

Report

Royal Commission into the Robodebt Scheme

Report
Volume 1

This report talks about some difficult themes, including suicide, self-harm and mental ill-health. Readers may find parts of the report distressing. These are some support services which might be helpful if you or someone you know needs help:·

- Lifeline 13 11 14 (24/7 crisis support line)
- Beyond Blue 1300 224 636 (24/7 telephone, website or email short-term counselling)
- Suicide Call Back Service 1300 659 467 (24/7 counselling for suicide prevention and mental health)

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7 July 2023

His Excellency General the Honourable David Hurley AC DSC (Retd)
Governor-General of the Commonwealth of Australia
Government House
CANBERRA ACT 2600

Your Excellency

Report of the Royal Commission into the Robodebt Scheme

In accordance with the Letters Patent issued to me on 18 August 2022, and amendments to the Letters Patent issued on 16 February and 11 May 2023, I have made inquiries and now have the honour to present to you the Report of the Royal Commission into the Robodebt Scheme.

I have provided to you an additional chapter of the report which has not been included in the bound report and is sealed. It recommends the referral of individuals for civil action or criminal prosecution. I recommend that this additional chapter remain sealed and not be tabled with the rest of the report so as not to prejudice the conduct of any future civil action or criminal prosecution.

I am also submitting relevant parts of the additional chapter of the report to heads of various Commonwealth agencies; the Australian Public Service Commissioner, the National Anti-Corruption Commissioner, the President of the Law Society of the Australian Captial Territory and the Australian Federal Police.

I also return herewith the Letters Patent.

Yours faithfully

Catherine Holmes AC SC
Royal Commissioner

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Introductory Section

Preface

At the outset of my inquiry, I had anticipated that the Commission would uncover how such a patently unreliable methodology as income averaging, without other evidence, to determine entitlement to benefit could become part of an Australian Government debt raising and recovery scheme. What has been startling in the Commission's investigation of the Robodebt scheme has been the myriad of other ways in which it failed the public interest.

It is remarkable how little interest there seems to have been in ensuring the Scheme's legality, how rushed its implementation was, how little thought was given to how it would affect welfare recipients and the lengths to which public servants were prepared to go to oblige ministers on a quest for savings. Truly dismaying was the revelation of dishonesty and collusion to prevent the Scheme's lack of legal foundation coming to light. Equally disheartening was the ineffectiveness of what one might consider institutional checks and balances – the Commonwealth Ombudsman's Office, the Office of Legal Services Coordination, the Office of the Australian Information Commissioner and the Administrative Appeals Tribunal – in presenting any hindrance to the Scheme's continuance.

The report makes a number of recommendations. Some are directed at strengthening the public service more broadly, some to improving the processes of the Department of Social Services and Services Australia. Others are concerned with reinforcing the capability of oversight agencies. A sealed chapter contains referrals of information concerning some persons for further investigation by other bodies. That in part is intended as a means of holding individuals to account, in order to reinforce the importance of public service officers' acting with integrity.

But as to how effective any recommended change can be, I want to make two points. First, whether a public service can be developed with sufficient robustness to ensure that something of the like of the Robodebt scheme could not occur again will depend on the will of the government of the day, because culture is set from the top down.

Second, politicians need to lead a change in social attitudes to people receiving welfare payments. The evidence before the Commission was that fraud in the welfare system was miniscule, but that is not the impression one would get from what ministers responsible for social security payments have said over the years. Anti-welfare rhetoric is easy populism, useful for campaign purposes. It is not recent, nor is it confined to one side of politics, as some of the quoted material in this report demonstrates. It may be that the evidence in this Royal Commission has gone some way to changing public perceptions. But largely, those attitudes are set by politicians, who need to abandon for good (in every sense) the narrative of taxpayer versus welfare recipient.

My thanks go to Counsel Assisting, the Official Secretary, the Solicitors Assisting, the legal and research teams, the media officers and the administrative staff of the Royal Commission for their stalwart efforts in bringing together hearings at short notice and in working to analyse massive amounts of evidence for the preparation of this report. It has been an arduous ten months, with many late nights and missed weekends.

Introduction

The Royal Commission into the Robodebt Scheme was established by Letters Patent on 18 August 2022 under the *Royal Commissions Act 1902* (Cth) to inquire into the Robodebt Scheme (the Scheme), and I was appointed Royal Commissioner.The Scheme was a proposal developed by the Department of Human Services (DHS), put forward as a budget measure by the Minister for Social Services in 2015 and begun that year (initially in pilot form and expanded in subsequent budgets). It was designed to recover supposed overpayments from welfare recipients going back to the financial year 2010-11 and relied heavily on a process known as "income averaging" to assess income and entitlement to benefit. As used, it neither produced accurate results nor complied with the income calculation provisions of the *Social Security Act 1991* (Cth). By the end of 2016, the scheme was the subject of heavy public criticism but was nonetheless persisted with until November 2019, when it was announced that debts would no longer be raised solely on the basis of averaged income. That was followed in 2020 by the settlement of a class action and a decision to reduce all debts raised in whole or part through averaging to zero. In June 2020 then prime minister, the Hon Scott Morrison MP, apologised for the Scheme.[1]

The matters into which I was directed to inquire were (in summary): how, by whom and why the scheme was established, designed, implemented; how risks and concerns in relation to it were dealt with and how complaints and challenges were managed by the Government; the use of third-party debt collectors; and the effects of the scheme – human and economic. The full terms of reference appear at the end of this Introduction.I was directed by the Letters Patent to provide the Governor-General with a report of the results of my inquiry and my recommendations not later than 18 April 2023, but, having regard to the number of issues which emerged, the extent of the evidence requiring consideration and delays in the production of that evidence, that date was extended to 30 June 2023, and, for different reasons, to 7 July 2023.

The workings of the Commission

Five counsel assisting were appointed: Justin Greggery KC, Angus Scott KC, Renee Berry, Salwa Marsh and Douglas Freeburn. Jane Lye was engaged as Official Secretary and the firm of Gilbert + Tobin was appointed as Official Solicitors to the Commission. Staff from a range of disciplines were appointed; a full list appears in the Appendix.

The Commission exercised its powers under the Royal Commissions Act to issue 200 Notices to Give Information and 180 Notices to Produce Documents. In response the Commonwealth produced over 958,000 documents. Unfortunately, the Commonwealth's document production systems were not as efficient as one would hope. Documents were often produced long after they were first sought by notice, while the amount of duplication was a constant hindrance to the Commission's work.

The Commission held four separate blocks of hearings between October 2022 and March 2023, the first three hearing blocks comprising a fortnight each and the final hearing block, three weeks. During those hearings 115 witnesses were called. A schedule of the hearings is in the Appendix. The hearings were open to the public and live streamed (other than during legal arguments concerning whether public interest immunity attached to prospective exhibits). The viewing audience for the live stream peaked at 57,511 and extended as far afield as England, Canada and the United States.

Witnesses included:

- ministers responsible for DHS and DSS and, later, Services Australia
- public servants from those departments who were involved with the Scheme's development and implementation
- officers from two agencies with relevant oversight responsibilities, the Office of Legal Services Coordination and the Office of the Commonwealth Ombudsman

- individuals and members of organisations who, in different ways, had represented the interests of people caught up in the Scheme
- DHS officers who were affected by the work they did during the implementation of the Scheme
- representatives of the debt collectors contracted by DHS under the Scheme
- individuals who had themselves, or through a family member, suffered the effects of receiving a demand under the Scheme.

Some DHS employees and some of the people who were harmed by the Scheme appeared under a pseudonym or gave evidence in such a way that their identity was not revealed.

Witness statements, exhibits and hearing transcripts were placed on the Commission's website, as were practice guidelines, directions, rulings and orders. Witnesses were granted leave to appear, which meant they were entitled to be represented and their legal representatives could seek leave to cross-examine other witnesses. The Commonwealth was represented throughout the hearings with standing leave to question witnesses.

In response to a general invitation to the public to make submissions to the Commission, individuals and organisations sent 1092 submissions which were, unless non-publication was requested, published on the Commission website. There was a mix of submissions: they came from people directly affected by the Scheme, individuals and organisations who represented people who had been directly affected by the Scheme, present and former public servants who had been involved in its administration or knew something about it, and people who were generally interested in the subject.

The Commission used a range of communication media, including press releases, social media and direct emails to subscribers to keep those interested informed as to its progress.

Procedural fairness and the standard of proof

The Commission applied the rules of procedural fairness, which are concerned with giving an individual liable to be affected by a decision a fair and impartial hearing before any such decision is made. It is to be noted that those rules are not a rigid, one-size-fits-all prescription; they entail a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case.[2]

In this instance, prior to the publication of this report, persons who were likely to have findings made against them were given a Notice of Proposed Adverse Finding (and in some instances, a Notice of Proposed Referral) which told them of the factors and evidence on which the finding was likely to turn and given the opportunity to respond.

There were complaints from some individuals that they had been denied procedural fairness because they had not had the opportunity to cross-examine other witnesses. The Commission's Practice Guideline, Cross-examination of Witnesses dated 28 September 2022, made it clear that applications for leave to cross-examine could be made before or after a witness gave evidence. None of the persons who complained about not being able to cross-examine had, in fact, made any application for leave to do so.

There was a very limited number of statements received from witnesses to clarify particular issues after the public hearings had closed. The fact that their evidence was not taken orally and that they were not cross-examined did not mean that their evidence cannot be accepted, but it did affect the weight of the evidence, a fact which has been taken into account by the Commission. No evidence of that kind has been relied on adversely to anyone in any instance where it is the only evidence on the point.

Some individuals complained that they were not forewarned before or during the Commission's hearings of matters that were later put to them in Notices of Proposed Adverse Findings. Some suggested that those allegations should have been contained in the Notice to Give Information they received before giving evidence, or that they should have been cross-examined on every point later the subject of a proposed adverse finding; an absurd proposition, because the whole inquiry process is about discovering

what happened and what allegations flow through that questioning. Many of the complaints confused the inquiry process with the trial process, where counsel for a party has an obligation to put their client's case to opposing witnesses. The Commission's processes are inquisitorial, not adversarial; it is not a party advancing any particular case.

Where notices were given to individuals and organisations against whom it was contemplated adverse findings might be made, the notices were not published and a non-publication direction was made in respect of them,[3] because the contemplated findings might never be made. Where individuals responded with submissions and statements, again they were not published because to do so would reveal the content of possible adverse findings. The non-publication direction against the publication of Notices of Proposed Adverse Findings is, however, qualified so that individuals, if they wish, can publish their own submissions and statements although they contain content from the notices they received.

