specifies that the compensation part of a lump sum payment is 50% of any payment made in settlement of a claim related to disease or injury. The payment of $30,000 made to Graham answered that description and, accordingly, the compensation part of the payment was $15,000, not $1000. The preclusion period was 26 weeks, the AAT decided.

'Special circumstances'

The AAT then rejected a submission on behalf of Graham that there were 'special circumstances' within s.1184 of the *Social Security Act*, which would justify the AAT treating part of the compensation payment as not having been made.

The 'special circumstances' were said to be that only $1000 had been received by Graham as compensation for his loss of earning capacity.

The AAT said that Graham had chosen, for reasons which only he knew, to opt out of the State compensation system. Section 1184 was 'not intended to be used to reward those who choose not to fully pursue their lawful entitlement to compensation': Reasons, para. 24.

A reduced entitlement to compensation for lost earning capacity might amount to special circumstances, However, there was no reason why Graham's choice, made whilst in receipt of legal advice, to forego his rights to compensation should allow him to receive social security when he could have been receiving compensation payments.

Formal Decision

The AAT set aside the decision under review and substituted a decision that the compensation part of the lump sum was 50% of $30,000 and the preclusion period was 26 weeks from 16 September 1991.

[P.H.]

Background

Waiver of social security debts: where do we go from here?

Introduction

On 3 June 1993 the Full Federal Court handed down its decision in the matter of *Riddell v Secretary, Department of Social Security* (1993) 17 AAR 340. In that decision, the court ruled that the ministerial directions governing the Secretary's discretion to waive debts under the *Social Security Act* 1991 were not authorised by that Act. In so doing, the court brought to an (arguably fitting) end directions which had been the subject of criticism since their inception, initially as a creature of the *Social Security Act* 1947 in 1988. A brief history of the directions is set out below, followed by a summary of the court's reasons for finding them to be beyond authority.

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 s.251 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 (SSAT) and the Administrative Appeals Tribunal (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 s.251 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 s.251 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 s.251 of the 1947 Act or s.1237 of the 1991 Act were issued.

In June 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 s.46A 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 s.1237 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] That motion was not carried.[5]

The ministerial directions of 8 July 1991

The ministerial directions issued on 8 July 1991 are prefaced by a statement in the following terms:

> Having regard to the importance of recovering public moneys paid in excess of entitlements authorised by Parliament, the long-standing 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. Before turning to the decision in *Riddell*, 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 were:

(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* (1985) 7 ALD 670).

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 subsection 1223(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 Federal Court decision in *Riddell*

In November 1990 Mrs Riddell was advised that DSS had decided (on the basis of the provisions of the 1947 Act) not to waive a debt that she owed under the 1947 Act. This decision was appealed to the SSAT, which set aside the decision and remitted the matter back to the Secretary, with directions that the debt be waived under sub-paragraph 251(1)(b)(i) of the 1947 Act.

This decision was then appealed to the AAT. By the time that the AAT came to consider the matter, the 1991 Act had come into operation. As a result of the relevant transitional provisions, the provisions of the 1991 Act were applicable and the AAT applied the ministerial directions of 8 July 1991.

The AAT set aside the SSAT's decision.[6] The matter was then appealed to the Federal Court.

As indicated above, the Federal Court remitted the matter back to the AAT for re-hearing, on the basis that the ministerial directions were not authorised by the 1991 Act and should not have been applied. The essence of the court's reasoning was that the directions purported to lay down precise rules that were to apply in relation to waiver of debts. It was the court's view that, in so doing, they did not give guidance in the exercise of the power to waive so much as attempt to deny its very existence.

In particular, the court found that 'the evident purpose and effect of the instrument. . . was to limit the very wide discretion conferred on the Secretary' by sub-section 1237(1) of the 1991 Act. Such a limiting of the discretion could only be valid if the language of the sub-section would support an instrument having that effect.

The court found that it did not. It said:

> In our opinion, the language of s.1237(3), when considered in its context and having regard to its legislative history, is not apt to have authorised the Minister to make the instrument of 8 July 1991. Section 1237(3) is not expressed in terms which authorise the Minister to circumscribe the wide discretion vested in the Secretary by s.1237(1). The language used is more apt to describe a power in the Minister to give general guidance to the Secretary, whether by way of statements of policy, or otherwise, in the exercise by him of the discretion vested in him but guidance which will leave the Secretary free, in any particular case, to depart from the guidance provided by the Minister's directions if the circumstances of the individual case warrant such a departure . . . [at 346]

The court found that the directions did not do this. Rather, they purported to 'lay down quite precise rules dictating the result of all, or nearly all, applications'. In so doing, they were not giving guidance so much as denying the

existence of the power and were, as a result, invalid.

