relation to lost earnings. The AAT considered the application of s.1171, referring to *Navrital and Secretary to the DFaCS* (2002) 69 ALD 777, a case with similar facts, where an earlier version of s.1171 applied (s.17(2B) as then in force). Despite some difference in wording, the AAT concluded that the effect of the provisions was the same. Section 1171 applies to deem various payments made in relation to a single event to be one aggregated lump sum compensation payment. Thus, no matter that the $50,419.45 had no relation to lost earnings, once it was aggregated with the $232,500 which did incorporate lost earning capacity, the total sum must be used in calculating the preclusion period.

The AAT affirmed the calculation of the preclusion period, and the commencement date. Consideration was given to whether there were any special circumstances warranting treating some of the compensation payment as not having been made. The AAT concluded that there were no such special circumstances in this case.

Ineligibility for a pensioner concession card during a preclusion period by application of s.1061ZA(1) was also affirmed. This section provides that qualification for a pensioner concession card on a particular day requires that a social security pension is payable for that day. As disability support pension is not payable during a preclusion period, Broad was not qualified for the card.

Formal decision

The decisions to impose a preclusion period of 220 weeks from the day after the last payment of periodic compensation, and to reject a claim for a pensioner concession card were affirmed.

[H.M.]

Parenting payment: incorrect claim and start date for payment

RUMMENY and SECRETARY TO THE DFaCS
(No. 2003/803)

Decided: 15 August 2003 by K.L. Beddoe.

Facts

Rummeny gave birth on 26 February 2002. She lodged a claim for family tax benefit (FTB) on 4 March 2002 and, when she asked Centrelink whether she was entitled to any other payment, she was advised that she was not.

After receiving advice from an acquaintance, Rummeny contacted Centrelink on 22 June 2002 regarding her potential entitlement to social security payments. She was advised to claim parenting payment (PP), which she did on 2 July 2002. Her claim was granted and she was paid from 22 June 2002.

There was no dispute regarding Rummeny's qualification for PP from the date of her son's birth, except for the requirement that she lodge a claim for that payment as required by s.11 of the *Social Security (Administration) Act 1999* ('the Administration Act'). Rather, the key issue to be decided by the AAT was whether Rummeny's claim for PP could take effect earlier than 22 June 2002.

Legislation

Subsection 15(1) of the Administration Act provides:

> For the purposes of the social security law, if
>
> (a) a person makes a claim for a social security payment; and
>
> (b) the claim is an incorrect claim; and
>
> (c) the person subsequently makes a claim for another social security payment for which the person is qualified; and
>
> (d) the Secretary is satisfied that it is reasonable that this subsection be applied;
>
> the person is taken to have made a claim for that other social security payment on the day on which he or she made the incorrect claim.

The AAT decided that this subsection could apply to allow Rummeny's PP claim to be paid from the day she lodged her FTB claim, if FTB could be considered to be a 'social security payment'. Section 23(1) does not include FTB in the definition of social security payment. However, the AAT then considered s.15(4) of the Administration Act, which provides:

> For the purposes of this section, a claim made by a person is an incorrect claim if:
>
> (a) the claim is for a pension, allowance, benefit or other payment under a law of the Commonwealth, other than this Act or the 1991 Act, or under a program administered by the Commonwealth, that is similar in character to a social security payment, other than a supplementary payment; and
>
> (b) when the claim was made, the person was qualified for a social security payment, other than a supplementary payment.

The Tribunal found that s.15(4) operates to include FTB in the definition of social security payments and that consequently, s.15(1) can apply. Further, the AAT applied s.29 of the Administration Act, and decided that, as the incorrect claim was lodged within four weeks of the child's birth, the benefit could be backdated to his birth.

Finally, the AAT distinguished this case from that of *Secretary to the DFaCS and Valori* [2002] AATA 252 on the grounds that in this case, the appellant specifically enquired about alternative or additional payments at the time of lodging the FTB claim, and was advised that she was not entitled to any other payment.

[E.H.]

Exempt assets: is a self-contained flat part of a principal residence?

SECRETARY TO THE DFaCS and LEUNG
(No. 2003/796)

Decided: 21 July 2003 by M.D. Allen.

Background

Leung lived in a three-bedroom house. A self-contained flat at the same address and on the same Certificate of Title was determined by Centrelink to be an assessable asset for the purposes of social security law. The SSAT set aside this decision, directing that no asset value was to be attributed to the flat.

The issue

The issue in this case was whether the self-contained flat at Leung's residential address was an assessable asset, or, being part of his principal home, an exempt asset.

The legislation

Section 11(1) of the *Social Security Act 1991* ('the Act') defines 'asset' as meaning property, or money. Section 11(5) defines 'principal home', as follows:

> A reference in this Act to the principal home of a person includes a reference to
>
> (a) if the principal home is a dwelling house the private land adjacent to the dwelling house to the extent that the private land together with the area of the ground floor of the dwelling house does not exceed two hectares or,

(b) if the principal home is a flat or home unit, a garage or storeroom that is used primarily for private or domestic purposes in association with the flat or home unit.

Exempt assets are those described in s.1118(10) paragraphs (a) to (s). Paragraph (d) reads, in part:

> In calculating the value of a person's assets for the purpose of this Act disregard the following: if the person is a member of a couple the value of any right or interest of the person in one residence that is the principal home of the person, of the person's partner or both of them.