Where I have made findings against individuals that were liable to cause real damage to reputation, as many of the findings in this report unquestionably do, I have acted on the *Briginshaw* standard.[4] I have not reached those conclusions without a high degree of satisfaction about the evidence.

Despite what was said in some submissions, the absence of direct evidence against an individual did not mean that a finding could not be made. In many instances, the combination of circumstances and documentary evidence pointed to a clear conclusion about what had occurred.

The challenges

The Commission had to act very quickly to assemble hearings and proceed to take evidence without much of the information needed. When the documents did come, they came in great numbers, some of them frustratingly close to the end of the hearings. There was no one witness who gave any connected account of what had occurred. Those at the Scheme's heart were not always very forthcoming.

Making the process of getting to the bottom of what had occurred all the harder was the absence of documentation of decisions made throughout the life of the Scheme. There simply were not records kept of who decided what, when. Occasionally, a brief to a minister would disclose a little information but they were usually couched in very careful terms. The Commission found itself piecing together emails to track through what had happened. The process was rather like putting together a second-hand jigsaw puzzle: a reasonably clear picture emerged, but there will always be some pieces missing.

The Commission has done its best to synthesise the enormous amount of evidence it received into this report. No doubt with more time it could have been sleeker, but the fact it has been able to be produced so quickly is a marvel and a credit to the dedication and energy of the Commission's staff.

Parliamentary privilege

A question that was asked of Commission staff was why the Commission was making no use of the evidence given to, and reports of, the Senate Inquiries which had examined the Scheme between 2017 and 2022. (The Senate Standing Committee on Community Affairs produced a series of reports.) The answer is that parliamentary privilege prevented the material put to the Senate hearings and the reports the Senate Committee produced from being tendered in evidence or asked about for the purposes of relying on what was said in them.

To explain: section 16 of the *Parliamentary Privileges Act 1987* (Cth) prohibits evidence concerning "proceedings in Parliament" from being tendered in evidence for specified purposes.[5] In that context, "proceedings in Parliament" means "all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House [of Parliament] or of a committee."[6] The purpose of the privilege is to protect free speech and debate in Parliament.[7] The exceptions to the privilege are extremely limited.[8]

As a result of that broad prohibition, documents relating to several prior investigations, inquiries, and reports involving the Scheme are either not in evidence,[9] or else were tendered only for a limited purpose consistent with section 16 of the *Parliamentary Privileges Act 1987* (Cth).[10]

Many of the same people who gave evidence before this Commission had given evidence before the Senate Standing Committee on Community Affairs and the Senate Community Affairs Legislation Committee. Without making any formal recommendation on the topic, I strongly suggest that a copy of this report be provided to the Clerk of the Senate, and perhaps the chairs of each of those committees in case they are interested in seeing how the evidence developed in the Commission.

Structure of the report

The first section begins with an overview of the Scheme and summarises my conclusions about it. The bases for those conclusions are set out in subsequent chapters, the first of which gives some background to the departments and agencies involved in the Scheme's introduction and administration and the processes for data matching and income averaging which were integral to it.

The second part of the report begins with the design of the Scheme and its adoption by Cabinet as a Budget measure, with a particular exploration of how concerns about its legality were put to one side. The following chapters chart the life of the Scheme, over the period between April 2015, when a pilot was commenced, and November 2019, when averaging (as the sole basis of raising debts) was abandoned. They contain extensive detail and often quote emails and other documents. Because direct evidence of what happened has been so lacking it has been important to refer at some length to the emails, briefs and other documents to explain how the Commission has reached its conclusions.

The next part of the report is concerned with the Scheme's impact on those income support recipients to whom it was directed and also with the effects on DHS staff of having to administer it. Then there is a chapter which makes clear the Scheme's economic costs, including the unreality of its projected savings, the costs of administering it, the costs of seeking expert assistance to try to remedy its failings, the costs of inquiries into it, including this one, and the costs of settling the class action and cancelling those debts based on averaging.

What follows is some description and discussion of automated decision making and data matching, both of which were features of the Scheme, and a chapter which is concerned with the debt recovery processes used.

The following section of the report deals with what might loosely be described as the checks and balances which might have operated to prevent the Scheme's continuation, but did not or could not: the parts played by the lawyers involved, the Administrative Appeals Tribunal, the Commonwealth Ombudsman and the Office of the Australian Information Commissioner.

There is then a chapter with some modest proposals concerning the Australian Public Service, followed by my conclusions.

Use of language

The Commission has tried, as far as possible, to avoid falling into what, without wishing to offend, might be called public service jargon. It has, however, had to resort to the use of acronyms because the report would be considerably longer if, for example, every time the Department of Social Services were referred to, its name had to be set out in full.

One term which appears throughout the report is "recipient" to signify people who, during the Robodebt Scheme, were receiving benefit or pension or had formerly received benefit or pension. The departmental word is "customer" but since the experience of those individuals during the Scheme had so little to do with service it seemed appropriate to adopt a different term. The term "recipient" has been adopted in respect

of both past and former recipients except where it was relevant to distinguish between them (because, for example, some debt recovery methods can only be applied against former recipients).

Although in this chapter and the closing chapter I have occasionally spoken directly, most of the report is not written in the first person. The usual mode of expression is "the Commission finds." Under the terms of reference I am, in fact, the Royal Commission, an odd state of being, so that reference is to me. Of course, during the work of the Commission, the term has referred to the collective work of the Commission's legal, research and administrative teams.

Finally on the subject of language, the Commission staff are not to be blamed for the archaic forms of syntax "a number of people was" and use of the subjunctive "if he were" throughout the report. That is my doing; my staff did their best to correct what they were convinced were errors, only to have me stubbornly reinsert them. (I have grudgingly succumbed to the use of "their" in the singular.)

Terms of reference

ACKNOWLEDGING the harm caused to affected members of the Australian community by the debt assessment and recovery scheme known as Robodebt (the Robodebt scheme) which reportedly comprised, from 1 July 2015, the PAYG Manual Compliance Intervention program, including associated pilot programs from early 2015 to 30 June 2015, and the following iterations of this program:

a. Online Compliance Intervention, which applied to assessments initiated in the period from on or around 1 July 2016 to on or around 10 February 2017;

b. Employment Income Confirmation, which applied to assessments initiated in the period from on or around 11 February 2017 to on or around 30 September 2018;

c. Check and Update Past Income, which applied to assessments initiated after on or around 30 September 2018

AND that:

d. in November 2019 the Federal Court of Australia declared, with the consent of the Australian Government, that a demand for payment of an alleged debt under the Robodebt scheme was not validly made; and

e. the Australian Government had adopted the same or a similar approach in calculating and raising debts against hundreds of thousands of other individuals under the Robodebt scheme; and

f. the Australian Government subsequently announced that over 400,000 debts raised under the Robodebt scheme would be zeroed or repaid.

NOW THEREFORE We do, by these Our Letters Patent issued in Our name by Our Governor-General of the Commonwealth of Australia on the advice of the Federal Executive Council and under the Constitution of the Commonwealth of Australia, the Royal Commissions Act 1902 and every other enabling power, appoint you to be a Commission of inquiry, and require and authorise you to inquire into the following matters:

g. the establishment, design and implementation of the Robodebt scheme, including:

   i. who was responsible for its design, development and establishment; and

   ii. why those who were responsible for its design, development and establishment considered the Robodebt scheme necessary or desirable; and

   iii the advice, process or processes that informed its design and implementation; and

   iv any concerns raised regarding the legality or fairness of the Robodebt scheme;

h. the use of third party debt collectors under the Robodebt scheme;

i. in relation to concerns raised about the Robodebt scheme following its implementation:

   i. how risks relating to the Robodebt scheme were identified, assessed and managed by the Australian Government in response to concerns raised by the Australian Taxation Office, other departments and agencies, affected individuals and other people and entities; and

   ii. the systems, processes and administrative arrangements that were in place to handle complaints about the Robodebt scheme from members of the public affected by the scheme, their representatives or government officials and staff; and

   iii. whether complaints were handled in accordance with those systems, processes and administrative arrangements, and, in any event, handled fairly; and

iv. how the Australian Government responded to adverse decisions made by the Administrative Appeals Tribunal; and

v. how the Australian Government responded to legal challenges or threatened legal challenges; and

vi. approximately when the Australian Government knew or ought to have known that debts were not, or may not have been, validly raised; and

vii. whether the Australian Government sought to prevent, inhibit or discourage scrutiny of the Robodebt scheme, whether by moving departmental or other officials or otherwise;

j. the intended and actual outcomes of the Robodebt scheme, in particular:

i. the kinds of non-pecuniary impacts the scheme had on individuals, particularly vulnerable individuals, and their families; and

ii. the approximate total cost of implementing, administering, suspending and winding back the Robodebt scheme, including costs incidental to those matters (such as obtaining external advice and legal costs);

AND We direct you to make any recommendations arising out of your inquiry that you consider appropriate, including measures needed to prevent a recurrence of any failures of public administration you identify.

AND, without limiting the scope of your inquiry or the scope of any recommendations arising out of your inquiry that you may consider appropriate, We direct you, for the purposes of your inquiry and recommendations, to focus on decisions and actions taken, or not taken, by those in positions of seniority.

AND We further declare that you are not required by these Our Letters Patent to inquire, or to continue to inquire, into a particular matter to the extent that you are satisfied that the matter has been, is being, or will be, sufficiently and appropriately dealt with by another inquiry or investigation or a criminal or civil proceeding.

AND We declare that you are a relevant Commission for the purposes of sections 4 and 5 of the Royal Commissions Act 1902.

AND We declare that you are a Royal Commission to which item 5 of the table in subsection 355-70(1) in Schedule 1 to the Taxation Administration Act 1953 applies.

AND We:

k. require you to begin your inquiry as soon as practicable; and

l. require you to make your inquiry as expeditiously as possible; and

m. require you to ensure the inquiry is conducted in a professional, impartial, respectful and courteous manner, including appropriately managing any actual or perceived conflicts of interest; and

n. require you to submit to Our Governor-General any recommendations that you make before making them public; and

o. require you to submit to Our Governor-General a report of the results of your inquiry, and your recommendations, not later than 30 June 2023[11].

