[2015] AATA 405

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2014/5396 |
| Re | Michael Nelson |
|  | APPLICANT |
| And | Secretary, Department of Social Services |
|  | RESPONDENT |

# Decision

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| Tribunal | **Ms A F Cunningham, Senior Member** |
| Date | **5 June 2015** |
| Place | **Perth** |

The Tribunal sets aside the decision under review and in substitution therefore decides that there are special circumstances which warrant the exercise of the discretion under s1184K(1) of the *Social Security Act 1991* to treat that part of the compensation payment as not having been made as from 3 January 2013.

......(Sgd) A F Cunningham..................................................................

**Ms A F Cunningham, Senior Member**

# Catchwords

*Social Security-age pension-lump sum compensation payment- preclusion period- special circumstances- decision under review set aside.*

# Legislation

Social Security Act 1991 (Cth) – s 17 – s 17 (1) (a) - s 17(1) (aa) – s 17(3) – s 17 (3) (a) - s 1169 – s 1169 – s 1170 – s1170 (1)– s1170 (4)- s 1171 - s 1184K

# Cases

Re Beadle and Director-General of Social Security (1984) 6 ALD 1

Drake and Minister for Immigration and Ethnic Affairs (No 2) (1979) 46 FLR 409

Dranichnikov v Centrelink [2003] FCAFC 133

Re Ivovic and Director General of Social Services [1981] AATA 57

Re Krzywak and Department of Social Services (1988) 15 ALD 690

Re Reid and Director-General of Social Services [1981] AATA 108

# Secondary Materials

Guide to Social Security Law- Pt 4.13.4.10- Pt 4.13.4.20

# REASONS FOR DECISION

**Ms A F Cunningham, Senior Member**

**5 June 2015**

1. The applicant, Michael Nelson was employed as a Senior Survey Pilot when on 13 July 2010 he suffered significant spinal injuries in an aircraft accident. Mr Nelson received workers compensation payments until 8 July 2011. Following a claim, age pension was paid to Mr Nelson from 19 July 2011. Upon receipt of his workers compensation settlement payments, Centrelink imposed a preclusion period and cancelled Mr Nelson’s age pension. Mr Nelson unsuccessfully sought a review of Centrelink’s decision which was affirmed by the Social Security Appeals Tribunal (SSAT) on 11 August 2014. Mr Nelson now seeks a review of the SSAT’s decision by the Administrative Appeals Tribunal (Tribunal).
2. The hearing was conducted by way of video link to the Perth Registry of the AAT. Mr Nelson appeared on his own behalf and was assisted by his wife Diane Nelson. Both Mr and Mrs Nelson gave oral evidence and were cross-examined by Ms Ladhams who appeared for the respondent.
3. The T documents were tendered in evidence pursuant to section 37 of the *Administrative Appeals Tribunal Act 1975* together with a number of other documents which included a written statement by Mr Nelson with attachments, various medical reports, financial statements, statements from Mr Nelson’s employer, pay advice statements, an application for financial assistance, and the applicants Statement of Issues with attachments.

# legislation

1. The legislation relevant to the decision under review is set out in the *Social Security Act 1991* (Social Security Act).
2. There is no dispute that the lump sum payment received by Mr Nelson in two amounts namely the sum of $146,769.97 and a gross amount of $585,000 constituted compensation for the purposes of the definition provisions for compensation recovery in section 17 of the *Social Security Act* *1991* (Cth) (Social Security Act). Further, that Mr Nelson’s age pension is a “compensation affected payment as defined in section 17(1)(aa) of the Social Security Act”.
3. The relevant provisions relating to compensation recovery are contained in Chapter 3 Part 3.14 of the Social Security Act.
4. Section 1169 provides that:

**1169** Compensation affected payment not payable during lump sum preclusion period

(1) If:

(a) a person receives or claims a compensation affected payment; and

(b) the person receives a lump sum compensation payment;

the compensation affected payment is not payable to the person in relation to any day or days in the lump sum preclusion period.

