- The length of the preclusion period, a further 14 years, was exceptional in itself.
- If Hooper's claim had been resolved before 20 March 1997, her age pension would not have been affected by these provisions as age pension was only included as a compensation affected payment from this date. An arbitration hearing had made an award in her favour in February 1997, but the insurer had appealed, thus extending the litigation.
- The expenditure by Hooper was modest and appropriate and it was unknown both when and how much the claim for legal costs would amount to.
- Hooper had attempted to find out the impact of compensation payments and had been told that these payments would not affect her age pension.

It was submitted that these factors should be taken into account as special circumstances and that only $40,000, the amount awarded by the court in relation to future loss of income, should be used in calculating the preclusion period.

Special circumstances

The Tribunal considered the various submissions. It accepted that there was no 'double dipping' and that Hooper's expenditure had been reasonable. The Tribunal accepted that she had approximately $34,500 in the bank and the expectation of compensation for the costs of her litigation.

The Tribunal also accepted that Hooper's health meant that she was unable to work and would not be able to work again. She had a number of expenses as a result of her health.

The Tribunal accepted that the litigation was protracted and that she had been told by Centrelink that the compensation would not affect her age pension (the Tribunal found that the advice was probably not incorrect).

In conclusion, the Tribunal found that these circumstances were not, by themselves, sufficient to justify exercising the discretion under s.1184. However, the Tribunal also considered whether the application of the preclusion period resulted in 'unfairness or injustice'.

The Tribunal noted that the strict application of the recovery provisions would preclude payment of age pension to Hooper until she was over 82 years of age. The Tribunal decided to adopt the approach outlined by Merkel J in *Kertland v Secretary, Department of Family and Community Services* (1999) 57 ALD 600 'to address the unfairness arising from the imposition of a preclusion period until 20 January 2015'.

The Tribunal found that the appropriate outcome was for the preclusion period to end on 29 August 2002, the date after which there would be no element of 'double dipping' (i.e. the date after which Hooper did not receive any compensation under the court order).

Formal decision

The Tribunal set aside the decision under review and substituted a new decision that, given the special circumstances of the case, the portion of the compensation awarded to Hooper should be treated as not having been made under s.1184 as would allow the preclusion period to end on 29 August 2002.

[R.P.]

Lump sum preclusion: special circumstances; compensation divisor

ALLAN and SECRETARY TO THE DFaCS (No. 2001/271)

Decided: 4 April 2001 by H.E. Hallowes.

Background

Allan was paid weekly compensation payments until 13 March 1998. On 3 March 1998 he was awarded compensation of $250,000.

In November 1999 Allan claimed disability support pension. Centrelink decided that he was precluded from receiving payments between 14 March 1998 and 20 January 2004. Allan reclaimed disability support pension on 22 May 2000. He was again advised that he would be precluded from receiving payments until 20 January 2004.

The preclusion period was calculated on the basis of the divisor at the time of settlement ($403.20) and the period commenced on the day after the weekly workers compensation payments ceased (13 March 1998).

This decision was affirmed by the Social Security Appeals Tribunal.

The issues

The Tribunal considered two issues:

1. the date used for assessing the compensation divisor; and
2. whether there were special circumstances under s.1184 of the *Social Security Act 1991* to justify disregarding all or part of the compensation payment.

Compensation divisor

The preclusion period was calculated by Centrelink using the compensation divisor at the time of settlement. The Tribunal noted that the legislation did not specify when the calculation of the preclusion period was to be determined, although s.1165(5) provided for the beginning and end of the preclusion period. The Tribunal referred to the case of *Stephens and Secretary to DFaCS* (2001) AATA 108. It noted that in Allan's case, as with Stephens, the compensation divisor used was one of the lowest and that this had a direct effect on the length of the preclusion period. It also noted that the effect of the GST on cost of living was one of the special circumstances considered in *Stephens'* case.

The Tribunal made no conclusion about the appropriate date for applying the compensation divisor, preferring to focus on the issue of special circumstances as occurred in *Stephens*.

Special circumstances

The Tribunal considered the expenditure of the lump sum by Allan. It had been submitted that Allan had spent his money recklessly — some $307,000 being spent between 13 March 1998 and 17 November 1999. Information provided by Allan showed that he had spent his money by purchasing a house and land for $145,000; a car for $10,000; legal fees of $25,000; accumulated debts of $30,000; and various other expenses of $40,000.

Evidence was provided that Allan had sold his property for $147,000 of which he would net $59,000. It had been submitted that this was sufficient money to enable Allan to support himself until October 2003.

The Tribunal noted the poor prospects in relation to Allan's health and his drug addiction which was a consequence of his treatment. It concluded:

> His addiction is a factor which makes Allan's circumstances uncommon. Having lost his home, the decision under review provides that he must find food and shelter through his own resources, including the funds he has following the sale of his house and land, to survive until 20 February 2004. It is important that he be given some hope for the future.

(Reasons, para. 22)

The Tribunal noted that the compensation divisor used to calculate Allan's conclusion period was $403.20 and that at 1 July 2000 this figure was $543.63. The Tribunal also noted the effect of the GST on the cost of living after 1 July.

