

LETTER TO THE EDITOR

Compensation Payments: Affect on Entitlement to Social Security Payments

I write in my capacity as parliamentary Secretary for the Social Security Portfolio with responsibility for compensation matters to inform you of important changes which were announced in the Budget concerning the affect of compensation payments on a person's entitlement to payments under the Social Security Act 1991 (the Act). This letter is rather long but I believe the significance of the existing provisions, the Budget changes and the need for an understanding of them by your members is of such importance that a note of this length is necessary.

Background

For some years the Act has attempted to govern the affect of payments under the various State/Territory compensation systems vis a vis access to the payment of Commonwealth pensions, benefits and allowances. The basic rationale of the provisions has been to limit, as far as is practicable, so-called "double-dipping". The cases which cause particular concern are those where a lump sum compensation payment for personal accident, injury or disease is received by a person, who having expended the lump sum, wishes to be paid a Commonwealth income support payment. I refer in more detail to these cases below.

You may be aware that since 9 February 1988 the Act has provided, once it could be shown that a lump sum has, at least in part, an "economic loss" component, that a statutory formula is to be applied to identify the period of time in respect of which income support is not payable as a result of having received the lump sum is required to be disregarded for social security purposes with the remaining half being divided by an Average Weekly Earnings figure; the resulting period rounded down to whole weeks is the period in respect of which income support is not payable. If that period, or part of it, relates to a period in the past in which the compensation recipient has already been

paid an income support payment, the amount of income support previously paid is repayable to the Commonwealth. If the period relates to the future, then the period must expire before income support becomes payable. The terminology in the Act is "lump sum preclusion period."

I have referred above to my concern about lump sum cases and I would like to spell out the difficulties I have encountered with these cases. The very great majority of compensation claimants are legally represented. The impact of a lump sum compensation payment of a person's entitlement to an income support payment can be profound. Take the case of a person who receives a \$75,000 lump sum. On the face of it, that person would be precluded from receiving any income support from the Department of Social Security for a period of 61 weeks.

It is my view that the solicitor involved in the compensation case should appreciate that impact of a lump sum. Regrettably the cases show otherwise. I would guess that in at least 80% of compensation appeal cases in the social security jurisdiction the client asserts that their solicitor failed to advise them of the affect of the lump sum on their income support payments.

Professional Negligence

You will appreciate the results of such a failure. As a solicitor myself I am very much aware of the potential risks in negligence involved in these cases. Both the Administrative Appeals Tribunal and the Social Security Appeals Tribunal have made it clear that such action should be contemplated in appropriate cases. I note that a solicitor was successfully sued in Tasmania recently in this regard.

Naturally I am anxious to take steps which would render unnecessary such actions against the legal profession. I therefore seek your assistance in bringing to the attention of the members of your Society the potentially profoundly unhappy consequences for both themselves and their

clients if the affect of compensation payments on DSS entitlements is not fully understood. If your members wish to make enquiries concerning the compensation provisions in the Act, they should contact the Departments' Compensation Management Section in their Area Office.

"Budget" Changes

As to the major changes announced in the Budget, they include:

- the removal of the need to have an "economic loss" component in a lump sum compensation payment before the Act applies to it; and
- the substitution of the "employees (all persons)" AWE figure in place of the current "all male" AWE figure, as the divisor in the 50% rule.

These changes will commence on and from 1 January 1994.

Economic Loss

At the time the 50% rule was introduced there was some criticism that such an arbitrary rule would result in injustice. That criticism did not persist because, I believe, it has advantaged the majority of the persons to whom it has applied. It had been suggested that larger lump sums in, say, motor vehicle accident cases, could and sometimes do, contain more than 50% for future costs. It is to be noted that the Act applies the compensation provisions after the application of both the income and assets test, so in cases where the lump sum is, say, \$250,000 the legislation, under the assets test, might already prevent payment of income support. (Irrespective of the person's circumstances compensation payments over \$420,000 will under the assets test, preclude all payments).

