Centrelink Preclusion and Recovery provisions: their significance for plaintiffs

Part 3.14 of the *Social Security Act* (1991) ('the Act') entitles Centrelink to recover past payment of social security income support payments from recipients of pecuniary loss damages. Part 3.14 further entitles Centrelink to preclude plaintiffs from claiming social security income support payments for a proportionate period after receipt of pecuniary loss damages.

These provisions may have considerable significance to plaintiffs in the course of deciding whether to accept an offer of settlement, or to propose or accept a particular form of settlement, and may then continue to affect their income stream long after their claim has settled. During the course of investigating and litigating a claim plaintiff lawyers may be tempted to overlook the significance of Centrelink's recovery role and to consign the obtainment of Centrelink Estimates of Charge/Preclusion to the last minute and to the care of less qualified staff. This article demonstrates why the plaintiff's potential obligations to Centrelink ought be given early and careful consideration by their legal advisers.

In *Hutt v Pigott Wood & Baker* His Honour Justice Crawford found that the Defendant (a law firm) had *'breached its duty of care to the Plaintiff by failing to advise her at or around the time of the settlement of the effect that the receipt by her of the damages would have on her continuing entitlement to receive a benefit or pension from the Department of Social Security'*. The Court heard evidence that at the time of settlement, neither Mrs. Hutt nor her legal advisor had envisaged that she would expend her damages in only four months. Evidence that the plaintiff had some cognisance of her disentitlement to receive Centrelink benefits for some time resulted in a reduction of the damages awarded to her by half. By contrast, there was no dispute as to her having been fully advised and aware of her obligations to repay some of the damages she received to Centrelink for benefits previously paid to her. The lessons that might be learned from *Hutt's case* are that practitioners ought to advise as to Centrelink preclusion periods irrespective of their expectations of each client's post-settlement lifestyle and management of their financial affairs. Furthermore, the obtainment of estimates of Social Security Charge and Preclusion, and conveyance of those estimates to their clients throughout the course of the conduct of a claim, decreases the risk of overlooking the provision of such advice at the time of settlement.

Legal practitioners also need to be aware that failing to update the Centrelink Estimate of Charge/ Preclusion forms in a timely manner throughout the course of the action, or incorrectly completing the form may result in as poor outcomes as failing to lodge them at all. Worse, the provision of incorrect advice to Centrelink may be open to more sinister interpretation. In *Sammut v Department of Family & Community Services - Federal Court[1999] FCA 1735 (15 December, 1999)* the Federal Court expressed concern at the alleged submission to Centrelink by the Plaintiff solicitor that Mrs. Sammut's settlement did not contain provision for economic loss. The Defendant solicitors had submitted otherwise. The Federal Court found that:

> it would be inconsistent with a solicitor's ethical responsibilities to seek to clothe a compensation payment made to his or her client with a false character for the purpose of evading the operation of the Act...it would not be ethical for him or her to seek to obtain from the paying party a written statement that the payment did not include any economic loss component for the purpose of assisting his or her client to avoid the operation of Part 3.14 of the Act.

The information below may be of assistance in understanding how, when and why your client's potential liability to Centrelink ought be investigated.

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When should 'Estimate of Social Security Charge/Preclusion' forms be lodged?

Prior to any event at which a settlement offer is likely to be made, or upon receipt of an offer during the course of the claim, a Centrelink Preclusion Form ought to be lodged with the relevant Centrelink Compensation Recovery Team (listed at the end of this article) requesting an estimate of the recovery/preclusion period.

Even where Plaintiffs instruct (reliably or otherwise) that they have not received Centrelink benefits in the past, they may

still be subject to a preclusion period in the future and accordingly, an 'Estimate of Social Security Charge/Preclusion' ought be obtained on their behalf.

With the passage of time, or upon receipt of an increase in the quantum of damages offered to your client, there is a risk that the quantum of repayment and the period of preclusion may alter considerably. As can be seen from the examples below, there is significant risk in relying upon stale estimates when advising your client as to their liabilities on the basis of stale information:

Example Situation

Injury: 1 July, 1998 (loss of earnings commence)

Social Security Payments commenced 1 January, 1999 and continuing

No periodic compensation paid.

Example 1

An estimate request on 1 July, 1999 on the basis of a $100,000 settlement would result in a preclusion period from 1 July, 1998 to 10 October, 2000. At 1 July, 1999 $4671.55 would be repayable.