(2) In this section:

lump sum compensation payment does not include a lump sum payment:

(a) to which section 1164 applies; or

(b) that relates only to arrears of periodic compensation payments.

1. The provisions relating to how a lump sum preclusion period is calculated are set out in section 1170.
2. Section 1171 provides that where a person receives two 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 at least one of the multiple payments is made wholly or partly in respect of lost earnings or lost capacity to earn, the person is taken to have received a single lump sum payment (being the total of the multiple payments), on the day the last of the multiple payments was received.
3. Section 1184K of the Social Security Act allows the Secretary to treat the whole or part of a compensation payment as not having been made if the Secretary thinks it is appropriate to do so in the special circumstances of the case. That section provides:

**1184K** Secretary may disregard some payments

(1) For the purposes of this Part, the Secretary may treat the whole or part of a compensation payment as:

(a) not having been made; or

(b) not liable to be made;

if the Secretary thinks it is appropriate to do so in the special circumstances of the case.

(2) If:

(a) a person or a person's partner receives or claims a compensation affected payment; and

(b) the person receives compensation; and

(c) the set of circumstances that gave rise to the claim for compensation is not related to the set of circumstances that gave rise to the person's or the person's partner's receipt of, or claim for, the compensation affected payment;

the fact that those 2 sets of circumstances are unrelated does not alone constitute special circumstances for the purposes of subsection (1).

1. The compensation part of a lump sum is defined in subsection 17(3) which provides:

Compensation part of a lump sum

(3) Subject to subsection (4), for the purposes of this Act, the **compensation part of a lump sum compensation payment** is:

(a) 50% of the payment if the following circumstances apply:

(i) the payment is made (either with or without admission of liability) in settlement of a claim that is, in whole or in part, related to a disease, injury or condition; and

(ii) the claim was settled, either by consent judgment being entered in respect of the settlement or otherwise; or

(ab) 50% of the payment if the following circumstances apply:

(i) the payment represents that part of a person's entitlement to periodic compensation payments that the person has chosen to receive in the form of a lump sum; and

(ii) the entitlement to periodic compensation payments arose from the settlement (either with or without admission of liability) of a claim that is, in whole or in part, related to a disease, injury or condition; and

(iii) the claim was settled, either by consent judgment being entered in respect of the settlement or otherwise; or

(b) if those circumstances do not apply--so much of the payment as is, in the Secretary's opinion, in respect of lost earnings or lost capacity to earn, or both.

# background

1. Mr Nelson’s compensation claim was settled by two separate payments. On 9 May 2012 a settlement agreement was signed with respect to a schedule 2 compensation amount in the sum of $146,769.97 which did not include any component for economic loss. On 22 November 2013 Mr Nelson entered into a further settlement agreement for a total gross lump sum amount of $585,000, being $525,000 in compensation and $60,000 in costs and disbursements (T14). In Mr Nelson’s Compensation Advice of Lump Sum Payments to Centrelink (T15) he stated that the settlement contained a component for economic loss but the amount was not specified.
2. On 10 December 2013, a Centrelink officer made a decision to cancel Mr Nelson’s age pension because he was subject to a compensation preclusion period beginning on 9 July 2011 and ending on 5 April 2019. Centrelink calculated that Mr Nelson was required to repay $42,259.50 on the basis that he had received income support from Centrelink during this period to which he was not entitled. Mr Nelson’s insurers, CGU Insurance Ltd were requested to repay the amount before the balance of Mr Nelson’s compensation payment was made to him.

# issues

1. Mr Nelson does not dispute that payments of his age pension are subject to a compensation preclusion period. Whilst Mr Nelson originally argued that the “50% rule” produced an unfair result in his circumstances, he accepts that it has been applied in accordance with the relevant legislative provisions. Although Mr Nelson agrees that the preclusion period has been correctly calculated in accordance with the “50% rule” he asks the Tribunal to review the extent of the compensation preclusion period on account of the loss of income component of the lump sum settlement.
2. Mr Nelson further contends that special circumstances exist that make it appropriate to treat all or part of the compensation lump sum as having never been made.

