completing an enrolment period, the student will be required to re-enrol for the next study period. This is clearly indicated in the words used in the section 'the time already spent by the student on the course'.

The Tribunal cannot accept the ... contention that the date referred to in this section can only ever be the date that the student initially enrols in the course ... [O]n each occasion there is a re-enrolment, Centrelink must calculate the allowable study time in accordance with the provisions of section 569H(3). If, at the point of re-enrolment, the applicant has completed 4 years of study but requires another year to complete the study, then section 569H(3)(b)(i) would apply and the student would have a further one year period to complete the study. However, it would be ridiculous to suggest that if the student had completed 4 years of study but required only a further semester or half-year to complete the course of study, that section 569H(3)(b)(i) should apply and the student be entitled to a further year. Clearly, in that case, section 569H(3)(c) would apply.

The AAT also accepted the Department's submission that the calculation of allowable time was not a reviewable decision.

Formal decision

The AAT set aside the decision of the SSAT and substituted a decision that Martinsen remained eligible for Austudy as at 26 June 2002.

[H.M.]

Compensation: special circumstances; loss of earnings after age of retirement

SECRETARY TO THE DFaCS and KELAVA
(No. 2003/834)

Decided: 27 August 2003 by J. Handley.

Background

Kelava suffered back injuries from his employment. On 27 November 2000 he received a lump sum payment of $28,492 under the *Accident Compensation Act*. He received a further lump sum of $80,000 plus costs on 18 January 2002 by way of a common law payment.

The preclusion period was calculated by Centrelink on the basis of both payments of compensation.

The SSAT set aside the decision on the grounds of special circumstances and decided that the lump sum received by Kelava should be taken as not having been made beyond 9 October 2002, the date of his 65th birthday.

The issues

The AAT considered two issues:

- whether the preclusion period could be based on both compensation payments;
- whether special circumstances existed where the compensation payment was structured to take account of weekly compensation only to the age of 65.

Dual compensation payments

The law in relation to the first issue was set out in s.1171(1) of the *Social Security Act 1991* as follows:

1171(1) If:

(a) a person receives 2 or more lump sum payments in relation to the same event that gave rise to an entitlement of the person to compensation (the multiple payments); and

(b) at least one of the multiple payments is made wholly or partly in respect of lost earnings or lost capacity to earn;

the following paragraphs have effect for the purposes of this Act and the Administration Act:

(c) the person is taken to have received one lump sum compensation payment (the single payment) of an amount equal to the sum of the multiple payments;

(d) the single payment is taken to have been received by the person:

(i) on the day on which he or she received the last of the multiple payments; or

(ii) if the multiple payments were all received on the same day, on that day.

1171(2) A payment is not a lump sum payment for the purposes of paragraph (1)(a) if it relates exclusively to arrears of periodic compensation.

This section was introduced in 2001, consequently it was not in force when Kelava received his first compensation payment. The Tribunal expressed the view that the first payment was not a compensation payment as it was payment only for physical impairment; however, the second payment had the effect of changing the character of the first payment by virtue of this subsection. The Tribunal noted that this was 'surely an unintended consequence'. However it took this matter no further focusing on the issue of special circumstances.

Special circumstances

Section 1184K allows a discretion to treat all or part of a compensation payment as having not been made where special circumstances exist. The special circumstances alleged in this case were that the lump sum received by Kelava related only to weekly compensation up to the date of his retirement, the age of 65.

It was argued that the imposition of a preclusion period until 7 November 2003 had the effect of denying Kelava payment of age pension beyond his 65th birthday, a period of time during which he had no entitlement to accident compensation.

It was argued that there was no 'double dipping' in this case and strict application of the law would result in an inequitable situation.

The Department submitted that there was no evidence to substantiate the claim that the lump sum related solely to payments pre retirement. It was also submitted that age pension is included as a 'compensation affected payment' and consequently Parliament intended that age pensioners would be precluded from the pension if they received a payment of compensation as defined by the Act. It was also argued that the '50% rule' was introduced to avoid manipulation by people as a result of payment of compensation claims.

Evidence provided by Kelava's solicitor in relation to the accident claim was that 65 was the compulsory retiring age and that s.93F of the *Accident Compensation Act* limited entitlement to weekly payments to the period before retirement age.

The Tribunal was satisfied that the lump sum of $80,000 was structured so as to take account only of weekly compensation to the age of 65. The Tribunal referred to the case of *Kirkbright v Secretary, Department of Family & Community Services* (2000) FCA 1876, quoting comments of Mansfield J:

> Indeed in my view s.1184 is designed specifically to enable the respondent and on review the Tribunal to ameliorate such unfairness or injustice when it appears by virtue of strict application of the Act.

The Tribunal concluded that it was not reasonable to expect that Kelava be disqualified from both accident compensation and social security payments beyond the age of 65. To do this would be 'unreasonable, unjust and inappropriate'.

