Administration

New guidelines on assurances of support (formerly maintenance guarantees)

Following a detailed submission from the Sydney-based Welfare Rights Centre and a campaign by more than 40 NSW ethnic and welfare organizations, the DSS has recently revised its guidelines on assurances of support.

These assurances are undertakings signed by a relative or a sponsor of a migrant who may be unable to support herself or himself, before that migrant enters Australia. They amount to a promise that the relative or sponsor will support the migrant or will repay the Commonwealth any money which the Commonwealth might provide to the migrant by way of income support.

The new guidelines make several fundamental changes:

- In response to such AAT decisions as *Sakaci* (noted in this issue of the *Reporter*), the existence of a valid assurance or guarantee will not affect the migrant's eligibility for special benefit – the only form of income support for which most migrants covered by these assurances or guarantees will qualify.

The only relevance of the assurance or the guarantee will be to determine the liability of the assuror or guarantor to repay to the Commonwealth the amount of special benefit paid to the migrant.

- The new instructions provide that, even where a migrant is being supported under an assurance, the migrant will qualify for special benefit: however, the value of the support provided is to be deducted from the standard rate of special benefit (equal to unemployment benefit): *USB Manual*, 24.1830-4. [This will avoid the catch-22 situation faced by the applicant in *Sakaci* (see this issue of the *Reporter*) after he had returned to his son's house.]
- In response to legal advice, the Government has conceded that an assurance or guarantee given before 2 April 1984 becomes invalid when the migrant has been absorbed into the Australian community. This is because the assurances and guarantees were, until that date, based on the Commonwealth Parliament's immigration power which, according to the High Court in *ex parte Walsh & Johnson* (1925) 37 CLR 36, gave the Commonwealth no power over an immigrant once that person had become part of the Australian community. (Establishing whether that has happened is not a cut-and-dried process and, under the new guidelines, the question is to be decided in each case by the Department of Immigration and Ethnic Affairs.)
- Again because of legal advice, the Government has conceded that an assurance of support given after 2 April 1984 will become invalid as soon as the migrant takes out Australian citizenship (now possible after 2 years in Australia). This is because the *Migration Amendment Act* 1983 commenced operation on that date; and the Act now bases the assurances on another Commonwealth power, the power over aliens: it is clearly established that, once a person takes out Australian citizenship, the person cannot be an alien and therefore, is not subject to Commonwealth laws made under the aliens power.

New powers of investigation for DSS

The *Social Security Legislation Amendment Act* 1983 introduced a series of new provisions into Part VIIIA of the *Social Security Act*. These new provisions set out the information-gathering powers of the DSS; and the apparently sweeping terms, in which the new provisions are expressed, have generated a great deal of concern amongst welfare rights workers.

Notification by pensioners, beneficiaries etc.

The new s.135TE gives the Director-General (or, of course, a delegate) power to compel by notice a person, who is receiving a payment from the DSS, to provide the DSS with information which 'might affect' the person's entitlements. It replaces a series of notification provisions (such as ss.30B, 45, 74, and 130), each of which imposed obligations to report specified information: for example, s.45 obliges an age or invalid pensioner to report increases in income and s.74 obliges a widow's pensioner to report increases in income, becoming married or ceasing to maintain a child.

It appears that the range of information which can be required under the new s.135TE is considerably broader (indeed, vaguer) than under the old provisions.

Moreover, there is a strong argument that the obligation to provide information on the demand of the Director-General overrides any privilege against self-incrimination. The Act provides for a fine of $500 and cancellation of a pension, benefit or allowance if a person served with a notice demanding information fails to comply with the notice 'to the extent that the person is capable of complying with it': s.135TE(5). The same phrase in the *Trade Practices Act* was described by the High Court, in *Pyneboard Pty Ltd* v *T P C* 45 ALR 609 at 619 as overriding the privilege against self-incrimination.

The substantial penalties which the new provision establishes for any failure to supply requested information are substantially heavier than under the replaced provisions. Not only is there now a fine of $500 rather than $40; but, under the new s.135TJ *any* payment which a person is receiving under the Act can be cancelled or suspended whereas, under the replaced provisions, only the payment to which the information was relevant could be cancelled or suspended in the event of failure to provide that information. That is, a widow's pensioner could now have her widow's pension and family allowance cancelled because of her failure to provide information which 'might affect' her pension; whereas, under the replaced provisions, the Director-General could only cancel or suspend her widow's pension because of her failure to provide information of the type specified in s.74.

Information from third parties

A series of sections in the *Social Security Act* had given the Director-General power to obtain information 'for the purposes of this Act' (s.16) or which 'might affect the grant or payment of a pension, allowance or benefit under this Act to any other person' (s.141).

These (and several other similar sections) have been replaced by a new s.135TF which allows the Director-General to demand information, documents or the giving of evidence (which can be on oath or affirmation) which might affect the payment of a pension etc. to that person or any other person.

The new s.135TF (by combining the old ss.16 and 141) allows the DSS to demand a broader range of information, by a more coercive procedure than either of the old sections. It also provides heavier penalties for non-compliance ($1000 fine or 6 months imprisonment rather than $40 fine). Moreover, a person's failure to comply with a demand for information under s.135TF can lead to cancellation of the person's pension, benefit or allowance, even though the demanded information may have nothing to do with the person's pension, benefit or allowance.

As with the new s.135TE, the new s.135TF overrides any privilege against self-incrimination.

Finally the investigatory powers under the old ss.16 and 141 were subject to quite stringent safeguards: they could only be exercised by the senior officials of the DSS named in those sections. But the more wide-ranging and coercive power under the new s.135TF can be exercised by any DSS officer to whom the powers have been delegated.

Why?

The question that immediately springs to mind is: why was the *Social Security Act* amended to confer these extraordinary, perhaps oppressive, powers on the DSS? The Department and the Minister have claimed that the new provisions do not confer additional powers on DSS officers, and that they merely 'tidy up' the older provisions and clear up some 'administrative anomalies'. The Minister and many senior DSS officers no doubt believe that: but any person with legal training who compares the old and new provisions will know that this is not an adequate explanation.