Background

Policy statement, directions and guidelines: how binding?

Anyone who works with the *Social Security Act* 1947 will be aware that at many crucial points it allows to those who administer it a choice of course of action. We may distinguish first, the exercise of a *discretion* such as that of the Secretary under s.251 to write off or waive a debt due to the Commonwealth as a result say of an overpayment to a person. This discretion is 'open-ended', for on its face it gives no indication of the matters that are and are not relevant to its exercise. In the second place, the application of many provisions requires *a discretionary judgment* such as a determination whether a person is living with another of the opposite sex 'on a *bona fide* domestic basis': s.3(1).

Until recently, the Department attempted through its manuals to guide the manner in which its decision-makers (the delegates of the Secretary) and the review Tribunals exercised these discretions or made these choices. It is well-known that the Tribunals did not always accept this guidance, and the Department in turn did not always accept the Tribunals' approach: see Carney, T. and Hanks, P., 'Resisting Welfare Rights' (1987) 12 *Legal Service Bulletin* 266. The establishment of the SSAT as a determinative body (see 45 *SSR* 587) has made resolution of the tension generated by conflicting approaches more difficult.

It seems that the government has sought to resolve the tension by inserting into the Act provisions designed to give to the Minister a legislative basis for controlling the exercise of discretions and perhaps the making of discretionary judgments. Thus we now find that

(1)by s.17 the Minister 'may prepare a written statement of a policy of the Commonwealth Government in relation to the administration of the Act', and Departmental officers and the SSAT 'shall have regard to' any such statement when exercising their powers;

(2)by s.19(4B) the Minister 'shall set guidelines for the exercise' of a power in the Secretary in relation to the disclosure of information, and the Secretary 'shall act in accordance with [those] guidelines'; and

(3)by s.251(1B), the Minister 'may give directions' relating to the Secretary's discretion under s.251, and the Secretary 'shall act in accordance with [those] directions.

The term 'instrument' will be employed to refer in a general way to these kinds of device to control discretions.

The purpose of this comment is to indicate a few only of the legal problems which may arise as a consequence of these developments. My particular concern will be with ss.17 and 251, but some reference must be made to s.19 too.

Confined discretions and structured discretions

To begin, it may be observed that control of discretion may take one of two forms. Where a discretion is *confined*, the decision-maker must operate within the boundaries created by the instrument. Thus, if it says that circumstances x, y, and z are relevant to the exercise of the discretion, then the decision-maker must take into account those (and only those) circumstances.

Where, however, the discretion is *structured*, then, while the decision-maker must have regard to x, y, and z, he or she might also exercise the discretion by having regard to some other circumstance. The decision-maker would in such a case determine what other circumstances were relevant to the exercise of the discretion by having regard to the scope and purpose of the discretion: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 60 ALJR 560. The Federal Court has in this manner spelt out the matters relevant to the exercise of the discretion in what is now s.251: see *Director-General of Social Security v Hales* (1983) 47 ALR 281, analysed in *Re Ward and Secretary, Department of Social Security* (1985) 7 ALN 66.

Looking now at ss.17 and 251, the first question is: who is bound by instruments issued under these sections? Assume for the moment that a discretion given to a primary decision-maker can be confined or structured by an instrument made under s.17 or s.251. Then, from an exercise of that discretion a person aggrieved may appeal to the SSAT and the AAT.

In general terms, the appeal bodies 'stand in the shoes' of the primary decision-maker. Is then the SSAT or the AAT bound to exercise the discretion having regard to the way it has been confined or structured by a s.17 or s.251 instrument?

(The question is less acute where the discretion has only been structured, for in this case the Tribunal may have regard to circumstances which lie outside the structure.)

As a practical matter, the answer should be yes. If the Tribunals might ignore the legislative instrument, persons aggrieved by the decision of the primary decision-maker would be more inclined to appeal to them, for the Tribunals would be more likely to arrive at a different decision.

As a matter of law this is probably also the correct answer. It is fundamental to the notion of an unrestricted appeal that the appellate body applies that body of law which constrained the primary decision-maker.

This concept is reflected in s.182(4) of the *Social Security Act* and s.43(1) of the *Administrative Appeals Tribunal Act*. The first provision provides that the SSAT 'may, for the purposes of reviewing a decision under this Act, exercise all the powers and discretions that are conferred by this Act on the Secretary'.

Section 43(1) is to the same effect so far as the AAT is concerned. These provisions suggest that the Tribunals should exercise those discretions subject to the limitations which apply to the primary decision-maker.

The way that ss.17, 19, and 251 have been drafted creates uncertainty. Does the mention of the SSAT in s.17 mean that the AAT is not bound? Does the omission of the SSAT and the AAT mean that in relation to the legislative instruments made under ss.19 and 251 neither Tribunal is bound? Despite these matters, the commonsense view that both the primary and the review level decision-makers are affected by what the Minister does under any of ss.17, 19, and 251 is probably the legal result too.

