the person lodges an application form under the section; and the Secretary is satisfied that the person would suffer severe financial hardship, then the hardship provision in s.1129 will apply. Once s.1129 applies, then under s.1130, the value of any unrealisable asset is to be disregarded in working out the age pension. Under s.11, an asset is unrealisable if the person cannot sell it or use it as security for borrowing, or be reasonably expected to do so.

Clayton only lodged an application under s.1129 in 1996. The application was refused but the AAT advised him to apply immediately for review of that decision. The AAT concluded that it did not have jurisdiction to hear a hardship application until Clayton took action under s.1129. The AAT commented that the DSS officers should draw s.1129 to the attention of applicants if assets and hardship appear relevant to the claim.

Formal Decision

The AAT affirmed the decision under review

[M.S.]

Ordinary income on a yearly basis

SECRETARY TO DSS and MORRIS (No. 10956)

Decided: 17 May 1996 by J.A. Kiosoglous, D.J. Trowse and J.Y. Hancock.

Background

Morris, a 65-year-old married man was in receipt of fortnightly payments from Commonwealth Superannuation (ComSuper) under the *Defence Force Retirements and Death Benefits Act* 1973 (DFRDB Act).

He applied for age pension on 14 July 1995, and a dispute arose about the method to be used to calculate his annual income for the purposes the rate of pension payable.

The method used by the DSS delegate was to take Morris' gross annual entitlement of ComSuper, $14,634.65, as his annual income. Morris argued to the DSS that the correct method should have been to multiply his gross fortnightly payment by the number of such payments in a financial year.

The difference between the two methods was that the Morris method produced a figure one day's payment short of his annual entitlement. The 1994-95 financial year did not consist of 26 fortnights but of 26 fortnights and one day.

It also appeared that in certain financial years Morris, and other beneficiaries under the DFRDB Act, would receive 27 fortnightly payments although this would occur about every 13 years.

The SSAT set aside the DSS decision and ordered that the Morris method was to be used to determine the annual rate of income. The DSS requested review by the AAT.

Legislation

Both parties agreed the ComSuper payment was income for the purposes of s.8 of the *Social Security Act 1991,* and to be taken into account in determining pension entitlements.

The DSS claimed its process of calculation is as set out in the 'Method Statement' in Point 1064-A1 of the Act, which identifies a number of steps to take according to specified Modules. Included in this process is Module E which requires calculation of 'the amount of the person's ordinary income on a yearly basis' and in Morris' case is the $14,634.65 entitlement.

The AAT had to decide whether Morris' full annual entitlement of ComSuper fits the description of income that is 'earned, derived or received' within the meaning of s.8(2) of the Act, in order to determine what was his 'ordinary income on a yearly basis'.

Discussing the cases

The sticking point for the parties was the distinction between an annual 'amount' of income and an annual 'rate' of income. The DSS argued that the High Court case of *Harris v Director of Social Security* (1985) 57 ALR 729 was support for its position that 'rate' was the correct basis for its calculation, rather than the receipts for a financial year, as this was consistent with the expression of the 'rate of pension' in Point 1064-A1 of the Act.

Harris dealt with the *Social Security Act 1947* which used the expression 'annual rate of income' rather than 'on a yearly basis'. The DSS argued the 1991 Act did not change the notion of income away from an annual rate.

The AAT looked at a number of other Tribunal and superior court decisions in order to consider the proper meaning to be given to the words in s.8(2): (*Siebel and Director General of Social Security* (1983) 5 ALN N194, *Brent* v *FC of T* (1971) 125 CLR 418, *Smith and Director-General of Social Services* (1982) 4 ALN N231 and *'Carden's case'* (1938) 63 CLR 108).

The essence of the AAT's discussion of these cases, especially *Brent* and *Carden,* was that:

> 'The decisions of Dixon and Gibbs JJ make it clear that monies realisable (ie, where a present legal entitlement exists), but not received in an accounting period, should not always be regarded as income derived during that period and that, in any consideration of derivation, the source and kind of income are of prime importance.'

(Reasons, para. 25)

In looking at Morris' enforceable right of claim under the DFRDB Act, in other words his 'present legal entitlement', the AAT said it was limited to the amount actually received.

The words 'earned, derived or received' were to be given their own individual meaning. The AAT decided the ComSuper payment was 'earned' but it was the 'present entitlement' that was a vital part of the 'earned formula' and without that it could not be said to have been 'earned', and this coincided with the amount received by Morris.

The Tribunal also commented on the *Harris* case relied on by the DSS. It opined that the discussion in *Harris* about the distinction between 'amount' and 'rate' of income was not relevant to the interpretation of the 1991 Act but in any event 'the phrase "ordinary income on a yearly basis" is more analogous to the phrase "annual amount of income" than "annual rate of income"': Reasons, para. 29.

Formal decision

The AAT affirmed the decision of the SSAT.

[P.W.]

Compensation preclusion: special circumstances

SECRETARY TO DSS and HICKMAN (No. 11108)

Decided: 31 July 1996 by H.E. Hallowes

The DSS decided that Hickman was precluded from being paid disability support pension until 10 September 2001 as a result of his receipt of a lump sum compensation payment of $350,000.