The Tribunal found this was consistent with the legislative objective of the Act as stated in the *Guide to Social Security Law* published by the Department which states under the subheading of

'Rationale for the lump sum preclusion period':

> lump sum compensation payments are treated on the basis that people who cannot work because of a compensable injury should not receive income support for the same period from both the Social Security system and compensation payments.

In conclusion the Tribunal found that there were sufficient grounds to warrant the exercise of the discretion under s.1184K.

Formal decision

The AAT affirmed the decision of the Social Security Appeals Tribunal.

[R.P.]

Compensation preclusion period: special circumstances

THOMAS and SECRETARY TO THE DFaCS (No 2003/842)

Decided: 29 August 2003 by B.J. McCabe.

Background

Thomas was injured in a motor vehicle accident in May 1996. He settled his compensation claim on 12 March 1999 for a lump sum compensation payment of $390,000, of which he received $282,000 in his hand. A preclusion period was imposed until 13 April 2005, during which he was not able to receive compensation-affected social security payments.

There was no money remaining from the settlement and Thomas requested that the preclusion period be reduced, due to his 'special circumstances', so that he could receive Centrelink payments. This request was refused by Centrelink and by the SSAT.

The legislation

Section 1184K, formerly s.184, of the *Social Security Act 1991* ('the Act'), provides a discretion allowing all or part of a compensation payment to be treated as not having been made (thus reducing the preclusion period) if there are special circumstances.

Evidence

The AAT noted that Thomas 'frankly admitted that he did not spend his settlement monies wisely' (Reasons, para. 6). Large sums were given to friends, and debts of $50,000 were cleared. Thomas also paid debts of a friend and his family in anticipation of this family moving their business from the Gold Coast to Mackay, living with Thomas, and Thomas becoming a silent partner in their business. He bought and renovated a large enough house in anticipation of this. The friend did not move to Mackay. The house was sold for less than the purchase price and Thomas bought a remote 100-acre property for $62,000 from the proceeds, on which he lived in a shed. He had intended to develop the property to self-sustainability, but found it was not suitable for growing anything. The property had been on the market for several months at the date of hearing, and Thomas was not confident it would sell. He had sold his Harley-Davidson bike, obtained a Triumph motorbike and retained an old Holden ute.

He was unable to support himself, had no money in the bank and was without income.

Discussion

The AAT referred to Keifel J in *Groth* v *Secretary, Department of Social Security* (1995) 40 ALD 541, at 545, as explaining that the legislative discretion can only be applied where there are exceptional circumstances which clearly distinguish the case from others.

Being in difficult financial circumstances is not considered unusual. Particular attention was paid to *Secretary, Department of Family and Community Services and Szoke* [2001] AATA 353 in which Szoke had recklessly dissipated all her compensation funds.

The AAT considered Thomas had also been reckless; that he was 'in a mess of his own making' (Reasons, para. 15).

> That is not the end of the matter, however. Even the foolish and the profligate must be protected in appropriate circumstances through the exercise of the discretion embodied in s 1184 [sic]. Mr Thomas is marooned in the bush on his only realisable asset. He says it is difficult to sell at anything like the price he paid for it. If he leaves the property, the chances of selling it will presumably diminish even further. He is unlikely to get a job in the area. He cannot sell the vehicles — the bike is in working order but will not sell for much, and the ancient and unreliable Holden utility is presumably almost worthless. He may be the author of his own misfortune, but I am satisfied the circumstances of that misfortune set him apart from the usual run of cases, and certainly allow his case to be distinguished from cases like *Szoke* and *Re Mazurak and Secretary, Department of Family and Community Services* [2002] AATA 883.

(Reasons, para. 16)

Formal decision

The AAT set aside the decision and substituted a new decision that the length of the preclusion period should be reduced by 12 months.

[H.M.]

Family tax benefit: maintenance income; inclusion of monies received for maintenance of non-FTB children

HORSEY and SECRETARY TO THE DFaCS (No. 2003/802)

Decided: 15 August 2003 by K. Beddoe.

The issue

The issue in this matter was whether maintenance payments received in respect of children who were not FTB children, should be included in the calculation of annual maintenance income for FTB purposes.

Background

The applicant had three children Jacqueline, Joshua and Daniel, and was entitled to FTB in the financial year ending June 2001. In that year, the father of the older two children paid some $5010 in child support (including an arrears amount) in accordance with an assessment by the Child Support Agency, but Centrelink was unaware of this assessment and calculated FTB on the basis of a lower monthly maintenance amount. In addition, Horsey did not have the care of Jacqueline and Joshua at any time during the 2000/2001 year, but did not advise Centrelink of this as she believed Centrelink and the Child Support Agency cross-matched their data. Centrelink became aware of this change in care arrangements only in February 2001 from which time FTB benefits in respect of these two children were ceased.

An Authorised Review Officer determined that an overpayment of family tax benefit (FTB) for the year ending June 2001 had occurred in respect of the applicant's two children, Joshua and