In essence, it disagreed that $59,000 would be sufficient to support Allan until the end of the preclusion period.

The Tribunal decided to exercise its discretion and reduced the preclusion period on the basis of using the compensation divisor in effect when Allan claimed disability support pension on 22 May 2000. The Tribunal therefore precluded payment until 1 July 2003. The Tribunal commented that this might give Allan some hope for the future, it reflected the increased cost of living in the future and acknowledged Allan's chronic pain, the treatment of which had unfortunately led to a drug addiction.

Formal decision

The Tribunal set aside the decision under review and substituted a new decision that, given the special circumstances of the case, the portion of the compensation awarded to Allan should be treated as not having been made under s.1184 as would allow the preclusion period to end on 1 July 2003.

[R.P.]

Compensation: lump sum preclusion period; small component for economic loss

KEIGHLEY and SECRETARY TO THE DFaCS
(No. 2001/0231)

Decided: 23 March 2001 by J.D. Campbell.

Keighley was granted disability support pension (DSP) in 1993, and it continued at all times. On 1 July 1994 he began working as a salesman for a company of which he was a director and shareholder, agreeing to accept $50 a week until the company was in a stronger financial position. He was injured in a motor vehicle accident on 5 April 1995, returned to work on light duties on 4 August 1995, and resumed work as a salesman on 4 September 1995.

By consent judgement made on 3 March 1999, Keighley was awarded $150,000 plus costs of $15,000 with no particularisation of any head of damage. Centrelink then recovered $29,458.50 being DSP payments made from 6 April 1995 to 22 September 1998. Keighley applied for a review of that decision.

The issue

It was not in dispute that Centrelink had correctly applied the relevant provisions of the *Social Security Act 1991* (the Act) to calculate the amount recovered. The issue was whether some or all of the compensation should be disregarded under s.1184(1) of the Act to reduce the amount to be recovered. It provides:

> **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.

Keighley had used the compensation money to buy a block of land with an incomplete house where he and his wife resided. They had lived in rental accommodation for five or six years before buying it. He was 58 years old, and his wife was an aged pensioner. They had no debts or assets except a small amount in the bank, and a weekly income of about $300. They borrowed their son's car when needed and available. The son died on 26 February 1999 and, besides paying the funeral expenses, Keighley had assisted his son's wife and two small children when he could.

Keighley suffered from long-standing ulcerative colitis causing episodic abdominal pain and diarrhoea. After the accident he had a continuously painful right foot that swelled occasionally and required surgical footwear, and his right knee gave way every now and again. He later developed diabetes. He needed expensive special stockings to assist his circulation, and expensive surgical shoes and boots.

The AAT found that the amount claimed on Keighley's behalf in the negotiations prior to the consent order was $3258 for past economic loss, and between $15,000 and $35,000 was discussed for future economic loss in the negotiations.

For Keighley it was argued that because the claim was settled by consent, the effect of s.17 of the Act was to take an arbitrary 50% of the total amount to be for lost earnings or lost capacity to earn. The calculation of the amount to be recovered was based on that figure. As the amount actually claimed for economic loss was well below $50% of $165,000, application of the 50% rule would be harsh and inequitable in his case. The discretion in s.1184(1) should be exercised so that the resultant preclusion period reflected the intent of both parties in respect of the amount for economic loss.

The cases

The AAT noted *SDSS v Banks* (1990) 56 *SSR* 762, *SDSS v a'Beckett* (1990) 57 *SSR* 779, *SDSS v Hulls* (1991) 60 *SSR* 834 and *SDSS v Cuneen* (1997) 3(3) *SSR* 36, and held that what is nominated in a statement of claim and in discussions is indicative of each party's consideration at those points in time, but a consent order is an independent document which may or may not reflect their earlier positions. Any attempt to imply or infer matters not stated on the face of the order must be resisted as it throws into question the process and validity of a consent order.

This matter could be distinguished from *SDSS v Beel* (1995) 38 ALD 726 and *SDSS & Caruso* (1996) AAT 11243, where special circumstances were found because the arbitrary 50% of the settlement amount was perceived to be at such significant variance with what was detailed as economic loss in consent orders. The AAT doubted that those decisions were consistent with the statutory intent of the legislation, adding that advocates for such a position were placing a significant emphasis on the proper construction of a consent order, while at the same time jeopardising the integrity of a statutory process which balanced both individual social need and a community's responsibility to ensure equity and probity of resource distribution to meet those needs.

The AAT referred to *Beadle & DGSS* (1984) 20 *SSR* 210 for the meaning of the phrase 'special circumstances', and to *Green & SDSS* (1990) 21 ALD 772 for a framework against which claims for special circumstances could be considered. In this case there was nothing unusual, uncommon or exceptional in adhering to the mandatory statutory process as others in similar circumstances would experience it, and as such it did not constitute special circumstances. While Keighley had been granted DSP for the ulcerative colitis he was still able to work in a particular capacity. Together with the injuries he received in the car accident, for which he had been compensated, and the subsequent onset of diabetes, his various medical conditions did not constitute special circumstances. He was not experiencing financial hardship, let alone exceptional