The submissions

Leung submitted that the whole of the structure at his residential address was his principal home, and in doing so placed reliance on the decision of the Full Court of the Federal Court in *Secretary, Department, Education, Training and Youth Affairs v Ovari* 98 FCR 140. His second argument was that the flat had no value, as it could not be realised.

The Department argued that the flat did not form part of the principal home and therefore was not an exempt asset.

Discussion

The AAT considered *Ovari*, and also considered *Secretary, Department of Family and Community Services v Kulshrestha* (2003) AATA 227, in which *Ovari* was distinguished by Deputy President Forgie. The Tribunal concluded that *Kulshrestha* applied to the present case, quoting D.P. Forgie's consideration of *Ovari* in *Kulshrestha* (at paras 24-26):

> The Full Court did not explain the meaning of a principal home. Some assistance as to the meaning of the expression 'principal home' is available from the dictionary definitions. The word 'home' has a number of meanings but in context in which it appears in the Act it means (1) a house or other shelter that is the fixed residence of a person, a family or household ...
>
> The meanings ascribed to the word 'principal' include first or highest in rank, importance, value, etcetera, chief or foremost. Taken together a person's principal home is the place of residence that is his or her chief or first and foremost residence ...
>
> Having regard to the principles in the authorities and to the ordinary meaning of the expression what is Dr Kulshrestha's principal home? The place in which Dr Kulshrestha resides is 47 Braeside Avenue, it is the place where he cooks, eats, sleeps, washes himself and his clothes and generally lives. It is the place where he usually resides and it is the place that he regards as home.
>
> 47 Braeside Avenue is part of a larger building comprising both it and 47A Braeside Avenue. At one time when he and his family lived together he and they resided in the whole of the building. The whole of the building could then be regarded as his home. We are not satisfied that he has resided in the whole building at the relevant times. Indeed, we are satisfied on the basis of his evidence and of the plan that the building is capable of being divided into two residences but may also be used as one. On the basis of the tenancy agreement we are satisfied that it has been divided into two and that his tenants have exclusive possession of 47A Braeside Avenue. Dr Kulshrestha is not entitled to enter that part of the building at will. He may only enter in accordance with the terms of the lease and insofar as the law permits him to do so. He may not carry out the activities of daily living in 47A Braeside Avenue or indeed any of them. In relation to 47A Braeside Avenue Dr Kulshrestha is a landlord and his tenants, rather than Dr Kulshrestha are the people for whom it is home. It is not Dr Kulshrestha's home and therefore we are satisfied that it is not part of his principal home. We find that his principal home is limited to 47 Braeside Avenue and does not encompass the whole of the building.

The AAT decided that the decision in *Kulshrestha* must be followed, and that the flat was not part of Leung's principal home.

The Tribunal next considered whether a value could be attributed to the asset. Departmental guidelines state that 'assets are generally assessed at their net market value'. It noted:

> The net market value is the amount you would expect to receive if you sold the asset on the open market less any valid debts or encumbrances. Prima facie this would indicate that as in this particular case the asset cannot be separately sold, its value on an open market being nil, then it has no value in the hands of the respondent.

The Tribunal then turned to *Bowden v Repatriation Commission* 15 AAR 325 at 326/7 where it was held that the fact that a flat was an unrealisable asset could only be taken into account pursuant to the hardship provisions of the Act, not in determining the value of assets.

Formal decision

The decision of the SSAT was set aside, and the matter remitted to the Department with the direction that the flat on Leung's property was an asset for the purposes of the *Social Security Act 1991*, and that the value of that asset was to be ascertained after full inspection and assessment by the Australian Valuation Office.

[H.M.]

Youth allowance independent rate: paid work in period or periods of employment over 18 months

MORAN and SECRETARY TO THE DFaCS (No. 2003/1003)

Decided: 7 October 2003 by R.G. Kenny.

The issue

Moran applied for Youth Allowance ('YA') to assist him during his full-time study at University of Queensland. He sought to be paid at the 'independent' rate, meaning that his payments would be calculated without regard to his parents' earnings. However, in January 2003 Centrelink determined that he could not be paid at the independent rate, a decision affirmed at the SSAT in May 2003.

The law

The meaning of 'independent' for social security purposes is contained in s.1067A of the *Social Security Act 1991* ('the Act') which provides:

> **1067A.(10)** A person is independent if the person has supported himself or herself through paid work consisting of:
>
> (a) full-time employment of at least 30 hours per week for at least 18 months during any period of 2 years; or
>
> (b) part-time employment of at least 15 hours per week for at least 2 years since the person last left secondary school; or
>
> (c) a period or periods of employment over an 18 month period since the person last left secondary school, earning the person at least the equivalent of 75% of the maximum Commonwealth training award payment that applied at the start of the period of the employment.

Here the question was whether Moran had earned, over an 18-month period, the equivalent of 75% of the relevant applicable training award payment.

Background

From October 2000 to August 2001 Moran was employed part-time with Myer Stores and earned $8362. He was then unable to work for some 10 months due to chronic fatigue syndrome, but from July 2002 he again worked until December 2002, earning $8465. In addition to his earnings, he received two payments of $4031 from REST Superannuation as income protection insurance payments, in respect of the periods October 2001 to April 2002, and April to