The facts

In 1992 Hickman had been seriously injured in a motor vehicle accident. Medical evidence showed that his injuries included frontal lobe damage, fitting, loss of hearing and smell, urinary and sexual dysfunction. He suffered from depression and epilepsy following the accident. He was easily distracted and impulsive and was only able to perform simple structured and familiar tasks if he did them slowly.

Hickman separated from his wife after the accident and he used part of the compensation money to pay off the home she occupied with their two children. He bought himself an isolated property and a vehicle and placed the balance of the money in long-term investments for himself and his children. The compensation money had been totally expended, and Hickman was being supported financially by his former wife.

The legislation

The AAT considered s. 1184 of the *Social Security Act 1991* which contains a discretion to treat the whole or part of a compensation payment as not having been made or not liable to be made, if it is thought appropriate to do so 'in the special circumstances of the case'.

The caselaw

The AAT referred to those decisions where the meaning of 'special circumstances' had been considered, and it noted that the occasions when circumstances are special will vary with the facts of each matter.

Special circumstances

The AAT concluded that there were a range of factors which, taken together, satisfied it that special circumstances existed in this case. These included the severity of Hickman's injuries and the impact of the injuries on his life and on his relationship with his former wife.

The AAT acknowledged that there was a need for separate households, and that Hickman will need the emotional support of his former wife in the future. This should not be jeopardised by the forced sale of the former matrimonial home.

Length of preclusion period

The AAT noted that there were sound reasons for Hickman to use some of his invested funds to support himself. It was proposed by the DSS that in calculating the length of the preclusion period the AAT should take into account the current pension rate or Hickman's weekly living expenses rather than average weekly earnings.

The AAT decided to treat $250,000 of the compensation payment as not having been made. This sum reflected what had been expended on accommodation, a suitable vehicle, medical and living costs. The balance of $100,000 should be divided by average weekly earnings to arrive at a preclusion period.

Formal decision

The AAT set aside the decision under review. It remitted the matter to the DSS with directions that $250,000 of the compensation payment be treated as not having been made and that the preclusion period be determined under the relevant provisions of the *Social Security Act 1991* in accordance with the AAT's reasons.

[A.A.]

Waiver: administrative error, good faith

FALCONER and SECRETARY TO DSS
(No. 10896)

Decided: 1 May 1996 by K.L. Beddoe.

Falconer sought review of a decision to raise and recover an overpayment, caused by Falconer being paid a prepayment to which he was not entitled, as he had earnings for the same period which precluded payment of job search allowance.

On 8 December 1994, Falconer, in lodging his form had advised the DSS that he had regular employment as a cleaner at a local shopping centre. Falconer was paid an advance payment of the full amount of job search allowance on the 22 December 1994.

The issue

The AAT addressed whether or not the overpayment of job search allowance should be waived on the ground that Falconer had advised the DSS that he had work which would preclude him from receiving job search allowance.

The legislation

The relevant section of the *Social Security Act 1991* was:

> Waiver of debt arising from error
>
> Administrative error
>
> 1237A.(1) The Secretary must waive the right to recover the proportion of a debt that is attributable solely to an administrative error made by the Commonwealth if the debtor received in good faith the payment or payments that gave rise to that proportion of the debt.
>
> Note: Subsection (1) does not allow waiver of a part of a debt that was caused partly by administrative error and partly by one or more other factors (such as error by the debtor).

Administrative error

The AAT when looking at administrative error in the context of s.1237A(1) commented that:

> 'I am satisfied, and so find, that when the applicant told the officer on 8 December 1994 that the continuation report lodged on that day would be his last because he had obtained regular employment, he gave the respondent good and sufficient advice of his change in status. The error was not the applicants, but was rather the respondents in its failure to input this into the system.'

(Reasons, para. 14)

After finding that the first part of s.1237A(1) was satisfied because there was administrative error by the DSS, the AAT considered whether the payment had been received by Falconer in good faith.

When Falconer discovered that there was extra money in his bank account, he approached the DSS and tried to repay it. Falconer's attempts to repay the money failed in two ways when in the first instance, the DSS refused to pick up a cheque from his home, and second, when he waited at the DSS office to be served but left after having to wait around unattended.

The AAT noted that administrative error in this matter was not confined to the incorrect payment, but also in the DSS failure to accept repayment when offered by Falconer.

Good faith

The AAT considered the decision of the Full Federal Court in *PT Garuda Indonesia Ltd v Grellman* (1992) 107 ALR 199 at page 211 where the court found that 'good faith' refers to receipt of the payment by the debtor in circumstances without notice of irregularity which is contrary to the Act.

The AAT asked the question:

> 'At the time the amount was credited to the applicant's bank account he had no knowledge of the payment. He did not know he was not entitled to such a payment. Is that knowledge sufficient to say the payment was not therefore received in good faith?'

(Reasons, para. 23)

The AAT decided the payment had not been received in good faith and reasoned that:

> '. . . the answer must be that because the applicant knew he was not entitled to the payment it cannot be said that he received the payment without noticing an irregularity. As the evidence shows, when the applicant became aware of the nature of the deposit in his bank account he took steps to pay the amount back to the respondent The fact that the respondent fell