Example 2

An estimate request on 1 July, 2000 on the basis of a $100,000 settlement would result in a preclusion period from 1 July, 1998 to 28 March, 2000, but at 1 July, 2000, $11,982.70 would be repayable. Pension would continue to be payable.

Example 3

An estimate request on the basis of a $200,000 settlement on 1 July, 2000 would result in a preclusion period from 1 July, 1998 to 1 January, 2002. At 1 July, 2000, $14,220.05 would be repayable. Pension would cease.

As can be seen from these examples you cannot simply double the recovery figures if the settlement doubles. This is because both the divisor and Social Security payments increase with time and Social Security may start at different times.

From a litigator's perspective, it may be of assistance to bear in mind that, on at least the first occasion that an 'Estimate of Social Security Charge/Preclusion' form is lodged with Centrelink, the Centrelink Compensation Recovery Section undertakes several tasks prior to issuing an Estimate. While Centrelink never discloses details concerning your client's Social Security payments to the defendant insurer, compensation recovery staff, preparing an estimate response, frequently telephone an insurer to confirm details of compensation payments and may issue a Preliminary Notice to an insurer if one has not been sent earlier. By forming the habit of obtaining an 'Estimate of Social Security Charge/Preclusion' prior to *every* occasion at which settlement is likely or *every* time an offer is made to your client (rather than upon receipt of an offer which you believe ought to be considered favourably by your client) contact from Centrelink should not be a matter of litigative significance to the Defendant or their legal advisers.

Given that the 'Estimate of Social Security Charge/Preclusion' form requires you to provide answers to a range of significant questions and that Centrelink officers will undertake further enquiries before providing an estimate of preclusion, provision of a reliable estimate is virtually impossible if your first inquiry is made from the door of the Court. It is unfortunate and concerning that such enquiries continue to be made and it is generally impossible for reliable estimates to be provided in the circumstances.

'Estimate of Social Security Charge/Preclusion' form

The latest version of the 'Estimate of Social Security Charge/Preclusion' form can be downloaded from the Centrelink Website at www.centrelink.gov.au (see footnote). The form is also obtainable in pads or in the kit "Compensation, What You Need To Know" both of which are available on request from the Compensation Recovery Teams. This form has been designed to ensure the proposed lump sum compensation payment and 'refundable' compensation payments received prior to settlement of a common law claim are identified. The form has notes on the back which should help in its completion.

Accurate completion of the claim form is critical if you are to obtain a reliable estimate from the Centrelink Recovery Team. The following tips may be a useful source of reference in completing the form:

- Proposed lump sum amount: Only insert one such amount per form. If you wish to obtain a range of estimates, you may submit up to three forms at one time. The proposed lump sum amount ought to include allowance for any lump sum benefit previously paid to the plaintiff which is 'refundable' from the current claim. Legal costs should be included in the calculation of the proposed lump sum amount when the offer is 'all in' or 'inclusive of costs'. Where a plaintiff's party/party costs are significant and they are likely to be affected by Centrelink benefit recovery and preclusion, consideration should be given as to whether their best interests are served by an 'all in' settlement.
- Where no periodic compensation has been paid, the date on which the loss of earnings or loss of earning capacity began is the date on which any preclusion period will begin. For most claimants the date of the accident is an appropriate date; for others the incapacity for employment may have commenced following surgery or further deterioration.
- Any previously paid periodic compensation that will be repaid as a result of the settlement is deducted from the settlement amount before calculating the preclusion period. This is the sole deduction allowed by the Act. The total should be only that of repayable periodic compensation and should not include other repayable expenses.
- Expected finalisation of settlement: Insert the trial date if known. Inserting the date of a mediation or some other event in the very near future will not hasten the provision of an estimate by the Recovery team, but will result in their relying upon an unrealistic 'resubmit' date for review of the claim.

The Notice of Charge

If the case is ultimately resolved by way of a determination of a Court or Tribunal, Centrelink will use the total of any past loss of earnings and future loss ▶

of earning capacity contained in the judgment as the compensation part for the purpose of calculating the preclusion period and framing the Notice of Charge. If a judgment does not have a breakdown then the decision maker will decide the compensation part on the available evidence.

However, estimates are always given using 50% of the settlement as the compensation part. Centrelink is unable to anticipate those relatively small number of cases that ultimately proceed to judgment.

However, if the matter resolves by consent, the Notice of Charge will usually reflect the pattern of assessment contained in the previous estimates. That is, there will be an assumption that the damages received by the plaintiff comprised a 50/50 split between pecuniary loss damages and general damages.