1 Commonwealth of Australia, Parliamentary Debates, House of Representatives: Official Hansard, 11 June 2020, p3930.
2 Kioa v West (1985) 159 CLR 550, 585.
3 Non-publication direction number 22.
4 Briginshaw v Briginshaw (1938) 60 CLR 336.
5 Parliamentary Privilege 1987 (Cth) s 16(3).
6 Parliamentary Privilege 1987 (Cth) s 16(2).
7 See, eg, Sankey v Whitlam (1978) 142 CLR 1, 35 (Gibbs ACJ).
8 See, eg, Sankey v Whitlam (1978) 142 CLR 1, 35 (Gibbs ACJ); Amann Aviation Pty Ltd v Commonwealth of Australia (1988) 19 FCR 223, 232 (Beaumont J).
9 See, eg, Australian National Audit Office, Management of Selected Fraud Prevention and Compliance Budget Measures (Report No 41, 28 February 2017); The Senate Standing Committee on Community Affairs References Committee, Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative (Report, 21 June 2017); The Senate Standing Committee on Community Affairs References Committee, Centrelink's compliance program (Interim report, February 2020); The Senate Standing Committee on Community Affairs References Committee, Centrelink's compliance program (Second interim report, September 2020); The Senate Standing Committee on Community Affairs References Committee, Centrelink's compliance program (Third interim report, September 2020); Senate Standing Committee on Community Affairs References Committee, Centrelink's compliance program (Fourth interim report, August 2021); Senate Standing Committee on Community Affairs References Committee, Centrelink's compliance program (Fifth interim report, November 2021); Senate Standing Committee on Community Affairs References Committee, Accountability and justice: Why we need a Royal Commission into Robodebt (Final report, May 2022).
10 See, eg, Exhibit 1-1229 – DSS.5003.0001.1185_R – Advice on provision to Media ANAO audit of Fraud Prevention and Compliance Initiatives in Human Services report changes; Exhibit 1-1230 – CTH.3009.0022.4949 – Embargoed Draft A4 – ANAO Report No. 41 2016-17 Management of Selected Fraud Prevention and Compliance Budget Measures.pdf; Exhibit 1-1234 – RBD.999.0001.0001 – Budget Measures 2015-16.
11 Amended Letters Patent, issued 16 February 2023.

List of Recommendations

The following is a list of 57 recommendations of this Commission. Recommendations have been grouped and numbered according to the chapter in which they appear.

Effects of Robodebt on individuals

Recommendation 10.1: Design policies and processes with emphasis on the people they are meant to serve

Services Australia design its policies and processes with a primary emphasis on the recipients it is meant to serve. That should entail:

- avoiding language and conduct which reinforces feelings of stigma and shame associated with the receipt of government support when it is needed
- facilitating easy and efficient engagement with options of online, in person and telephone communication which is sensitive to the particular circumstances of the customer cohort, including itinerant lifestyles, lack of access to technology, lack of digital literacy and the particular difficulties rural and remote living
- explaining processes in clear terms and plain language in communication to customers, and

acting with sensitivity to financial and other forms of stress experienced by the customer cohort and taking all practicable steps to avoid the possibility that interactions with the government might exacerbate those stresses or introduce new ones.

The concept of vulnerability

Recommendation 11.1: Clear documentation of exclusion criteria

Services Australia should ensure that for any cohort of recipients that is intended to be excluded from a compliance process or activity, there is clear documentation of the exclusion criteria, and, unless there is a technical reason it cannot be, the mechanism by which that is to occur should be reflected in the relevant technical specification documents.

Recommendation 11.2: Identification of circumstances affecting the capacity to engage with compliance activity

Services Australia should ensure that its processes and policies in relation to the identification of potential vulnerabilities extend to the identification of circumstances affecting a recipient's capacity to engage with any form of compliance activity. To this end, circumstances likely to affect a recipient's capacity to engage with compliance activities should be recorded on their file regardless of whether they are in receipt of a payment that gives rise to mutual obligations.

Recommendation 11.3: Engagement prior to removing a vulnerability indicator from a file

Services Australia should ensure that its processes and policies in relation to the identification of potential vulnerabilities require staff to engage with a recipient prior to the removal of an indicator on their file. For this purpose, Services Australia should remove any feature that would allow for the automatic expiry of a vulnerability indicator (or equivalent flagging tool). An indicator should only be removed where a recipient, or evidence provided to the Agency in relation to the recipient, confirms that they are no longer suffering from the vulnerability to which the indicator relates.

Recommendation 11.4: Consideration of vulnerabilities affected by each compliance program, including consultation with advocacy bodies

Services Australia should incorporate a process in the design of compliance programs to consider and document the categories of vulnerable recipients who may be affected by the program, and how those recipients will be dealt with. Services Australia should consult stakeholders (including peak advocacy bodies) as part of this process to ensure that adequate provision is made to accommodate vulnerable recipients who may encounter particular difficulties engaging with the program.

The roles of advocacy groups and legal services

Recommendation 12.1: Easier engagement with Centrelink

Options for easier engagement with Centrelink by advocacy groups – for example, through the creation of a national advocates line – should be considered.

Recommendation 12.2: Customer experience reference group

The government should consider establishing a customer experience reference group, which would provide streamlined insight to government regarding the experiences of people accessing income support.

Recommendation 12.3: Consultation

Peak advocacy bodies should be consulted prior to the implementation of projects involving the modification of the social security system.

Recommendation 12.4: Regard for funding for legal aid commissions and community legal centres

When it next conducts a review of the National Legal Assistance Partnership, the Commonwealth should have regard, in considering funding for legal aid commissions and community legal centres, to the importance of the public interest role played by those services as exemplified in their work during the Scheme.

Experiences of Human Services employees

Recommendation 13.1: Consultation process

Services Australia should put in place processes for genuine and receptive consultation with frontline staff when new programs are being designed and implemented.

Recommendation 13.2: Feedback processes

Better feedback processes should be put in place so that frontline staff can communicate their feedback in an open and consultative environment. Management should have constructive processes in place to review and respond to staff feedback.

Recommendation 13.3: "Face-to-face" support

More "face-to-face" customer service support options should be available for vulnerable recipients needing support.

Recommendation 13.4: Increased number of social workers

Increased social worker support (for both recipients and staff), and better referral processes to enable this support, should be implemented.

Failures in the Budget process

Recommendation 15.1: Legislative change better defined in New Policy Proposals

The Budget Process Operational Rules should include a requirement that all New Policy Proposals contain a statement as to whether the proposal requires legislative change in order to be lawfully implemented, as distinct from legislative change to authorise expenditure.

Recommendation 15.2: Include legal advices with New Policy Proposals

The Budget Process Operational Rules should include a requirement that any legal advice (either internal or external) relating to whether the proposal requires legislative change in order to be implemented be included with the New Policy Proposal in any versions of the Portfolio Budget Submission circulated to other agencies or Cabinet ministers.

Recommendation 15.3: Australian Government Solicitor statement in the NPP

The Budget Process Operational Rules should include a requirement that where legal advice has been given in relation to whether the proposal requires legislative change in order to be implemented, the New Policy Proposal includes a statement as to whether the Australian Government Solicitor has reviewed and agreed with the advice.

Recommendation 15.4: Standard, specific language on legal risks in the NPP

The standard language used in the NPP Checklist should be sufficiently specific to make it obvious on the face of the document what advice is being provided, in respect of what legal risks and by whom it is being provided.

Recommendation 15.5: Documented assumptions for compliance Budget measures

That in developing compliance Budget measures, Services Australia and DSS document the basis for the assumptions and inputs used, including the sources of the data relied on.

Recommendation 15.6: Documentation on the basis for assumptions provided to Finance

That in seeking agreement from Finance for costings of compliance Budget measures, Services Australia and DSS provide Finance with documentation setting out the basis for the assumptions and inputs used, including related data sources, to allow Finance to properly investigate and test those assumptions and inputs.

Data-matching and exchanges

Recommendation 16.1: Legal advice on end-to-end data exchanges

The Commonwealth should seek legal advice on the end-to-end data exchange processes which are currently operating between Services Australia and the ATO to ensure they are lawful.

Recommendation 16.2: Review and strengthen governance of data-matching programs

The ATO and DHS should take immediate steps to review and strengthen their operational governance practices as applied to jointly conducted data-matching programs. This should include:

- reviews to ensure that all steps and operations relating to existing or proposed data-matching programs are properly documented
- a review of all existing framework documents for existing or proposed data-matching programs
- a review of the operations of the ATO/DHS Consultative Forum and the ATO/DHS Data Management Forum
- a review of the existing Head Agreement/s, Memoranda of Understanding and Services Schedule
- a joint review of any existing or proposed data-matching program protocols to ensure they are legally compliant in respect of their provision for the data exchanges contemplated for the relevant data-matching program.

Automated decision making

Recommendation 17.1: Reform of legislation and implementation of regulation

The Commonwealth should consider legislative reform to introduce a consistent legal framework in which automation in government services can operate.

Where automated decision-making is implemented:

- there should be a clear path for those affected by decisions to seek review
- departmental websites should contain information advising that automated decision-making is used and explaining in plain language how the process works
- business rules and algorithms should be made available, to enable independent expert scrutiny.

Recommendation 17.2: Establishment of a body to monitor and audit automated decision-making

The Commonwealth should consider establishing a body, or expanding an existing body, with the power to monitor and audit automate decision-making processes with regard to their technical aspects and their impact in respect of fairness, the avoiding of bias, and client usability.

Debt recovery and debt collectors

Recommendation 18.1: Comprehensive debt recovery policy for Services Australia

Services Australia should develop a comprehensive debt recovery management policy which among other things should incorporate the Guideline for Collectors and Creditors' issued by the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC). Examples of such documents already exist at both federal and state levels. Any such policy should also prescribe how Services Australia undertakes to engage with debtors, including that staff must:

- ensure any debt recovery action is always ethical, proportionate, consistent and transparent
- treat all recipients fairly and with dignity, taking each person's circumstances into account before commencing recovery action
- subject to any express legal authority to do so, refrain from commencing or continuing recovery action while a debt is being reviewed or disputed, and
- in accordance with legal authority, consider and respond appropriately and proportionately to cases of hardship.

Services Australia should ensure that recipients are given ample and appropriate opportunities to challenge, review and seek guidance on any proposed debts before they are referred for debt recovery.

Recommendation 18.2: Reinstate the limitation of six years on debt recovery

The Commonwealth should repeal s 1234B of the Social Security Act and reinstate the effective limitation period of six years for the bringing of proceedings to recover debts under Part 5.2 of the Act formerly contained in s 1232 and s 1236 of that Act, before repeal of the relevant sub-sections by the *Budget Savings (Omnibus) Act (No 55) 2016* (Cth). There is no reason that current and former social security recipients should be on any different footing from other debtors.

