they do not know their TFN and that they authorise the Taxation Office to provide the TFN to the DSS, or a declaration that they have applied for a TFN and authorised the Taxation Office to tell the DSS if the TFN is issued what it is, or whether the application is refused or withdrawn.

No power to suspend

The Tribunal observed that the Act was silent on the matter of a person who was in Malloch's position of having no intention of applying for a TFN. It did not attempt to require people to apply for a TFN.

> 'The secretary is empowered to require the recipient of a disability support pension to give the secretary a written statement of the recipient's TFN or to authorise the Commissioner of Taxation to tell the Secretary the TFN. The Secretary has no power to require the recipient to supply a TFN which the recipient does not have and which the recipient has no intention of getting. The payment of Malloch's pension should never have been suspended.'

(Reasons, para. 5)

The DSS guidelines

The AAT also commented on the application of the DSS guidelines in this matter. In the view of the AAT Malloch should have been exempted under these guidelines in any event. It was noted that there was nothing in the guidelines which required all three points to be fulfilled. The disallowance of the exemption on the ground that he had not been in receipt of the pension for 10 years 'was not a balanced exercise of the discretion' according to the Tribunal.

Formal decision

The AAT set aside the decision under review to suspend payment of disability support pension.

[B.S.]

Disability support pension: incapacity, whether condition diagnosed

CONWAY and SECRETARY TO DSS

(No. 9354)

Decided: 8 February 1994 by K.L. Beddoe, J. Billings and R.A. Joske.

On 27 March 1990, Conway applied for an invalid pension (now disability support pension) which was later granted by the DSS. In 1993, the DSS decided to cancel Conway's disability support pension. The decision was affirmed by the SSAT and Conway appealed to the AAT.

The legislation

Section 94(1) of the *Social Security Act 1991* specifies the qualifications for a disability support pension. As well as other requirements, the person must have:

(i) a physical, intellectual or psychiatric impairment of 20% or more under the Impairment Tables (in Schedule 1B to the Act): s.94(1)(a) and (b); and

(ii) a continuing inability to work: s.94(1)(c).

The facts

Conway, had not been employed since 1980 and gave his occupation as labourer. He was in receipt of unemployment benefits from 1980 until he applied for an invalid pension in 1990. In considering his application, the DSS had regard to a report dated 27 February 1990 by Dr Clifford, a Commonwealth Medical Officer who rated Conway as having a 5% impairment of the left index finger and a 10% impairment for an undefined psychological problem.

The DSS decided to cancel Conway's pension on the basis of an assessment by Dr Thong who assessed his disability under s.94 and Schedule 1B of the Act. He concluded that there was a combined impairment of 5%.

Conway argued that the assessment of Dr Thong failed to take into account the psychological problem, referred to in the report of Dr Clifford. Conway was not psychologically assessed by the DSS when reviewing his entitlement. He indicated to both the SSAT and the AAT that he would refuse an invitation to attend a psychological assessment. Accordingly, the AAT found that it was unable to take into account any psychological or psychiatric impairment Conway might have. The AAT also found that it was unable to take into consideration Dr Clifford's 1990 opinion in determining the level of impairment under the impairment tables. His opinion was not relied on as it was not based on any independent expert evidence and it was given without the benefit of investigation or diagnosis.

Formal decision

The AAT affirmed the decision of the SSAT that Conway's pension should be cancelled.

[H.B.]

Disability support pension: educational or vocational training

RAAD and SECRETARY TO DSS

(No. 9346)

Decided: 4 March 1994 by B.A. Barbour, G. Stanford and D. Coffey.

Raad sought review of a decision of the SSAT which rejected his claim for the disability support pension (DSP). The claim had been rejected under s.94 of the *Social Security Act 1991*.

The issues

The DSS conceded that Raad satisfied ss.94(1)(b), 94(2)(a)(i) and 94(2)(a)(ii). That is, the DSS considered Raad's impairment to be of 20% or more, and that this impairment was of itself sufficient to prevent him from doing his usual work as well as other work for which he was skilled.

In contention was whether or not Raad's impairment would prevent him from undertaking educational or vocational training during the next two years, or whether such training would be unlikely to equip him to do work for which he was currently unskilled (s.94(2)(b)).

Ability to undertake educational or vocational training in the next two years

The issue required the AAT to consider whether or not Raad's impairment would prevent him from undertaking training. To decide this question the AAT turned its attention to the meaning of 'training' as referred to in the *Social Security Act 1991*.

The AAT had regard to previous decisions of *Hamal and Department of Social Security* (1993) 75 *SSR* 1082 and *Chami and Department of Social Security* (1993) 74 *SSR* 1073 in order to determine what constitutes 'training'.

