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

social security legislation operated unjustly in their circumstances. Those cases were unusual.

Although the AAT considered that the application of the formulae was unfair to Chamberlain because she would have to pay more than she had received by way of compensation for economic loss, Kiefel J considered that this factor would be present in most cases and therefore could not in itself amount to a special circumstance.

> The basis for the Tribunal's view was its acceptance of what the parties to the settlement said had been offered and accepted for the economic loss component. It was far less than the statute assumed to be the case in applying the formulae. Again, however, this will be so in many, if not most, cases to which the act applies. Further, the extent of the difference from the basis upon which the parties acted could not provide the necessary 'special circumstance'. The statute has selected a figure which may operate in an arbitrary way.
>
> The statutory objectives in utilising the formulae, referred to above, must also be borne in mind. It is not intended that a decision-maker be required to consider contentions about what part of the compensation reflected the economic loss component. That is so whether one has regard to the application of the formulae or the discretion under s.1184. The latter does not alter the objective and must be read in light of it.
>
> In my view the Tribunal was in error in its assessment of 'special circumstances' and its decision must be set aside.

The Federal Court also considered that the AAT had failed to look at Chamberlain's personal circumstances in its assessment of the application of s.1184 of the Act and it was therefore appropriate to remit the matter back to the AAT for reconsideration of the question of 'special circumstances' in light of that information.

Formal decision

The decision of the AAT was set aside and the matter remitted to it for further consideration of the application of s.1184.

[A.T.]

Disability support pension: residential qualification; continuing inability to work

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

Decided: 18 December 2001 by Drummond, Kiefel and Dowsett JJ.

Michael was born in Iran in May 1984. His family entered New Zealand as refugees and were citizens of that country. On 16 February 1999 Michael was diagnosed as suffering from autism, significant intellectual impairment, epilepsy and nocturnal enuresis. On 19 February 2000, Michael and his mother arrived in Australia and obtained permanent resident visas. When Michael approached 16 years of age he lodged a claim for disability support pension which was refused on the basis that he did not satisfy the residential qualifications for that pension. This decision was upheld by the SSAT, but set aside by the AAT.

The law

The qualification requirements for disability support pension are set out in s.94 of the *Social Security Act 1991* (the Act) as follows:

> **94.(1)** A person is qualified for disability support pension if:
>
> (a) the person has a physical, intellectual or psychiatric impairment; and
>
> (b) the person's impairment is of 20 points or more under the Impairment Tables; and
>
> (c) one of the following applies:
>
> (i) the person has a continuing inability to work;
>
> (ii) the Health Secretary has informed the Secretary that the person is participating in the supported wage system administered by the Health Department, stating the period for which the person is to participate in the system; and
>
> (d) the person has turned 16; and
>
> (e) the person either:
>
> (i) is an Australian resident at the time when the person first satisfies paragraph (c); or
>
> (ii) has 10 years qualifying Australian residence, or has a qualifying residence exemption for a disability support pension; or
>
> (iii) is born outside Australia and, at the time when the person first satisfies paragraph (c) the person:
>
> (A) is not an Australian resident; and
>
> (B) is a dependent child of an Australian resident;
>
> and the person becomes an Australian resident while a dependent child of an Australian resident.
>
> **94.(2)** A person has a **continuing inability to work** because of an impairment if the Secretary is satisfied that:
>
> (a) the impairment is of itself sufficient to prevent the person from doing any work within the next 2 years; and
>
> (b) either:
>
> (i) the impairment is of itself sufficient to prevent the person from undertaking educational or vocational training or on-the-job training during the next 2 years; or
>
> (ii) if the impairment does not prevent the person from undertaking educational or vocational training or on-the-job training — such training is unlikely (because of the impairment) to enable the person to do any work within the next 2 years.

The decision of the AAT

It was common ground that Michael satisfied ss.94(1)(a), (b), (c) and (d). Michael asserted that he also satisfied s.94(1)(e)(i). The Secretary argued that the condition which led to Michael's impairment for the purposes of ss.94(1)(a) and (b) had already been diagnosed in 1999 and his continuing inability to work for the purposes of s.94(1)(c) had therefore also arisen prior to his becoming an Australian resident. The AAT rejected that view and said:

> Given the focus of the concept of a 'continuing inability to work' upon a person's present ability and not upon some hypothetical ability in the future, it seems to me that a consideration of when a person first had that continuing inability must be grounded in a time when it would be expected that the person might work if he or she were able to do so and minded, when faced with the choice of furthering his or her studies, to do so. It would follow that it would not be relevant to consider the person's capacity for work as an infant when there would be no such expectation. That this is what is intended is confirmed by reference to the Minister's Second Reading Speech where the emphasis is upon people's moving into the labour market rather than remaining on what had until then been the invalid pension.

The AAT concluded that the provision requires assessment of inability as at 16 years of age. It was only at that time that Michael could be said to have an inability to work for the requisite period.

The decision of the Federal Court

The Secretary argued that s.94(2) requires that in order that there be a continuing inability to work, the relevant impairment be 'itself sufficient to prevent the person from doing any work