This 50% apportionment is a statutory deeming provision and applies even though you may understand that the actual pecuniary loss component was much smaller or even much greater than 50% of the total settlement. The Courts and Tribunals have found that this 50% apportionment cannot be varied on this basis alone. (See Woolrich; Secretary, Department of Family and Community Services [2000] AATA 943 (30 October 2000), which cites pertinent Federal Court decisions). All estimates are given on the basis of a compensation part of 50%. Settlements that demonstrably do not contain economic loss damages will not result in a preclusion period and/or charge. Settlements with a smaller than 50% economic loss component cannot be dissected and the 50% apportionment will apply unless the individual circumstances of your client are found to be 'special'.

What are the 'special circumstances' which might warrant variation to a Preclusion Period or a Notice of Charge?

Section 1184(1) of the *Social Security Act* 1991 provides that all or part of a compensation payment may be disregarded so that the extent of a preclusion period for the receipt of benefits may be varied or extinguished at the discretion of Centrelink 'in the special circumstances of the case.'

Special circumstances is not defined in the Act but in *Re Green and Secretary, Department of Social Security* (1990) 21 ALD 772, the AAT nominated a framework against which claim for special circumstances could be considered:

> The use of the word "special" is "intended to allow the decision maker the fullest opportunity to consider the particular circumstances of each case;
>
> - "hardship is a relevant consideration" but regard must be had to the way in which the hardship arose;
> - there must exist "factors which justify the making of an exception in whole or in part to the principle of liability which the Act otherwise establishes;
> - the decision maker must have regard to whether, by exercising the discretion in particular case he/she will be achieving or frustrating the ends or objects which are conformable with the scope and purpose of the Social Security Act; and
> - the decision maker must be prepared to respond to special circumstances of any particular case by reason of which strict enforcement of the liability created by the section would be unjust, unreasonable or otherwise inappropriate."

In the reported case law on this issue to date, it appears that the discretion is less frequently granted in the claimant's favour than otherwise. In deciding *Department of Family and Community Services v Johnson* (AAT No T2000/042) Senior Member Handley found that neither ignorance of the existence of, or duration of, a preclusion period (irrespective of Mr. Johnson's solicitor's alleged failure to advise of same) nor the premature expension of settlement monies by Mr. Johnson warranted the reduction of a preclusion period. The Tribunal also heard evidence as to the manner in which Mr. Johnson spent the settlement monies and the compromised welfare of infants who were dependent upon him, but the facts in that case did not warrant the application of the discretion to grant benefits to Mr. Johnson.

It appears from a review of the cases reported to date that for 'special circumstances' to be manifested such that Centrelink would prematurely recommence payment of benefits, that some extraordinary supervening occurrence is required to justify a waiving of the preclusion period and the claimant could not recover monies from another party in respect of the same.

The position was expressed by Senior Member Mr. Handley in *Johnson's Case:*

> There are many decisions of this Tribunal and the Federal Court that record that negligent advice is not of itself a special circumstance. The public purse need not be opened if the loss alleged to be suffered by Mr. Johnson can be recovered from another source. In this case that source is his former solicitors.

Centrelink provides estimates on the basis that the ultimate preclusion period and recovery amount may change if; details provided by litigant practitioners are incorrect, the settlement amount varies or further periodic compensation or social security payments are paid to clients after the estimate is given. Centrelink has a duty of care to ensure that the estimate is accurate so that practitioners and their clients can rely on it in their settlement deliberations.

Inaccurate advice by Centrelink is a factor in finding special circumstances which can result in all or part of a compensation payment being disregarded. This can reduce the preclusion period and/or the amount recoverable. In *Re Robinson and SDFACS* (1999) AAT 99/0398, Senior Member Burton found:

> that the circumstances outlined above, namely the inconsistent advice given by the Department, that Mr Robinson's legal advisers acted on the advice that they reasonably believed to be correct, are special circumstances to warrant the exercise of a discretion under subsection 1184(1) of the Act. I take into account the impact it had on Mr Robinson's decision to accept the settlement offer, and the likelihood of a better settlement figure being negotiated if what the Department regards as being the correct advice, was given at the relevant time.

The timing of any Application for Review of the Centrelink recovery amount/assessment of preclusion

When providing Estimates of Social Security Charge/Preclusion during the course of a claim, Centrelink Compensation Recovery Team staff *will not* address issues of 'special circumstances', nor will they take into account any estimation of the proportion of economic loss damages that alters from the 50/50 formula.