Lawyers and legal services

Recommendation 19.1: Selection of chief counsel

The selection panel for the appointment of chief counsel of Services Australia or DSS (chief counsel being the head of the entity's legal practice) should include as a member of the panel, the Australian Government Solicitor.

Recommendation 19.2: Training for lawyers – Services Australia

Services Australia should provide regular training to its in-house lawyers on the core duties and responsibilities set out in the Legal Practice Standards, including:

- an emphasis on the duty to avoid any compromise to their integrity and professional independence and the challenges that may be presented to a government lawyer in fulfilling that obligation.
- appropriate statutory and case authority references in advice writing.

Recommendation 19.3: Legal practice standards – Social Services

DSS should develop Legal Practice Standards which set out the core duties and responsibilities of all legal officers working at DSS.

Recommendation 19.4: Training for lawyers – Social Services

DSS should provide regular training on the core duties and responsibilities to be set out in the Legal Practice Standards which should include:

an emphasis on the duty to avoid any compromise to their integrity and professional independence and the challenges that may be presented to a government lawyer in fulfilling that obligation appropriate statutory and case authority references in advice writing

Recommendation 19.5: Draft advice – Social Services

DSS should issue a further direction providing that, if the administering agency decides that a draft advice need not be provided in final form, that decision and the reasons for it must be documented. One of those steps – finalisation, or a documented decision against finalisation – should have been taken within three months of the receipt of the draft advice.

Recommendation 19.6: Draft advice – Services Australia

Services Australia should issue a direction that legal advice is to be left in draft form only to the extent that the administrative step of finalising it has not yet been undertaken by lawyers or there are remaining questions to be answered in relation to the issues under consideration and that, if the administering agency decides that a draft advice need not be provided in final form, that decision and the reasons for it must be documented. One of those steps – finalisation, or a documented decision against finalisation – should have been taken within three months of the receipt of the draft advice.

Recommendation 19.7: The Directions 1

The Legal Services Directions 2017 should be reviewed and simplified.

Recommendation 19.8: Office of Legal Services Coordination to assist agencies with significant issues reporting

The OLSC should provide more extensive information and feedback to assist agencies with the significant legal issues process.

Recommendation 19.9: Recording of reporting obligations

The OLSC should ensure a documentary record is made of substantive inquiries made with and responses given by agencies concerning their obligations to report significant issues pursuant to para 3.1 of the Directions.

Recommendation 19.10: The Directions 2

The OLSC should issue guidance material on the obligations to consult on and disclose advice in clause 10 of the Legal Services Directions 2017.

Recommendation 19.11: Resourcing the Office of Legal Services Coordination

The OLSC should be properly resourced to deliver these functions.

Recommendation 19.12: Chief counsel

The Australian Government Legal Service's General Counsel Charter be amended to place a positive obligation on chief counsel to ensure that the Legal Services Directions 2017 (Cth) are complied with and to document interactions with OLSC about inquiries made, and responses given, concerning reporting obligations under those Directions.

Recommendation 19.13: Review of the Bilateral Management Agreement

The revised Bilateral Management Agreement should set out the requirement to consult on and disclose legal advices between the two agencies where any intersection of work is identified.

Administrative Appeals Tribunal

Recommendation 20.1: AAT cases with significant legal and policy issues

Services Australia should put in place a system for identifying AAT1 cases which raise significant legal and policy issues and ensuring that they are brought to the attention of senior DSS and Services Australia officers.

Recommendation 20.2: Training for DHS legal officers

Services Australia legal officers whose duties involve the preparation of advices in relation to AAT1 decisions should receive training which emphasises the requirements of the Standing Operational Statements in relation to appeal recommendations and referral to DSS; Services Australia's obligations as a model litigant; and the obligation to pay due regard to AAT decisions and directions.

Recommendation 20.3: Identifying significant AAT decisions

DSS should establish, or if it is established, maintain, a system for identifying all significant AAT decisions and bringing them to the attention of its secretary.

Recommendation 20.4: Publication of first instance AAT decisions

The federal administrative review body which replaces the AAT should devise a system for publication on a readily accessible platform of first instance social security decisions which involve significant conclusions of law or have implications for social security policy.

Recommendation 20.5: Administrative Review Council

Re-instate the Administrative Review Council or a body with similar membership and similar functions, with consideration given to a particular role in review of Commonwealth administrative decision-making processes.

The Commonwealth Ombudsman

Recommendation 21.1: Statutory duty to assist

A statutory duty be imposed on departmental secretaries and agency chief executive officers to ensure that their department or agency use its best endeavours to assist the Ombudsman in any investigation concerning it, with a corresponding statutory duty on the part of Commonwealth public servants within a department or agency being investigated to use their best endeavours to assist the Ombudsman in the investigation.

Recommendation 21.2: Another power to obtain information

The Ombudsman Act be amended to confer on the Ombudsman a power in equivalent terms to that in s 33(3) of the Auditor-General Act.

Recommendation 21.3: Oversight of the legal services division

Departmental and agency responses to own motion investigations by the Ombudsman should be overseen by the legal services division of the relevant department or agency.

Recommendation 21.4: Log of communications

The Ombudsman maintain a log, recording communications with a department or agency for the purposes of an own motion investigation.

Recommendation 21.5: Powers of referral

The AAT is soon to be replaced by a new administrative review body. S 10A and s 11 of the Ombudsman Act should be amended so as to ensure the Ombudsman has the powers of referral and recommendation of referral in respect of that new administrative review body.

Improving the Australian Public Service

Recommendation 23.1: Structure of government departments

The Australian Government should undertake an immediate and full review to examine whether the existing structure of the social services portfolio, and the status of Services Australia as an entity, are optimal.

Recommendation 23.2: Obligations of public servants

The APSC should, as recommended by the Thodey Review, deliver whole-of-service induction on essential knowledge required for public servants.

Recommendation 23.3: Fresh focus on "customer service"

Services Australia and DSS should introduce mechanisms to ensure that all new programs and schemes are developed with a customer centric focus, and that specific testing is done to ensure that recipients are at the forefront of each new initiative.

Recommendation 23.4: Administrative Review Council

The reinstated Administrative Review Council (or similar body) should provide training and develop resources to inform APS members about the Commonwealth administrative law system. (see Automated Decision-Making and the Administrative Appeals Tribunal chapters)

Recommendation 23.5: "Knowledge College"

The Commonwealth should explore the feasibility of establishing an internal college within Services Australia to provide training and development to staff linked to the skills and knowledge required to undertake their duties.

Recommendation 23.6: Front-line Service

SES staff at Services Australia should spend some time in a front-line service delivery role and with other community partnerships.

Recommendation 23.7: Agency heads being held to account

The Public Service Act should be amended to make it clear that the Australian Public Service Commissioner can inquire into the conduct of former Agency Heads. Also, the Public Service Act should be amended to allow for a disciplinary declaration to be made against former APS employees and former Agency Heads.

Recommendation 23.8: Documenting decisions and discussions

The Australian Public Service Commission should develop standards for documenting important decisions and discussions, and the delivery of training on those standards.

Closing observations

Section 34 of the Cth FOI Act should be repealed

The Commonwealth Cabinet Handbook should be amended so that the description of a document as a Cabinet document is no longer itself justification for maintaining the confidentiality of the document. The amendment should make clear that confidentiality should only be maintained over any Cabinet documents or parts of Cabinet documents where it is reasonably justified for an identifiable public interest reason.

Overview of Robodebt

There are different mindsets one can adopt in relation to social welfare policy. One is to recognise that many citizens will at different times in their lives need income support - on a temporary basis for some as they study or look for work; longer-term for others, for reasons of age, disadvantage or disability - and to provide that support willingly, adequately and with respect. An alternative approach is to regard those in receipt of social security benefits as a drag on the national economy, an entry on the debit side of the Budget to be reduced by any means available: by casting recipients as a burden on the taxpayer, by making onerous requirements of those who are claiming or have claimed benefit, by minimising the availability of assistance from departmental staff, by clawing back benefits whether justly or not, and by generally making the condition of the social security recipient unpleasant and undesirable. The Robodebt scheme exemplifies the latter.

This chapter is a broad reflection on the scheme: how and why it came into being, how it operated and why it continued to operate, and what was wrong with it. Later chapters give more detail and explanation.

In September 2013, the Liberal-National Coalition, led by the Hon Tony Abbott MP, won government. Interviewed by the *Australian Financial Review* in December 2012, Mr Abbott had made some expectations clear, in what the writer described as a "blunt warning to public servants:"

> Because what normally happens is that a government comes in, they've got all these policies and they rely for the implementation on the public service … There's nothing wrong with that as such, but what I'd like to be able to say to the public service is, 'Look, this is how we think it needs to be done'. Rather than relying on them to tell us, I'd like to be in a position to tell them on day one.
>
> The executive government depends on the public service for its administration, but the more authoritatively the government of the day can speak to the public service, the more likely it is that the public service will administer your policy in a way which recognises its spirit and its letter.

Budget control and debt reduction had been second in the Coalition's list of policy priorities in its election manifesto. Consistent with that policy, in July 2014 the Hon Kevin Andrews MP, the Minister responsible for the Department of Social Services (DSS), proposed the setting up of an interdepartmental committee to develop a whole-of-government strategy for recovery of debt owed by members of the public to the Australian Government. The terms of reference included examining data matching, using online and self-servicing options, using external debt collection agencies and applying a standardised interest charge to debts. And in relation to welfare services, in January 2015 the newly-appointed Minister for Social Services, Mr Morrison described himself in an interview as planning to be a "strong welfare cop on the beat;" because Australians were

> "not going to cop people who are going to rort [the social security] system."

It was in this climate that the essential features of the Robodebt scheme were conceived by employees of the Department of Human Services (DHS), were put by way of an Executive Minute in February 2015 to the Minister for Human Services, Senator the Hon Marise Payne, and to Mr Morrison as Minister for Social Services. Approved by the latter, they made their way in the form of a New Policy Proposal (NPP) through Cabinet with remarkable speed. In May 2015, as part of its 201516 Budget, the government adopted a measure named Strengthening the Integrity of Welfare Payments. Described as a package for "enhancing ... fraud prevention and debt recovery and improving assessment processes" in relation to the payment of social security benefits, it was expected to save $1.7 billion over five years. Most of those savings were to come from the Employment Income Matching measure, the initiative which began Robodebt, which was proposed to recover overpayments resulting from incorrect declarations of income. Another measure in the package, titled "Taskforce Integrity", involved the secondment of Australian Federal Police officers and was designed to crack down on welfare fraud. The two were often, and not coincidentally, mentioned in the same breath.

