s.1165(8) of the Act. In effect the 'compensation part of a lump sum' (CPLS) is divided by the 'income cut-out amount' (ICOA), and the result is the equivalent of the number of weeks in the preclusion period.

The ICOA, the divisor, is defined at s.17(1) to be the amount of weekly earnings at which the single rate of pension is no longer payable. Prior to 20 March 1997 it was based on 'average weekly earnings'. A table provided to the AAT by the Secretary showed it to be $571.90 immediately prior to 20 March 1997, $402.20 from that date, and $410.00 on 1 June 1998.

The CPLS is defined at s.17(3) of the Act to be 50% of the payment made in settlement of the claim where the claim was settled after 9 February 1988.

Section 1184 of the Act permits some or all of the compensation payment to be treated as not having been made, or as not liable to be made, if there are special circumstances.

The calculation

For Morgan it was argued that in calculating the preclusion period the CPLS was only $120,000 because a letter from the TAC's solicitors recorded that the $320,000 represented $200,000 for general damages and $120,000 for economic loss and costs. The AAT did not agree, holding that the effect of s.17(3) was that the CPLS was 50% of $320,000, namely $160,000.

It was also argued for Morgan that the divisor in the calculation, the ICOA, was not $410, the value used, but was in the vicinity of $530-$560 as stated in the SSAT's reasons for decision. However, the origin of the SSAT's figures was not readily apparent, while the $410 was the correct figure at the date of the settlement. The AAT noted that the Act had been amended to take effect from 20 September 2001 to define the ICOA as 'that in force at the time when the compensation was received'. Nevertheless, prior to that date, and in the absence of any legislative mandate, it was departmental policy to apply the divisor in effect at the date of settlement. The AAT considered that the policy should be applied so there was consistency in decision making. Logically, that was the date which should be used to determine the ICOA because the duration of the preclusion period was calculated at the date of settlement.

The discretion

The AAT then considered whether the discretion in s.1184 could be applied in Morgan's case. It found that Morgan received about $195,000 from the settlement after costs and the refund of DSP payments. This was used to repay mortgages over her home and other debts, and to buy a car, furniture and shares. At the date of the hearing Morgan and her husband owned a house and land of 2.5 acres near Echuca valued at $300,000, with an outstanding mortgage of $17,000 to the Defence Force Retirement Benefit Fund repaid at $156 a month. House contents were valued at $15,000 and their car at $40,000. Morgan received no income but her husband received a war pension at $289 a fortnight from the Department of Veteran's Affairs, and a carers pension of $75 a fortnight. Her two sons lived at home and paid $50 a week board. The costs and charges for Morgan's continuing medical care, including travel to Melbourne, were incurred wholly by the TAC.

The AAT observed that the legal charges by Morgan's solicitors appeared to be excessive. Morgan indicated that she had considered a complaint to the Law Institute but was told she was 'out of time'.

Morgan had been made aware by her solicitors, prior to the settlement that a preclusion period would be imposed, but was told it would expire in 2000. The AAT considered that any consequence arising from that advice — if negligent — should be exercised by her against the solicitors. It was not a circumstance which could be regarded as being special to reduce or disregard the compensation payment when calculating the preclusion period.

The AAT concluded that despite the impact on Morgan's domestic, personal and financial circumstances as a result of the injuries suffered in the accident, she had received settlement funds and had considerable assets. After referring to *Beadle and Director General of Social Security* (1984) 20 *SSR* 210 as to the meaning of the phrase 'special circumstances', it was unable to find that there were any special circumstances.

Formal decision

The AAT affirmed the decision under review.

[K.deH.]

Psychiatric confinement: course of rehabilitation

SECRETARY TO THE DFaCS and FRANKS
(No. 2001/738)

Decided: 24 August 2001 K.L.Beddoe.

Background

Franks was in receipt of a disability support pension when he was charged with an indictable offence. He was remanded in custody until April 2000 when the Mental Health Tribunal found that he was of unsound mind and was not fit to plead at his trial. Franks was then transferred to a psychiatric hospital as a restricted patient and remained so at the date of the AAT hearing. The criminal proceedings were deferred indefinitely while Franks remained unfit to stand trial. The psychiatric hospital was not a place declared to be a prison under the Corrective Services (Establishment of Prisons) Regulations 1992.

Franks was diagnosed with a degree of Korsakoff's Syndrome and was reported as being of below average intelligence with limited education and literacy and numeracy deficits. He was at the psychiatric hospital formally for the purpose of psychiatric assessment but he had also participated in a rehabilitation program designed to assist his long-term prospects.

The period of detention at the hospital was uncertain. Franks' progress was monitored each three months by the Patient Review Tribunal and that Tribunal would decide when he was ready to be released from the hospital. The rehabilitation activities were being provided for an uncertain period because they would continue while Franks remained at the hospital pursuant to the order of the Mental Health Tribunal.

Issues

The issue was whether disability support pension was payable to Franks, and this depended on whether he was a person undergoing psychiatric confinement, after having been charged with committing an offence. If so, he would not be entitled to disability support pension unless he was undertaking a course of rehabilitation.

