Parliamentary scrutiny which, arguably, it deserves. Though the directions were, in the final analysis, neither made by nor disallowed by the Senate, they *were* subject to a careful and considered analysis by the Senate before being allowed to pass into law. In the circumstances, it is difficult to imagine what more could have been expected.

Finally, as to the subject matter of the directions themselves, it seems clear that (whatever else they may or may not do) the directions will, at least, provide debtors, their advocates, DSS and, ultimately, the tribunals with a much clearer guide as to what criteria are to be applied when deciding whether or not a debt should be waived. Senator Patterson summed up this point as follows:

> In effect, this ministerial direction sets in concrete those circumstances in which [DSS] and the appellate tribunals can waive debts or overpayments. It provides very clear guidelines as to when a debt owing to DSS can and cannot be waived. To this end, this direction can result only in greater consistency, greater certainty and greater equity between decisions in relation to the waiving of social security debts.[19]

If the directions actually achieve these worthy goals, it is difficult to see how they are anything but 'a good thing'.

Endnotes

1 See, generally, Senate Standing Committee on Legal and Constitutional Affairs, *Debt recovery under the Social Security Act and the Veterans' Entitlements Act* (Parliamentary Paper No 91 of 1990), especially at pp10-11. See also S Argument 'Prevention better than cure?', (1990) 15 Legal Services Bulletin 158 which discusses that report.

2 Senate Standing Committee for the Scrutiny of Bills, *Seventeenth Report* of 1988 (Parliamentary Paper No 402 of 1988) pp 264-266.

3 See Senate. *Hansard.* 13 December 1988. p 4070.

4 See Senate, *Hansard*, 6 November 1991, pp 2503-2511.

5 (1985) 7 ALD 670.

6 Senate, *Hansard*, 6 November 1991, p 2503.

7 Senate, *Hansard*, 6 November 1991, p 2504.

8 Senate, *Hansard*, 6 December 1991, p 2505.

9 (1983) 47 ALR 281.

10 Senate, *Hansard*, 6 November 1991, p 2505.

11 Senate, *Hansard*, 6 November 1991, p 2505.

12 Senate, *Hansard*, 6 November 1991, p 2507.

13 Senate, *Hansard*, 6 November 1991, p 2507.

14 Senate, *Hansard*, 6 November 1991, p 2507.

15 Parliamentary Paper No 91 of 1990.

16 Recommendation 15, para 5.32 of the *Report*.

17 Senate, *Hansard*, 6 November 1991, p 2508.

18 Senate, *Hansard*, 6 November 1991, p 2509.

19 Senate, *Hansard*, 6 November 1991, p 2507.