It has become apparent, especially over the last couple of years, that compensation settlements are being written to "escape" the Act. The device most often used is to have the settlement document contain no reference to payment for economic loss. This is done even when it is pretty clear that economic loss has been suffered. This practice is not illegal but

LETTER TO THE EDITOR

it is a device which results in considerable cost-shifting onto the Commonwealth budget in relation to people who should be adequately compensated by the system designed for that purpose. I would add that the social security system is a needs based system and a person who has access to, say, a compensation lump sum in some cases a very considerable lump sum, can reasonably be expected to use at least part of that money for their own support before calling on the taxpayer through the social security system. I believe that this principle should apply irrespective of the suggested basis, often not necessarily agreed between parties, for which the lump sum was paid. Adopting the practice of describing lump sums as containing no economic loss thwarts the very objective the 50% rule was introduced to achieve. I would argue that 50% is, generally, a generous approach especially when taken together with the AWE divisor.

AWE Divisor

The current divisor in the 50% rule is "all male" AWE. It has been decided that the "employees (all persons)" figure is more appropriate as it more correctly reflects the level of wages paid to persons subject to the compensation provisions and it recognises the fact that there are women in the workforce. The current all persons AWE Figure is about \$520 per week.

Other Budget Matters

There are a number of other matters in the Budget concerning the compensation provisions of the Act, including:

- extending the recovery provisions to cover wife pensioners who receive compensation in their own right (this will ensure consistent treatment of all wife pensioners - wife pensioner partners of compensation recipients are already within the legislation).
- a number of technical amendments to preserve the integrity of the provisions.

I am especially concerned to ensure that the legal profession are aware of the law concerning the affect of

compensation payments on Commonwealth social security income support payments and you may consider including this letter in your next publication. I will be writing to you again to seek your co-operation in having inserted in your publication a more detailed article on compensation matters which I will provide when the legislation is settled.

In addition I would be happy to discuss with your organisation any or all of the measures announced in the Budget concerning compensation matters. My office (06) 2774980 would be happy to arrange a meeting at a mutually convenient time. The contact is my adviser Mr Greg Rudd.

*The Hon Con Sciacca MP
Parliamentary Secretary
to the Minister for Social Security*

The President's response to this letter is as follows:

Thank you for your letter of 13 September 1993. There are a number of issues which arise from your letter.

Firstly, I note your comments in relation to the possibility of professional negligence actions against legal practitioners in respect of a failure to advise people of possible preclusion from income support from the Department of Social Security in the event of lump sum compensation being received by way of settlements of claims.

I am conscious of the need for solicitors to provide a complete service to their clients and to be aware of these matters in order that they can fully inform their clients of the consequences of litigation and the settlement of that litigation. To that end, it is my intention to publish the full contents of your letter in the Law society's regular monthly journal "Balance".

Of concern, however, are the changes announced in the Budget in relation to application of the Social Security Act to lump sum payments.

If I may be so bold as to say so, it would appear that the premise for the changes is that the majority of people working in this area are not to be

trusted, and no regard whatsoever appears to have been given to the particular legislative regimes of various jurisdictions.

You may not be aware that in all but a few limited circumstances actions for "economic loss" in the Territory have been abolished, particularly in the case of motor vehicle accidents and work related injuries which are of course the vast majority of personal injury actions. It is still possible to obtain lump sum compensation, particularly in respect of loss of utility according to a "table of maims". On the formulation proposed, those amounts are taken into account in determining a person's entitlements to income maintenance pursuant to the Act. Similar comments apply to any payments which might apply in respect of pain and suffering and lump sum payments in respect of future medical expenses.

I am sure you will agree that in such circumstances the approach proposed is unjust in the extreme.

What appears to have occurred, therefore, is that what is generally regarded as a fair rule, namely the 50% rule, has been varied in such a way as to give it an unfair operation in many cases, apparently on the basis of a perception that the system was being written to "escape" the provisions of the Act. I respectfully suggest that this is not a proper basis for such a dramatic change; rather, the appropriate solution would be for the Department to be more vigilant in its consideration of such settlements. I therefore urge you to reconsider the position before the changes come into effect on 1 January 1994.

The result of this change, together with the change in the AWE Division (which your letter did not spell out will result in significantly lower lump sum exclusion periods) will, I suggest, have serious adverse consequences on victims of accidents.

Should you wish to discuss the matter further please do not hesitate to contact me on (089) 430400.

*Neville Henwood
President*