# Federal Court decisions

## Compensation award: preclusion

**McKENZIE v SECRETARY TO DSS**

**Federal Court of Australia**

**Decided:** 2 June 1989 by Davies, Wilcox and Foster JJ.

This was an appeal, under s.44 of the *AAT Act*, from a decision of the AAT. The AAT had affirmed a decision made by the DSS that, because McKenzie had received a lump sum payment of compensation on 16 July 1987, he was precluded from receiving pension (for which he had applied in August and October 1987) through the operation of s.153(1) of the *Social Security Act*.

The question raised by this appeal was whether the retrospective amendments made to s.153(1) by the *Social Security Amendment Act* 1988 had the effect of covering McKenzie's case.

### The legislative history

As it stood between 1 May 1987 and 16 December 1987 (that is, at the time when McKenzie received his compensation award and then applied for a pension), s.153(1) of the *Social Security Act* had applied a preclusion period where a person 'who is receiving a pension receives . . . a lump sum payment by way of compensation'. In that form, the sub-section would have applied the preclusion period only to those persons (like McKenzie) who were receiving a pension under the *Social Security Act* at the time when they received their lump sum payment of compensation. It would not have covered those persons who delayed claiming a pension until after receiving their lump sum compensation payment.

From 16 December 1987, s.153(1) was amended prospectively so as to apply the preclusion period where a person received a lump sum payment by way of compensation at a time when the person was 'qualified to receive a pension'. However, this second form of s.153(1), not being retrospective, did not apply to McKenzie's case — he had received his compensation payment before December 1987.

By the *Social Security Amendment Act* 1988, s.153(1) was amended so as to insert a phrase into that sub-section; and it was declared that this amendment 'shall be taken to have commenced on 1 May 1987'.

The effect of this retrospective amendment to s.153(1) was unclear, because the form of s.153(1), as it stood between 1 May 1987 and 16 December 1987, could not easily accommodate the phrase which, according to the *Social Security Amendment Act* 1988, was to be inserted in it.

### The Federal Court's solution

In their joint judgment, **Davies, Wilcox** and **Foster JJ.** noted that the 1988 Amendment Act had proposed the insertion of a phrase 'or has received (whether before or after becoming so qualified)' in the 'Principal Act'. The Federal Court said that, in adopting that course, 'Parliament followed the usual Australian practice of textually amending the Act.'

The court referred to Pearce's *Statutory Interpretation in Australia* (2nd edition), p. 218, where it is noted that, in Australia, amending Acts 'do not provide that the original Act is to be read as if some change were made in it but provide that the original Act is physically altered as a result of the amendment made.' The court continued:

> 'In other words, one engrafts the terms of the amendment upon the Principal Act as it stands at the time of the amendment. It follows that, in the ordinary case, where an amendment is made retrospective, the whole of the provision, as amended, is given retrospective effect.'

(Reasons, p. 6)

That is, the reference in the Amendment Act to the Principal Act was a reference to the post-16 December 1987 version of s.153(1). The effect of the Amendment Act was to amend that post-16 December 1987 version and then make that amended version operate from 1 May 1987.

The Federal Court noted that there were 'internal indications' that this was what Parliament had intended when it passed the 1988 Amendment Act: any other reading made little sense, the judges said.

It followed, the Federal Court said, that s.153(1) of the *Social Security Act* should be read as providing, with effect from 1 May 1987, that a person was precluded from receiving a pension where the person, 'who is qualified to receive a pension receives or has received (whether before or after becoming so qualified) . . . a lump sum payment by way of compensation'.

As McKenzie had received a lump sum payment by way of compensation after 1 May 1987 and had subsequently been found to be qualified to receive a pension, he was caught by s.153(1).

### Formal decision

The Federal Court dismissed the appeal.

**[P.H.]**

## Unemployment benefit: full-time student?

**HARRADINE v SECRETARY TO DSS**

**Federal Court of Australia**

**Decided:** 5 June 1988 by Wilcox, French and Von Doussa JJ.

In 1987 Harradine was enrolled as a full-time law student at Adelaide University. He also, between February and September of that year, worked as a high school teacher.

Harradine attended only 35 hours of law classes in this period. When his teaching contract expired he applied for unemployment benefit. His claim was rejected by the DSS on the ground that he was a full-time student and thus ineligible for unemployment benefit because of s.136 of the *Social Security Act*.

Harradine appealed to the SSAT, which recommended that the decision be reversed. The DSS did not accept this recommendation and Harradine unsuccessfully appealed to the AAT. He then appealed to a single judge of the Federal Court who dismissed his appeal: *Harradine* (1988) 47 *SSR* 615. This note concerns Harradine's further appeal to the full Federal Court.

### The legislation

Section 116(1) of the *Social Security Act* sets out the basic requirements of