'lump sum amount' is the amount of the lump sum referred to in paragraph (b);

'number of fortnights in the period' is the number of whole fortnights in the period referred to in paragraph (c).

Section 1165 of the Act deals with lump sum amounts and precludes a person from receiving social security payments for the lump sum preclusion period. Section 1168 provides for the reduction in payments where periodic compensation payments have been received. The relevant definitions are contained in s.17 of the Act. The definition of compensation includes a payment made under a scheme of insurance or compensation under State law in respect of lost earnings or lost capacity to earn. It includes periodic payments.

The State Act under which Reid received his compensation payments allows for payment for loss of future earnings.

The primary judge

Reid argued that at the time he made his claim for DSP he was not covered by s.1163A(1)(a) of the Act because he was not a person who 'is entitled to periodic payments under a law of the State.'

Von Doussa J noted that even though the subsection was expressed in the present tense it was describing events in the past. This was logical because there is only an entitlement to a lump sum where an earlier entitlement to periodic payments has been converted to an entitlement to a lump sum. When this section is read as a whole it is clear that it refers to past events. Otherwise the object and purpose of the section would be frustrated, and any other construction would not reflect the intention of Parliament. It was noted that where s.1165 applies, s.1163 does not.

> As the lump sum payments received by Mr Reid in March 1997 and March 1998 were each lump sum payments calculated by reference to a period, and as the requirements of pars 1163A(1)(a) and (b) were fulfilled, s.1163A governed Mr Reid's application for disability support pension and not s.1165.

(Reasons, para. 15)

The Full Court

The majority (Branson and Mansfield JJ) agreed with von Doussa J. Reid did not obtain a right to be paid DSP when he became incapacitated for work. Reid had made no claim at that time — a requirement under the Act. If a claim was made, Centrelink then had to determine if Reid was qualified and whether the pension was payable at the time the claim was made (s.114). Section 1163A in its present form was in force at that time and applied to his claim. The majority rejected the argument put by Reid that s.1163A applied only where the loss of earning capacity occurred after 12 December 1995. Applying the present s.1163A did not imply that it operated retrospectively.

Lindgren J stated that s.1163A operated prospectively only and so could not apply to Reid's situation. Reid received his first lump sum payment in March 1995 and ceased to be entitled to weekly payments. From 1 January 1994 to 11 December 1995 s.1163A provided that if a person's periodic payments for a period were converted to a lump sum which was paid in two or more instalments then the person was considered to be still receiving periodic payments for the period. The lump sums paid to Reid would not be caught by this provision because each was not paid in two or more instalments. The amendment to s.1163A was introduced on 12 December 1995 to close this loophole. But the closure was prospective in its operation. There is a presumption that this amendment does not apply retrospectively because the amendment did not expressly state that it should.

However it was not necessary to rely on the presumption against retrospectivity. Because the amended s.1163A uses the present tense it is clear that it refers to:

> A state of affairs which prevails contemporaneously with the operation of the subsection, that is, after 12 December 1995. Accordingly, the subsection provides that if at any time after that date a person is entitled to periodic payments under a law of a State or Territory and that entitlement is then converted under that law into an entitlement to a lump sum which is calculated by reference to a period, Part 3.14 of the SS Act applies.

(Reasons, para. 35)

This means that if Reid's entitlement to periodic payments was converted to an entitlement to one or more lump sums prior to 12 December 1995, then provided he received the lump sum as a single payment s.1163A did not apply. The wording of s.1163A(1) suggests that the legislature deliberately chose those words to ensure that the section referred an actual entitlement in existence at the time the amended subsection operated.

Formal decision

By majority the Federal Court dismissed the appeal.

[C.H.]

Disability support pension: in gaol

GARDEN v SECRETARY TO THE DFaCS
(Federal Court of Australia)

Decided: 2 July 2001 by Gray J.

Garden appealed against the AAT decision that while he was an in-patient of a psychiatric institution he was 'in gaol'.

The facts

In 1995 Garden was convicted of murder and sentenced to be detained in a psychiatric institution for 18 years and 9 months. In December 1996 Garden was discharged and transferred to prison because he was compliant with his medication and had no overt psychiatric symptoms. By May 1998 Garden was no longer compliant with his medication and concerns were expressed about his mental state. He was transferred back to a secure psychiatric unit. Shortly after he lodged a claim for a disability support pension.

The law

Section 98(1)(e) of the *Social Security Act 1991* (the Act) provides that even though a person is qualified for a disability support pension it may not be payable because the person is in gaol. Section 1158 provides:

> A social security pension (other than pension PP (single)) is not payable to a person on a pension day if:
>
> (a) on that payday the person is:
>
> (i) in gaol; or
>
> (ii) undergoing psychiatric confinement because the person has been charged with committing an offence;

The term 'in gaol' is defined in s.23(5) as including 'a person being lawfully detained in a place other than a prison, in connection with the person's conviction for an offence'. Section 28(8) defines psychiatric confinement and includes the proviso that a person is not considered to be in psychiatric confinement where the person is undertaking a course of rehabilitation.

