Definition of income for pension purposes

In Read v Commonwealth (1988) 78 ALR 655 the High Court by a 3-2 majority allowed an appeal from a decision of the full Court of the Federal Court concerning the definition of income for purposes of calculating entitlement to a social security pension. Mrs Read, who had been receiving age pension, was the registered owner of units in a capital growth trust which in 1984, following a revaluation, issued her with 8755 additional units. The full Federal Court, reversing an AAT decision (Justice Davies), had found that the bonus units constituted income within the meaning of the Social Security Act.

The High Court held that it was not possible to regard the appellant as having 'earned, derived or received' any 'valuable consideration' in this case, since the units were not capable of being treated separately from the beneficial interest she acquired on issue to her of the original units; and that the additional units did not constitute a 'profit', since they did not result in any consequential financial gain to the appellant. The definition of income in the Social Security Act has since been amended to refer to receipts whether of a capital nature or not, but it seems that this would not have resulted in a different decision.

Commonwealth Ombudsman

Act of grace payments

The Ombudsman's recommendations for act of grace payments have been a difficult issue for some years, with the agencies involved and the Department of Finance in particular sometimes reluctant to make such payments, especially where large sums of money are involved. Following discussions in June this year, however, the Prime Minister and the Minister for Finance agreed to new arrangements for processing act of grace payments. When these are implemented, the intention is to devolve responsibility for approving act of grace payments to departments and agencies for a 12 month trial period. The Department of Finance will play an advisory role. When the Ombudsman proposes to recommend an act of grace payment he will seek the Finance Department's views on whether the proposed payment would set an undesirable precedent or would run counter to established policy. If he then persists with the recommendation, the Ombudsman will pass the Department of Finance's views on to the relevant agency.

Delay in redress of Defence Force grievances

Under the Defence Force 'redress of grievance' system, complaints by members of the Defence Force are dealt with internally through a series of appeals to progressively higher authorities. In general complainants may only approach the Defence Force Ombudsman on completion of that process or where the member considers the delay in processing excessive. The

Ombudsman frequently has protested such delays, which often indicate poor administration even though the consequences for the complainant are not usually serious. In one recent case the delay was excessive and redress probably would have been effective only if granted within a short time of the application. The Ombudsman considered that the delay meant the applicant in all likelihood had been deprived of redress. He therefore recommended that the application be given top priority and foreshadowed a possible recommendation of monetary compensation for the complainant.

Conditions of service for Defence Force members without families

Some recent complaints to the Ombudsman concerned entitlements which appear to discriminate against service members without families, concerning removal and storage of personal effects.

Members without families may be required in the course of their Service employment to move at relatively short notice from their home or rented accommodation to the standard single room accommodation provided on a Service establishment for single personnel. In such circumstances they have very little room for the personal effects required in other accommodation and need to store them.

The Minister for Defence Science and Personnel recently announced improved removal and storage entitlements for members without families, which should resolve the problem in this area.

Advice to Telecom subscribers

During the past year the Ombudsman conducted a detailed review of Telecom's business practices with regard to new time-charged calling facilities. In particular, he was concerned by the absence of adequate notice to subscribers about facilities which appeared to attract a local call fee but which were in fact time-charged.

The matter arose from Telecom's trial in Perth some time ago of a new facility, 'Partyline'. Partyline allowed people to dial into a group conversation which was charged as a timed call, similar to the charging system for STD calls. Many subscribers complained that they had not known of Partyline's existence but faced large bills, some involving thousands of dollars, incurred by children and others calling Partyline without the subscriber's knowledge.

As a result of the investigation into Partyline, the previous Ombudsman proposed to Telecom, to avoid a repetition of such problems with the future introduction of timed services, that:

- before the introduction of any timed facility, Telecom should provide every subscriber with written advice explaining the rates of charging and how to have the facility disconnected if required; and

- facilities involving timed call charges should not be introduced unless subscribers have first been given the option of having the facility disconnected without loss

of other services such as STD, where that is technically practicable.

Telecom subsequently introduced in July 1988 a group of special information services, accessed by the prefix 0055 and charged for on a timed basis. In line with the previous Ombudsman's proposals, Telecom proposes to advise all subscribers about the 0055 facility and how to have it disconnected. Telephone exchanges where disconnection of 0055 could interfere with other facilities, such as STD, will not have access to 0055 services.

Retrospectivity of sickness benefits

The Social Security Act 1947 currently provides that sickness benefits will be paid retrospectively only if the claim is lodged within 5 weeks of the date of incapacity. The Social Security Amendment Bill 1988 amends the retrospectivity requirement, however, to give the Secretary of the Department of Social Security a discretion to grant sickness benefits on late claims for up to 4 weeks retrospectively from the date of lodgment of the claim, if the incapacity was the sole or major cause of the delay in lodging the claim.

As a result of several complaints on this issue, some from complainants who had approached the Ombudsman on the advice of the Social Security Appeals Tribunal, the Ombudsman is currently considering whether the retrospectivity should be restricted to 4 weeks if incapacity is the cause of delay; and whether an unlimited discretion rather than an entitlement would be appropriate if the claimant can prove that incapacity was the cause of delay.