# calculation of lump sum preclusion period

1. The Secretary contends that Mr Nelson’s lump sum preclusion period has been correctly calculated in accordance with section 1170 of the Social Security Act. In accordance with the provisions of the subsection 1170(1) the lump sum preclusion period would commence on 9 July 2011, being the day following the last day of the periodic payment period. The end date is calculated in accordance with the provisions of subsection 1170(4) which provides the following formula for working out the number of weeks period:



1. The compensation part of a lump sum is calculated in accordance with the provisions of section 17(3)(a) that is, 50% of the payment. In this case, that is 50% of $731,769.97, namely $365,884.985. The income cut out amount that was in force at the time when the compensation was received was $905.10. Thus, the number of weeks in the lump sum preclusion period is calculated as follows:

$365,884.985/$905.10= 404.248 weeks

1. The end date of Mr Nelson’s lump sum preclusion period is 404 weeks from 9 July 2011, namely 5 April 2019.
2. It is Mr Nelson’s contention that if the extent of the lump sum preclusion period is “calculated on the actual loss of income awarded” rather than the 404 weeks calculated by Centrelink, the preclusion period would have expired in early November 2012 which is actually some 12 months prior to the date of the final settlement agreement. Mr Nelson maintains that the amount of economic loss awarded was based on two factors: firstly, his salary for the 12 month period immediately preceding his accident when, due to be global financial crisis his workload had been significantly reduced; and secondly, a presumed retirement age of 70 years when it was Mr Nelson’s intention to work until he was 73.
3. The lump-sum preclusion period is calculated in accordance with the provisions of the Social Security Act as outlined above, which does not permit the exercise of discretion to take account of the factors raised by Mr Nelson. They may however be relevant to the exercise of discretion with respect to the special circumstances of the case. It is the Tribunal’s conclusion that the lump sum preclusion period has been correctly calculated in accordance with the relevant legislative provisions.

# special circumstances

1. Pursuant to section 1184K the Tribunal can treat all or part of the lump sum compensation payment as having not been made if it is satisfied that it is appropriate to do so in the special circumstances of the case.
2. The term “special circumstances” is not defined in the Social Security Act but has been considered in a number of cases. In *Re Beadle and Director-General of Social Security* (1984) 6 ALD 1, the Tribunal said (at 6):

“An expression such as ‘special circumstances’ is by its very nature incapable of precise or exhaustive definition. The qualifying adjective looks to circumstances that are unusual, uncommon or exceptional. Whether circumstances answer any of these descriptions must depend on the context in which they occur. For it is the context which allows one to say that the circumstances in one case are markedly different from the usual run of cases. This is not to say that the circumstances must be unique but they must have a particular quality of unusualness that permits them to be described as special.”

1. In *Dranichnikov v Centrelink* [2003] FCAFC 133 the full Federal Court held that for a finding of special circumstances to be made:

“… What is required will be circumstances which distinguish the case in consideration from the usual case. There will be a requirement that the circumstances are such that takes the case out of the ordinary.”

1. In *Re Ivovic and Director General of Social Services* [1981] AATA 57 (*Re Ivovic*) the Tribunal commented that the use of the word “special” is:

“intended to allow the decision maker the fullest opportunity to consider the particular circumstances of each case.”

The Tribunal went on to state [at 45]:

“The reference to special circumstances… requires, in our view, that there must exist in the circumstances of the case, a factor or factors which justify the making of an exception in whole or in part to the principle of liability which the Act otherwise establishes. In the exercise of the discretion… the decision-maker must have regard to whether, by exercising the discretion in a particular case, he will be achieving or frustrating ends or objects which are conformable with the scope and purpose of the… Act.

One of the evident objects of the legislation is to require compensation recipients to provide for their own support during preclusion periods. The discretion of the special circumstances should be exercised with that in mind.”

