pected to sell or realise the asset; and (b) the person could not reasonably be expected to use the asset as a security for borrowing.

The Department conceded that it would be unreasonable to expect the loan to be used as security for borrowing. However, it was proposed that Mr and Mrs Maher could realise the only asset of the company, that is, the home in which they had been residing for some years and had been treating as their family home.

The Tribunal then considered whether Mr and Mrs Maher could be expected to sell the family home. The Tribunal found that this was a 'reasonably broad test' and referred to the case of *Repatriation Commission v Hall* 15 ALD 84, where the Full Court of the Federal Court said:

> In determining, for the purposes of the assets test, whether a person could reasonably be expected to sell or realise a property, it was not appropriate to confine consideration to the personal financial circumstances of the pensioner or claimant for a pension. All matters which bear upon the reasonableness of a decision to sell or realise a property should be taken into account. These include personal and social factors as well as financial and economic factors and the public or community interest as well as the interests of the claimant.

And at page 86:

> It was, in our opinion, open to the Tribunal to find 'severe financial hardship' on the evidence before it. We do not read this expression as requiring proof of destitution.

Mrs Maher had given evidence concerning her state of health, their severe and longstanding financial situation and the impact that selling the family home would have on her and her husband. The Tribunal also noted that they had received 'particularly bad advice' in relation to the sale of Portview Place.

Considering all the circumstances, the Tribunal concluded that it was appropriate to apply s.1129 and to pay age pension to Mrs Maher. (The same provision could not be applied to Mr Maher because of the effect of s.1131.)

The Tribunal also considered whether subsection 2 allowed the pension to the backdated.

> **1129.(2)** A decision under s.(1) takes effect:
>
> (a) on the day on which the request under paragraph (1)(d) was lodged with the Department; or
>
> (b) if the Secretary so decides in the special circumstances of the case — on a day not more than 6 months before the day referred to in paragraph (a).

The Tribunal found that there were special circumstances in this case and therefore age pension could be backdated to 22 August 2000.

Formal decision

The AAT affirmed the decision in the case of Mr Maher and in the case of Mrs Maher the decision under review was set aside and the Tribunal substituted its decision that she was entitled to the payment of age pension, as and from 22 August 2000.

[R.P.]

Federal Court

Actual means test: reduction in liquid assets of partnership

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

Decided: 25 January 2002 by Kiefel J.

The Secretary to the DFaCS appealed against the decision of the AAT that certain sums received by Green's parents from two partnerships should be excluded from the actual means test.

The facts

Green lodged a claim for youth allowance on 28 April 1999. Included with his claim were forms completed by his parents in relation to the actual means test. In a document titled 'Market Value of Assets' two partnerships were identified — Townsville Auto Parts and Banks Bros Properties. Both Mr and Mrs Green were partners of Townsville and Mrs Green only was a partner of Banks Bros. In the Cash Flow Statement it was recorded that $8000 (later amended to $743) was paid from the partnership interest in Bank Bros and $12,106 from the partnership interest in Townsville.

Centrelink included these amounts in the family's actual means, as did the SSAT. The AAT decided that the actual means of the family should be reduced by the above amounts.

The law

Section 1067G-G1 of the *Social Security Act 1991* (the Act) sets out the method for determining the effect of the actual means test on a person's rate of payment. In particular s.1067G-G3 provides that the actual means of a family are to be worked out according to the Regulations, which set out the amounts to be included and excluded. Regulation 14 provides that the actual means of a family for a tax year is the total spending and savings in that year. Regulation 15 specifies the spendings and savings that are to be excluded and includes spending or savings from any liquidation of assets (reg.15(2)(h)).

The AAT decision

The AAT found that the liquid assets of the Townsville partnership were reduced by $12,106 which was used by the family for living expenses, and the liquid assets of Banks Bros were similarly reduced. The AAT:

> appears to have accepted that the amounts from the two partnerships were assets of the parents which were realised and thereby reduced the assets of the partnership.

(Reasons, para. 11)

The Federal Court

The Secretary argued that these amounts should be regarded as business related. The regulations are concerned with personal expenditure and savings and regulation 15(2)(h) should be read in this light. To determine this question it was first necessary for Keifel J to consider the status of the money in the partnerships' accounts. The cash flow statement was of little assistance. Green's father in a letter of May 1999 had described the moneys as coming from a reduction in partnership capital and current accounts. The Court referred to the description of the capital of a partnership outlined in a partnership text as *the aggregate of the contributions made by the partners*. Partners are entitled to a return of their capital contribution on the dissolution of the partnership so a partner's equity in a partnership can be viewed as an asset capable of being realised at a future date.

Green's father also referred to moneys coming from current accounts.

According to Kiefel J this reference was less clear. An account for current transactions was unlikely to be an asset and any payment from it was more likely to be income.

However the unchallenged evidence from Green's father was that the moneys came from the partnerships' capital and the AAT's finding was that the moneys came from realising this asset. If the AAT was wrong making this finding that was an error of fact and not of law.

