because the exercise of that discretion had not been considered by the SSAT nor by the delegate.

The Tribunal referred to a decision in *Cranswick and Repatriation Commission* (1988) 15 ALD 459, where the AAT had concluded —

> 'that the Tribunal did not have jurisdiction to review decisions made under completely separate sections of an Act which required different criteria and considerations when those matters were not considered by previous decision-makers, nor was it statutorily required that such sections be considered, nor was a request made by a party for such issues to be considered.'

(Reasons, para. 27).

It might well be, the AAT said, 'a preferable practice' for the s.186 discretion to be considered whenever an overpayment was raised —

> 'but where this has not been done, I cannot see how this Tribunal has jurisdiction to review what has never been decided. A different conclusion may have been reached if there had been an application made for the exercise of that discretion, and the relevant decision-makers had neglected or failed to consider such application. For these reasons, I find it is not within the jurisdiction of this Tribunal to consider the provisions of s.186 of the Act.'

(Reasons, para. 28).

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Compensation award: recovery of sickness benefit

SUTERS and SECRETARY TO DSS (No. 4999)

Decided: 7 February 1989

by E.T. Perignon.

Graham Suters suffered an industrial injury in September 1986. Between May and December 1987 he received sickness and unemployment benefits, totalling $7677.

In December 1987 Suters settled a worker's compensation claim for $36 290. The DSS then recovered the full amount of the sickness and unemployment benefits $7677, direct from the insurer of Suters' employer. When the DSS refused to waive full recovery of the sickness and unemployment benefits, Suters applied to the AAT for review.

The legislation

Section 155(1) of the *Social Security Act* authorises the DSS to recover amounts of sickness and unemployment benefit (and other payments) made to a person direct from any insurer who is liable to pay compensation to that person, where the compensation has been paid for an incapacity for work.

Section 156 gives the Secretary to the DSS a discretion to treat all or part of the compensation payment received by a person as not having been received if the Secretary considers it appropriate 'in the special circumstances of the case'.

'Special circumstances'

Suters argued that he had settled his compensation claim for $36 290 because the DSS had led him to believe that it proposed to recover only $3844 from him.

In August 1987 the DSS had advised Suters that, if he received a compensation award, 'some or all of the sickness benefit paid to you might have to be paid to this Department'.

In response to enquiries from Suters' solicitors, the DSS had told those solicitors, on 2 November 1987, that the sum of $3844 had been paid to Suters between June and September 1987, but that the amount to be repaid to the DSS could only be calculated when the full details of any settlement were known. The compensation recovery section of the DSS had written this letter in the belief that Suters' compensation claim had been settled in September. However, Suters had told the relevant regional office of the DSS that his claim was scheduled for hearing in late November.

Suters claimed that the two letters from the DSS (one warning him that he would have to repay sickness benefits, and the other indicating that he had received $3844 from the Department) had led him to believe that this was the total amount which the Department would seek to recover from his compensation award.

The AAT decided that Suters and his solicitors had been misled by the correspondence from the DSS; and that Suters would not have settled his worker's compensation claim for $36 290 if he had known that the DSS would insist on repayment of $7677.

However, the AAT thought that there had been some neglect on the part of Suters or his solicitors in not making an up-to-date enquiry of the DSS as to the amount which it proposed to recover immediately before settling the matter in December 1987.

Because of these considerations, the Tribunal decided that the discretion in s.156 should be exercised so as to allow for a refund to Suters, from the recovered sickness and unemployment benefits, of $2000, thereby permitting the DSS to recover $5677.

Formal decision

The AAT set aside the decision under review and substituted a decision that so much of the compensation payment should be treated as not having been made as would result in the repayment to Suters of $2000.

[P.H.]

Compensation award: discretion to disregard

MINDA and SECRETARY TO DSS (No. 4969)

Decided: 10 March 1989

by B.M. Forrest.

The AAT *affirmed* a DSS decision that the applicant, Aurel Minda, was precluded from receiving pension from September 1987 to January 1989 because of a lump sum award of compensation made in his favour in September 1987.

On that date, Minda had settled his common law and accident compensation claims for $47 500, of which $27 500 had been paid as 'future compensation' for Minda's work-caused injuries. The DSS had calculated the preclusion on the basis that only $27 500 was a payment in respect of incapacity for work within s.152(2) of the *Social Security Act*.

'Special circumstances'

This application for review focused on s.156 which allowed the Secretary to treat all or part of a compensation payment as not having been made if the Secretary thought this was appropriate 'in the special circumstances of the case'.

Minda raised several factors which, he said, amounted to 'special circumstances'. The first of these was that the had been incorrectly advised by his solicitors that, if he settled his compensation claim, his entitlement to invalid pension would not be affected.

The AAT said that it had some reservations about the evidence on this point. It said that 'positive incorrect advice upon which a person acted to his detriment in particular circumstances' could be a factor in establishing 'special circumstances', where the person did not have the financial capability to pursue a legal remedy against the person who gave the incorrect advice; but, in general, that incorrect advice would not be a 'special circumstance' within s.156.