Penalties imposed under taxation legislation

Tax legislation imposes heavy flat rate penalties and gives the Commissioner a discretion to remit the penalties in full or in part. Penalties are imposed for late lodgment of returns, late payment of tax and the making of false or misleading returns. The Ombudsman has been concerned over the years that tax rulings on remission policy have been used too rigidly and that in some cases penalties imposed are too high.

In 1987 a review body for the tax office provided an interim report on its remission policy, and officers from the Commissioner for Taxation's office met in June 1988 with officers from the Ombudsman to discuss the report. The Ombudsman has furnished to the Commissioner a comprehensive commentary on the review body's report. This use of the Ombudsman's experience of the impact of the law on members of the public is an encouraging recognition of the contribution that he can make to policy formulation.

Adoptions in the ACT

In February 1988 the Ombudsman reported to the Administrative Review Council his concern about the legislative basis for adoption procedures in the ACT. This was initiated by a case where a single person was assessed as suitable to adopt but as ineligible due to the wording of the Adoption of Children

Ordinance; and where the case could not be tested in Court unless the Welfare Authority was prepared to submit a report on it to the Court, which it normally would only do for successful applicants. The ACT Administration was then considering the Report of the Adoption Review Committee on ACT Adoption Legislation and Practice, published in December 1987, which included review considerations. At the Ombudsman's instigation, the report was forwarded to the Council in July 1988 and is currently under Council consideration.

Selection of Antarctic expeditioners

In 1986 the Ombudsman received a complaint about the refusal by the Antarctic Division of the then Department of Science to permit a woman scientist to continue her research at Mawson, in the Antarctic, during the 1986-87 summer. The Antarctic Division previously had given permission for her to go, but had withdrawn its permission just three weeks prior to the intended departure date. As a result she suffered financially both from loss of income and from the financial outlays which had been necessary in preparation for her Antarctic season.

The case was complicated by the agency's unwillingness to cooperate with the Ombudsman in his investigation. He had to call on the coercive powers with which he is invested before all relevant information was provided.

After investigation, the Ombudsman concluded that the Antarctic Division's actions were unreasonable and unjust in several respects, namely:

- the Division's selection procedures and criteria for 1986/87 expeditioners did not address the way in which performance and behaviour on any previous expeditions would be assessed, or how any such assessment would be used;

- this defect permitted a situation which was unreasonable and unjust with regard to the woman concerned and her nominators, and which potentially could have an unreasonable and unjust effect on other nominees and applicants;

- the Division's 'final selection' policy was unjust because it was designed specifically to disqualify this woman applicant, because it reflected bias and prejudice, and because it was not conveyed to the applicant or the institution that nominated her before it was used to exclude her; and

- the policy was used to disqualify the applicant at a time unreasonably close to her departure.

The Ombudsman informed the Department of his conclusions, in accordance with section 15 of the Ombudsman Act, in April 1987. He also recommended that the Department offer an apology to the complainant; that it pay compensation for income foregone and for outgoings incurred in preparing for the trip; that the Department counsel the relevant staff in the Antarctic Division; that it prepare new selection procedures; and that it give appropriate advice to nominees found unsuitable in

future.

The Department agreed to all of the recommendations, and subsequently asked the Ombudsman to comment on its draft procedures for personnel working in Antarctica. In addition, following protracted negotiations over the amount of compensation, the Department of Finance approved a payment of over $9 000 for the applicant.

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A D M I N I S T R A T I V E L A W W A T C H

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Requirement to consult the ARC on review issues

New editions of the Legislation and Cabinet Handbooks bring the role of the Council to the attention of government departments and agencies. The Council discussed with the Department of the Prime Minister and Cabinet the appropriate wording in the handbooks, which remind agencies of the need to consult the Council when considering proposals with major implications for the administrative review system. The Attorney-General in June 1988 wrote to his ministerial colleagues drawing their attention to the requirements to consult both the Council and his Department.

The new Cabinet handbook, recently released, states that

> 'Particular note should be taken of the Administrative Review Council's role when Cabinet Submissions involving legislation with administrative review implications are being prepared. Consultation at an early stage with the Council should occur through the Attorney-General's Department.'

The Legislation Handbook, due for release shortly, contains further guidelines. These include the advice that where legislation confers discretionary powers these should normally be subject to some form of external review on the merits; that the appropriate body will normally be the Administrative Appeals Tribunal; that strong reasons would need to be advanced to support creation of a specialist review tribunal and that very strong reasons would be needed to support proposed exclusions from the AD(JR) Act.

Legislative changes to the Complaints Act

In late 1987 the Parliament passed several amendments to the Complaints (Australian Federal Police) Act 1981 as part of the Statute Law (Miscellaneous Provisions) Act 1987. Consequential amendments recently were made to the Australian Federal Police (Discipline) Regulations. The main effects of the amendments are:

- to provide a statutory basis for the procedures developed by the Ombudsman and the AFP to deal with minor complaints;