Applications by solicitors for alteration in the assessment of the amount to be repaid for the period of preclusion ought be made *after* settlement of the claim and upon receipt of the Notice of Charge issued by Centrelink. At that time any submission about special circumstances, including those concerning equity or fairness of the statutory 50% apportionment in the particular circumstances of settlement, should be addressed to the original decision maker. (Their name and contact details will be on the Notice of Charge). The decision maker may require further information such as copies of the Writ and List of Special Damages. If the plaintiff is unhappy with the reconsideration, ask for the issue to be addressed by an Authorised Review Officer (ARO). If the plaintiff remains dissatisfied with the decision of the ARO, they are entitled to make an application to the Social Security Appeals Tribunal.

Where the Notice of Charge affects a right to receive payments, a request for review must be made within 3 months of receipt of the Notice, if the plaintiff is to preserve their rights to back payment of benefits (if any).

Given the trend of findings against solicitors by Courts and Tribunals cited at the commencement of this article, it is arguable that a solicitor has a duty to their client to raise with Centrelink any issues or evidence which might reduce the assessment of the recovery amount or preclusion period contained in the Notice of Charge and to do so as soon as practicable after receipt of the Notice.

Pensions and allowances for plaintiffs and their spouses may continue throughout the preclusion period

There remain some Centrelink benefits to which plaintiffs and their spouses may be entitled, irrespective of the existence of a Centrelink Preclusion Period or the amount of the settlement.

Benefits to which plaintiffs may continue to be entitled post-settlement include Family Tax Benefits A & B, payments for children, Mobility Allowance, and Carer Allowance. Low income earners may qualify for a Heath Care Card during the preclusion period. The compensation may be assessed under the usual income test for Family Tax Benefit and for the Health Care Card. Mobility Allowance and Carer Allowance are not means tested.

In many cases, plaintiffs' spouses' entitlement to receive Centrelink benefits may continue, subject to reduction as a result of the application of an 'assets test'. Even where a spouse loses their entitlement to a Carer's Pension (for example) they may still continue to receive a Carer's Allowance.

Advice to a plaintiff that they are precluded from claiming benefits from Centrelink for a prescribed period ought be tempered with advice that they may have a residual entitlement to certain types of allowances and ought to inquire about those entitlements directly with Centrelink.

Given the constant legislative changes to the types of Centrelink benefits and allowances available and to the variation of eligibility criterion for each one, most plaintiff solicitors would be well advised to refer their clients (and their spouses) to Centrelink at the conclusion of their claims. Given that Centrelink does not assess or pay benefits and allowances retrospectively, it is in a plaintiff's interest to apply for benefits as and when they are entitled to them. Plaintiffs and their financial advisers may be further assisted by contacting the Centrelink Financial Information Service. The service is free, confidential and independent and while it does not recommend particular investment types or how to manage their lump sums, it may provide advice about evaluating different investment strategies and how they will impact on social security payments at the conclusion of the preclusion period. PL

Further Information

The Social Security legislation and the policy 'Guide To The Administration of the Social Security Law' are available on the Department of Family and Community Services website at **www.facs.gov.au**

Specific information about the Centrelink recovery processes is located at **www.centrelink.gov.au** where you may download copies of the current Estimate of Social Security Charge/Preclusion Form. The Centrelink Recovery Teams are located as shown:

TEAM AREA	ADDRESS	TEL	FAX
Brisbane QLD	Locked Bag 33, Brisbane 4001	07 3210 8149	07 3210 8097
North QLD	PO Box 1981, Townsville 4810	07 4760 8590	07 4760 8349
East Coast NSW	PO Box 726, Wollongong East 2520	02 4251 4107	02 4251 4098
Hunter NSW	PO Box 542, Charlestown 2290	02 4974 3400	02 4974 3497
Pacific Central	PO Box 1336, Coffs Harbour 2450	02 6648 6966	02 6648 9898
West (NSW)	Private Bag CC8, Parramatta 2123	02 9865 3619	02 9865 3680
Sth Metro NSW	Private Bag 4, Liverpool 2170	02 9203 8720	02 9203 8497
South West NSW	PO Box 1210 Queanbeyan 2620	02 6200 5562	02 6200 5498
South Australia	GPO Box 1845 Adelaide 5001	08 8402 8088	08 8402 8097
North Australia	LMB 86, Darwin 0801	08 8936 3737	08 8936 3798
Victoria	PO Box 312 Sunshine, 3020	03 9201 9119	03 9201 9398
West Australia	GPO Box P1187, Perth 6844	08 9464 2541	08 94642589
Tasmania	GPO Box 1507R, Hobart 7001	03 6222 2945	03 6222 2772