1. The Tribunal in *Re Ivovic* recognised that the decision maker must be prepared to respond to the “special circumstances” of any case by reason of which a strict enforcement of the legislative provisions would produce an unjust, or unreasonable or otherwise inappropriate result. This is not to say however, that merely because a result may be harsh, that the decision maker is justified in ignoring the clear meaning of legislative provisions and the intent of Parliament (*Re Krzywak and Department of Social Services* (1988) 15 ALD 690).
2. The Social Security Act is also interpreted with the assistance of a policy called “The Guide to Social Security Law” (the Guide). Whilst the policy is not binding on the Tribunal, regard may be had to the policy, provided it is consistent with the legislation. (*Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 46 FLR 409). However if the Tribunal in exercising its function to reach the correct or preferable decision considers that the application of the policy would produce an unjust decision in the circumstances of a particular case, it may depart from the policy provisions.
3. Part 4.13.4.20 of the Guide whilst acknowledging that it is impossible to give a precise lists of factors that should be taken into account when considering whether the special circumstances provision should apply, sets out some common factors that may amount to special circumstances and provides guidance to decision makers about those factors. The Guide states “there is usually not one factor which makes a situation unusual, unforeseen or exceptional, but a combination of factors applying to each individual”.
4. In the overview of the application of the special circumstances provisions, the Guide at 4.13.4.10 states that the intent of compensation recovery provisions is “to ensure that people who receive compensation for a loss of income do not also receive income support from the Australian Government in respect of the same period of time.”
5. Whilst recognising that each case must be examined on its own merits, the Guide states that as a general rule special circumstances would not usually be applied where: the person has sufficient liquid assets to support themselves, and their family if applicable, for the duration of the preclusion period; the person acquired realisable assets after being advised of the preclusion period and there is no impediment to the realisation of those assets; the persons periodic compensation payments reduced due to the effects of taxation laws, and this is the only ground for consideration; where the only special circumstance is the legal deduction from both a social security payment and DVA payment; where the only special circumstance is the perceived unfairness of the 50% rule; if the sole factor is that the person or their partner's reason for receiving a CAP was different to the reason the compensation was paid.
6. A number of factors have been put forward by Mr Nelson as justifying special circumstances in his case. They can appropriately be categorised as follows: financial circumstances, health and medical reasons, inclusion of legal costs in the lump sum amount and the unfairness of the compensation settlement.
7. Mr Nelson contends that there are many factors that have contributed to the family’s financial distress. He maintains that the lump sum settlement amount that he received in two separate payments was far below that which he was hoping to receive and the amount his lawyer had advised he should expect to receive in the circumstances. Mr Nelson claims that if he had received a fairer settlement, he would not be in the financial predicament in which he currently finds himself. Mr Nelson maintains that without restoration of the age pension, he will be unable to manage and will be virtually destitute. There is little money remaining in Mr and Mrs Nelson’s bank accounts and they still have outstanding bills and financial commitments. Mr Nelson contends that he has already suffered significantly as a result of the accident and that refusal of the age pension will cause further hardship.
8. The first settlement payment of $146,769.97 received in May 2012 was distributed as follows: $14,677 to Medicare Australia; $26,820 to Mr Robert Bender for repayment of a loan; $13,795.58 to ASK Funding; $3164 to Shield Mercantile Proprietary Limited and the balance of $88,313.39 was paid to Mr Nelson. The second lump sum settlement payment was made in or around November 2013 in the gross amount of $585,000. Included in the T documents (at T20) was a breakdown of the distribution of the total settlement funds as follows: $77,500 legal fees; $8000 loan R Benda; $3000 loan D Percy; $3000 loan G Kennedy; $3300 loan D Klinac; $1200 loans misc; $824 debts chemist; $2500 loan J Ioppolo; $200 vet; $1162.45 Alinta Gas; $9116.40 Synergy; $2850 car repairs; $4000 bank overdraft; $611 fines enforcements; $507.25 dental; $425,000 purchase of home; $42,259.50 Centrelink; $58,500 Medicare; $10,469 rent and living. From this total sum of $653,999 a Medicare rebate in the sum of $57,370 was received leaving a balance of $596,629.60. Following the Centrelink rebate of $16,000 this amount was reduced to $580,625.