But how exactly are the primary and the review level decision-makers affected by what the Minister does? May the Minister lawfully *confine* the

discretion, or may he or she only structure it?

None of ss.17, 19, or 251 give a very clear answer. On its face s.17 seems to go no further than permitting the discretion to be structured. This is perhaps implicit in the notion of a 'policy statement'; and see too the words 'have regard to' in ss.17(3) and (4).

But what of s.19(4) — 'the Secretary shall act in accordance with guidelines', and s.251 — 'the Secretary shall act in accordance with directions'? Perhaps it might be argued that 'guidelines' only structure, while 'directions' confine. But, according to the *Macquarie* Dictionary, one sense of 'direction' is 'guidance; instruction'. Taking them as equivalents, might the guidelines and the directions confine the relevant discretion?

Administrative law principles

At this point, it is necessary to take account of some basic principles of administrative law. In *Re Drake and Minister for Immigration and Ethnic Affairs (No. 2)* (1979) 2 ALD 634 at 640-641, Brennan J stated the legal obligations of a decision-maker exercising a discretion by reference to some policy. (In this context, policy means some specification of the circumstances relevant to the exercise of the discretion, whether specified by the decision-maker or by some other person or body.)

His Honour's basic point was that both the primary decision-maker and the AAT would be in error to regard the statement of policy as confining the exercise of the discretion. It was said that

> 'a policy must be consistent with the statute. It must allow the Minister to take into account the relevant circumstances, it must not require him to take into account irrelevant circumstances, and it must not serve a purpose foreign to the purpose for which the discretionary power was created. A policy which contravenes these criteria would be inconsistent with the statute . . . Also it would be inconsistent . . . if the [Minister's] policy sought to preclude consideration of relevant arguments running counter to an adopted policy which might be reasonably advanced in particular cases. The discretions reposed in the Minister by these sections cannot be exercised by binding rules . . . His discretion cannot be so truncated by a policy as to preclude consideration of the merits of specified classes of cases.'

In *Re Drake*, the policy was not incorporated in a legislative instrument, and it is entirely possible for the statute which confers the power to authorise the making of an instrument which might displace any or all of the elements of the *Drake* doctrine.

This is so even with respect to the lawfulness considerations. That is, a statute could be drafted so as to authorise (say) a Minister to confine the exercise of a discretion, in ways which otherwise would conflict with the proper interpretation of the discretion. If so, the statute would in effect authorise the Minister to amend the statute. The Commonwealth Parliament may enact such provisions (known as 'Henry VIII clauses), but the intention to do must be very clear.

But where the drafter has left these matters obscure, as he or she has with s.251(1B), it may well be that the proper approach to take is to understand the statute as having left the Drake doctrine to operate. The approach taken by Northrop J in *Zayen Nominees Pty Ltd v Minister for Health* (1983) 47 ALR at 188-189 suggests that this might be the case. (There is no space here to develop the point, and reference should be made to *Zayen Nominees*.)

If this line of analysis is correct, then an instrument made under s.251 could not confine the exercise of the discretion, but could structure it by stating matters which must be *considered* by the decision-maker. But decision-makers affected by directions made under s.251(1B) would *not be obliged* to regard them as an exhaustive statement of the relevant considerations. They will in other words still need to have regard to all the factors stated in cases such as *Hales* and *Ward*. (So far as s.251 is concerned, there is support for this analysis in the legislative history. See the statement by Senator Bolkus to the Senate: Senate, *Debates*, 13 December 1988, 4070).

The *Drake* principles also suggest that a particular direction under s.251(1B) would be unlawful if it tried to control the discretion in s.251(1) in a way which obliged the decision-maker to ignore a consideration which, having regard to the object of the discretion, would be relevant to its exercise. In such a case, the decision-maker should ignore that direction. (This argument assumes that the Tribunals may decide a matter on the basis that a legislative instrument is invalid. This is not entirely clear, although the little authority there is suggests that they may: see *Re Costello and Secretary Department of Transport* (1979) 2 ALD 934 at 939.)

Publication

The final matter to note briefly is the question of publication of instruments under ss.17, 19 or 251. There is no room here to develop this argument, but it may well be, depending on whether what is prescribed has a legislative character, that any such instrument is a statutory rule under the *Statutory Rules Publication Act* 1903, and thus affected by s.5(1) of the Act.

The little noticed regulation 3 of the *Rules Publication Rules* 1913 extends the definition of statutory rules to encompass any instrument which has a 'legislative effect'. (I deal with this matter, and the question whether there might be a common law obligation to publish, in a comment in the May or June issue of the *Australian Law Journal*.)

In any event, s.9 of the *Freedom of Information Act* 1982 requires that guidelines and the like, whether informal or in the form of a legislative instrument, be made available for purchase by the public (unless they are otherwise published), and that an index of such documents be prepared. If s.9 is not complied with, the effect of s.10 of that Act needs also to be borne in mind.

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