In summary, the Employment Income Matching measure entailed a process of data-matching and debt raising to be applied to some 866,857 instances of possible overpayment for the financial years 201011, 201112 and 201213 identified through a comparison of Australian Taxation Office ("ATO") and DHS data. DHS would obtain information from the ATO as to what a benefit recipient's employers had returned as the income earned by the recipient in the relevant financial year ("PAYG data"), compare it through an automated system with what had been declared to DHS by the recipient, and in the event of discrepancy would require the recipient to go online to explain it.

If the recipient did not respond or provide details which explained the discrepancy, or agreed with the PAYG data, the amount declared by the employer would be averaged across a period of time, which was often whatever employment period the employer had indicated. The system applied some rules which attempted to account for the varied circumstances of income support recipients; however, the basic premise was that the amount declared by the employer would be divided up evenly, and allocated into the number of fortnights included in the period being reviewed. (That process was variously referred to income "averaging", "smoothing" or "apportioning".)

Where, in any given fortnight, the averaged fortnightly amount exceeded the income the recipient was entitled to receive before reduction of benefit, it would be taken that there had been an overpayment, a debt would be raised accordingly and steps would be taken to recover it. Where the recipient was still on benefit, deductions would be made from the income support currently being paid. Where the recipient was no longer on benefit, they would be required to enter a repayment arrangement. Debt collectors would be involved if they did not respond, and they were liable to have any income tax refund they were entitled to receive garnished. Robodebt began with some pilots in 2015, was rolled out with its online platform in September 2016 and continued in various iterations for four years.

In a broad sense, certain elements of the Robodebt scheme were not new. DHS had for some years undertaken data-matching with the ATO to identify discrepancies between employer-reported and recipient-declared income. In the past, such discrepancies had served as a trigger for a manual review of those files exhibiting the strongest likelihood of overpayment and the highest levels of discrepancy (about 20,000 such files a year). Those reviews involved a DHS compliance officer checking the file for relevant information, contacting the recipient to see if any discrepancy could be readily reconciled and, if not, requiring their employers to provide more specific payment information. The raising of a debt and its recovery might then follow.

There were five significant differences under Robodebt.

The first and major difference was that the PAYG data was to be regarded as the primary source of earned income information, which could be acted on to raise debts although unconfirmed by the employer or the recipient.

Secondly, where in the past compliance officers had engaged with recipients, examined the file and used powers under the Act to seek information from employers in order to determine whether a debt existed, now recipients were given a gross income figure with a period which might or might not accurately reflect the period worked, with the onus placed on them to provide details to contradict it, or have a debt and, prospectively, a 10 per cent penalty automatically raised against them.

Thirdly, where averaging had previously been used to arrive at a fortnightly income figure in limited circumstances and often with the agreement of the recipient that it gave a figure which reflected his or her actual income, the PAYG data averaged on a fortnightly basis for the declared period was now applied automatically where alternative information was not provided and accepted. That was despite the fact that entitlement to income support was to be determined under the *Social Security Act 1991* by reference to the actual fortnightly income of the recipient, and it could not safely be assumed that recipients earned precisely the same amounts each fortnight they worked or that they worked every fortnight during the period nominated by an employer (which did not need to be more precisely stated than the relevant financial year). In basing entitlement on actual fortnightly income, the *Social Security Act* reflected the policy aim of social welfare payments: to support people in their periods of real need so that a recipient who earned little or nothing in a given fortnight would be assisted then.

Fourthly, critical to achieving the predicted savings, where previously compliance officers had been involved, it was now anticipated that in most instances the entire process would be conducted online, the aim being to reduce (and preferably obviate) human involvement at the DHS end.

The fifth and final difference: where data-matching and consequent reviews had in the past been conducted on an annual basis, now recovery efforts would be directed over several years, going back some five years from the implementation of the program. (The measure was extended to include the 2013-14 and 2014-15 financial years in the 2015 MYEFO, and the 2015-16, 2016-17 and 2017-18 years in the 2016-17 MYEFO.) This seems to have been based on a notion that because discrepancies in the hundreds of thousands had been identified in previous financial years there must also be debts in the hundreds of thousands of dollars in those years awaiting recovery; ignoring the facts, firstly, that a discrepancy did not necessarily indicate an overpayment and secondly, that the 20,000 or so files involving discrepancy which had already been reviewed for each of those years had probably already yielded the bulk, in monetary terms, of the overpayments in those years.

In late 2014, in response to DHS's initial canvassing of the Robodebt concept, DSS had obtained an opinion from its employed "in-house" lawyers. Their advice had emphasised the requirement in the statutory benefit entitlement rate calculators to consider actual fortnightly earning or receipt of income, expressing concern that averaging might, therefore, not be consistent with the legislative framework. A policy advice given at the same time similarly pointed out that calculation by averaging did not accord with the legislation and a debt amount calculated in that way might be wrong.

In February the following year, DHS officers provided the Ministers for Social Services and Human Services with the Executive Minute containing a number of proposals including Employment Income Matching (Robodebt). It pointed out that (consistently with its 2014 advice) DSS had advised policy change might be, and legislative change would be, needed to implement the Employment Income Matching initiative. On 20 February 2015, Mr Morrison signed the Minute, indicating his agreement that initiatives including Employment Income Matching be developed as a package of NPPs and that DHS work with DSS to advance consideration of the necessary policy and legislative change.

By 3 March 2015 an NPP reflecting the Employment Income Matching initiative had been prepared for inclusion in an exposure draft of a Social Security Portfolio Budget Submission. It contained no reference to legal risks and said that legislation was not required. The Scheme was approved by Cabinet and proceeded without the legislative change to support averaging which DSS had said was needed. That awkward question was avoided in the NPP by the simple expedient of not mentioning averaging and saying instead, falsely, that the new approach would not change how income was assessed or payments calculated.

Given that it was still proposed to undertake 866,857 compliance reviews (or "interventions") for the 201013 financial years producing gross savings of $1.1 billion (as compared with an estimated $1.2 billion in the Executive Minute) and given the speed with which the NPP was developed and approved for presentation to Cabinet, it is not credible that anyone closely involved with the measure could have believed that there had been some fundamental change to the proposal so that it no longer entailed averaging or for some other reason ceased to require legislative change. It is worth considering for a moment what legislative change to enable the reliance on averaging inherent in the Robodebt scheme would have entailed: a retrospective change to the statutory basis on which social security recipients had been entitled to receive, and had received, income support going back years. It would certainly have encountered parliamentary and public opposition.

The use of averaging was by no means the only in the Robodebt scheme. No consideration seems to have been given to the legal basis on which DHS could ask recipients to provide information in response to it. The letters sent to recipients during the various iterations of the program used language indicating that a response was required, not just requested ("You need to tell us …") but they were not said to be notices from the secretary of DHS requiring information under any of the provisions of the *Social Security (Administration) Act* which enabled information to be obtained in that way. Similarly, there is no evidence that any thought was given to the grounds on which a penalty of 10 per cent (euphemistically called a

"recovery fee") was added to the debts raised against recipients. In subsequent internal legal advice, there seems to have been an assumption that if averaging resulted in a debt, it could be assumed that the recipient must have failed to inform DHS of a change in their income. That was an extraordinary assumption. The notion that averaging without more could prove a debt was unsound in the first place, but to charge a penalty required a conclusion that the recipient had committed a breach of the *Social Security (Administration) Act* by failing to report a change in income, and required correspondingly compelling evidence to justify it. That seems not to have crossed anyone's mind.

Those were respects in which the Scheme was devised without regard to the social security law. More fundamentally, the way averaging was used in the Scheme was essentially unfair, treating many people as though they had received income at a time when they had not, and did not need support when they did, with the further fiction that they now owed something back to the government. It subverted the rationale on which income support was provided in the first place: as a safety net to ensure that people received help when they most needed it.

There were other fundamental unfairnesses in the program. No regard was had to the sheer unreasonableness of placing the onus on recipients to attempt to establish what their earnings were for periods going back as long as five years when they had been given no reason to expect anything of the kind at the time they declared their income and received their benefits. (DHS's own website, at least at the start of the Robodebt scheme, contained the information that it was necessary to retain payslips only for a period of six months.) Some recipients were unable to produce payslips because employers had gone out of business or were unhelpful. Others were reluctant to approach employers for a variety of reasons, including poor relations with them, an unwillingness to trouble them, or embarrassment at having to disclose receipt of welfare benefits.

The system was set up with the intention of forcing recipients to respond online to the PAYG data and to minimise contact with DHS officers, in the interests of economy; this was vital to the anticipated savings. (Indeed, having had the benefit of "behavioural insights," DHS employees setting up the system made a conscious decision not to include any telephone number for the Customer Compliance division in the letters sent to recipients, so as to force them to respond online, while compliance officers were told to direct recipients online.) No outside parties with an interest in welfare were consulted in order to understand how the Scheme might actually affect people. There appears to have been an obliviousness to, or worse a callous disregard, of the fact that many welfare recipients had neither the means nor the ability to negotiate an online system. The effect on a largely disadvantaged, vulnerable population of suddenly making demands on them for payment of debts, often in the thousands of dollars, seems not to have been the subject of any behavioural insight at all.

Some of the difficulties in the system in its initial online iteration (the Online Compliance Intervention (OCI)) were the result of its being put into operation in haste, rather than conscious decision-making. A pilot and a manual version of the program were conducted in 2015, using manual rather than automated intervention but relying on the PAYG data to raise a debt in the absence of a response. The online component of the Scheme was the subject of a limited release in July 2016, but it was fully rolled out in September of that year although no proper evaluation of the pilot or manual program had taken place and there were numbers of unresolved problems. The system sometimes deleted details of previously declared income; there were failures in employer name matches which led to wrong duplication of earnings; particular allowances and payments were wrongly treated. No user testing had been done on the screens presented to recipients when they responded to the DHS initial letter; that was supposed to be done in 2017. Recipients had difficulty uploading data and from time to time the platform went down altogether. It was not just recipients who struggled with the system; so did DHS compliance officers.

Other problems were inevitable. Former recipients were contacted through the addresses held for them on DHS records – a postal address or a myGov account – although, since the debts went back some years, they might well have moved away or ceased to monitor their myGov account for any Centrelink notices. Their inevitable failure to respond resulted in income averaging being applied and debts raised against them. The 2015 pilots showed that only about 40 per cent of customers were making contact. On

that evidence it could reasonably be expected that a majority of recipients would, when the automated system began, be the subject of automated debt raising using averaging because they did not receive the notifications, did not understand what they needed to do, or thought their dealings with Centrelink were long past. Others did log on and, as the initial letter instructed, confirmed the information presented – the employer's name and the amount of earnings in the period nominated by the employer – on the basis that it did represent their income for the financial year in question. They were given no warning that their answer would then be used to raise a debt against them by way of averaging over the employer-nominated period, often the entire financial year, even where they had worked for shorter periods. (DHS's own figures showed that as at 27 January 2017, 76 per cent of those who were subject to the OCI had debts raised based on averaging of their earnings: 99,404 recipients). And no-one could understand how the debts were calculated, because the debt notices gave no explanation.