9. It was Mr Nelson’s evidence that due to the requirement to pay Centrelink and prior to the reimbursement being received, they were unable to proceed with the purchase of the home at the time despite their offer of $425,000 having being accepted.
10. As a result of the accident Mr Nelson suffers from memory loss and confusion and was unable to give detailed responses to some of the questions asked of him at the hearing. Many of the issues were clarified by Mrs Nelson in her evidence to the Tribunal. Mrs Nelson explained that at the time of the accident they were residing in rented accommodation in Mosman Park Western Australia where they had lived for the past 20 years. This house, an old two-storey home, proved not suitable for Mr Nelson following his accident and in any event had been purchased for redevelopment. Whilst they initially investigated further rental accommodation they did not find anything suitable which was made difficult because they had two dogs to accommodate. Mr and Mrs Nelson then started looking for a house to purchase in anticipation of the lump sum settlement award.
11. At the time of the accident Mr and Mrs Nelson owned a house in Cottesloe which they were forced to sell in August 2012 because they are unable to meet the mortgage repayments. The mortgage had been increased by $100,000 in 1989 to fund a business that Mr Nelson was operating. Because Mr Nelson required significant care due to the nature of his injuries, Mrs Nelson was forced to resign from her salaried position of $60,000 per annum which she had held for six years. Mrs Nelson said that at the time of the accident their combined income was around $140,000, but following her resignation, their income reduced to around $42,000 per annum from which they were required to meet the same commitments. This amount included Mr Nelson’s workers compensation payments until July 2013 when it was reduced to a pension payment of around $13,000 per annum. By this stage they had accumulated significant loans to family and friends.
12. Mr and Mrs Nelson intended to use the settlement proceeds to purchase a home for their future security. It was anticipated that Mrs Nelson would be able to return to the workforce and she applied for a position at the Mandurah Performing Arts Centre as an Operations Manager. Mrs Nelson discovered however, that she did not possess the specific computer skills required for the position and that the working hours were impossible because of her commitments to care for her husband. She had been hoping to obtain part-time employment.
13. When the contract for the first house fell through, Mr and Mrs Nelson found another house that they considered would be suitable for Mr Nelson’s needs and anticipated deteriorating condition. Mrs Nelson explained that Mr Nelson had already sustained a number of falls due to partial numbness and instability in his feet. She said that access from the car to the house is on level ground and there are wide sliding doors for easy wheelchair access which they anticipate will be needed in future years.
14. Mr Nelson said that that his physical condition is expected to deteriorate in the coming years and it was their concern that they would not be able to modify a rented residence. Mr Nelson has suffered weight loss and muscle wastage in recent years which makes walking difficult and particularly his ability to access stairs. He has experienced significant additional pain which is only treatable by higher doses of morphine which he is reluctant to take. He has also been recently treated by a psychiatrist for depression who has doubled his anti-depression medication.
15. Both Mr and Mrs Nelson agreed that their decision to purchase a home was made after they were made aware that payment of the age pension would be subject to a compensation preclusion period. Mr and Mrs Nelson considered that they needed to purchase a house to provide security particularly given the nature of Mr Nelson’s injuries and the expected deterioration in his health. They were hopeful that an appeal against the preclusion period imposed would be successful given the particular circumstances of their case.
16. Mr and Mrs Nelson had sought financial advice from Anglicare and tendered in evidence was a Statement that had been prepared to assist them.
17. Of the $396,000 balance in settlement monies received, the sum of $390,000 was used to purchase the house together with a reverse mortgage in the sum of $130,000 which was recommended by their bank manager. Because they were not having to pay the amount of $2000 each month in rent, and in the absence of the requirement to meet monthly mortgage repayments, Mr and Mrs Nelson expected to be able to manage with money received from the Centrelink repayment and the carers payment received by Mrs Nelson. In addition, Mrs Nelson hoped that she may obtain part-time work.
18. In February 2014 Mr Nelson received the sum of $57,000 from Medicare however by this stage they owed a debt to Mrs Nelson’s 88 year old mother (who is still providing assistance). They spent $10,000 to replace their motor vehicle and repay debts arising from the costs of moving house. Mr and Mrs Nelson maintained that they have never engaged in frivolous or unnecessary spending of funds. They rarely enjoy social occasions and have not even been out to dinner since the accident.

