Assuring support to migrants

Who pays?

Pamela O'Connor

This article explores the legal issues arising from assurances of support given to the Commonwealth Government by sponsors of migrants

Since 1988 the Commonwealth has been putting in place the legislative and administrative machinery that will enable it to recover its expenditure on social security payments to new migrants from those who signed assurances of support for the migrants.

An assurance of support, formerly called a maintenance guarantee, is a formal undertaking by the signatory to maintain the migrant for a specified period of time after arrival in Australia, and to repay to the Commonwealth any amount paid to the migrant for the latter's maintenance. The liability to repay extends to payments of special benefit and (since December 1989), unemployment benefit, newstart or job search allowance, but not to other types of benefit, allowance or pension.[1]

The Migration Regulations 1989 prescribe the categories of migrant in respect of whom an assurance of support is required before migrant entry may be approved. These are categories of migrant that would otherwise be likely to be a charge on the community, such as orphaned minors, special need and last remaining overseas relatives and aged dependent relatives.

It is not necessary for the assurance of support to be given by the person who sponsored the migrant. In practice the assurance of support is often signed by a family member selected by the sponsor or the migrant as being the most financially sound.

Since new migrants generally lack the residential qualifications for pensions and benefits, the only social security payment available to most of them is special benefit. Under s.729 of the *Social Security Act* 1991 (Cth) the Secretary, Department of Social Security has a discretion to grant special benefit to a person who 'is unable to earn a sufficient livelihood'.

Since 1959 the Migration Regulations have provided that where special benefit is paid to a migrant during a period when an assurance of support is in force, an amount equal to the expenditure is a debt due and payable to the Commonwealth by the person who gave the assurance of support. The debt could be sued for and recovered in a court of competent jurisdiction. In practice many such debts were, until recently, waived or written off.

Until new guidelines were adopted in 1984, DSS often refused to grant special benefit to a migrant during a period when an assurance of support was in force and the signatory was able but unwilling to provide support. Under the 1984 guidelines, the existence of an assurance of support ceased to be a barrier to the grant of special benefit to a migrant, although the availability of support from the signatory or from other family members were relevant to the assessment of the rate of benefit payable.[2]

Following the 1988 Budget initiatives, new powers were inserted into the *Social Security Act* 1947 (Cth) to enable the Secretary, DSS to recover assurance of support debts. The Secretary could recover the debt by withholding instalments from a pension, benefit or allowance payable to the signatory (s.246(2A)), or by means of the garnishee power in s.162. The Secretary could also waive or write off the debt or accept payment by instalments (s.251). The *Social Security Act* 1947 was repealed from 1 July 1991 and a new 'plain English' Act substituted, the *Social Security Act* 1991. The recovery provisions in the new Act are not significantly different from those in the 1947 Act.[3]

On 18 December 1991 the Minister for Immigration announced details of new assurance of support arrangements. These measures, which were provided in the Migration Regulations (Amendment) (SR 418 of 1991) to commence on 20 December 1991, were as follows:

- the duration of assurances of support given on or after 20 December 1991, or which had been in force for less than two years at that date, was reduced from five years to a period of two years from the date of the migrant's entry into Australia or from the date of the grant of permanent residence, whichever happens later (r.163B(2)).
- From 20 December 1991 current assurances which have run for more than two years will cease, but debts which were accrued before then will remain (rr.163B(1) and 163D); and

Pamela O'Connor teaches law at Monash University and is an editor of the Social Security Reporter.

- a person who gives an assurance of support for applications lodged on or after 20 December 1991 is required to lodge a bond to secure payment to the Commonwealth, on demand, of monies due to the Commonwealth under the assurance of support. The amount of the bond is $3500 for the first person covered by the assurance, and $1500 for each additional adult (r. 164D). The bond is additional to the charge of $822 required under the *Migration (Health Services) Charge Act* 1991 in respect of each migrant for whom an assurance of support is required.

