

The safeguards against litigation becoming delayed in a flood of extraneous material of doubtful value, appear to lie not in narrowing the kinds of material to which reference can be made but by keeping a close and sensible eye on whether, as a practical and discretionary matter, one *should* look at such material: see subs(3).

(Reasons, para. 35)

### Centrelink's guide

Madgwick J doubted whether it was appropriate to refer to Centrelink's policy because it had been prepared after the statute had been enacted. The policy was not influenced by parliament but neither could it be described as self-serving by Centrelink. He concluded that because it was unclear how senior the officer was who had written the policy and because of s.15(3) of the AI Act, especially paragraph (b), the policy should not be considered. Section 15(3)(b) provides that when considering whether to refer to an extrinsic document to assist interpretation, regard should be had to prolonging legal proceedings without compensating advantage.

### The purpose of the Act

The Court described the purpose of the legislation as beneficial and so it should be liberally interpreted. The result of the AAT's interpretation does not accord with the purpose and objects of the Act. The purpose of the Act was to achieve a welfare safety net for farmers. Parrett's claim failed because of factors outside his control. This result is anomalous. If a farmer derives no income for two years despite significant labour and capital contributions, the farmer would be ineligible for assistance. In contrast if the farmer earned \$1 this would be sufficient to be eligible for assistance.

### Derives a significant part of income

Section 8B(c) requires the person to have been a farmer for a continuous period of at least two years. However the definition in s.3(2) does not require the period over which income is considered to be the last two years the person was a farmer. To satisfy the requirements it is sufficient if the person has farmed for at least two years and taken as a whole the person has derived a significant part of his income from farming. The AAT erred by requiring the income to be derived during the two-year period prior to the period when Parrett was being assessed.

On the contrary, s.8B only requires that, for a continuous period of which those two years were at least a part, a significant part of income was so derived, even though through out that period, and in particular in the last

two years, such a significant income was not *continuously* derived.

(Reasons, para. 45)

The reference to two years was not meant to limit the period that could be considered when investigating a person's eligibility for the grant. It cannot have been the parliament's intention to deprive a farmer of support where that farmer had been sick or had been subjected to drought.

Madgwick J was satisfied that parliament had not dealt with a situation like this in the legislation even though this case was 'within the mischief with which the Act was dealing' according to the Explanatory Memorandum, the Second Reading Speech and the Act's purposes. Parrett would not be eligible for any other welfare assistance. If the parliament's attention had been drawn to the situation where a farmer had derived no farm income it may have modified subparagraph (c) of the definition of farmer by including the words attempts to derive income but is prevented from doing so because of ill health or seasonal factors.

The Court concluded that the term 'derives ... income' includes both actual income and intended income.

### The date of effect of the decision

It had been argued before the AAT that the SSAT had misconstrued the date of effect provisions in the Act. The AAT had not decided this issue because it had found that Parrett was not a farmer. An appeal to the Federal Court is from the effective decision of the AAT of the application under review. Because the AAT did not decide the matter there was no error of law for the Court to review. The Court agreed that Parrett could seek a declaration in respect of the SSAT's decision. The matter was adjourned to allow further submissions.

### Formal decision

The AAT decision was set aside and the matter listed for further direction.

[C.H.]

## Compensation preclusion: whether interest is part of compensation lump sum

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

Decided: 3 July 2002 by Heerey, Mansfield and Hely JJ.

The Secretary appealed to the Full Court of the Federal Court against the decision of Dowsett J that the interest on an award of compensation for loss of earnings was not compensation under the *Social Security Act 1991* (the Act).

### The facts

Mourilyan was injured on 2 December 1993 and received weekly payments of compensation under Queensland compensation law until 14 June 1996. He received social security payments from 27 June 1996. Mourilyan commenced common law proceedings and on 26 August 1998 the Court awarded him \$201,620.01. The judgment included an award for past economic loss with interest.

### The law

The Act provides that a person is precluded from receiving a social security benefit during a preclusion period. A preclusion period is imposed where a person receives a lump sum compensation payment. The preclusion period is calculated by dividing the *compensation part of a lump sum compensation payment by the income cut-out amount*. The term compensation is defined in s.17(2) of the Act and includes a payment of damages and a payment made under a scheme of compensation under a state law 'made wholly or partly in respect of lost earnings or lost capacity to earn'. Section 17(3)(b) defines the compensation part of an award of compensation as '... so much of the payment as is, in the Secretary's opinion in respect of lost earnings or lost capacity to earn'.

Section 1184 of the Act provides that the Secretary may treat all or part of a lump sum compensation as not having been made in the special circumstances of the case.

### Interest on damages for past economic loss

The Court defined the issue as calculating the correct period during which Mourilyan was not entitled to the disability support pension. It was accepted that \$115,200, the amount awarded for past economic loss, was compensation.