The disastrous effects of Robodebt became apparent soon after it moved, in September 2016, from the last part of the limited release, involving around 1000 recipients, to sending out 20,000 notifications per week. In December 2016 and January 2017 the media, traditional and social, were saturated with articles about people who had had demonstrably wrong debts raised against them, and in many instances heard of it first when contacted by debt collectors. The human impacts of Robodebt were being reported: families struggling to make ends meet receiving a debt notice at Christmas, young people being driven to despair by demands for payment, and, horribly, an account of a young man's suicide. The Australian Council of Social Services, the peak body for community services supporting recipients, wrote to the Minister for Human Services in December 2016, pointing out the inaccuracies which were being produced by averaging instead of applying actual fortnightly income figures, the unfairness of charging a penalty where it was not established that a recipient had even been contacted, the difficulty for people in recovering information from employment years past, the technical difficulties with the online system, the lack of assistance from Centrelink officers and the commencing of debt collection often without warning to the recipient.

The beginning of 2017 was the point at which Robodebt's unfairness, probable illegality and cruelty became apparent. It should then have been abandoned or revised drastically, and an enormous amount of hardship and misery (as well as the expense the government was so anxious to minimise) would have been averted. Instead the path taken was to double down, to go on the attack in the media against those who complained and to maintain the falsehood that in fact the system had not changed at all. The government was, the DHS and DSS ministers maintained, acting righteously to recoup taxpayers' money from the undeserving.

DSS obtained cover in the form of what was called a "legal" advice supporting averaging from one of its in-house lawyers. That advice expressed the view that it was open to the DHS secretary "as a last resort" to act on averaged income to raise and recover a debt where a recipient did not provide income information after being given an opportunity to do so. No legislative provision or case law was cited to support that proposition. That advice – but not the 2014 advice pointing out the inconsistency of averaging with the legislative framework – was provided to the Commonwealth Ombudsman, who was conducting an own motion investigation into the Scheme, including a consideration of its legality.

When the Ombudsman pressed for any advice DSS had given about legislative change needed for the use of ATO data prior to the February 2015 Executive Minute, senior DSS officers provided the 2014 advice and offered this justification of its obvious inconsistency with the 2017 advice. After the 2014 advice was given, DHS had adjusted the process, giving recipients the opportunity to correct the PAYG data, so as to assuage DSS's concerns and satisfy it that legislation would not be needed. This explanation suffered from two deficiencies: it was untrue – the opportunity to correct information had always been part of the proposal – and it made no sense. DSS reinforced its position with a letter from its secretary to the Ombudsman asserting DSS's satisfaction that the system operated "in line with legislative requirements" and that DHS had made no changes to the way it assessed PAYG employment income.

Uncompelling though DSS's 2017 advice and explanation were, the Ombudsman decided against raising questions in his report about whether averaging under the scheme had legislative authority. With a good deal of input from DHS employees, he reported in April 2017 that, while there were numerous

technical problems with the operation of the OCI, after examination of the underpinning business rules, he was satisfied that it raised accurate debts based on the available information. Those business rules, the Ombudsman concluded, "accurately capture[d] the legislative and policy requirements." Thereafter, ministers and departmental representatives relied on the Ombudsman's report as proof of the legality and appropriateness of Robodebt against all comers: the media, opposition politicians, social welfare bodies, critics in academia and a Senate Committee which made adverse findings.

(In 2018, the Ombudsman again raised concerns about the legality of averaging but was fobbed off with explanations that it involved the best available evidence and was only used where the customer had not taken the opportunity to provide information. DHS dissuaded the Ombudsman from mentioning the legality issue at all in his 2019 report into implementation of the recommendations in the 2017 report.)

Meanwhile, the Scheme trundled on, with the government engaging PricewaterhouseCoopers to assist with some of its clumsier components (although never taking receipt of a critical report prepared by the consultancy). It had to accept that the Scheme was not functional in many respects. One was that the online component was an abject failure, with the result that large numbers of employees had to be drafted on short-term contracts or by way of labour hire into the DHS to cope with enquiries. And it became apparent, partly as a result of that factor, but also because of the overestimation in the first place of the numbers of debts and their average amount, that the touted savings would never be reached.

The cover-up continued. Social Security recipients against whom a debt was raised could seek review from the first level, or Tier 1, of the Administrative Appeals Tribunal (the AAT). To do so required some understanding of what had actually happened, which was virtually impossible to ascertain on the DHS documents, as well as the confidence and capacity to seek review. Still, a number of decisions was made by AAT members setting aside debts raised under Robodebt in its various incarnations for the reason that averaging, of itself, could not provide evidence of actual income or, it followed, overpayment and debt. Section 8(f) of the *Social Security (Administration) Act* requires the DSS secretary to apply government policy with due regard to relevant decisions of the AAT. If the secretary disagreed with them, Tier 1 decisions could be appealed to Tier 2, a higher level of the AAT. Arrangements between DHS and DSS required that DHS refer AAT decisions to DSS where there was a significant error of law, a significant issue of policy or administrative practice, or the matter had attracted or was likely to attract media or parliamentary attention. And DHS and DSS had adopted joint litigation principles, which required that the decision whether to appeal any decision would be made with regard to whether there was need for clarification of a significant point of law or stated Government policy.

The AAT decisions setting aside Robodebts on the ground that evidence of averaging was not capable, without more, of proving a debt met those criteria. Because DHS disagreed with them, it ought to have referred them to DSS for consideration of appeals and it certainly should not have continued to use averaging in disregard of what was said in them. However, DHS took the course instead of taking whatever steps were directed by the AAT to rectify the individual cases by obtaining other evidence, but otherwise ignoring the decisions. The fact that Tier 1 AAT decisions were not published made it easier for it to do so.

DSS seems to have taken little interest in the AAT cases until mid-2018, when DHS referred an AAT decision that income averaging was unlawful to it. The AAT member had placed reliance on an article by Professor Carney, a former AAT member, raising a number of legally-based criticisms of averaging. The combination of the case and article prompted a decision to obtain an advice from solicitors, Clayton Utz, as to the lawfulness of using averaging to determine income. The draft advice which the solicitors provided said that it was not permissible to determine a recipient's entitlement to benefit by averaging employer-reported income from the ATO. It was received in August 2018 and should have prompted, if not the immediate suspension of Robodebt averaging, at the least the immediate obtaining of further advice from the Solicitor-General. However, it was never put into final form or acted on.

It took two applications for judicial review made to the Federal Court in 2019, *Masterton* and *Amato*, to finally change the government's position on Robodebt averaging, but that did not come quickly. In relation to the first, *Masterton*, lawyers with the Australian Government Solicitor's office advised DHS in March

2019 that, given that the applicant had not been receiving a consistent fortnightly income, averaging could not provide an accurate assessment of her income or establish the existence of a debt, and there was no statutory basis for deeming that it could. DHS then had two options: it could run its averaging argument and get a Federal Court ruling as to its legality or it could recalculate on other evidence to arrive at a nil debt figure in the hope of ending the proceeding. Digging in, DHS chose the second course but, at the Australian Government Solicitor's suggestion, took steps to obtain further advice from the Solicitor-General. In September 2019, the Solicitor-General advised that averaged PAYG data could not support a conclusion as to the amount or existence of a debt in the absence of further evidence that the recipient earned a consistent fortnightly income over periods precisely aligning with the periods declared by the employer to the ATO. That advice led to the settlement of the second application for review, *Amato*, with an accompanying declaration by the Federal Court that averaged PAYG income information was not capable of satisfying a decision-maker of the existence of a debt.

Shortly before the settlement of *Amato* was formalised, on 19 November 2019 the Minister for Government Services announced that debts would no longer be raised solely on the basis of PAYG data. On the same day, recipients present and past, against whom debts had been raised using the averaging process, commenced a class action against the Australian Government. (Soon after, DHS, which had been renamed Services Australia, ceased to exist, being recreated as an agency within the Social Services portfolio.) In May 2020, the Solicitor-General advised that the government was bound to fail in defending the claim for unjust enrichment made in the class action. That was followed by the government's announcement that it would refund debts raised wholly or partly on the basis of averaging if they had been repaid, and would reduce them to zero ("zero" them) if they had not. This involved reimbursement of $746 million to some 381,000 affected individuals and writing off debts amounting in total to $1.751 billion. In November 2020, on the day it was set for trial, the government settled the class action.

Declaring income earned was not necessarily straightforward for income support recipients because their earnings might be irregular and the periods over which they earned would not necessarily match the Centrelink fortnight on which income was calculated. Inaccuracies could be hard to avoid. But DHS did nothing by way of investigation of discrepancies before demanding explanations from recipients. For people who were able to prove they did not owe a debt, it was a stressful and time-consuming process. Undoubtedly some people paid amounts they did not owe because they were not in a position, practically or psychologically, to demonstrate otherwise.

For other people who might have owed what would, certainly to them, have been significant amounts, the process was unreasonable: suddenly and unexpectedly being confronted with demands for information and payment in respect of benefits which might have been received and spent long ago. People who did owe some amount were unable to get any clear information as to what they owed and why. Of those people who were overpaid, it is questionable how many of them owed debts at a level which justified interrupting their lives years later to demand repayment and it is unknown how many of the debts recovered during the life of the Robodebt scheme actually proved, once payslips were provided, to have been of too small an amount to meet the cost of recovery.

Robodebt was a crude and cruel mechanism, neither fair nor legal, and it made many people feel like criminals. In essence, people were traumatised on the off-chance they might owe money. It was a costly failure of public administration, in both human and economic terms.

