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

Research Council Report, *Home Equity Conversion in Australia*. That report made reference to the distinction between sale and loan plans for equity conversion in the following terms:

> 'Under a sale plan, older people sell their homes to an investor in return for a "life or long term tenancy" agreement . . .
>
> Under a loan plan, older people mortgage their home to an investor or financial institution and retain ownership of the home . . .
>
> The repayment of the loan and interest is not made until the end of a specified period or the older owner moves out or dies.'

It was submitted for McDicken that a home equity conversion arrangement is different from a home equity loan in that in the latter, the equity in the home is merely used as security for the loan. With a home equity loan there is periodic repayment towards repayment in full. The home equity loan does not anticipate the sale of the house to effect repayment.

It was submitted that ambiguity in the definition of 'home equity conversion agreement' required recourse to the Explanatory Memorandum to determine meaning. The AAT agreed that such recourse was appropriate as the literal meaning required clarification in accordance with s.15AA of the *Acts Interpretation Act 1901*, in order to establish the purpose or object of the provision. The AAT said that the Explanatory Memorandum made it clear that the new provision was not intended to apply to ordinary home loans. The AAT said that what the Government intended was that the provision deal with home equity conversion plans, not ordinary loan agreements, secured by a mortgage, requiring ongoing periodic interest payments, as was the nature of McDicken's loan. The potentially wide definition in s.8(1) therefore should be read down. The AAT noted that support for its approach was to be found in *Secretary Department of Social Security v McLaughlin* (1997) 48 ALD 536 which confirmed that the term 'income' does not extend to a bona fide loan.

The AAT pointed out that the Act makes provision for assessing income on investments such as the investment that McDicken had financed by taking out the loan and for the Department to assess both the investment and the loan as income would be 'double dipping'.

Formal decision

The AAT set aside the decision under review.

[M.C.]

Federal Court Decisions

Sole parent pension: dependent child

SECRETARY TO THE DSS v LOWE
(Federal Court of Australia)

Decided: 28 May 1999 by Burchett, Kiefel and Hely J.J.

The DSS appealed against the judgment of the Federal Court at first instance that neither Lowe nor his ex-wife Schembri, had a dependent child, and thus neither were entitled to be paid sole parent pension.

The facts

Lowe and Schembri have one child, Serena. They divorced in 1992 and agreed to share the care of Sarina and so did not obtain a court order. Sarina lived with each parent on alternate weeks, the changeover day being Friday. The financial burden of caring for Sarina had been shared, and major decisions about her care had been made jointly. The parent with whom Sarina was living at the time made the daily decisions. The AAT had found that Lowe and Schembri shared equally all the parenting rights, duties, responsibilities, care, concern, contact time, love, affection, hopes and ambitions.

The AAT decision

Because Schembri had ceased work to spend more time with her daughter, the AAT decided that Schembri's financial needs were greater than Lowe's and on this basis she should be paid the sole parent pension.

The Federal Court at first instance

The Court decided that this particular situation did not fall within s.251 of the *Social Security Act 1991* (the Act) and pension could not be paid to either parent.

The law

Section 249(1) of the Act provided that sole parent pension could only be paid to a person who has an 'SPP child'. According to s.250 the natural child of a person can only be an SPP child if the child is a 'dependent child of the adult' and had not turned 16. Sarina had not turned 16. 'Dependent child' is defined in s.5(2) as:

> **'5.(2)** Subject to subsections (3) and (6) to (8), a young person who has not turned 16 is a **dependent child** of another person (in this subsection called the **'adult'**) if:
>
> (a) the adult is legally responsible (whether alone or jointly with another person) for the day-to-day care, welfare and development of the young person, and the young person is in the adult's care; or
>
> (b) the young person:
>
> (i) is not a dependent child of someone else under paragraph (a); and
>
> (ii) is wholly or substantially in the adult's care.'

Section 251 of the Act provides:

> **'251.(1)** A young person can be an SPP child of only one person at a time.
>
> **251.(2)** If the Secretary is satisfied that, but for this section, a young person would be an SPP child of 2 or more persons, the Secretary is to:
>
> (a) make a written determination that the Secretary is satisfied that that is the case; and
>
> (b) specify in the determination the person whose SPP child the young person is to be; and
>
> (c) give each person a copy of the determination.'

'At a time'

At first instance the Judge decided that Sarina was in the care of each parent for one week only. She was never in the care of both parents at the one time so there was no reason to apply s.251(2)(b).

The Full Court found this reasoning incorrect for two reasons. It found the construction of the term 'at a time' by the judge narrow and inflexible, and it ignored the purpose and context of s.251:

> 'This is not the way beneficial legislation should be construed. The purpose is plainly to identify the parent who should receive the provision in respect of the child, not to eliminate the provision. A generous construction of the language of this legislation, preferring the substance to the form, and so as to promote the fair and consistent effectuation of its objects, is required by the Court.'

(Reasons, para. 7)

The Full Court found that 'time' is not restricted to a short time and may refer to a substantial period. The expression 'at the same time' can be construed as 'during the same period'. Section 251 looks at the arrangements for the care of the child during a period and:

> 'Asks whether, during that period, more than one person would, but for the section, fulfil the statutory conditions for entitlement to the pension. It stands to reason the period in question must be long enough to make the inquiry meaningful — the period must be sufficient to be