The question was whether the interest of \$16,107 awarded on this amount was also compensation. The Court described the interest thus:

It was not awarded as part of the loss suffered by the respondent: *cp Hungerfords v Walker* (1988) 171 CLR 125 (Hungerfords), but as interest payable on the award of damages for being deprived of the use of the damages for past loss of earning capacity.

(Reasons, para. 5)

#### 'In respect of'

Dowsett J found that the phrase *in respect of* in s.17(3)(b) should be confined to any amount paid in respect of lost earnings or lost capacity to earn. A broader construction had the potential to catch other components of an award of damages because there may be no connection between the amount of interest and the period during which weekly compensation payments were made.

The Full Court recorded that *in respect of* indicated some connection between the damages awarded and the lost earnings or lost capacity to earn. It considered a number of cases that had contemplated the phrase *in respect of* and concluded that the meaning of the phrase could not be established in the abstract. According to s.1163(1) of the Act Mourilyan's entitlement to the disability

support pension may be affected by an entitlement to or the receipt of damages. The period of the preclusion of the payment of the disability support pension does not have to be the same period the person received compensation. The Court noted that the intention of Part 3.14 (Compensation Recovery) of the Act was to preclude payment of compensation-affected payments:

and to permit recovery of those payments, under the Act during the preclusion period because there is a presumed correspondence between the period of entitlement to the DSP or the 'compensation affected payment' and the preclusion period calculated by reference to the 'compensation part of a lump sum compensation payment'.

(Reasons, para. 24)

Nothing in the Act supported a restrictive interpretation of *in respect of*. The interest was awarded because Mourilyan had been deprived of use of the compensation moneys. There was a direct relationship between the damages awarded and Mourilyan's lost earnings. The interest was compensation for not being able to use his earnings up to the date of the judgment. 'It thus reflects an attempt to put the respondent, in relation to his past loss of earnings, in the position he would have been in but for his injuries' (Reasons, para. 25).

The Full Court noted that:

The purpose of Part 3.14 of the Act and s.17(3) require a discernible rational relationship between the particular element of the damages awarded and the respondent's past loss of earnings.

(Reasons, para. 27)

In this case there was a connection between the interest awarded and Mourilyan's loss of earnings — the interest had been calculated on the amount of his loss of earnings.

#### Special circumstances

The AAT had decided the interest was not paid for lost earnings or lost capacity to earn. It also decided that there were special circumstances pursuant to s.1184 because the application of s.1165 was 'both unfair and unintended and constitutes special circumstances'. It was agreed by both parties that the AAT had failed to determine whether all or some of the payment should be treated as not having been made in the special circumstances of the case.

#### Formal decision

The Full Court allowed the appeal and remitted the matter back to the AAT to consider whether s.1184 of the Act applied.

[C.H.]

## SSAT Decisions

### Assets test: family trust; application of control test

GKY

#### Background

GKY was in receipt of age pension until 31 December 2001. Legislative amendments to the *Social Security Act 1991* apply from 1 January 2002 the intention of which is to means test private companies and trusts. In 2001 Centrelink asked GKY to provide certain information about the KKY Family Trust. GKY, through his solicitors, provided that information on 5 April 2001. Subsequent evidence was provided in December 2001. The information provided included minutes of a meeting in which it was resolved that GKY and his wife's shares in H Nominees Pty Ltd (the trustee company for KKY Family Trust) were to be transferred to their children. GKY and his

wife also resigned as Directors and Secretary of the company.

On 1 January 2002 as a result of the information provided, Centrelink determined that GKY's age pension was to be cancelled.

On 19 February 2002 an authorised review officer decided that the assets and income of the KKY Family Trust were to be used in the assessment of GKY's entitlement to age pension. As a result, the assets of the trust were added to GKY's existing assets and GKY's total assets precluded payment of the age pension. The authorised review officer concluded that although GKY may have intended to give formal control of the KKY Family Trust to his son and daughter, he still had informal control of that trust. He was therefore the controller of the trust and the trust's income and assets were attributed to GKY and his wife.

#### The issues

The question was whether the assets of the KKY Family Trust should be taken

into account in calculating GKY's eligibility for the age pension. For this to occur, GKY had to be an attributable stakeholder after 1 January 2002. There is a three-step process to determine if he was an attributable stakeholder. If he was, the result was that assets are attributed to him, where they may not have been before the introduction of these rules.

- First, the trust must be a designated private trust.
- Second, taking into account the control test or the source test, the trust must be a controlled private trust.
- Third, it needed to be determined that GKY was an attributable stakeholder and if so, the attribution percentage applicable to him.

#### The decision

It was accepted that the KKY Family Trust was a designated private trust. The next issue was whether it was a controlled private trust. Section 1207V