Robodebt Scheme Timeline

June 2014
Minute drafted within DHS about "Trusted Data Assessment" Concept

2015
Associated pilot programs and PAYG Manual Compliance Intervention

March 2015
ERC
New Policy Proposal

May 2015
2015-16 Budget presented

July 2016
OCI
implemented

February 2017
EIC implemented

April 2017
Commonwealth Ombudsman Report

2017
Senate Committee inquiry

September 2018
CUPI implemented

February 2019
Federal Court challenge (Masterton test case)

March 2019
AGS advice to DHS

2019
Second Senate Committee inquiry

September 2019
Gordon Legal announces intention to file class action

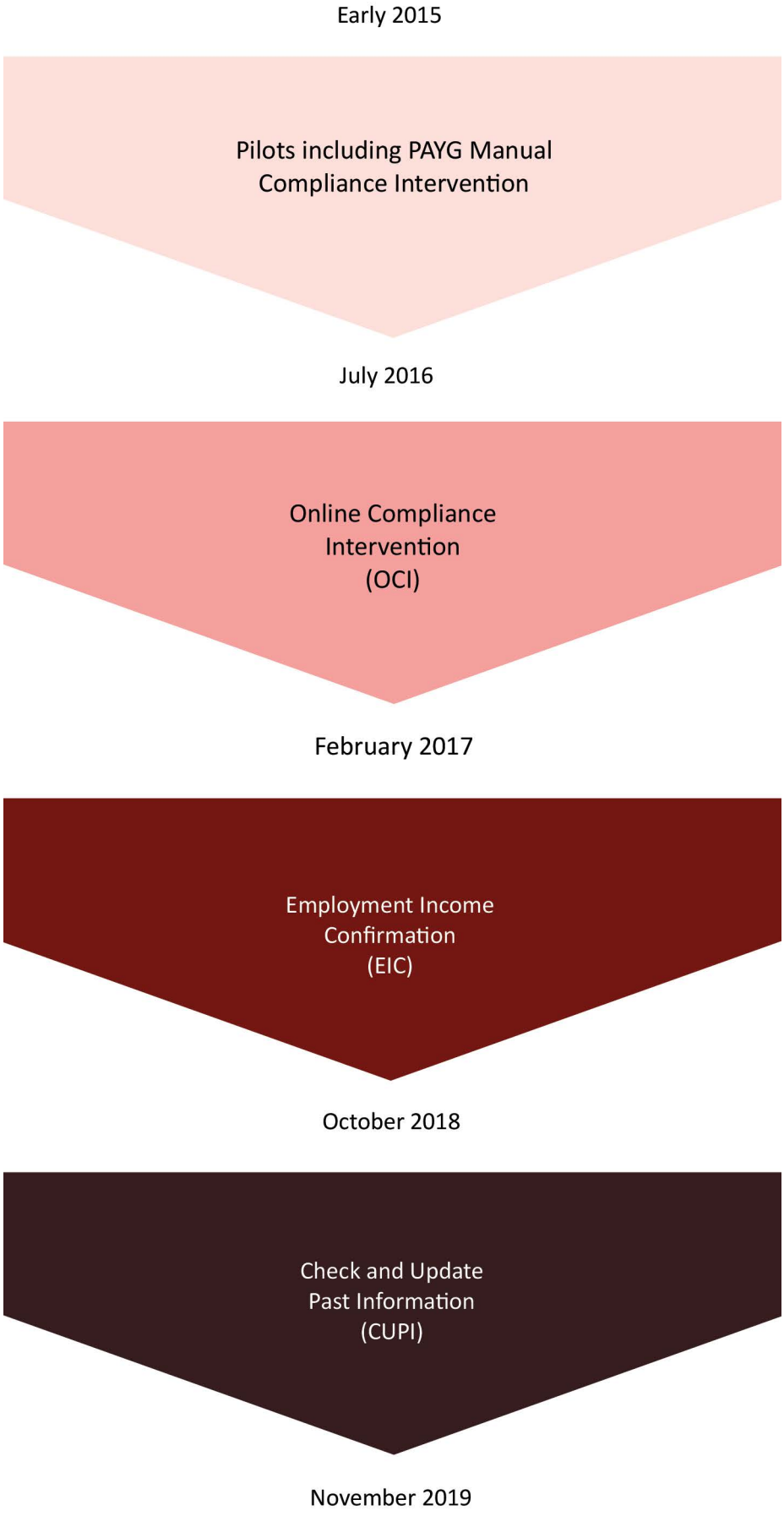
September 2019
Solicitor-General's advice

November 2019
Federal Court declares income averaging unlawful;
Minister notifies PM of AGS advice;

19 November 2019
Debts no longer raised solely on the basis of averaging

30 June 2020
Robodebt scheme ends

Phases of the Robodebt Scheme



Chapter 1: Legal and historical context of the Scheme

1 Introduction

This chapter gives some context for the Robodebt Scheme (the Scheme) with a brief history of the departments and agencies which administered the social security law, some relevant details of that law and an account of how data matching and income averaging were used to identify and raise debts before the Scheme came into being.

2 The different incarnations of the Department of Social Services

The Department of Social Services (DSS) was established on 26 April 1939,[1] but did not immediately begin operating independently. The Administrative Arrangements Order of November 1939[2] identified invalid and old age pensions, maternity allowances, and national health and pensions insurance as matters within the Department's responsibilities, but it was not until 1941 that it actually assumed administration of the *Invalid and Old-age Pensions Act 1908* and the *Maternity Allowance Act 1912* from the Department of Treasury.[3] In the decade following DSS' commencement in 1941, the Commonwealth implemented a series of initiatives said to have been broadly reflective of recommendations made by the Commonwealth Parliamentary Joint Committee on Social Security, which reported between 1941 and 1946.[4] Those initiatives, including "special" benefits for those "who had no other entitlement and, for good reason, were unable to provide for themselves and had little or no other means of support",[5] formed the basis of the social security system which developed in succeeding decades.[6]

In 1947, the *Social Services Consolidation Act 1947* brought together in one Act a range of welfare payments, including age and invalid pensions and unemployment and sickness benefits. The Administrative Arrangements Order of July 1951 assigned responsibility for those benefits to the Department of Social Services, but receipt, investigation and payment of claims for unemployment and sickness benefit was delegated to the Department of Labour and National Service as agent for the Department of Social Services.[7] That Department was also responsible for the payment of allowances to returned service personnel. By 1958, though, the Department of Social Services had resumed sole responsibility for pensions, allowances and benefits under the *Social Services Act 1947.*[8]

In 1972, the Whitlam Government replaced the Department of Social Services with the Department of Social Security,[9] which continued to make all welfare payments under the *Social Services Act 1947* and its successor, the *Social Security Act 1991*, until the establishment of Centrelink in 1997. The Department of Education was responsible for the payment of student allowances after the enactment of the *Student Assistance Act* in 1973[10] until 1998, when student payments were replaced by Youth Allowance and Austudy, administered under the *Social Security Act.* The Department of Social Security was succeeded in turn by the Department of Family and Community Services in 1998,[11] the Department of Families, Community Services and Indigenous Affairs in 2006,[12] and the Department of Families, Housing, Community Services and Indigenous Affairs in 2007,[13] before the current Department of Social Services (DSS) was formed at the end of 2013.[14]

3 A brief history of Centrelink, and the beginnings of Human Services

In July 1997, the *Commonwealth Services Delivery Agency Act 1997* established an independent statutory agency designed to undertake the delivery of social welfare services and benefits which had previously been provided by the Department of Employment, Education, Training and Youth Affairs (in the case of Austudy and Youth Allowance for students) and DSS (in respect of all other welfare payments). Those Departments were the clients of the new agency, which began operation in September 1997 under the name Centrelink, and the secretaries of the Departments were members of the Board of Management which managed Centrelink.[15] Section 1299 of the *Social Security Act 1991* gave the Secretary of DSS power to delegate his or her powers under the *Social Security Act* to the Chief Executive Officer of Centrelink or, in some instances, to employees of Centrelink.

Centrelink was intended to improve services for recipients, but it was also designed to return substantial savings by amalgamating the service arms of the two parent Departments and reducing the costs of administration.[16]

In 1998, Centrelink added to its responsibilities the delivery of services formerly provided by the Department of Health and Family Services. The three Departments retained responsibility for policy development and design of programs, but according to Sue Vardon, the inaugural Chief Executive Officer of Centrelink, collaborative solutions were found between the departments and Centrelink.[17] The agency, she says, placed a strong emphasis on front line service delivery, listening to front line workers and to advocacy groups. Staff were trained for their positions in an in-house College.

In 2000, the *Social Security (Administration) Act 1999* (the Administration Act) came into effect. Section 7 of that Act conferred on the DSS secretary responsibility, subject to the Minister's direction, for the administration of the social security law.[18] Section 8 set out the principles of administration, in a provision which remained unchanged for the duration of the Robodebt Scheme,

> In administering the social security law, the Secretary is to have regard to:
>
> (a) the desirability of achieving the following results:
>
> ...
>
> (ii) the ready availability of publications containing clear statements about income support entitlements and procedural requirements;
>
> ...
>
> (iv) the development of a process of monitoring and evaluating delivery of programs with an emphasis on the impact of programs on social security recipients;
>
> ...
>
> (b) the special needs of disadvantaged groups in the community; and
>
> ...
>
> (d) the importance of the system of review of decisions under the social security law; and
>
> (e) the need to ensure that social security recipients have adequate information regarding the system of review of decisions under the social security law; and
>
> (f) the need to apply government policy in accordance with the law and with due regard to relevant decisions of the Administrative Appeals Tribunal and the Social Security Appeals Tribunal.

Section 234 of the *Social Security Administration Act* enabled the Secretary of DSS to delegate all or any of his or her powers under the social security law to the Chief Executive Officer of Centrelink.

On 26 October 2004 the Department of Human Services – DHS – was established[19] within the Finance and Administration portfolio as a small "core department" for improving social and health service delivery. Six existing agencies, one of which was Centrelink,[20] were brought under its umbrella. Centrelink's Board of Management was disbanded, with its powers and responsibilities transferred, in a more traditional model, to the Chief Executive Officer of Centrelink, who then reported directly to the Minister for Human Services. On the policy side, the Department of Education, Science and Training (now a separate department from Employment) dealt with income support, policies and programs for students and apprentices; the Department of Employment and Workplace Relations with income support policies and programs for people of working age, including Disability Support pension and Newstart allowance for unemployed persons; and the Department of Family and Community Services with income security policies and programs for others: families with children, carers, the aged and people in hardship.[21] In 2007, DHS and the agencies became part of the newly-created Human Services Portfolio.[22] The following year, the Department was given responsibility for the development of service delivery policy.[23]

From 1 July 2011, Centrelink ceased to exist at all as an entity. It was absorbed with the other agencies into a massively expanded DHS, which, with a staff of 37,500,[24] became one of the biggest departments in the Australian Government. The term "Centrelink" was now used to describe a collection of Commonwealth programs, benefits and services managed under the auspices of DHS.[25] Statutory responsibility for their delivery was attached to the newly-created position of Chief Executive Centrelink,[26] occupied by an SES employee of DHS, appointed by the DHS Secretary pursuant to section 7(2)(b) of the *Human Services (Centrelink) Act*. (Kathryn Campbell had become DHS Secretary early in 2011, succeeding Finn Pratt in the role; he became secretary of the Department of Families, Housing, Community Services and Indigenous Affairs, and, in 2013, DSS.)

