debt was that Sines was not enrolled at the University during this time.

The evidence

Sines attended all necessary classes and passed all relevant examinations in semester 1 and 2 of 2002.

Sines enrolled at the start of 2002 and did not believe there was any need to re-enrol in semester 2 as he had selected a number of full-year subjects. When he enrolled he was in difficult financial circumstances and could not pay the student union fees. Apart from this, he fully participated in campus life.

In August 2002, the University cancelled his enrolment because he had not paid these fees. Sines did not discover this until June 2003 when he was advised of the overpayment by Centrelink. At this stage he offered to pay the full amount but was advised that the University would only accept the amount relevant to semester 1. Once these fees were paid he was re-enrolled for semester 1 only.

The law

The relevant sections of the *Social Security Act 1991*, included ss.568, 541(1) and 541B(1) which require a person to satisfy the activity test, to undertake full-time study and be enrolled in a course of education, in order to be eligible for Austudy.

The issue

The issue considered by the Tribunal was whether Sines was enrolled and qualified for Austudy from the start of semester 2, 2002.

Conclusion

The AAT dealt firstly with the issue of whether Sines was undertaking study in semester 2 of 2002. The Tribunal found that he was, as he attended classes and passed examinations.

The Tribunal then considered whether he was enrolled in semester 2 of 2002. The Tribunal found that there was no evidence that enrolment was conditional on payment of union fees and that the only 'sanction' for not paying these fees was that Sines did not receive his semester 1 results at the usual time. It was also noted that the University did not inform Sines that payment of these fees was a condition of enrolment, nor that he was 'sanctioned' for failing to pay the fees. The University accepted his assignments and allowed him to sit for examinations even after his enrolment was cancelled.

The Tribunal referred to the case of *Okely and Secretary, Department of Education Training and Youth Affairs* [1999] AATA 429, which considered the meaning of 'enrol' and stated:

> As regards the requirement that the applicant have been 'enrolled' as a student of a secondary school ... the Tribunal is of the opinion that the word 'enrolled' should be interpreted flexibly having regard to the nature of the relevant school.

(Reasons, para. 27)

The Tribunal accepted that Sines attended the University and that on the basis of the dictionary meaning of enrolment and the approach taken in the case of *Okely*, Sines was 'enrolled' in semester 2 of 2002.

The Tribunal then considered whether he was enrolled after this time.

The evidence was that Sines returned to Sydney after completing semester 2 and intended to find a job. He could not find work but decided not to return to study and claimed unemployment benefits in early 2003.

On the basis of this evidence, the Tribunal found that Sines did not intend to re-enrol and consequently had no entitlement beyond the end of his examinations in semester 2.

Formal decision

The AAT set aside the decision and substituted a decision that there was a debt from the end of semester 2, 2002 until 20 March 2003.

[R.P.]

Waiver of compensation recovery debt due to special circumstances

HIGGINS and SECRETARY TO THE DFaCS (No. 2004/793)

Decided: 1 June 2004 by S. Webb.

Background

Higgins was injured on 14 December 1996 during an assault. He received newstart allowance from 14 January 1997 to 10 March 1999.

Higgins claimed compensation for his injuries and requested an estimate of the compensation preclusion period charge that would apply if he settled the case for a nominal settlement of $300,000.

In October 2002 Centrelink advised Higgins that the estimate of charge was $5219.96, based on a settlement of $300,000 and a lump sum preclusion period from 14 December 1996 to 21 September 2001.

Higgins' compensation claim was settled by consent on 21 November 2002 for $200,000.

On 26 November 2002 Centrelink advised Higgins that a lump sum preclusion period would apply from 14 December 1996 to 18 February 2000 and $14,353.50 was to be repaid before releasing the balance of the settlement to him. Higgins sought review of that decision.

The issues

The sole issue was whether there were grounds to disregard all or part of the compensation payment or whether it was appropriate to waive all or part of the amount that was recovered from that payment.

Discussion and the law

The *Social Security Act 1991* ('the Act') provides that the Secretary may issue a notice for recovery by deduction from a compensation payment prior to release to the claimant (s.1184). The recoverable amount that is specified is a debt to the Commonwealth.

The Act specifies the circumstances where all or part of a compensation payment may be disregarded (s.1184K) and when recovery of debts payable may be waived in whole or in part (s.1237AAD).

The Tribunal said that the clear intention of the compensation recovery provisions of the Act is to prevent a person receiving income support from two different sources during the same period of time. For that reason compensation-affected payments under the Act are not payable during a lump sum preclusion period. However, provision is made to take account of special circumstances where it may be appropriate to treat a compensation payment, in whole or in part, as not having been made, or to waive the Commonwealth's right to recover a debt.

The Tribunal considered it was not appropriate to disregard any amount of Higgins' compensation payment pursuant to s.1184K, nor was it necessary to

interfere with the length of the lump sum preclusion period.

