The Court then considered the history of this section and concluded that the statutory policy was that persons confined in psychiatric institutions as a consequence of being charged with an offence were supplied with the essentials of life and had no need for the pension. Treatment for a mental illness whilst detained did not change this situation. There was a difference between a person who was being confined because they had been charged with an offence, and a person being confined to undertake a course of rehabilitation.

Cooper J considered the two previous Federal Court decisions of *Blunn v Bulsey* (1194) 53 FCR 572 and *Garden v Secretary to the Department of Family and Community Services* (2001) 33 AAR 280, and found that both cases were concerned with the issue of why the person had been detained.

Rehabilitation

According to Cooper J there was:

> No statutory intention that a person who is in psychiatric confinement because he or she has been charged with committing an offence and is thereby deprived of the right to a pension, may render s.1158(1)(a)(ii) inoperative merely by undergoing a course of rehabilitation. To read such an intention into s.23(9) is to give the definitional section a substantive effect which is not the function of such a section ... Section 23(9) was to remind or warn those reading the section of the need to properly characterise the reason for the psychiatric confinement by asking whether or not the existence of a pending charge was or was not the reason for the confinement.

(Reasons, para. 55)

The AAT should have addressed the question of why Franks was undergoing psychiatric confinement. If the answer to the question was because he had been charged with an offence the fact that Franks was undertaking rehabilitation would not change the reason for or the character of Franks' confinement. While Franks was confined because he was charged with an offence he would be subject to s.1158.

Formal decision

The Federal Court set aside the AAT decision and remitted the matter to the AAT to be reconsidered according to law. The Court did not make an order about costs because the appeal was allowed for a reason different from the grounds of appeal.

[C.H.]

[**Editor's note**: If this interpretation of ss.1158, 23(8) and (9) is adopted, then s.23(9) is in effect rendered nugatory. That is, it is difficult to see how the 'rehabilitation' exception in s.23(9) can ever come into effect to exempt a claimant from the general rule in s.1158, that he or she is not eligible for disability support pension whilst in gaol or in psychiatric confinement in connection with an offence. It is also difficult to see what other role s.23(9) could be intended to play other than to provide such an exception. The interpretation of Cooper J is surely inconsistent with the intention of the legislative scheme.]

Compensation: whether an award of interest is compensation

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

Decided: 12 November 2001 by Dowsett J.

DFaCS appealed against the decision of the AAT that the compensation part of the lump sum paid to Mourilyan did not include the interest paid on damages for past economic loss.

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 sum of $78,410.76 was repaid to the Workers Compensation Authority from the judgment and Centrelink imposed a charge of $15,838.24 being pension payments made from 24 June 1996 to 20 August 1998.

The law

The *Social Security Act 1991* (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'.

Dowsett J noted that both s.17(2) and (3) refer to a payment to the person.

> The amount of a judgement is not itself a payment; nor is any amount allowed for lost earnings or lost capacity to earn which may be included in the judgement. The exercise contemplated by par 17(3)(b) must commence with the identification of an amount actually paid to the relevant person. Where the judgement has been reduced for some statutory reason, only the reduced amount will be paid to the plaintiff. That reduced amount will be the starting point for the purposes of par 17(3)(b). The Secretary must then determine the part of that payment which is in respect of lost earnings or lost capacity to earn.

(Reasons, para. 11)

The award of interest

The Court identified the issue to be decided as whether the award of interest on past economic loss was in respect of lost earnings or lost capacity to earn. The SSAT had decided that it was but the AAT had decided that it was not.

Dowsett J referred to the High Court's reasoning in *Hungerford v Walker* (1988) 171 CLR 125 where it was decided that an award of interest was damages independent of any statutory provision and intended to provide a person with some protection against late payment of damages. It was a foreseeable loss directly related to the defendant's breach of contract or tort.

> Whilst the award of damages for lost earnings or capacity to earn focuses on the loss of income, the award of interest (pursuant to the statute or as damages) focuses on the plaintiff's likely use of his or her income ... he or she is still seeking either the cost of borrowing or the value of a lost opportunity to invest.

(Reasons, para. 17)

In respect of

The phrase 'in respect of' is very broad in meaning and describes the relationship between lost earnings or lost capacity to earn and the compensation lump sum. However too broad a construction might catch many other components of a personal injuries award than was intended. Also when awarding interest a court may take into account that the person had already received weekly compensation payments or the lost opportunity to earn interest on the amount awarded. Dowsett J decided that:

> Par 17(3)(b) must be read as providing for the identification of any amount paid in respect of lost earnings or lost capacity to

earn. That construction reflects the use of the word 'payment' and avoids the anomalies to which I have referred.

