

## Compensation: lump sum preclusion period; interest on economic loss

**MOURILYAN and SECRETARY TO THE DFACS**  
(No. 2000/1026)

**Decided:** 23 November 2000 by K.Beddoe.

### Background

Mourilyan was injured in a work-related accident in December 1993, and began receiving periodic compensation payments. He lodged a claim for pension and was advised by letter in July 1996 that a preclusion period could apply if he received a lump sum compensation payment. Mourilyan did receive such a payment in August 1998, when he was awarded a total of \$201,620 including \$115,200 in respect of past economic loss and \$16,017 being interest on that economic loss amount. After repayment of moneys to WorkCover, to Social Security (Centrelink), and legal fees, Mourilyan received a net payment of \$82,325.

Centrelink calculated a preclusion period from June 1996 until August 2002, using as a basis for calculation \$131,307 being the sum of the amounts paid in respect of past economic loss (\$115,200) and the interest calculated on that amount (\$16,107). Centrelink subsequently amended the period of preclusion to conclude in June 2000. Mourilyan sought review of this decision but it was affirmed by the SSAT.

### The issue

The principal issue in this matter was whether, in calculating the compensation payment amount on which determination of the period of preclusion is calculated, the interest component of the lump sum should be included. The AAT noted the provisions of s.17(2) of the *Social Security Act 1991* (the Act) which defines 'compensation' to mean (inter alia) '...any other compensation or damages payment ... made wholly or partly in respect of lost earnings or capacity to earn ...'.

### Should the interest component of damages be included as compensation?

Noting the decisions in *Fire and All Risks Insurance Co Ltd v Callinan* (1978) 140 CLR 427, *Cullen v Trappell* (1980) 29 ALR 1 and *Thompson v Faraonio* (1979) 24 ALR 1, the AAT concluded that the amount of interest awarded to Mourilyan could be distin-

guished from damages in respect of lost earnings or capacity to earn. The AAT concluded that:

... damages awarded because a claimant has been kept out of the damages payable on the date of accident by an intervening period of time between the accident and the award of damages, may be distinguished from damages in respect of lost earnings or lost capacity to earn. It is compensation for being kept out of the payment of damages and is made wholly in respect of time lost rather than lost earnings or capacity to earn ... it is a payment to reflect the fact that the damages awarded were not paid on the date of the accident so there is a deemed loss of interest [which is] ... a financial loss caused by and arising out of the delayed payment of damages. It is not related to lost earnings or lost capacity to earn ...

(Reasons, para. 25).

The AAT concluded therefore that the interest awarded in respect of damages for past economic loss was not within the definition of 'compensation' contained in s.17(2) of the Act.

### Formal decision

The Tribunal set aside the decision under review and substituted a decision that the lump sum preclusion period be recalculated taking into account that the interest received was not in respect of lost earnings or capacity to earn, and so the compensation part of the lump sum should be reduced accordingly.

[P.A.S.]

## Compensation: special circumstances; small component for economic loss

**SECRETARY TO THE DFACS and WOOLRICH**  
(No. 2000/943)

**Decided:** 30 October 2000 by J.D. Campbell.

### Background

Woolrich was born in the Phillipines in 1958 and married Mr Woolrich in 1994. She came to Australia later that year bringing a daughter, then aged 10, but leaving a son, then aged 4, with her mother. Her husband died on 21 October 1995. Woolrich was then paid a sole parent pension (SPP), and later parenting payment (PP).

She started a part-time cleaning job earning \$40 a week in July 1996, and three weeks later was involved in a motor vehicle accident receiving multiple injuries. A compensation claim, including \$3680 for economic loss, was settled for \$25,000 by consent order dated 19 March 1999.

Centrelink recovered \$5261.80 from the settlement amount, being the total amounts of SPP and PP paid during a preclusion period of 30 weeks commencing from the date of the accident. It was agreed that Centrelink had correctly calculated the length of the preclusion period by dividing 50% of the lump sum compensation settlement, namely \$12,500, by an 'income cut-out amount'. However, the *Social Security Act 1991* (the Act) also 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.

On review the SSAT had found that 'the small amount of the award attributable to economic loss' was a special circumstance, and had exercised this discretion to decide that the recoverable amount should be recalculated after treating \$17,640 of the compensation settlement amount as not having been made. The effect was that the amount Woolrich claimed for economic loss, rather than the arbitrary 50% of the settlement amount as specified in s.17(5) of the Act, would be used to calculate the preclusion period. The Secretary sought a further review by the AAT.

Woolrich told the AAT she had received \$10,746 net from the settlement. She had apparently spent all or most of it, including \$5500 visiting the Phillipines with her daughter and her partner to see her son, and repaying a debt of \$1000 to her partner. Her partner had left three months after she received the compensation. She had worked casually in a shop throughout 1999 earning \$600 a fortnight, and she had started a full-time cleaning job in 2000. Apart from her daughter, who was in Year 10, she had no relatives in Australia and sent \$300 to \$400 every two months to the Phillipines to pay for the care of her son. She suffered from rib pain and reflux for which she took medication, and may have needed a gall bladder operation.

