Section 1075 in Division 1A provides:

> 'that if a person carries on a business, the person's ordinary income from the business is to be reduced by losses and outgoings that relate to the business and are allowable deductions for the purposes of section 51 of the *Income Tax Assessment Act 1936.*'

The issues

The main issue for the AAT was whether Haynes was an employee of H&R Block in the relevant periods, it being agreed that he was carrying on a business in his private practice.

If he were an employee of H&R Block, then he would not have been entitled to deduct business losses and outgoings against that income. If, however, he were carrying on a business, then the deductions would be allowable. Haynes would then have stated his income correctly, and there would be no debt.

A secondary issue was whether, should the AAT find that a debt existed, it could be waived on the basis of administrative error (s.1237A).

Findings of fact

The evidence was that Haynes had signed a document headed 'Terms and Conditions of Employment', which indicated that he was an employee. He had filled in an employment declaration, which was lodged with the tax office, in order to take advantage of the tax free threshold, while superannuation payments and Workcover levy were paid by H&R Block on his behalf.

Business or employee?

The AAT held that no single criterion will be determinative in deciding whether there is an employment relationship, although there will be certain criteria ordinarily looked to. The AAT quoted, and relied on the statement of Mason J in *Stevens v Brodribb Sawmilling Co. Pty Ltd* (1986) 160 CLR 16:

> 'Rather it is the totality of the relationship between the parties which must be considered . . . Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee.'

Wilson and Dawson JJ in the same case, said that other relevant indicia include the right to have a particular person do the work, and the right to suspend or dismiss the person.

The AAT followed the observations of the Court in *Federal Commisioner of Taxation v Barrett* (1973) 129 CLR 395, holding that where the work performed is that of a professional, the lack of supervision by the employer does not derogate from a finding that the professional is an employee.

The AAT held that the fact that Haynes maintained a regular working timetable indicated that he was in fact an employee. The wording of the contract he had signed was also of considerable importance. The other criteria also pointed in the same direction.

With respect to the work performed for H&R Block Haynes was not carrying on a business. He was therefore not entitled to make deductions from that income. As he did do so, the statements of income on the fortnightly forms for the period constituted false statements for the purposes of the Act.

The AAT said that a false statement does not have to have been made intentionally for it to constitute a false statement for the purposes of s.1224 of the Act (relating to debts arising from a recipient's contravention of the Act). The AAT found that Haynes owed debts to the Commonwealth of $1247.75 for the period 4 July 1997 to 28 August 1997 and $589.90 for the period 29 August 1997 to 9 October 1997.

Administrative error and waiver

In relation to the issue of waiver, the AAT did not accept that Haynes had been given incorrect advice by an officer of Centrelink as to the method of filling in the fortnightly forms. Even if the AAT had accepted that incorrect advice had been given, Haynes had made an error in filling in the forms in that he had provided net income, although the form clearly required him to declare the amount before tax and other deductions. As Haynes made that error, the debts could not be attributable solely to administrative error.

Formal decision

The AAT affirmed the decisions under review.

[A.B.]

Compensation payment: preclusion period

JONES and SECRETARY TO THE DFACS
(No. 13549)

Decided: 17 December 1998 by B. Burns.

Background

Jones was seriously injured when he was 14 years old, and was granted an invalid pension (now called disability support pension) on turning 16 in 1988. On 21 November 1995 his damages claim was settled for $1 million including costs. As part of this amount was for lost earnings and lost capacity to earn, the Department applied Part 3.14 of the *Social Security Act 1991*. It effectively deems 50% of a settlement amount to be for economic loss (the 50% rule), and divides that amount by the average weekly earnings (at that time) to work out the number of weeks the person is precluded from receiving specified social security payments. As a result the Department recovered $56,672.90 from the insurers, equivalent to the amount of pension paid to Jones since grant until 30 November 1995, and it refused further payments until 5 June 2004.

The issue

The issue was whether the preclusion period should be reduced by an exercise of the discretion in s.1184(1) of the Act that states:

> **'1184.(1)** For the purposes of this Part, the Secretary may treat the whole or part of a compensation payment as:
>
> (a) not having been made; or
>
> (b) not liable to be made;
>
> if the Secretary thinks it is appropriate to do so in the special circumstances of the case.'

The discussion

Referring to *Secretary to the DSS v Banks* (1990) 23 FCR 416 and *Ivovic and DGSS* (1981) 3 ALN N95, the AAT concluded that a decision-maker must be satisfied the 50% rule would operate to bring about a clearly unjust or unreasonable result in the circumstances of a particular case in order to exercise the discretion in favour of an applicant. It noted that in *Secretary to the DSS and Beel* (1995) 38 ALD 736 the AAT was satisfied that the portion of a lump sum payment for lost earnings was in fact less than the 50% deemed to be so under the Act, and it was an example of a case where the evidence enabled it to say categorically that the

purpose of the 50% rule would not be served by its strict application.