# determination

1. Ms Ladhams urged the Tribunal to take into account the general principles that have been applied regarding the application of the “special circumstances” in the context of the Social Security Act and in particular the application of the compensation preclusion provisions. It is acknowledged that Mr Nelson had suffered a terrible accident which had implications for the whole family whose lives have changed as a result. She pointed out however, that hardship results in most such cases and the question is whether Mr Nelson’s circumstances are sufficiently unusual or different from other social security recipients.
2. Ms Ladhams acknowledged the family’s difficulty in meeting their day to day expenses but contended that had it not been for the expenditure of the bulk of the compensation monies on the purchase of their house, they would have been able to meet these expenses. Ms Ladhams contended that their decision to use the bulk of the lump sum compensation monies to purchase a house in full knowledge of the imposition of a compensation preclusion period, cannot amount to special circumstances. She asked the question whether there is anything in the particular circumstances of this case that justified such expenditure and set it aside from the circumstances of other social security recipients.
3. Ms Ladhams maintained that it is open for the Nelsons to sell their house and realise further funds which would cover the balance of the imposed preclusion period. Alternatively, they could use some of the funds to purchase a more modest property and use the balance for their day-to-day living expenses. Ms Ladhams contended that the evidence regarding the psychological impact on the family from the sale of the house does not suggest that this is an unreasonable alternative. Ms Ladhams further contended that Mr Nelson’s poor health arising from the accident could not of itself be regarded as special circumstances because this is the basis upon which the compensation monies were awarded.
4. Ms Ladhams also referred the Tribunal to recent decisions concerning the inclusion of legal costs in the lump sum settlement amount. She maintained that in the circumstances the sum of $60,000 was not an unreasonable proportion of the settlement sums such as to constitute a special circumstance.
5. Set out above at paragraph 29,are situations where, as a general rule, special circumstances would not usually be applied. Included is the case where a person acquires realisable assets after being advised of the preclusion period and where there is no impediment to the realisation of those assets. In this case the asset purchased is the family home. The evidence is that Mr and Mrs Nelson purchased their home in the full knowledge that a preclusion period would be imposed. They maintain that they made the decision to use the bulk of Mr Nelson’s compensation monies to purchase the property after careful consideration of their circumstances which included Mr Nelson’s deteriorating health as well is their financial situation. They hoped that an appeal against the preclusion period would be successful on the basis that the component for loss of income was relatively small having been based on Mr Nelsons reduced income for the 12 months prior to the accident and a lower work life expectancy of 70. The respondent does not dispute that the economic loss component of the settlement funds was calculated on this basis.
6. Evidence was produced regarding the financial circumstances of Mr and Mrs Nelson at the time of the accident and following as well as in 2014 around the time of the decision under review. This evidence is largely not in contention. There is no dispute as to the minimal bank account savings nor the debts owed comprising loans, credit cards and general household accounts. There is evidence that Mr and Mrs Nelson had sought financial assistance in 2011 as well as financial counselling.
7. It is evident that Mr and Mrs Nelson could possibly manage financially if they sold their house and realised the proceeds after paying out the amount owing on the reverse mortgage and any possible outstanding interest payments. The question is whether it is reasonable in the circumstances to expect them to do so. It is their evidence that even if their appeal is unsuccessful, they would not consider selling the house because of the major disruption that it would cause to their lives living and the impacts on their health. Included in the household is the parties’ son who has also suffered significantly as a result of his father’s accident. It was Mrs Nelson’s evidence that prior to the accident their son was a healthy, fit and industrious young man with a bright future. Mrs Nelson gave emotional evidence of the impacts of Mr Nelson’s accident on their son who resides with them in the family home, is unable to work and is dependent upon Newstart allowance.
8. Tendered in evidence was a medical statement from Dr Boon Loke dated 13 February 2015 describing the medical impacts of Mr Nelson’s accident. Mr Loke reported that Mr Nelson has a recurrence of major depression and that he had increased his medication. In conclusion he stated “it is my opinion that it would be stressful for Mr Nelson and, while he is depressed, potentially detrimental to his mental health if he has to sell his house and move.”
9. In a report dated 24 February 2015 Mrs Nelson’s medical practitioner, Dr Cullen reported that Mrs Nelson has suffered from chronic physical exhaustion and emotional stress and subsequent depression and anxiety for which she has been referred to a clinical psychologist. In his opinion the family’s psychological well-being would be adversely affected should the family be forced to sell their home.
10. There is no suggestion that Mr and Mrs Nelson were extravagant in the selection and purchase of their home. It was Mrs Nelson’s evidence that the house is located in a lower socio-economic area from that where they had previously resided. Their evidence regarding their attempts to obtain rental accommodation was not in dispute.