The AAT also rejected Minda's argument that a 3-month delay on the part of the DSS in advising him that he would be precluded had contributed to him spending most of the compensation award before he discovered that the preclusion period would be applied to him. The AAT said that there was no legal duty imposed on the DSS to give to a claimant for invalid pension advice about a lump sum compensation award; but the delay of the Department in warning Minda was a factor to be taken into consideration in deciding if special circumstances existed.

Minda also argued that the retrospective amendment of s.153(1) in June 1988 operated harshly on him. The AAT agreed that this was 'a factor to be considered but not given such weight as to be rendered ineffective', given the clear intent of the 1988 amendment: Reasons, p.14.

The AAT noted that, if Minda's claim had been settled on or after 9 February 1988, the formula in s.152(2)(c) would have applied to that award and 50% of the total compensation payment of $47 500 would have been used to calculate the preclusion period. The operation of the legislation, the AAT said, did not amount to a 'special circumstance' in Minda's case.

Turning to Minda's financial circumstances, the AAT noted that Minda had paid various amounts of money to his adult children, paid off the mortgage on his house and improved that house, and was unable satisfactorily to explain how he had spent some $13 500. His financial position did not, the AAT said, constitute a 'special circumstance'.

[P.H.]

Compensation award: preclusion

COWARD and SECRETARY TO DSS
(No.4967)

Decided: 20 March 1989
by H.E. Hallowes.

The AAT *affirmed* a DSS decision that the applicant, Warren Coward, was precluded from receiving a pension from November 1987 to May 1989, as a result of Coward having received a worker's compensation lump sum award of $35 000 in November 1987.

The AAT adopted the approach in *Kryzwak* (1988) 45 *SSR* 580, concluding that the retrospective amendments made to s.153(1) in June 1988 applied to Coward's lump sum award received by him in November 1987.

Award taken at face value

Coward's solicitors argued that only part of the compensation award should be used for the purpose of calculating any preclusion period. The award had described the sum of $35 000 as 'future compensation' in respect of Coward's injuries, apart from any future medical or similar expenses. The solicitors said that the award had been drafted in this way at the insistence of Coward's employer, to enable the employer to obtain a payment from the Workers' Compensation Board Fund.

The AAT did not accept that argument. It noted that, in the matter of *Cocks* (1989) 48 *SSR* 622, the Tribunal had looked behind the terms of a compensation award. However, in the present case, the evidence before the AAT was consistent with the terms of the award and there was no error apparent on the face of that award.

The AAT referred to comments of the Tribunal in *Cristallo* (1988) 46 *SSR* 597, to the effect that it was doubtful whether the AAT or the DSS 'should act on advice of the worker's lawyer as to how the lump sum should be apportioned, if that is in conflict with the express terms of the consent award'.

The Tribunal also decided that there were not sufficient 'special circumstances' within s.156 of the *Social Security Act* to justify disregarding any part of the $35 000 when calculating the preclusion period.

[P.H.]

TESTA and SECRETARY TO DSS
(No. 4956)

Decided: 14 March 1989
by R.N. Watterson.

Michael Testa suffered an industrial injury in December 1985. In May 1987 he settled a claim for worker's compensation for $61 500 and a common law action for damages for $1000.

In July 1987, Testa claimed an invalid pension. The DSS applied the preclusion provision, s.153(1) of the *Social Security Act*, against Testa, calculating the preclusion period on the basis that the sum of $61 500 was a payment in respect of incapacity for work, within s.152(2)(c).

Testa asked the AAT to review that decision.

The preclusion period

The AAT approached this case on the basis that the retrospective amendments made to the various sections in June 1988 applied to Testa's compensation claim, received by him in May 1987. This approach is consistent with the general line of AAT decisions since *Kryzwak* (1988) 45 *SSR* 580.

Testa's solicitor argued that the AAT should look behind the terms of the compensation award. The solicitor said that the figure of $61 500 referred to in that award was 'merely a convenient device', covering both the worker's compensation and the common law claims.

The Tribunal said that the 'correct principle' had been laid down in decisions such as *Secretary to DSS v Siviero* (1986) 68 ALR 147, *Walker* (1987) 41 *SSR* 517, and *Cristallo* (1988) 46 *SSR* 597. [The AAT did not mention the decision in *Cocks* (1989) 48 *SSR* 622.]

There was, the AAT said, 'no evidence . . . as to the precise terms of the redemption award'. Nor was there any evidence of an error on the face of the award:

> 'accordingly, the redemption should be accepted at face value and the whole of the sum of $61 500 regarded as payment "in respect of an incapacity for work" within ss.152 and 153.'

(Reasons, para. 16)

'Special circumstances'

Testa then asked that the AAT exercise the s.156 discretion to treat all or part of the compensation award as not having been made, because of the 'special circumstances' of the case.

The AAT noted that neither the Secretary nor the SSAT had expressly considered the s.156 discretion.