for the DFaCS that Genat's circumstances were far from straitened and that he had the ability to work and was intending to undertake computer studies to better position himself for employment. It was further submitted that his most recent cessation of employment in 1999 was voluntary and not forced on him. The evidence had also revealed that family financial support was available and was given.

The weighing of the circumstances

After satisfying itself that the settlement was 'compensation' within the meaning of the Act and that the preclusion period had been correctly calculated, the AAT turned to the substantial issue between the parties, that of 'special circumstances'.

The AAT said that it was unable to be satisfied whether the settlement did or did not include a component for economic loss but that if it did 'it was indeed small as Mr Genat had resumed full time employment for a period before the settlement': Reasons, para. 58. The AAT found, as had the Department and the SSAT, that there was no connection between the receipt of social security benefits and the circumstances for which Genat eventually was compensated.

The AAT cited *Commonwealth v Daniels* (1994) 33 ALD 711 and *Secretary to the DSS and Hill* (1996) 2(1) *SSR* 9 as two cases where there was no element of a person being compensated for loss of earnings or of earning capacity when in receipt of benefit.

The AAT decided that the fact that there was no causal relationship between the events giving rise to the compensation and the events giving rise to the receipt of social security payments could be considered a special circumstance in Genat's case. The AAT further found that while current financial circumstances were difficult they were not straitened. However, it was a special circumstance of Genat's case, the AAT said, that the deprivation of some $25,000 recovered as a charge in 1997 at a time when the family was in greater financial difficulties than later, was a special circumstance. The AAT held that it would be unjust and unfair to force on Genat a charge of that amount when all recognised that the payment of benefit was unrelated to his reasons for receiving compensation.

In so deciding, the AAT noted that s.1184(2) did not apply to Genat's case, as this was not a situation where Genat's partner was the recipient of the compensation. The AAT adopted the reasoning in *Hill* on this point that where the partner does not receive a compensation payment the subsection has no application and consideration must therefore be confined to subsection 1184(1).

The AAT decided that the whole of the charge was not payable by Genat.

Formal decision

The AAT set aside the decision under review and substituted the decision that the whole of the amount of $25,295.71 should be disregarded.

[M.C.]

Compensation preclusion period: special circumstances; gambling

MALES and SECRETARY TO THE DFaCS
(No. 19990863)

Decided: 17 November 1999 by J. Handley.

The issue

Males had injured his back at work in August 1994 and had not worked since then. Weekly compensation payments under the Victorian Workcover scheme ended in August 1996, and he received various social security payments until 9 July 1998. A common law claim against his former employer was settled for $200,000 on 1 July 1998.

It was not in dispute that the compensation provisions of the *Social Security Act 1991* (the Act) operated to preclude social security payments, including disability support pension, from 24 August 1994 to 20 April 2001. The issue was whether the preclusion period should be reduced by an exercise of the discretion in subsection 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 facts

After reimbursing the social security payments made during the preclusion period, paying legal costs, repaying loans, and buying a car, furniture and equipment, Males invested the remaining $130,000. By December 1998 he was virtually penniless having withdrawn the investments in amounts of $20,000 at a time and losing them in poker machines at 'Tabaret' venues, despite having been informed that he would be precluded from social security benefits for many years.

Males described himself as a light, recreational gambler before he was injured, spending between $20 and $50 on the machines no more than once a week on Friday or Saturday nights. After the accident he began to attend the hotels more frequently, up to three or four times during the day and seven days a week, with the intention of spending only $20. There were some large payouts, including one of $2000, but they were also lost.

Males realised he had a problem with gambling as early as December 1994, and he had discussed it with a psychologist and a psychiatrist who were treating him, but neither gave him any guidance on how to end it. Between August 1994 and December 1998 he had made three or four attempts to avoid gambling by not driving past the hotels, succeeding for periods of up to a month. He had returned to gambling believing he could casually attend and 'put $20 through the machine', and then rapidly 'became out of control'. He had received counselling for his gambling after all the money was spent.

Males said that he was depressed and bored at home where he could read, watch television or play on his computer. He attended the hotels not only to gamble, but because he could have people around him. But he did not want to interact with them. He did not drink alcohol and just played on the poker machines.

Males was 30, single and lived with his mother in a rural community of 10,000 people with a high unemployment rate. He had left school aged 15 without completing Year 9. Before the injury he earned $320 net a week. He had not worked since the injury, being unable to do heavy labour. His mother gave him free board and lodgings, as well as $20 a week. She was receiving weekly workers compensation, and owned her home without mortgage or debts.

The reasoning

> In ... *Beadle v Director-General of Social Security* (1985) 60 ALR 225 ... the Full Federal Court acknowledged that circumstances need not be unique to be 'special' but 'they must have a particular quality of unusualness that permits them to be described as special'. The Court also said that the word 'special' in its context 'looks to circumstances which are unusual, uncommon or exceptional' and whether those circumstances exist will be dependent upon the context where a

a determination needs to be made as to whether the circumstances are different from 'the usual run of cases'.

(Reasons, para. 25)

The Tribunal considered that Males must be regarded as an extremely vulnerable person. He was and remained a single young man with a serious back injury, who had not worked for many years and was unlikely to do so in the immediate future. He had probably become addicted to poker machine gambling by the time he received the compensation lump sum, although winning was not the most important thing. He also attended the venues because he was bored, wanted to get out of the house and was depressed.