11. The Tribunal can understand Mr and Mrs Nelson’s reasons for purchasing their own home in their particular circumstances and with the expected impacts of Mr Nelson’s declining health. As Mrs Nelson stated they would not be able to effect modifications to a rented home. The Tribunal accepts their evidence that if they had continued to rent during the course of the preclusion period, they would have had no other opportunity of purchasing a home in the future.
12. The medical evidence is that Mr Nelson suffers significant musculoskeletal pain which requires a combination of medication. He underwent extensive spinal surgery following his accident and has been left with continued dysfunction of the urinary bladder and bowel which requires intermittent catheterisation and manual evacuation. He also displayed obvious difficulty during the course of his evidence to the Tribunal in recalling important facts and circumstances.
13. The Tribunal accepts that initially Mr and Mrs Nelson believed that they would be able to manage financially using the majority of the balance of compensation monies together with a reverse mortgage to fund the purchase of a home. They had hoped that Mrs Nelson may have been able to return to work part-time however it has emerged that her caring responsibilities for Mr Nelson can occupy up to 11 hours each day.
14. Ms Ladhams argued that it is not appropriate to consider the nature of the injuries for which the compensation monies have been awarded in the Tribunal’s consideration of special circumstances unless the state of health of the applicant is more severe than the majority of DSP recipients. The medical evidence is that the impacts of the accident have caused significant injuries with long term consequences. In addition Mr Nelson has now been diagnosed with major depression for which he has not been compensated. Mr Nelson also suffers the indignity of the dysfunction of his urinary bladder and bowel.
15. Many applicants for a compensation affected payment have encountered a series of unfortunate and financially disadvantaged circumstances in the past and may face ongoing health problems and an uncertain future. The consideration of what constitutes “special circumstances” in any particular case is a matter for the Tribunal to be assessed having regard to the evidence of all of the relevant circumstances. There would not usually be one particular factor that would make a situation unusual, unforeseen or exceptional but a combination of factors may very well do so. It is this combination of circumstances in the current case as outlined above, that together in the Tribunal’s view, constitute circumstances that set this case apart from others.
16. The Tribunal does not consider that it is reasonable in the circumstances to expect Mr and Mrs Nelson to sell their modestly priced family home which was purchased to accommodate Mr Nelson’s ongoing needs arising from the consequences of his accident. Although uncorroborated, it was their evidence that there has been a downturn in the real estate market in the area and that they may have difficulty in realising the price that they paid for the property. They included extracts from real estate reports suggesting that sales had slowed by 15% during 2015 compared to the same period last year and price decreases were expected. Also included was a letter from their bank stating that they would not have access to further funds. It was not suggested by Ms Ladhams that the sale of their low value motor vehicles would assist their financial predicament. The couple own no other realisable assets. The evidence was that the balance of the lump sum settlement had been totally expended and that Mr and Mrs Nelson have minimal bank savings. The Tribunal accepts that without restoration of Mr Nelson’s age pension, the family will suffer severe financial circumstances. Even if Mr Nelson was forced to sell the family home, after deduction of the reverse mortgage, any interest owing and other expenses associated with the sale, it is questionable whether the family could sustain rental payments for the entire eight year preclusion period, particularly given the evidence that they are unlikely to realise the price paid for their home.
17. The Tribunal accepts the medical evidence as outlined above regarding the expected psychological impact on both Mr and Mrs Nelson, and the possible likely impact on the party’s son if they were forced to sell their home. Both Mr and Mrs Nelson have been diagnosed with a form of depression and anxiety as a consequence of the impacts of the accident. This is a condition for which Mr Nelson has not been financially compensated. Prior to the accident the family were managing financially. Both Mr and Mrs Nelson had secure employment and they had endeavoured to provide for their long-term financial security by purchasing a home. Unfortunate circumstances forced the sale of their property at Cottesloe which incurred a significant financial loss for them. Mr and Mrs Nelson sought financial assistance and financial counselling. The Tribunal accepts that they have not been extravagant with the distribution of the settlement funds. There is no suggestion that the loans repaid from the settlement funds were not reasonably incurred. The Tribunal accepts the evidence that they arose following the accident and were incurred to cover the family’s expenses during a period of reduced family income.
18. The intent of the compensation recovery provisions is stated in Part 4.13.4.10 of the Guide as being "...designed to ensure that people who receive compensation for a loss of income do not also receive income support from the Australian Government in respect of the same period of time." The evidence is that the component for loss of income was not significant and for this reason the Tribunal does not believe that a finding of special circumstances in this case is inconsistent with this policy statement.
19. Nor does the Tribunal consider that exercising discretion to shorten the preclusion period is contrary to the objectives of the Social Security Act to provide social security payments for those who are in genuine need. As the Tribunal said in *Re Reid and Director-General of Social Services* [1981] AATA 108:

“'the decision-maker must have regard to whether, by exercising the discretion in a particular case, he will be achieving or frustrating ends or objects which are conformable with the scope and purpose of the Social Services Act 1947… thus while keeping the general rule laid down by s.29(2) in mind, the decision-maker must nevertheless be prepared to respond to the circumstances of a particular case if for any special reason the application of the general rule would be unjust, unreasonable or otherwise inappropriate having regard to the scope and object of the Act.”

1. The Tribunal is satisfied that Mr Nelson’s particular circumstances when considered together, justify the exercise of discretion in this case. The remaining question is by how much the preclusion period should be shortened. Mr Nelson maintains that the economic loss component of his compensation payment was minimal and was calculated for a limited period, namely when he reached 70 years of age. Further that it was based on a significantly reduced income during a period when there was little demand for aerial surveys due to the global financial crisis. He maintains that the major component of the settlement monies was for medical, pharmaceutical, equipment, expenses, pain and suffering. Mr Nelson contends that the preclusion period should be limited to the time when he turned 70 years of age, namely 3 January 2013.
2. Mr Nelson was aged 67 at the time of his accident. He said that it was his intention to work until he was 73. The preclusion period has been imposed for a period of just under 8 years ending on 5 April 2019 at which time Mr Nelson would be 76 years of age. In all of the circumstances the Tribunal considers that the preclusion period should be shortened to the date when Mr Nelson turned 70 years of age being the date for the assessment of the economic loss component of his lump sum compensation settlement. The preclusion period will accordingly end on 3 January 2013.
3. For all of the above reasons the Tribunal finds that there are special circumstances which warrant the exercise of the discretion under s1184K(1) of the Social Security Act to treat that part of the compensation payment as not having been made as from 3 January 2013.

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| I certify that the preceding 64 (sixty - four) paragraphs are a true copy of the reasons for the decision herein of Ms A F Cunningham, Senior Member |

....(Sgd) T Freeman....................................................................

Associate

Dated 5 June 2015

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| Date of hearing  Applicant  Representative for the Applicant | **27 March 2015**  **In person**  **Mrs A Nelson** |
| Representative for the Respondent | **Ms A Ladhams** |
| Solicitors for the Respondent | **Australian Government Solicitor** |