However, in this case Higgins was seeking a reduction in the amount recovered by Centrelink by way of a s.1184G debt. The issue was the recovery of that debt, and therefore it was appropriate to consider s.1237AAD that permits waiver of the right to recover all or part of a debt if special circumstances exist (see *Secretary, Department of Family and Community Services v Sekhon* (2003) 73 ALD 41).

At the heart of this case was Centrelink's incorrect estimate provided to Higgins prior to settlement of his claim. He relied on the estimate of charge received from Centrelink and negotiated a settlement on that basis. Subsequently Centrelink recovered an amount that was almost three times greater than the estimated charge. It was common ground that the calculation of the estimate of charge was in error.

In the Secretary's submission Centrelink's error did not constitute special circumstances because there was no certainty that Higgins would have received a more favourable settlement if he had been advised of the correct amount of the charge. The Tribunal did not accept that submission.

It said that the purpose of providing the estimate was to enable Higgins to take into account the amount he would have to repay to Centrelink if he settled his claim for the nominated amount of $300,000. Therefore, it was up to Centrelink to ensure that the estimate was accurate when it was issued.

The Tribunal considered the meaning of special circumstances and said, essentially, in order to be considered special the circumstances must have a particular quality of unusualness (see *Beadle v Director-General of Social Services* (1984) 6 ALD 1). Further, considering the circumstances in the context of the applicable law, if it is found that something unfair, unintended or unjust has occurred then special circumstances may exist (see *Groth v Secretary, Department of Social Security* (1995) 40 ALD 541).

In this case the Tribunal was satisfied that special circumstances did exist. Although the Tribunal considered that Higgins' circumstances were straitened, he was not in financial hardship and his ill health did not distinguish him from many others within the ambit of the social security scheme.

The special circumstance in this case was the wrong estimate provided by Centrelink. In the Tribunal's opinion a person was entitled to rely on specific information that is provided by the Government, see *Secretary, Department of Social Security and McAvoy* (1996) 44 ALD 721. That was especially so where the advice was provided to enable the recipient to properly take into account the amount he or she may have to repay to the Commonwealth on settlement of a compensation claim. Had Higgins been given a correct estimate of charge he would have had the opportunity to negotiate a settlement in the full knowledge of the amount he would be required to repay to the Commonwealth. By being given incorrect advice he was denied that opportunity. It was unfair in those circumstances to strictly enforce the compensation recovery provisions.

The fact was that he settled his claim for the lesser amount of $200,000 on the basis that he would be required to repay an amount of approximately $5219.

The Tribunal was satisfied that it was appropriate to waive part of Higgins' debt under s.1237AAD ($9133.54 thereby reducing the amount from $14,353.50 to the amount of $5219.96).

Formal decision

The decision under review was set aside and substituted with a decision that the Commonwealth's right to recover $9133.54 of Higgins' compensation recovery debt under s.1184G of the Act be waived in the special circumstances of his case pursuant to s.1237AAD of the Act.

[S.P.]

Compensation preclusion period: special circumstances

SLADEN and SECRETARY TO THE DFaCS (No. 2004/792)

Decided: 29 June 2004 by G.A. Mowbray.

Background

Sladen suffered a work-related injury between October 2001 and March 2002 while working for the Advertising Standards Bureau (ASB) and became increasingly incapacitated for work. She finally stopped work on 13 March 2002 and received worker's compensation until 17 May 2002 after which she claimed newstart allowance.

Sladen was paid newstart allowance from 18 May 2002 until 29 October 2003. On 3 November 2003 she settled a claim for workers compensation with ASB for a lump sum of $150,000 which included lost earnings, legal costs and employment entitlements. The settlement of the compensation claim was conditional on Sladen resigning from her position and therefore employment entitlements were included.

Centrelink advised Sladen on 7 November 2003 that because she had received a lump sum payment, she would not be eligible for Centrelink payments until 19 November 2004 because of the imposition of a preclusion period.

Sladen requested a review of Centrelink's decision to apply the preclusion period and on 16 December 2003 a decision was made that the original decision was incorrect because costs were added onto the settlement, whereas they were in fact part of the settlement. The preclusion period was therefore re-calculated to end on 20 August 2004. On 12 January 2004 the authorised review officer affirmed that decision. The Social Security Appeals Tribunal also affirmed the decision on 10 February 2004.

The issues

The Tribunal looked at the following issues in this appeal:

- whether the employment entitlements were 'compensation' for the purposes of s.17(2) of the *Social Security Act 1991* ('the Act'), and whether they could be excised from the lump sum for the calculation of a lump sum preclusion period under the Act, and
- if the employment entitlements were compensation, whether there were special circumstances which allowed the amount received to be disregarded under s.1184K.

The law

The Tribunal considered s.17(2) of the Act:

> Subject to subsection (2B), for the purposes of this Act, compensation means:
>
> (a) a payment of damages; or
>
> (b) a payment under a scheme of insurance or compensation under a Commonwealth, State or Territory law, including a payment under a contract entered into under such a scheme; or