Secretary, DFaCS & Rankin [1999] AATA 496 was distinguished on the basis that Rankin still owned real estate after dissipating $35,000 in a casino over a short period of time, and there was no evidence that he was addicted to gambling.

The Tribunal acknowledged that it might be said that Male's circumstances were the result of his own folly and failure to recognise his addiction to gambling or to seek any help or relief from it.

> An attitude of that type would in my view be harsh, uncaring and heartless. Mr Males now endures perilous economic circumstances by reason of the dissipation of funds due to gambling and payment of other debts. Yet this cannot be looked at in isolation from his personal circumstances being his age, domicile, incapacity, injury, limited education, limited job opportunities and social status. He has virtually no assets capable of realisation and would not qualify for borrowed funds. At the age of 30 he presently lives on handouts from his mother who is also a workers compensation recipient. Despite having repaid ... $16,863 from the proceeds of his common law settlement, he has — for practical purposes — been precluded from receiving a benefit since August 1996, some 165 weeks. At the time of the hearing there remained 77 weeks of his preclusion period to run before he becomes eligible for a social security benefit.

(Reasons, para. 29)

For those reasons the Tribunal was satisfied that part of the compensation moneys should be treated as not having been made, to the extent that the preclusion period should end on the date of the delivery of the reasons for the decision. The discretion in s.1184 is sufficiently broad to permit a finding of this type without any 'formula' (refer *Secretary, DSS v Smith* (1994) 53 FCR 58).

Formal decision

The AAT varied the decision so that the period of preclusion ended on the date of delivery of the decision.

[K.deH.]

Lump sum compensation: whether in respect of lost earning or lost earnings capacity

LAWLOR AND SECRETARY TO THE DFaCS (No. 19990910)

Decided: 2 December 1999 by J.A. Kiosoglous.

Background

Lawlor was involved in a motorcycle accident in a motorcross event. His injuries were significant and he started to receive a disability support pension soon after.

His claim for compensation was settled for $90,000 and a preclusion period was worked out under the provisions of the *Social Security Act 1991* (the Act). As he had been paid a social security pension during the time of the preclusion period, the DFaCS recovered from him the amount that he had been paid in social security payments. Lawlor was unsuccessful in having that decision changed when he sought review by the ARO and the SSAT.

The issues

The issue identified by the AAT was whether or not there was a component for lost earnings or lost capacity to earn in the lump sum compensation payment. The significance of this issue was that it determined whether the lump sum fell within the definition of 'compensation' in the Act. If it did not then no preclusion period would apply and no moneys would be recoverable under the Act as having been paid within that time.

The legislation

Under the Act, the provisions that govern the setting of preclusion periods or those that govern recovery of payments after an award of damages or compensation is made, rest upon an initial determination that an amount is 'compensation' within the meaning of the Act. This is defined in s.17(2):

> **17.(2)** For the purposes of, means:
>
> (a) a payment of damages; or
>
> (b) a payment under a scheme of insurance or compensation under a Commonwealth, State or Territory law, including a payment under a contract entered into under such a scheme; or
>
> (c) a payment (with or without admission of liability) in settlement of a claim for damages or a claim under such an insurance scheme; or
>
> (d) any other compensation or damages payment;
>
> (whether the payment is in the form of a lump sum or in the form of a series of periodic payments) that is:
>
> (e) made wholly or partly in respect of lost earnings or lost capacity to earn; and
>
> (f) made either within or outside.

The settlement

Lawlor's evidence was that he did not claim compensation for past or future economic loss. His argument was that the case was settled on a commercial risk basis as legal advice was that his claim had little chance of success. Whilst the particulars of claim did state that Lawlor 'has suffered economic loss as a result of the injuries and will have substantial loss of future earning capacity', Lawlor submitted that it is standard to make such claims. The DFaCS, however, relied on these words in the claim and on correspondence between Lawlor's solicitors and the insurance company, to show that the issue of a component of economic loss was in the forefront of the parties' minds.

In deciding the matter the AAT looked at several authorities dealing with the issue of whether a sum is 'compensation' at all. The Tribunal referred to *Cocks and Secretary to the DSS* (1989) 48 *SSR* 602 and cited from that decision:

> ... In many cases the task of obtaining sufficient evidence to enable the delegate to form the necessary opinion is at the least a very difficult one. In the case of a judgement of the Industrial Court after a contested hearing it would be unlikely that the delegate in forming an opinion one way or the other would depart from the decision of that Court in the absence of other evidence. Where, however, there is a consent order like the type in question then the task of the delegate is, to the extent that it is possible having regard to all the circumstances, to identify the basis upon which the compensation was paid in order to identify what incapacity the payment was to effect compensation ... In the absence of the delegate having sufficient information to form the requisite opinion then the Department cannot recover under s.115B.

(Reasons, para.14)

In *Cunneen and Secretary to the DSS* (1995) 2(2) *SSR* 8 the AAT, in deciding that a sum was not 'compensation' within the meaning of the Act, had stated:

> **28.** ... I find that the balance was made up of:
>
> (a) $31,275 — s.66 — compensation for permanent injuries paid in accordance with the percentage loss determined under a table of maims
>
> (b) $15,000 — s.67 — pain and suffering
>
> (c) $10,000 — medical expenses
>
> $56,275
>
> **29.** It follows, in my view, that I cannot be satisfied that the lump sum payment included any amount for lost earnings or lost