In due course the reduction in the duration of assurances of support given since 20 December 1989 and the taking of bonds to secure monies payable under assurances given after 20 December 1991 will lessen the number of recovery actions against signatories. But the next few years are likely to see sustained DSS activity directed at recovering debts incurred prior to 20 December 1991, which are not affected by the recent changes. The remainder of this article is directed to issues concerning the recoverability of those debts.

Review rights

In 1989 DSS established new policy and procedures for recovery of assurance of support debts. As a result a number of assurance signatories received letters notifying them that they were indebted to the Commonwealth and, where the migrant was currently receiving benefits, that the debt was continuing to grow. In some cases recovery action was commenced by way of garnishee or deductions from the signatory's social security payments. In other cases, DSS sought information about the signatory's circumstances preliminary to recovery action.

In 1989-91 a number of signatories sought to exercise their appeal rights upon receiving such letters. A preliminary issue was whether there was a reviewable decision in cases where the Department had notified that a debt was accruing, but had taken no other action to recover it.

The jurisdiction of the Social Security Appeals Tribunal (SSAT) and the Administrative Appeals Tribunal (AAT) depends on there being a decision of an officer under the *Social Security Act*. On one view the DSS had done no more than notify the signatory of a liability that had arisen by operation of law. That argument was laid to rest in February 1991 when the AAT said that it was not necessary to wait until recovery action was commenced before reviewing the raising of the debt. A decision by a DSS officer that a 'the legal and factual elements of recoverability exist' is a reviewable decision.[4]

Defences to recovery

Signatories who receive a letter from DSS notifying that a debt has been incurred may raise a number of grounds of objection. In some cases the person from whom recovery was sought had not in fact signed the assurance of support. Other defences that may be raised include the following:

1. The signatory did not understand the nature of the document when he or she signed the assurance of support. For example, the person may have thought that he or she was signing a sponsorship form. The signatory may have been unable to read English, or have suffered some other special disadvantage that should have been apparent to the officer who approved the assurance.
2. The person, although possibly understanding the nature of the document, believed that the duty to repay would not arise so long as he or she was willing and able to support the migrant in the person's own home. The signatory may not have foreseen that a personality conflict with the migrant would develop, resulting in the migrant deciding to move out and claim special benefit.
3. The signatory signed the form as a result of pressure amounting to duress or undue influence by the migrant, the sponsor or other family members.
4. The signatory thought the assurance of support would cease to operate or not be enforced if his or her financial circumstances deteriorated after the migrant's arrival, for example as a result of the birth of children and the resultant loss of a wife's income.
5. It may be argued that the migrant had ceased to have the status of a migrant upon becoming naturalised as an Australian citizen, or as a result of being 'absorbed into the Australian community', thereby passing beyond the reach of the immigration power of the Commonwealth upon which the validity of the Migration Regulations depends.
6. Even if the debt is legally recoverable, the signatory may argue for a variety of reasons that the Secretary should exercise the discretion to waive or write off the debt. Waiver expunges the debt so that it ceases to be recoverable in law, while write off is an administrative step recognising that a debt is for practical reasons not recoverable either temporarily or permanently. Write-off is not appropriate in cases where the signatory is able to pay.

Waiver

In the past the waiver power has been freely applied to assurance of support debts. In some cases where the legal existence of the debt was in question, waiver of the debt avoided the cost and trouble of testing the Commonwealth's claim.[5] Discretionary considerations indicating waiver were not always kept distinct from legal defences to the recovery of a debt. As a result, many of the interesting legal issues thrown up by these cases are yet to be ruled upon.

A more rigorous approach will be necessary in future following the restriction of the waiver discretion by directions given by the Minister for Social Security. The directions were given in a notice under section 1237(3) of the 1991 Act, and have effect from 24 July 1991. Under subsection 1237(2) the Secretary (and, derivatively, the SSAT and AAT) when exercising the waiver power must 'act in accordance with directions from time to time in force under subsection (3)'.

The directions appear to preclude some of the grounds on which debts were waived in the past. For example, it was DSS policy to waive a debt arising from special benefit paid to a migrant before DSS had notified the signatory that the benefit had been granted. The directions do not authorise waiver on this ground (although in a recent case the AAT suggested, *obiter*, that failure to notify could be sufficiently unusual to amount to 'special circumstances', a ground for waiver under para. (g) of the Notice)[6].

