'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

Jacqueline. In addition, when calculating Horsey's correct entitlement to FTB for Daniel, the authorised Review Officer took into account maintenance income of $5010 received by Horsey during 2000/2001. The total overpayment amount in question was $3904.15 less $1000 waived under a Determination made in 2001 under s.102 of *A New Tax System (Family Assistance) (Administration) Act 1999* ('the Act').

The law

The Act provides in Schedule 1 for a maintenance income test, the effect of which is that the rate of FTB payable depends on the amount of maintenance income received by an applicant.

The Act in 3 defines 'maintenance income' as:

> ***maintenance income***, in relation to an individual, means:
>
> (a) child maintenance — that is, the amount of a payment or the value of a benefit that is received by the individual for the maintenance of an FTB child of the individual and is received from:
> (i) a parent of the child; or
> (ii) the partner or former partner of a parent of the child ...

In s.22 of the Act the term 'FTB child' is defined to mean:

> **22 When an individual is an FTB child of another individual**
>
> (1) An individual is an ***FTB child*** of another individual (the ***adult***) in any of the cases set out in this section.
>
> *Individual aged under 18*
>
> (2) The individual is an ***FTB child*** of the adult if:
>
> (a) the individual is aged under 18; and
>
> (b) the adult is legally responsible (whether alone or jointly with someone else) for the day to day care, welfare and development of the individual; and
>
> (c) the individual is in the adult's care; and
>
> (d) the individual is an Australian resident or is living with the adult.

In the year in question, neither Jacqueline nor Joshua were in the applicant's care, and hence the Tribunal concluded that neither could be considered to be an 'FTB child' in that year. The Tribunal noted that receipt of child support (maintenance) in relation to a non FTB child (in this case, Joshua and Jacqueline) would be unusual such as to fall within the concept of special circumstances as noted in *Beadle v Director-General of Social Security* (1984) 6 ALD 1. As neither Joshua nor Jacqueline were FTB children in the year in question, any maintenance payments received in respect of them should be excluded from the maintenance income test and so from calculation of the rate of FTB to be paid.

The decision

The Tribunal set aside the decision under review and directed that the overpayment be recalculated on the basis that only maintenance income received in respect of Daniel be included in the calculation of the annual maintenance income.

[P.A.S.]

Member of a couple: jurisdiction; meaning of 'decision'

YORK and SECRETARY TO THE DFaCS
(No. 2003/843)

Decided: 29 August 2003 by R. Kenny.

The issue

The issue in this directions hearing was whether the Tribunal could determine the question of a debt and its waiver when these had not been explicitly considered by the SSAT.

Background

In October 2002 Centrelink determined that York was a member of a couple for disability support pension purposes ('DSP') and that, as a result, an overpayment of DSP had occurred. This decision was affirmed by an Authorised Review Officer in January 2003, and by the SSAT in April 2003. In its decision the SSAT affirmed that York was a member of a couple, but made no mention of any overpayment, debt or waiver. The applicant appealed to the AAT, requesting that both her relationship status and the question of any debt be resolved.

The law

The *Social Security (Administration) Act 1999* ('the Act') provides by s.181 that '[the] AAT may only review a decision that has been reviewed by the SSAT'. The question which arises is whether the decision under review by the Tribunal is that made by the SSAT or the primary (operative) decision.

The Tribunal noted that various approaches to this question have been taken, but that in *Yolbir* v *Administrative Appeals Tribunal* (1994) 48 FCR 246 and again in *Lee* v *Secretary, Department of Social Security* (1996) 69 FCR 491 the latter interpretation was applied — that is, it was the primary (operative) decision that was to be reviewed at the Tribunal.

The Tribunal concluded that:

> ... [once] the SSAT determined that the applicant was a member of a couple, the implication of that decision was that she was overpaid disability support pension in the period nominated and ... there is authority for the view that the waiver issue may be considered by the Tribunal on the basis that non-waiver is implied in the situation ...

(Reasons, para. 14).

The decision

The Tribunal concluded that the decision under review was the operative decision and all those matters that were included in that decision, including York's relationship status, whether a debt existed and whether any debt should be waived.

[P.A.S.]