The *Mental Health Act 1986* (Vic) and the *Sentencing Act 1991* (Vic) provide that if a person is found guilty of an offence they can be admitted to an approved mental health service as an involuntary patient instead of being sentenced, if the person is mentally ill and requires treatment. Such a person may be discharged from the mental health service and returned to a prison if the person no longer needs to be

detained at the service. A person in prison who becomes mentally ill may be transferred to a mental health service for treatment.

In gaol

The AAT decided that Garden was 'in gaol' when he was transferred back to the mental health service in May 1999, and thus he was not entitled to DSP. On behalf of Garden it was argued that he should be treated as a person who had become mentally ill while serving a period of imprisonment and had been transferred to hospital for treatment. He was not undergoing psychiatric confinement because he had been charged with an offence but because he was mentally ill.

Gray J referred to the previous Federal Court decision of *Blunn v Bulsey* (1994) 53 FCR 572 in which it was decided that the person's detention must be connected with the offence. The AAT had applied *Bulsey* and decided that Garden was detained in connection with the offence. Garden had received treatment since his arrest, he had been in psychiatric units in prison or in mental health services, and he received some treatment while in prison. These were all questions of fact. The Court found that the AAT was bound to follow *Bulsey*, which it did. It distinguished Garden's situation from Bulsey's situation by applying the law to the facts found by the AAT. This was not an error of law.

Gray J then went on to consider whether the test outlined in *Bulsey* correctly set out the law.

> The question posed by s.23(5(b) of the *Social Security Act* is whether a person is being detained in connection with his or her conviction for an offence. It is not, as Einfeld J characterised in *Blunn v Bulsey* at 576, a question of a connection between the mental condition of the person concerned with a crime for which that person has been imprisoned. The required connection is a connection between the lawful detention and the fact of a conviction for the offence. It is unnecessary to inquire whether mental illness played a role in the commission of the offence, only whether the detention is connected with the conviction.

(Reasons, para. 21)

There need be no connection between the mental condition of the person being sentenced and the offence. The person is detained in a mental health service because their mental condition at the time of sentencing requires it.

The intention of the legislation is that where a person has been convicted of an offence and detained in a prison or some other facility at any time during the sentencing period a social security payment will not be payable. It is assumed that the sentence will be served either in prison or some other place of detention. Therefore it does not matter whether the person is transferred from prison to a psychiatric unit or back again. It was incorrect in *Bulsey* to say that there must be more than a temporal connection.

Rehabilitation

A person is also deprived from receiving a social security payment if undergoing psychiatric confinement because they have been charged with an offence (s.1158(a)). This section covers those on remand, those found unfit to plead and those acquitted because of their mental condition. In Garden's situation successful rehabilitation would result in him returning to gaol. It was argued on behalf of Garden that the legislative intention was that if he was undergoing a course of rehabilitation he would be entitled to a social security payment. Gray J decided:

> The intention is to exclude the normal entitlement to social security pensions in respect of all convicted offenders, for so long as they continue, in effect, to serve sentences of imprisonment, whether in prison or by means of detention in other places. If the legislature had intended to preserve an entitlement to social security pensions for all those undergoing courses of rehabilitation for mental illness while serving sentences of imprisonment, it could have made express provision to this effect.

(Reasons, para. 27)

Formal decision

The Federal Court dismissed the appeal.

[C.H.]

Retirement assistance for farmers: meaning of 'make a request'

SECRETARY TO THE DFaCS v HAAGAR
(Federal Court of Australia)

Decided: 11 September 2001 by Cooper J.

The law

Part 3.14A of the *Social Security Act 1991* (the Act) provides for retirement assistance for farmers. The purpose of the Part is to provide that, if the conditions set out in the Part are met, the value of certain interests transferred by a qualifying farmer will be disregarded in determining whether a social security payment is payable or at what rate a social security payment is payable.

Division 4 of Pt 3.14A is headed 'Requests for increase in rate of social security payment'. The Division relevantly provides as follows:

1185G If:

(a) the rate at which a social security payment is being, or has been, paid to a person is less than the rate (the increased rate) at which it would be, or would have been, paid if the value of the qualifying interests transferred by the person or the person's partner had not been included in the value of the person's assets, or of the partner's assets, in calculating the rate of the person's social security payment; and

(b) the person wants the social security payment to be paid at the increased rate;

the person must make a request to that effect.

1185H A request under s.1185G must be made in writing and must be in accordance with a form approved by the Secretary.

1185J(1) If:

(a) a person makes a request under s.1185G in respect of a social security payment; and

(b) the Secretary is satisfied that the rate at which the social security payment is being, or has been, paid to the person is less than the rate at which it would be, or would have been, paid if the value of the qualifying interests transferred by the person or the person's partner had not been included in the value of the person's assets, or the partner's assets, when calculating the rate of the person's social security payment;

the Secretary must determine that the request is to be granted.

The issues

The AAT determined that a request under s.1185G of the Act for a social security payment to be paid at an increased rate, was made by the Haagars when the written request in the proper form was posted.

The DFaCS contended that the proper construction of s.1185G of the Act required that until receipt by the Secretary of a written notice in proper form no request was made for the purpose of the section. On the construction contended for by the DFaCS, the request was not made until receipt of the written request by the Gympie office of Centrelink in the ordinary course of post. The determination of when the request was made, also determined the