Realisable assets

Regulation 15(2)(h) requires the assets of the person to be identified.

> It would not seem to me to be to the point to identify an asset which is regarded as that of a partnership or other entity unless, as here, it represents something in which the partners themselves have an interest capable of realisation.

(Reasons, para. 20)

Kiefel J distinguished the Federal Court decision of *Leah v Secretary to the Department of Employment, Education, Training and Youth Affairs* (1998) 52 ALD 274 on the basis that it dealt with the AUSTUDY Regulations where there were no exemptions. There was no reason to read down regulation15(2)(h) to only cover non-business assets. Such a limitation could easily have been included in the Regulations if that had been the objective.

Formal decision

The Federal Court dismissed the appeal.

[C.H.]

Compensation preclusion period: special circumstances; small component of economic loss

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

Decided: 18 February 2002 by Keifel J.

Background

On 13 January 1999 Chamberlain was injured in a motor vehicle accident. She was 60 years of age. Prior to the accident Chamberlain had received firstly disability support pension and then age pension. On 6 December 1999 her compensation claim was settled out of court for a total of $35,000 plus costs of $4000. Of that amount, $31,500 was attributed by the parties to be compensation for Chamberlain's pain, suffering and medical expenses, while $3500 was for her loss of earnings to the date of settlement and any future loss. Chamberlain stated that the component of $3500 was for the loss of her opportunity to teach music theory after the accident. She said that she was able to earn $50 per week without affecting her entitlement to a pension.

As a result of the compensation provisions set out in the *Social Security Act 1991* (the Act) a compensation preclusion period was imposed from the date of the accident 13 January 1999 to 26 October 1999. This meant that Chamberlain was required to repay social security entitlements received by her during that period of $7643.36.

The decision of the AAT

The AAT considered that the amount of $3500 in the settlement was a token figure to compensate for Chamberlain's loss of ability to teach. It observed that the result of applying the statutory formulae in the Act was that Chamberlain was required to repay to Centrelink more than double the amount she actually received for economic loss.

It said:

> Where a settlement is specifically itemised and a genuine amount has been set for economic loss, the discretion to disregard some or all of the compensation payment in order to ameliorate the effect of the 50% rule is at least opened up.
>
> This is not a case where there was an attempt to hide compensation for economic loss or to double-dip on the social security system. This is a case where an elderly lady was given a token figure in her compensation payment to cover what was effectively her 'play money' — the little extra she earned above her pension to make life that bit easier.
>
> Mr Foster, for the respondent, submitted that when considering whether Mrs Chamberlain's circumstances were special, the Tribunal should keep in mind that she is now over $17,000 better off as a result of her compensation payment.
>
> In this particular case that is not the point. $31,500 was given to her specifically for her pain and suffering and for her medical expenses. By having to pay money to Centrelink out of that figure she is in fact in a worse position than that which the payment intended to put her. This is a case where Centrelink has in effect double-dipped and that can not have been the intention of the legislature.
>
> It was submitted by the applicant that this is a case where the Tribunal should exercise the discretion so as to disregard the whole of the compensation payment. It is not a submission with which I agree. The legislation is designed to ensure that a person does not receive compensation for economic loss both from the defendant in their personal injuries case and from Centrelink. It is important to ensure that this aim of the legislation is upheld.

(Reasons, paras 17–21)

The AAT considered that 'special circumstances' were present in Chamberlain's case and that $28,000 of the $35,000 should be disregarded in calculating the 'lump sum preclusion period'.

The decision of the Federal Court

On appeal the Secretary submitted that the Tribunal had erred in treating the application of the '50% rule' as itself having an unjust result. A comparison of what was intended by the parties as economic loss with the amount to be repaid to Centrelink was invalid since it was clear that the statute did not intend that the component parts of the settlement should be taken into account.

It was argued on behalf of Chamberlain that it was permissible to have regard to the true facts of a particular case in determining whether special circumstances existed. Two decisions of the Federal Court were cited in support of this proposition: *Kertland v Secretary to the DFaCS* (1999) 95 FCR 64 ((1999) 4(1) *SSR* 11) and *Secretary to the DFaCS v Smith* (1991) 30 FCR 56 (1991) *SSR* 848. In *Smith*, the compensation recipient suffered a work-related injury but had returned to light duties when he contracted hepatitis, as a result of which he received sickness benefits. The Federal Court concluded that the absence of any relationship between Smith's incapacity to work during this period and his work injury was a relevant circumstance. In *Kertland* legislation precluded a person who was employed at the time of injury from recovering compensation for economic loss for a period 18 months. As a result the Federal Court found the circumstances on which the social security legislation was predicated, namely compensation for economic loss in that period, not to be present.

Kiefel J examined these cases and concluded that the court had taken into account the true position of compensation recipients in determining that there was no element of double payment and that there were special circumstances. However, Keifel J considered those cases enabled a decision-maker to determine objectively that there could not have been double payment and therefore the statutory assumptions set out in the