(Reasons, para. 21)

Error of law

The Court then found that the award of interest in this case related in some way to past economic loss. There was no evidence before either the SSAT or the AAT of the basis for calculating the award of interest except that it related to past economic loss. Whether any part of the interest payment was in respect of lost earnings or lost capacity to earn is a question of fact. The AAT found as a fact that the interest awarded was not in respect of lost earnings or lost capacity to earn and so there was no error of law.

Formal decision

The Federal Court dismissed the appeal.

[C.H.]

Debt due to failure to advise of marriage-like relationship: aspects of decision requiring consideration

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

Decided: 14 March 2002 by Gray J.

Hazim appealed against the decision of the AAT that she owed a debt because she failed to advise the Department of Social Security and later Centrelink that she was living in a marriage-like relationship and thus was paid sole parent pension, parenting payment single, family payment and family allowance she was not entitled to receive.

The facts

Hazim had three children in 1993 and received sole parent pension and then parenting payment single. Centrelink claimed that between 24 April 1993 and 12 November 1998 Hazim was living as a member of a couple with Abdul Karim and had been overpaid $74,677.85. Hazim had three more children by Karim; two of those children were born within the above period. Hazim also received family payment and then family allowance for the children during the relevant period.

The SSAT decided that Hazim had lived in a marriage-like relationship since 12 January 1994 and that the debts must be recalculated and recovered. The AAT decided Hazim was a member of a couple and therefore not qualified to receive payments from 12 January 1994 to 4 September 1996 and from 13 October 1997 to 16 February 1998.

The law

According to s.249(1) of the Social Security Act 1991 (the Act) a person is only qualified for sole parent pension (and parenting payment single) if they are not a member of a couple. The definition of member of a couple is found in subsections 4(1),(2) and (3) of the Act. Subsection 4(2) states:

> **(2)** Subject to subsection (3), a person is a **member of a couple** for the purposes of this Act if:
>
> ...
>
> (b) all of the following conditions are met:
>
> (i) the person has a relationship with a person of the opposite sex (in this paragraph called the **'partner'**);
>
> (ii) the person is not legally married to the partner;
>
> (iii) the relationship between the person and the partner is, in the Secretary's opinion (formed as mentioned in subsections (3)), a marriage-like relationship;
>
> (iv) both the person and the partner are over the age of consent applicable in the State or Territory in which they live;
>
> (v) the person and the partner are not within a prohibited relationship for the purposes of section 23B of the *Marriage Act 1961*.

Subsection 4(3) sets out the criteria the Secretary must take into account when forming an opinion that the person is living in a marriage-like relationship. Subsection 4(4) provides that if a person has been living together with a person of the opposite sex in a residence for at least eight weeks, and they have a child, then the Secretary must not form the opinion the person is not living in a marriage-like relationship unless the weight of evidence supports this opinion.

The rates of payment of family allowance and family payment are calculated according to the person's income, which includes the income of their spouse. If Hazim was a member of a couple her spouse's income should have been taken into account when calculating the rate of family payment paid to her.

When Hazim received the sole parent pension, the Act provided in ss.282 and 284 for the person to be given notices requiring them to give information or a statement to Centrelink if there was a change of circumstances or an event occurred that affected their payments. Sections 288, 289 and 290 permitted the pension to be suspended or cancelled if the person did not provide the information or statement. Section 295 stated that the pension was to be cancelled or suspended if it was not payable under the Act. Similar provisions applied to payment of parenting payment single, family payment and family allowance.

The debts were raised pursuant to s.1224 of the Act, which provided:

> **1224.(1)** If:
>
> (a) an amount has been paid to a recipient by way of social security payment; and
>
> (b) the amount was paid because the recipient or another person:
>
> (i) made a false statement or a false representation; or
>
> (ii) failed or omitted to comply with a provision of the social security law or this Act as in force immediately before 20 March 2000 or the 1947 Act;
>
> the amount so paid is a debt due by the recipient to the Commonwealth.

Further relevant sections are s.24(2) and s.1237AAD. Subsection 24(2) states that if a person is a member of a couple the Secretary may decide for a *special reason in the particular case* that the person be treated as not being a member of a couple. Section 1237AAD provides that a debt may be waived in the special circumstances of the case if the debtor did not knowingly make a false statement or representation that caused the debt.

The AAT's findings of fact

Gray J noted that there were discrepancies between the AAT's observations in its reasons, its findings of fact and its decision. It was argued by Hazim that this was an error of law. One of the functions of the AAT is to identify the facts. The discrepancies between some of the AAT's findings and its decision were errors of fact. Section 43AA of the Administrative Appeals Tribunal Act 1975 which sets out the 'slip rule' in statutory form, was the perfect remedy for this error. It allowed the AAT to correct the discrepancies by ordering the Registrar of the AAT to amend the decision and reasons according to its directions. It was also argued by Hazim that the fact that the AAT had not of its own motion corrected the discrepancies in its decision was an error of law. This argument was rejected by the Court because the AAT