109 CLR 153 and *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd* (1964-65) 113 CLR 520.

The history of the amendments indicated that they were intended to apply retrospectively. The guidelines for the exercise of the waiver power had been inserted in the principal Act following the decision of the Federal Court in *Riddell* (1993) 73 *SSR* 1067. The Court in *Riddell* held that administrative guidelines to similar effect issued by the Minister were an invalid fetter on the discretion conferred by the old s.1237. The purpose of inserting the guidelines in the Act itself was to achieve the objective that had earlier failed, and was therefore unlikely to have been intended to apply only to applications made after the amendments commenced

This interpretation was confirmed by reference to the explanatory memorandum which accompanied the amendments, which said that the amendments were required to overcome the effect of the *Riddell* decision.

The Court remitted the matter to the AAT to determine in accordance with law as set out in the Court's reasons.

[P.O'C.]

AAT's jurisdiction to review unauthorised decision

SECRETARY TO DSS v ALVARO
(Federal Court of Australia)
Decided: 27 May 1994 by Spender, French and Von Doussa J.

The SSAT decided, on the application of Alvaro, to affirm a decision made by an officer of the DSS (and affirmed by a review officer) that Alvaro owed a debt to the Commonwealth under s.1224 of the *Social Security Act 1991*; and that recovery of the debt should not be waived. Alvaro appealed to the AAT.

The AAT then decided that it had no jurisdiction to entertain Alvaro's application for review: *Alvaro* (1993) 77 *SSR* 1123.

The AAT said it was not satisfied that the decision in question was a valid decision under the *Social Security Act 1991*, because it was not satisfied that either the officer who had decided to recover the overpayment or the review officer who confirmed that decision held valid delegations from the Secretary.

The Secretary appealed to the Federal Court under s.44(1) of the *AAT Act*. The Court was constituted as a Full Court.

The AAT's review jurisdiction

Von Doussa J delivered the judgment of the Full Court. He noted that s.25 of the *AAT Act* gave the AAT 'power to review any decision in respect of which application is made to it under any enactment'; and s.1283(1) of the *Social Security Act 1991* provided that an application could be made to the AAT for review of a decision that had been reviewed by the SSAT.

Von Doussa J said that the AAT had taken the narrowest view possible as to the meaning of the term 'decision', as used in those provisions, namely that there must be a decision which was a legally effective exercise of power conferred by the *Social Security Act*. On this interpretation, there would be no 'decision' within s.1283 if a purported decision lacked legal effect.

The AAT's interpretation, Von Doussa J said, was contrary to the Full Court's decision in *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 2 ALD 1:

> 'where it was held that a decision made by an administrator in purported or assumed pursuance of a relevant statutory provision is reviewable under the AAT Act even if the administrative decision is legally ineffective or void.'

(Reasons, pp. 11-12)

The *Brian Lawlor* decision had been applied by another Full Federal Court in *The Hospital Benefit Fund of Western Australia Inc v Minister for Health, Housing and Community Services* (1992) 16 AAR 566.

Von Doussa J noted that the word 'decision' in s.1283(1) of the *Social Security Act* was not qualified by any words referring to an exercise of powers conferred by the Act: in that provision, even on a literal reading, there was no reason why 'decision' should be narrowly construed.

The reasons of convenience given by Brennan J in *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (above) and by the Full Court on appeal applied to require the rejection of the AAT's narrow interpretation of 'decision' in s.1283(1). 'To hold otherwise', Von Doussa J said, 'would defeat the purposed of the review procedures established under the Act': Reasons, p.12.

Von Doussa J continued:

> 'The right of review by the AAT of a decision of the SSAT given by s.1283(1) arises where an administrative decision made in purported exercise of powers conferred by the Act has, as a matter of fact, been reviewed by the SSAT. That right exists whether or not the decision reviewed by the SSAT, or the decision of the SSAT itself, was legally effective. A similar construction should also be accorded to 'decision' in ss.1239 and 1247 which respectively provide for internal review of decisions by the Secretary, and the review of decisions by the SSAT . . .
>
> 'In the hierarchy of reviews from original decision-maker to the AAT it was not necessary that there be at the outset an original decision that was in all respects validly made, and at each level of review thereafter another decision that was in all respects validly made. The person or tribunal to whom application for each of the reviews was made had jurisdiction to undertake that review so long as the preceding decision-maker had made what purported to be a decision in exercise of powers conferred by the Act affecting the interests of the person seeking review. It mattered not whether the ground of complaint made about the preceding decision was merely that it is wrong on the merits, or that in law it was not an effective decision because it was made by someone without authority, or in excess of authority, or for improper purposes, or was vitiated through procedural irregularity such as a failure to accord natural justice.'

(Reasons, pp. 12-14)

Von Doussa J said that the AAT would have jurisdiction and power to substitute its own decision if it concluded that an earlier decision-maker in the decision-making process had acted in excess of authority; and he cited *Secretary to DSS v Hodgson* (1992) 322 ALR at 330.

Authority to decide under the Social Security Act

The Court went on to consider the question whether the decisions under review by the AAT were in fact valid or authorised decisions under the *Social Security Act*.

Section 1224(1) of the *Social Security Act* provides that, if an amount has been paid to a recipient by way of pension, benefit or allowance under the Act because of a false statement or a failure or omission to comply with the Act, and the amount has not been recovered by deductions from on-going entitlements, the amount so paid is a debt due by the recipient to the Commonwealth.

Speaking on behalf of the Court, Von Doussa J said that a 'decision' to

raise a debit under s.1224 involved no more than deciding whether certain objective facts existed – that an amount had been paid, that the payment was because of the recipient's false statement or failure to comply with the Act, and that the amount had not been recovered by deductions from on-going payments. Making a decision of this character did not involve the exercise of discretionary power – the opinion to be formed was simply that the facts existed; and on review, the correctness of the opinion could be tested against the available evidence: Reasons, p. 23.

These considerations, Von Doussa J said, favoured the view that an authorised officer could lawfully make a decision under s.1224 without holding a formal delegation from the Secretary under s.1299 of the Act.

To determine whether the officer's decision was valid, the AAT would need to decide the nature and scope of the duties of the position held by the officer. In the present case, the AAT had not examined those questions but had assumed that a valid instrument was essential before the officer's decision could be regarded as valid.

In contrast to s.1224(1), s.1237(1) of the *Social Security Act* conferred a discretionary power to waive recovery of a debt and vested that power in the Secretary. The exercise of the discretion would significantly affect the rights and liabilities of an individual and was likely to be based on broad policy objectives: Reasons, p. 24.

Those considerations, Von Doussa J said, supported the view that the discretion should be exercised personally or by an officer to whom the power had been delegated by an instrument under s.1299 - but the considerations were not decisive.

It might be that a properly authorised officer, not holding a formal delegation, could exercise the discretion on behalf of the Secretary or a delegate of the Secretary, consistent with the High Court's decision in *O'Reilly v Commissioner of State Bank of Victoria* (1983) 153 CLR 1.

That question, and the question whether the decision to raise the debit under s.1224 had been made by an authorised officer, should now be considered by the AAT in the course of deciding the application for review.

Formal decision

The Federal Court allowed the appeal and remitted the matter to the AAT with the direction that the AAT decide the application for review of the decision of the SSAT.

[P.H.]