### Special circumstances

At issue was whether there were special circumstances pursuant to s.1184 of the

Act to justify treating all or part of Woolrich's compensation payment as having not been made. In particular, at issue was whether the application of the '50% rule' had produced an unfair or unintended consequence. For Woolrich it was argued that the SSAT decision was correct.

Referring to *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, the AAT took the view that an argument based on what may or may not be specified in a statement of claim is without merit as it is a significant departure from the intentions of the statutory process. A consent award may or may not reflect issues nominated in the statement of claim. The AAT added that cases 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, are not consistent with the statutory intent of the legislation. Advocates for such a position are 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 balances both individual social need and a community's responsibility to ensure equity and probity of resource distribution to meet those needs.

The AAT noted that the consent order in this matter was silent as to the elements of the lump sum payment. That distinguished it from *SDSS v Beel* (1995) 38 ALD 726 and *Re SDSS & Caruso* (1996) AAT 11243 where the consent orders contained details of the economic loss component and special circumstances were found to exist.

The AAT referred to *Re Beadle & DGSS* (1984) 20 SSR 210 for the meaning of the phrase 'special circumstances', and to *Re Green & SDSS* (1990) 21 ALD 772 for a framework against which claims for special circumstances could be considered. It held that even if the outcome of the arbitrary 50% rule was unfair its consequence — that Woolrich had to repay some \$5000 more — had to be assessed against her other circumstances to decide whether or not special circumstances existed. It found that Woolrich was not in financial hardship, and noted that her medical conditions did not prevent her from engaging in employment or overseas travel. Based on those considerations it concluded that Woolrich's circumstances were not unusual, uncommon or exceptional and did not constitute special circumstances.

### Formal decision

The AAT set aside the SSAT's decision and reinstated the original decision that Woolrich was subject to recovery of \$5261.80 from her compensation settlement.

[K.deH.]

## Age pension income test: whether life insurance payout an 'exempt lump sum'?

VARCOE and SECRETARY TO THE DFaCS  
(No. 2000/1002)

Decided: 15 November 2000 by J.Dwyer.

### Background

In 1956 Varcoe took out two life insurance policies. He later changed them to endowment policies to mature at age 65. The policies matured on 30 July 1999 and had a combined value of \$18,117.60. Mr Varcoe had paid \$3,386.68 in contributions over the 43 years he had maintained the policies. Centrelink treated the balance of \$14,730.00 as payment of income over a 12-month period. As a result Varcoe received a substantially reduced rate of age pension.

### The issue

Whether the *Social Security Act 1991* (the Act) requires that the amount of \$14,730.00, being the total figure payable when the insurance policies matured, less premiums paid, be included as income for age pension purposes. The question for the Tribunal was whether the amount is 'an exempt lump sum' as defined in s.8(11) of the Act.

### The legislation

Section 1073(1) of the Act states if a person receives an amount that:

is not income within the meaning of Division 1B or 1C of this Part; and

(b) is not:

- (i) income in the form of periodic payments; or
- (ii) ordinary income from remunerative work undertaken by the person; or
- (iii) an exempt lump sum.

the person is ... taken to receive one fifty-second of that amount as ordinary income of the person during each week in the

12 months commencing on the day on which the person becomes entitled to receive that amount.

Section 8 of the Act contains the following income test definitions:

'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);

...

**8(11)** An amount received by a person is an exempt lump sum if:

- (a) the amount is not a periodic amount (within the meaning of subsection 10(1A)); and
- (b) the amount is not a leave payment within the meaning of points 1067G-H20, 1067L-D16 and 1068-G7AR; and
- (c) the amount is not income from remunerative work undertaken by the person; and
- (d) the amount is an amount, or class of amounts, determined by the Secretary to be an exempt lump sum.

Note: Some examples of the kinds of lump sums that the Secretary may determine to be exempt lump sums include a lottery win or other windfall, a legacy or bequest, or a gift ... if it is a one-off gift.

The definition of 'income' in the Act treats a lump sum amount as income unless the amount is 'an exempt lump sum'.

### Determination of exempt lump sum

There are four criteria in s.8(11), which have to be satisfied before an amount is 'an exempt lump sum'. The Tribunal found no issue arose in relation to paragraphs 8(11)(a)(b) and (c). As to paragraph 8(11)(d), the Tribunal noted that officers within Centrelink appear to have acted on the basis that the amount of \$3386.68 was 'an exempt lump sum', although there was no formal determination by the Secretary to that effect.

The Tribunal also noted that there was no determination by the Secretary relating to amounts received on maturity of an endowment or life insurance policy but that the possibility of individual