Circumstances negating the signatory's consent

Some of the grounds of objection listed above to the raising of a debt relate to the absence of any real consent to the giving of the assurance. Factors such as mistake, misrepresentation, duress and undue influence may negate the apparently voluntary nature of the undertaking.

In contract law, persons who sign agreements guaranteeing the debts of another may be able to obtain relief from their obligations under the guaran-

tee on various grounds. Equitable relief on the ground of undue influence may be available where the lender knew or should have known that a relationship of undue influence existed between debtor and guarantor, and the lender relied on the debtor to procure the guarantor's signature to the contract of guarantee (*Yerkey v Jones* (1939) 63 CLR 649). Mark Sneddon in a recent article[7] argues that the lender may be found to have relied upon the debtor even where the lender sent the contract directly to the guarantor for signing, and advised the guarantor to obtain independent legal advice before signing.

Akin to but distinct from the doctrine of undue influence, relief from a contract may be granted on the ground of unconscionable conduct. This arises where a person is at a special disadvantage in a transaction (e.g. because of language difficulties or ignorance) and the other party takes unconscientious advantage of the other's position (*Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.[8]

If the assurance of support were simply a contract between the Commonwealth and the signatory, ordinary principles of contract law would in some cases release the signatory from the obligations in the document. However the obligations of the signatory derive not from contract but from the Migration Regulations, which provide that the person who gave an assurance of support is indebted to the Commonwealth for each payment to the migrant during the currency of the assurance. The basis for the debt is a statutory one, voluntarily assumed and contingent upon the making of a relevant payment to the migrant.

This does not mean that circumstances tending to negative consent are irrelevant to the existence of a debt. The liability imposed by regulation 165 does not arise unless an assurance of support 'has been given'. While 'given' in this context is not defined, it may be argued that the regulation contemplates that the assurance of support has been freely and voluntarily given. If the element of voluntariness is absent, the precondition for the operation of the regulation is not met. Considerations of public policy will influence the extent to which doctrines derived from contract law are used to determine whether, as a matter of statutory interpretation, an assurance of support has been 'given'.

The plea of *non est factum* may also be called upon to negate the signing of the assurance of support form by a signatory who was fundamentally mistaken as to the nature of the document. This doctrine is not confined to the execution of contracts, being a plea to cover cases where a person claims to be entitled to disavow a document he has signed. It has yet to be determined whether it is also applicable to a voluntarily assumed statutory obligation.

A person who was negligent or careless about ascertaining the nature of the document is not entitled to rely on the plea, but it may be available to a person who is at a special disadvantage in reading and understanding the document where that disability was known to the officer of the Commonwealth with which the person was dealing. This may be so even if the person was advised to seek independent legal advice before signing.[9]

Duration of the Assurance of Support

The duration for which assurances of support were expressed to be given has varied at different times. Some of the assurances given in the 1970s and 1980s specified ten years, or 'while the migrant remained in Australia'. In 1984, following representations from community organisations, the DSS changed its guidelines to recognise that an assurance of support ceased to be in force once the migrant takes out Australian citizenship. In relation to assurances given prior to that date, the guidelines said that the assurance lapsed once the migrant became absorbed into the Australian community.

The notion of absorption is vague and ill-defined. It involves as a minimum a requirement that the person has not offended against the laws of Australia, and extends into an enquiry into the quality of the person's contribution to the community. The criteria for that enquiry are highly contentious, being rooted in an assimilationist view of the settlement process.[10]

The 1984 changes to the guidelines were based on legal advice to the DSS that once a migrant had been absorbed, by naturalisation or by other means, he or she ceased to have the status of a migrant and passed beyond the immigration power of the Commonwealth in the *Constitution* (s.51 (xxvii)). To the extent that the Migration Regulations rested upon the immigration power, they ceased to be applicable to a person who was no longer a migrant but a settler. This is the 'narrow' view of the immigration power as formulated in cases such as *Ex parte Walsh and Johnson: In re Yates* (1925) 37 CLR 36, per Higgins J.