The AAT confirmed that vocational and educational training, for the purposes of s.94(2), was formal tuition prior to commencing work. The AAT adopted the reasoning of the AAT in *Chami* that educational or vocational training would not include a program designed specifically for people with physical, intellectual or psychiatric impairments.

Application of meaning of training to Raad's situation

Raad suffered an injury to his back while alighting from a bus at work. Raad's usual work was as a bus driver, but in evidence he stated that this work now aggravated his disability. He left the Urban Transit Authority in July 1992 and lived off savings and sickness allowance for about 6 months until he claimed the DSP. The AAT accepted Raad's evidence of disability and accepted that his back injury was the cause of pain and discomfort in his daily life.

The AAT heard medical evidence which clearly advocated that Raad's employability was restricted by his physical injury and his self perception of ill health and chronic pain. The medical evidence addressed Raad's ability to undertake training by stating that:

> 'this man would need to undertake formal rehabilitation, with a psychological component, before he could successfully participate in retraining . . . It is my opinion that formal vocational training without rehabilitation would not equip Raad for work for which he is currently unskilled within the next two years.'

(Reasons, para.15)

This medical opinion was supported by another medical practitioner who gave evidence to the AAT by way of written report.

The AAT accepted the medical evidence that without rehabilitation Raad would not be able to participate in training. The AAT took into account Raad's literacy and formal educational background when considering whether he could be retrained.

Formal decision

The decision under review was set aside and the AAT substituted a decision that Raad was qualified for DSP from the date of claim.

[B.M.]

Compensation: one lump sum or two

SECRETARY TO DSS and WARD (No. V93/954)

Decided: 4 March 1994 by D.F. O'Connor J.

The DSS requested review of the SSAT decision of 19 August 1993 which had set aside the DSS decision to preclude Ward from receiving disability support pension for a certain period. The SSAT had reduced the preclusion period, stating that the lump sum compensation amount was only $10,000 and not $50,000.

The facts

Ward was injured at work on 13 October 1991 and received weekly payments of compensation until 12 March 1993. He commenced a common law action for damages for non-economic loss. In December 1992 Ward's employer offered to settle his common law claim for $40,000 and advised that it was prepared to settle his continuing claim for weekly payments. On 11 March 1993 Ward's common law claim settled for $40,000, and on 15 March 1993 he settled his entitlement for weekly payments of compensation for $10,000. Both settlements were made according to the provisions of the *Accident Compensation Act 1985* (Vic). On 29 April 1993 Ward's solicitors received 2 cheques from Ward's employer. Ward was sent a cheque for both amounts less costs shortly afterwards. He claimed the disability support pension on 2 March 1993.

The law

Section 1165(1) and (2) of the *Social Security Act 1991* precludes payment of a social security payment for a lump sum preclusion period. 'Compensation' is defined in s.17(1), and s.17(2) and (3) provides a method for determining the compensation part of a lump sum. Compensation means a payment of damages etc. made wholly or partly in respect of lost earnings or lost capacity to earn. The compensation part of a lump sum compensation payment is 50% of the lump sum if the claim is related to an injury and was settled.

The issue

The AAT decided that the issue it must address was whether the lump sum compensation payment was $10,000 or $50,000. Because of the requirements of the Victorian legislation, the common law settlement of $40,000 did not include an amount for loss of earnings or lost capacity to earn. The sum of $10,000 represented Ward's lost future earnings. It was submitted by the DSS that the 2 payments should be considered as one lump sum compensation payment. If both payments arose out of the one incident and are made in full settlement of all claims, then the payments should be regarded as one payment.

The AAT accepted on the evidence presented that each claim was negotiated separately and paid by two cheques, but that:

> 'agreement in respect of each was essential to the overall settlement of the respondent's [Ward's] claim against his employer.'

(Reasons, p.5)

In *Secretary, DSS and Abdelahad* (1994) 78 *SSR* 1142 the AAT had said that each of the 4 types of payments set out in s.17(2) are qualified by s.17(2)(e), that is, that each payment must be made wholly or partly in respect of lost earnings or lost capacity to earn. The AAT in this matter agreed with that conclusion and noted 'that if a payment made does not satisfy section 17(2)(e) then it cannot be aggregated to other payments that do': Reasons, p.6. Therefore the sum of $40,000 could not be aggregated with the sum of $10,000.

The AAT acknowledged the undesirable consequences of going behind lump sum payments and the practical benefits of the '50% rule'. However the wording of the *Social Security Act* was clear and unambiguous and must be given its ordinary meaning.

Formal decision

The AAT affirmed the decision of the SSAT that the lump sum compensation payment was $10,000.

[C.H.]