In the course of reaching this conclusion, the court also said that the directions had 'textual difficulties' and exhibited a 'misunderstanding' of the issues involved in Beadle. The court had been informed that the directions of 8 July 1991 had been revoked and replaced by an instrument setting out an amended set of directions, dated 5 May 1992. Though it was not strictly necessary for the purposes of the decision, the court noted that while the later instrument remedied some of the textual difficulties of its predecessor it may also have introduced some additional ones. It was the court's view that the later directions were equally flawed.

In remitting the matter back to the AAT for re-hearing, the court declined to give any general guidance to the AAT as to what circumstances should be taken into account in exercising the discretion conferred by sub-section 1237(1). It said:

> Each particular case must be considered on its merits. It is the essential nature of the provision to create a broad discretion to meet the great variety of circumstances which must occur, raising considerations of individual hardship, need, fairness, reasonableness, and whatever else may move an administrator, keeping in mind the scope and purposes of the Act, to make a decision one way or the other. [at 347]

Concluding comments

Apart from anything else, the decision in Riddell vindicated a hypothesis that Mrs Riddell's counsel, Peter Bayne, had been arguing for some years: that the directions were not valid because they 'confined' the discretion.[7] This contention, which was rejected by the AAT, was also at the heart of the Senate Scrutiny of Bills Committee's concerns about the 1988 amendments to the 1947 Act. The Committee was concerned that the directions could be used to limit the discretion that existed on the face of the legislation and, in so doing, could (in a practical sense) amend the 1947 Act.

It is also interesting to note that the DSS response to the decision is to seek to incorporate the contents of the directions into the legislation.[8] In my view (assuming that such directions are, in fact, necessary) that is where they should have been put in the first place.

Postscript

On 15 September 1993, the AAT handed down its decision in relation to the re-hearing of Mrs Riddell's case. In the absence of the ministerial directions, the Tribunal applied the relevant case law on the question of waiver. In particular, the Tribunal relied on the Federal Court decision in *Director-General of Social Services v Hales* (1983) 47 ALR 281. Having applied these authorities to Mrs Riddell's situation, the Tribunal concluded that the debt should be recovered from Mrs Riddell.

STEPHEN ARGUMENT

Stephen Argument is a Canberra lawyer.

References

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 pp.10-11. See also Argument, S., 'Prevention better than cure?', (1990) 15(4) *Legal Service 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.264-6.
3. See Senate, *Hansard*, 13 December 1988, p.4070. As to the relevance of the disallowance issue, see Argument, S., 'Parliamentary scrutiny of quasi-legislation', (15) *Papers on Parliament* (May 1992), pp.16-8.
4. See Senate, *Hansard*, 6 November 1991, pp.2503-11.
5. For further discussion of the disallowance question, see Argument, S., 'Waiver of social security debts', (9) *Australian Institute of Administrative Law Newsletter* 7.
6. See (81) *Australian Administrative Law Bulletin* (July 1992) para. 2874.
7. See, e.g., Bayne, P., 'Controlling the exercise of discretion — recent Commonwealth developments', paper delivered to Faculty Seminar at Bond University, 6 July 1989.
8. See *Social Security (Budget and Other Measures) Legislation Amendment Bill* 1993, cl.94.

Farewell to founding editor

Since its first issue in June 1981, the *Social Security Reporter* has been edited, with occasional help from others, by Peter Hanks. Peter was responsible for getting the *Reporter* started and he has been responsible ever since for keeping it going, not only as its editor but also as its most significant contributor.

After guiding the *Reporter* through more than 12 years and 75 issues, Peter has decided that the time has come to move on. The December issue of the *Reporter* will be his last. The members of the Legal Service Bulletin Co-operative which publishes the *Reporter* wish to express their deep thanks to Peter for the enormous contribution he has made in establishing and maintaining the *Social Security Reporter.*

We welcome also the new joint editors for 1994, Pam O'Connor and Christine Heazlewood.