A further change to DSS guidelines resiled from this position. Under the guidelines issued 21 February 1990, assurances of support signed on or after 1 April 1989 are said to remain valid for five years regardless of when the migrant becomes an Australian citizen.[11] The five year period appears to have derived from Migration Regulations 1989 which required that an assurance of support be expressed to remain in force for at least five years (r.164).

It appears that the Commonwealth no longer considered that its powers to enforce assurances of support was limited by the narrow view of the immigration power. There are other relevant heads of Commonwealth power that may support the assurance of support provisions, such as the social services power (*Constitution* s.51 (xxiii) and (xxiiiA) and the incidental power (s.51 (xxxix)). It is also possible that the Commonwealth may seek to rely on the execution of the assurance as an independent source of rights, based in contract. The difficulties in treating an assurance of support as a contract have been discussed above.

Change in circumstances

Section 181(4) of the *Migration Act* provides that an assurance of support given in accordance with the regulations 'continues to have effect, and may be enforced, in accordance with such regulations, in spite of any change in circumstances whatsoever'. This provision in the Act precludes a signatory from successfully arguing that the assurance of support was given subject to an implied condition that it would not be enforced if the signatory's circumstances deteriorated. If the change amounts to 'special circumstances', waiver of the debt may still be possible under the ministerial directions discussed above.

Objecting to the grant of benefit

A signatory who objects to a debt on the ground that the benefit should not have been granted to the migrant may have standing to appeal to the SSAT and the AAT against the decision to grant the benefit. Under s.1247(1) a person whose interests are affected by a decision of an officer under the Act may apply to the SSAT for review of the decision. A signatory who will incur a

debt as a result of the decision to grant can show that he or she has interests that will be affected other than as a member of the general public.[12]

In no reported case has a signatory sought to review a decision to grant special benefit to a migrant, although the decision has come under collateral attack in an appeal on the question of whether the resulting debt should be waived (*Re VXR*).

A signatory who wishes to contest the grant of benefit to a migrant should exercise review rights promptly upon learning of the decision. Once benefits have been paid to a migrant pursuant to a valid decision, the preconditions for a debt to arise in respect to past payments will still exist even if a review body subsequently sets aside that decision. A successful appeal will only prevent further debt accruing.

If the benefit granted is special benefit, the signatory may argue that the migrant is not 'unable to earn a sufficient livelihood' (s.729(2)(e)) because the signatory is willing and able to support the migrant. As special benefit is a discretionary payment, the signatory may also argue that even if the preconditions for grant are satisfied, the residual discretion to refuse the benefit should be exercised as the signatory would otherwise incur a debt. None of these arguments would be available if the benefit granted is job search or newstart allowance, since these are not discretionary payments.

It is likely that such arguments would fail if the Tribunal found that the migrant had reasonable grounds for declining the support offered by the signatory. For example it is unlikely that benefit would be refused where the offer was conditional upon the migrant returning to live in the signatory's home against a background of inter-personal conflict. In *Re VXR* the AAT accepted that the overcrowded nature of the accommodation offered by the signatory was sufficient ground for her migrant parents to decline her offer of accommodation.

Conclusion

Despite recent changes that will reduce the amount of unsecured debt arising under assurances of support, disputes concerning debts accrued before 20 December 1991 will continue to arise for some time to come. The restriction of the waiver discretion means that difficult questions concerning the recoverability of these debts and the viability of defences will have to be squarely considered.