In this case the damages claim was for $4,560,665 which included $25,000 for past economic loss and $336,000 for loss of future earning capacity calculated with reference to actuarial tables. The settlement amount of $1,000,000 represented 21% of the original claim, and there was no breakdown indicating how the settlement figure had been arrived at. The AAT accepted that the actual amount received for lost earnings or lost capacity to earn was in the vicinity of 21% of $361,000, namely about $72,200. It went on to say:

> 'It is clear that the operation of the arbitrary provisions in s.17(3) of the Act bring about a situation where the compensation part of the lump sum in this case is taken to be $500,000. What also is clear is that the arbitrary provisions of the Act bring about a situation where the compensation part of the lump sum for the purposes of calculation of the lump sum preclusion period in no way, resembles or approximates or even comes close to the amount that the Tribunal is reasonably satisfied he in fact received by way of compensation for loss of earnings or lost capacity to earn. In reality, the applicant received by way of compensation for lost earnings or lost capacity to earn somewhere in the vicinity of 15 per cent of that which he is deemed to have received under the Act. In this case, the disparity between the two is so extreme as to bring about a clearly unjust result whereby a preclusion period is fixed as a consequence of those arbitrary provisions which has the effect of precluding the applicant from entitlement to benefit during a period when it cannot be said that he received compensation. The Tribunal is of the view that these circumstances fall to be described as special and the Tribunal is of the view that it is appropriate in the special circumstances of this case to exercise the s.1184 discretion to redress the unjust result.'
>
> ...
>
> The Tribunal is of the view that it is appropriate that there should be a preclusion period of such duration which, on the one hand, remedies the unjust result courtesy of the application of the arbitrary provisions and the disparity they give rise to and, on the other, pays heed to the object of the legislative provisions which is to avoid double-dipping. In this regard, it must be remembered that the applicant has, on the one hand received some $56,000 by way of income assistance in the form of disability support pension and on the other hand he has received approximately $72,000 by way of compensation for lost earnings or lost capacity to earn.'

(Reasons, paras 25 and 26)

The AAT exercised the discretion so that as much of the compensation payment was treated as not having been made as would result in the preclusion period ending on the day after the cessation of pension payments which had been refunded. It noted that Mr Jones had invested most of his compensation so that, since the settlement, pension was not payable under the assets test.

Formal decision

The AAT set aside the decision under review and decided to treat as not having been made, such part of the compensation payment as would result in the lump sum preclusion period ending on the day after disability support pension ceased being paid. In all other respects, the decision under review was affirmed.

[K.deH.]

Age pension: loan or home equity conversion agreement?

McDICKEN and SECRETARY TO THE DFaCS (No. 19990169)

Decided: 19 March 1999 by R.P. Handley.

McDicken was in receipt of age pension and needing to consolidate certain of her debts and replace household items. To do so, she borrowed $91,000 secured by a mortgage on her home. The term of the loan was 12 months initially, during which time she was making interest only payments. McDicken made these payments regularly, some of the repayments coming from returns on an investment, which she had sourced partly from the borrowed moneys.

The amount she had borrowed was treated for the purpose of calculating her rate of pension, as a 'home equity conversion loan'. Only $40,000 of any such loan is exempt for social security purposes. The balance is held as income over the next 12 months. This meant for McDicken that her age pension was cancelled. The loan was extended and refinanced because of the cancellation, leaving her as it did without anticipated income support.

The issue

The issue for the AAT was whether the Department was correct in treating the $51,000 (taking into account the exempt $40,000) as '*income*' under the legislation to be held over the ensuing 12 months.

The legislation

The definition of 'home equity conversion agreement' is provided for in s.8(1) of the *Social Security Act 1991* (the Act) in the following terms:

> '**"home equity conversion agreement"**, in relation to a person, means an agreement under which the repayment of an amount paid to or on behalf of the person, or the person's partner, is secured by a mortgage of the principal home of the person or the person's partner . . .'

Section 8(4), and 8(6) then provide as one of the amounts excluded from the calculation of 'income' in the Act, the following:

> **'8.(4)** If a person is not a member of a couple, an amount paid to or on behalf of the person under a home equity conversion agreement is an **excluded amount** for the person to the extent that the total amount owed by the person from time to time under home equity conversion agreements does not exceed $40,000.
>
> **8.(6)** For the purposes of this Act, the amount owed by a person under a home equity conversion agreement is the principal amount secured by the mortgage concerned and does not include:
>
> (a) any amount representing mortgage fees; or
>
> (b) any amount representing interest; or
>
> (c) any similar liability whose repayment is also secured by the mortgage.'

The definition of 'income' in the Act, also in s.8, is as follows:

> '**"income"**, in relation to a person, means:
>
> (a) an income amount earned, derived or received by the person for the person's own use or benefit; or
>
> (b) a periodical payment by way of gift or allowance; or
>
> (c) a periodical benefit by way of gift or allowance;
>
> but does not include an amount that is excluded under subsection (4), (5), (7A) or (8);
>
> **"income amount"** means:
>
> (a) valuable consideration; or
>
> (b) personal earnings; or
>
> (c) moneys; or
>
> (d) profits;
>
> (whether of a capital nature or not) . . .'

Where a person receives income as a lump sum, the Act provides in s.1073 for the amount to be maintained for 12 months from its receipt.

The nature of the transaction

Between the parties there was no dispute as to the facts. What was in issue was the interpretation of the law and the meaning of 'home equity conversion agreement'. For McDicken it was argued that McDicken had entered into a loan agreement and not a home equity conversion agreement. It was submitted that the word 'conversion' was critical in the term. In McDicken's case she had merely used the home as security for a loan. She had not 'converted' her equity in order to obtain the funds.

Reliance was placed by McDicken's representative on an Australian Housing