Legislation

Section 1158(1) of the *Social Security Act 1991* (the Act) states that a social security pension is not payable if the person (otherwise entitled to payment) is:

(i) in gaol; or

(ii) undergoing psychiatric confinement because the person has been charged with committing an offence.

Section 23(5) states that a person is in gaol if the person is in one of the circumstances set out in the sub-section. Relevant to Franks' case was s.23(8), which provides that 'psychiatric confinement' in relation to a person includes confinement in:

(a) a psychiatric section of a hospital; and

(b) any other place where persons with psychiatric disabilities are, from time to time, confined.

Sub-section 23(8) is subject to s.23(9), which reads as follows:

> The confinement of a person in a psychiatric institution during a period when the person is undertaking a course of rehabilitation is not to be taken to be 'psychiatric confinement'.

Course of rehabilitation

The Tribunal referred to two previous decisions *Secretary to the DFaCS and Fairbrother* (1999) 30 AAR 93, contra *Pardo and Secretary to the DFaCS* (2000) 32 AAR 381; 4(7) *SSR* 84. Franks submitted that *Pardo* should be preferred because it accorded with the beneficial intent of the legislation and the decisions of *Bulsey and DSS* (1993) 31 ALD 621 and (on appeal) *Blunn v Bulsey* (1993) 53 FCR 572.

The Tribunal noted that s.23(9) clearly differentiates between confinement in a psychiatric institution per se and confinement in a psychiatric institution in order to undertake a course of rehabilitation and that the sub-section only operates in the latter circumstance.

The Tribunal referred to s.34 of the *Mental Health Act 1974* (Qld) which sets out the procedure on a finding that a person is unfit for trial. The person is detained as a restricted patient in a hospital, with a clear inference that the person is to receive appropriate treatment and rehabilitation with a view to the Patient's Review Tribunal and the Mental Health Tribunal eventually determining fitness for trial after treatment and rehabilitation.

There was no dispute that Franks was undergoing rehabilitation while detained under s.34. The Tribunal addressed the question whether there was a distinction to be drawn between a course of rehabilitation of indefinite duration as contemplated by s.34 of the *Mental Health Act 1974* (Qld) and a course of rehabilitation of a finite duration, for example, 12 months.

The Tribunal referred to *Fairbrother* (1999) 30 AAR 93 which decided that s.23(9) referred to a course of rehabilitation of finite duration. In contrast *Pardo and DFCS* (2000) 32 AAR 381 at 393-4 found that the words *'a period'* as used in s.23(9) should be interpreted as meaning the duration within which a person undertakes a course of rehabilitation. It may be flexible and may be reviewed from time to time.

The Tribunal found that the 'words "during a period" are to be construed so as to require a temporal connection from time to time between the confinement in a psychiatric institution and the undertaking of a course of rehabilitation' (Reasons, para. 27).

> Provided the confinement and the undertaking of the course of rehabilitation are contemporaneous the sub-section will operate to exclude the person from the operation of s.23(8) unless it can be said that rehabilitation which is determined on a flexible basis such as day to day or week to week is not a course of rehabilitation. I do not think that is an appropriate interpretation of the words. Rehabilitation of persons with psychiatric disabilities could not, in my view, be laid out as a week by week program as might be appropriate for a person with physical disabilities. It cannot be the intention of beneficial legislation to provide for the exclusion from the operation of s.1158 on a basis that would have little regard to the real life circumstances likely to occur from day to day. As Senior Member Handley said in *Re Pardo* (at 394) the restoration of a person's potential will vary from person to person. It must be added that this is even more so in relation to psychiatric illness.

(Reasons, para. 28)

Formal decision

The Tribunal affirmed the decision under review.

[M.A.N.]

Parenting payment rate: whether carrying on a business; allowable deductions

KLEWER and SECRETARY TO THE DFaCS (No. 2001/729)

Decided: 22 August 2001 by D. Muller.

The issue

The critical issue in this matter was whether the applicant was carrying on a business and, in turn, whether business deductions could be taken into account in determining her income for parenting payment purposes.

Background

Klewer was a sole parent raising four children, and during the period in question was in receipt of parenting payment. In September 2000 she returned a Parenting Payment Review form in which she declared that she was operating a business as a taxi driver. She provided Centrelink with a profit and loss statement, which included details of deductions against her earnings for GST paid, uniform laundry, fuel used in commuting to and from work, mobile phone costs, non-payment of full fares by passengers, loss of income due to vehicle breakdown, loss of income due to family commitments, and baby sitting costs.

The law

'Income' is defined in s.8(1) of the *Social Security Act 1991* (the Act) to include amounts 'earned, derived or received ... for the person's own use or benefit'. Where, however, a person is conducting a business s.1075 of the Act allows for 'losses and outgoings that ... are allowable deductions for the purposes of ... the *Income Tax Assessment Act 1936* ...' to be deducted against the amount of income.

Discussion

The Tribunal noted that some of the items claimed by Klewer as business deductions (the costs of fuel used in commuting to work, non-payment of full fares by passengers, loss of work due to cab breakdown, loss of work due to family issues, and baby-sitting costs) were not in fact allowable under the *Income Tax Assessment Act 1936* — and these items could not be claimed even if she was carrying on a business. The amount of GST collected by Klewer was not for her own use or benefit and was neither