References

1. Formerly regs 20 to 23 *Migration Regulations* 1959. Those regulations were repealed and replaced by regs 163 to 166 from 19 December 1989. The repeal of the former regulations does not affect any accrued liabilities (s.50 *Acts Interpretation Act* 1901 (Cth).
2. Bayne, P., 'Welfare Rights: A Modest Victory, 1979) 4 *LSB* 146.
3. Relevant sections of the 1991 Act are ss.1227, 1231, 1233, 1229, 1237 and 23 (definition of 'assurance of support debt').
4. *Re Secretary, DSS and Mathias,* (1991) 60 *SSR* 823; Re Secretary, DSS and Ibarra (1991) 60 *SSR* 822
5. Moon, G., 'DSS: Beyond Judicial and Ministerial Control?' (1985) 10 *LSB* 230.
6. *Secretary, DSS and VXR,* No. V/90 decided by AAT on 9 December 1991
7. Snedden, M., 'Unfair Conduct in Taking Guarantees and the Role of Independent Advice' (1990) 13,2 *UNSWLJ* 302.
8. ibid.
9. *Petelin v Cullen* (1975) 132 CLR 355; *Lee v Ah Gee* [1920] VR 278; see also Duncan, C.G., 'Migrants' Contracts', (1977) 2 *LSB* 242.
10. Wood, D., 'Deportation, the Immigration Power and Absorption into the Australian Community', (1986) 16(3) *Federal Law Review,* 288.
11. DSS, Benefits Manual para. 24.413.
12. *Re Control Investment Pty Ltd and Australian Broadcasting Tribunal (No 1)* (1980) 3 ALD 74.

Continued from p. 78

11. The Board operates an automated computer monitoring system of effluents discharged from the industrial plants in the region. At each plant automated sampling of effluent takes place on site and the quality of the effluent is continually monitored. If the readings show the effluent is exceeding specified limits, alarms are activated at the plant, an discharge into the sewerage system is automatically shut off until the problem is rectified. New industries establishing in the region are required to install an automated effluent monitoring system on site, connected to the Board's central office at their own expense. See 'The Injured Coastline', op. cit., p.72.
12. Beder, S., 'Sewage Update', op. cit., pp.44-45.
13. ibid., 'Previously 9 out of 10 samples had to be below 400 organisms [of faecal coliform] per 100 mL. Now only 4 out of 5 samples have to be below 600 organisms per 100 mL. Previously the geometric mean of 5 samples could not exceed 200 organisms per 100 mL. Now the median of 5 samples cannot exceed 150 mL.'
14. ibid., p.39.
15. ibid.
16. See Schultz, T., 'The Role of the Expert in Pollution Prosecutions', Proceedings of the National Environmental Law Association (NSW Division) Conference, 15-16 June 1990, p.7.
17. Camp Dresser McKee, op. cit., pp.9-7.
18. Beder, S., 'Toxic Fish and Sewer Surfing', op. cit., pp.94-110.
19. For North Head — dissolved air flotation; Malabar — magnetite; Bondi — chemically assisted sedimentation with lamella plates.
20. Beder, S., 'Sewage Update', op. cit., p.12.
21. ibid., p.13.
22. ibid. See also Camp Dresser McKee, op. cit., pp.4-1 to 4-76.
23. Camp Dresser McKee, op. cit., pp.5-35.
24. Farrier, D., 'Criminal Law and Pollution Control: the Failure of the Environmental Offences and Penalties Act 1989 NSW', 14 *CLJ* 1990, p.317.
25. Franklin, N., 'Environmental Pollution Control. The Limits of the Criminal Law', in (1990) 2 *Current Issues in Criminal Justice,* 1, Journal of the Institute of Criminology, July 1990.
26. Fisse, B., 'Recent Developments in Corporate Criminal Liability and Liability to Civil Monetary Penalties', paper presented to Committee of Postgraduate Studies Seminar Series, Faculty of Law, University of Sydney, 24 October 1990.
27. Brunton, N., 'Beach Pollution in Sydney', op. cit.; Lipman, Z. (ed.), *Environmental Law and Government in New South Wales,* Federation Press, Sydney, 1991 pp. 83-118.
28. Beder, S., 'Legislation, Compromise, and Negotiation: Implementing the Clean Waters Act', Pricing Policy and Clean Waters, Environmental Defender's Office Public Seminar, 9 October 1990.
29. Beder, S., 'Toxic Fish and Sewer Surfing', op. cit., pp.37-8.
30. Beder, S., 'Legislation', op. cit., p.8.