The DSS Secretary's power to delegate his or her powers under the social security law was now exercisable in favour of the Chief Executive Centrelink or, with the exception of one particular power, employees of DHS.[27] The Chief Executive Centrelink, in turn, was able to delegate powers to DHS officers.[28] In the years during which the Scheme was operating, the Secretary appointed the Deputy Secretary, Service Delivery Operations, as Chief Executive Centrelink.[29] (The Scheme, however, fell under the control of a different Deputy Secretary, whose responsibilities were originally entitled "Participation, Aged Care Service Strategy and Integrity" and eventually became "Integrity and Information".)[30]

When, in December 2019, DHS' successor in name, Services Australia, ceased to exist as a department and was replaced by an executive agency within the Social Services portfolio, the *Human Services (Centrelink) Act 1997* was amended so that Services Australia's Chief Executive Officer automatically became Chief Executive Centrelink.[31]

4 The relationship between the departments

In late 2013, the Department of Employment ceased to have any responsibility for income support policy and the minister of that department no longer administered the *Social Security Act* or the Administration Act in relation to support payments to people of working age.[32] The Minister for Social Services assumed sole responsibility for the administration of both Acts. The Minister for Human Services was responsible for administration of the *Human Services (Centrelink) Act 1997* as well as legislation relating to hearing services, Child Support and Medicare. DSS's policy responsibilities were explicitly expanded by an Administrative Arrangements Order (AAO) in December 2014 to include income support and participation policy for people of working age,[33] while DHS retained responsibility for development of policy on services delivery. The distinction has not been well-understood. Mr Pratt, secretary of DSS, observed in evidence to the Commission that he was unable to identify the demarcation between what he described as "pure" policy, for which DSS was responsible, and "operational" policy, for which DHS was responsible.[34]

In October 2014, Mr Pratt and Ms Campbell signed a Bilateral Management Arrangement said to be intended to "support an effective working arrangement" between DHS and DSS.[35] It established a Bilateral Management Committee to be jointly chaired by the departments' deputy secretaries, composed of them and other SES members. The Committee was to provide "direction on matters jointly affecting the departments" and provide guidance on operational issues and monitoring and mitigating risks.

Significantly in the Scheme context, the Bilateral Management Arrangement contained a bilateral assurance framework which proposed as a mitigation for risk, early engagement between the departments during policy development, including advice on service delivery options, and communication in advance of proposed changes to policy or service delivery arrangements to make sure both departments agreed. Both were to have timely access to comprehensive data and analysis to enable well-informed program management and service design and delivery decisions.

The Bilateral Management Agreement was supported by various protocols and service arrangements. The Corporate Services Protocol dealt with, among other things, "legal issues." Of particular note here is its expression of a shared commitment between the departments:

- consistent and accurate interpretation, understanding and application of the relevant social security, family assistance and other laws for which DSS has responsibility (the DSS portfolio legislation)
- the provision of legal advice prepared or procured, consulted on and shared in accordance with the Legal Services Directions
- a commitment to achieving a fair, courteous, prompt and cost-efficient internal review and appeal system that applies the DSS portfolio legislation and the Australian Government's policy.

The departments accepted joint responsibility "for ensuring the proper and consistent application of DSS administered legislation by consulting closely on legal matters in accordance with the Legal Services's Directions."

The Payment Assurance Service Arrangement set out the different roles and accountabilities of the departments. One of DSS's roles was "monitoring the effectiveness of compliance management in respect of the overall accuracy of payment outlays and debt management;" it was left to DHS to develop and undertake compliance strategies. Each department was to give priority to providing "quality and timely information" about matters affecting the other's responsibilities. The arrangement provided for the exchange of information between the departments on, among other things, "data relating to Budget measures (including Strengthening the Integrity of Welfare Payments)" for DSS to monitor and report on outlays and savings and advice on appeal decisions.

5 Entitlement to social security benefits and pensions and calculating the rate of payment

Unlike the contributory social insurance schemes which exist in other countries, the Australian social welfare system is needs-based. Indeed, in December 1975 the government ratified the International Covenant on Economic, Social and Cultural Rights, and as a party to the Covenant recognized by Article 9 "…the right of everyone to social security."[36]

The scheme of the *Social Security Act 1991*, as it was in the *Social Services Act 1947*, is to set the conditions for qualification for a pension or benefit[37] and provide for the rate of its payment to be determined by application of rate calculators which incorporate income and assets tests. As enacted, the Act distinguished between benefits (such as youth allowance) and pensions (such as the age pension and disability support pension) by providing that the rate of benefits was a fortnightly rate[38] while the rate of pension was an annual rate.[39] That was changed in 1999 to provide that both pensions and benefits were to be paid at a daily rate.[40]

The ordinary income "test" to be applied by the rate calculators for a pension, however, requires that the person's ordinary income be worked out on a yearly basis, while for benefits it is calculated on a fortnightly basis.[41] "Income" is defined as including "an income amount earned, derived or received by the person for the person's own use or benefit" and "income amount," in turn, includes "personal earnings." "Ordinary income" was, in the Act as enacted, "income that is not maintenance income;" that definition was subsequently amended to exclude exempt lump sums as well.[42]

A further complication in the rate calculators comes with the concept of "ordinary income-free area." Professor Peter Whiteford, in his report to the Commission,[43] has set out some of the concept's history in income testing under the social security legislation. Until 1969, benefit payments reduced by a dollar for every dollar a recipient received as income (a 100 per cent withdrawal rate). That constituted a disincentive for unemployed people to take part-time or low paid work, so from the 1980s adjustments were made to create "free areas" of income below which a recipient would not lose benefits, with more generous withdrawal rates above the free area. Professor Whiteford explains that, for example, an adult on Jobseeker payment has a free area of $150 per fortnight with a withdrawal rate above that of 50 per cent - that is to say, a reduction of 50 cents in benefit for every dollar earned over $150 per fortnight – up to income of $256 per fortnight, after which the withdrawal rate increases to 60 per cent in the dollar and cuts out altogether when the individual receives $1231.50 per fortnight.

The income test in the rate calculators involves working out what a person has earned, derived or received by way of ordinary income, for benefits on a fortnightly basis, and for pensions on a yearly basis; making some adjustments in relation to the person's partner income; and determining whether the prospective recipient's ordinary income exceeds their ordinary income-free area; and if there is an excess of their ordinary income over their ordinary income-free area, applying an ordinary income reduction (the percentage Professor Whiteford refers to as a withdrawal rate).

Section 79 of the Administration Act provides that if the secretary is satisfied that the rate at which a social security payment has been paid is more than the rate which the social security law provides for, the secretary can determine that the rate is to be reduced to the rate provided for by the social security law. Section 80 requires the secretary, if they determine that there has been an overpayment, to make a determination that the payment be cancelled or suspended.

DHS provided a list of payment types that were, at different times, subject to the Scheme:[44]

- Newstart Allowance[45]
- Youth Allowance[46]
- Disability Support Pension[47]
- Austudy Allowance[48]
- Age Pension[49]
- Carer Payment[50]
- Parenting Payment[51]
- Special Benefit[52]
- Bereavement Allowance[53]
- Wife's Pension[54]
- ABSTUDY[55]
- Widow A Allowance[56]
- Widow B Pension[57]
- Sickness Allowance[58]
- Partner Allowance[59]

Newstart Allowance and Youth Allowance formed the bulk of the payments subject to the Scheme. Professor Whiteford points out that between 5 per cent and 6 per cent of Newstart recipients and between 2.2 per cent and 2.5 per cent of Youth Allowance recipients had stable earnings over the financial years over which the Scheme operated; [60] information which was available to DHS and DSS.[61]

5.1 Reporting requirements

The secretary of DSS (or their delegate) has power under section 68 of the Administration Act to seek information about events or changes of circumstances which might affect the payment of a person's social security payment. That power was (and is) used to require recipients of most forms of continuing payments to provide details each fortnight of the income they had earned and the period over which it was earned.[62]

In addition, section 66A of the Administration Act requires a person who is, or has been, in receipt of benefits to notify the department within 14 days if an event or a change in circumstance has occurred which is likely to affect the rate of payment.[63]

In addition to the section 68 power, the secretary can also, under section 69, seek information about events and changes of circumstances from a person who has been in receipt of a social security payment in the past, but they are not required to comply with a notice unless the event or change of circumstances in question happened longer than 13 weeks before the notice was given. Notices under sections 68 and 69 are, themselves, subject to some requirements set out in section 72, failure to comply with some of which (such as the requirement to specify the period for response) will render the notice invalid. The secretary also has a broad power under section 192 to require a person to give information or produce a document where, among other things, it is relevant to whether a social security payment was payable. Section 196 requires that the notice be in writing and specify that it is given under that section.

Social security benefits are not payable if a person fails, without reasonable excuse, to comply with a requirement under the Administration Act.[64]

5.2 Debt recovery

A debt is due to the Commonwealth "if, and only if" a provision of the Social Security Act expressly provides that it was or is.[65] The key provision is s 1223(1) of the Social Security Act, which provides that where a person has had the benefit of a social security payment to which they were not entitled, they owe the amount of that payment to the Commonwealth as a debt which is deemed to have arisen when they got the benefit of the payment. A person is not entitled to obtain the payment if, for example, they were not qualified to receive it or it was otherwise not payable.[66]

Section 1228B of the Social Security Act provides for an additional 10 per cent of any debt to be added by way of penalty if the debt arose wholly or in part because the recipient refused or failed to provide information about their earnings or knowingly or recklessly gave false or misleading information "when required under a provision of the Social Security law, to provide information in relation to the person's income from personal exertion." The section does not apply if the secretary is satisfied the person had a reasonable excuse for refusing or failing to provide the information.

Section 1230C of the Social Security Act sets out the methods by which the Commonwealth can recover debts due to it: by deductions from the person's social security payment, by an arrangement for repayment by instalments, by legal proceedings or by a garnishee notice; although the last two are only available if the Commonwealth first has tried to recover the debt through deductions from a social security payment or by a repayment arrangement and the recipient has either refused to enter a reasonable repayment arrangement, or has not honoured it once entered.

6 The history of data matching in the Social Security context

6.1 Early data matching

In March 1989 a memorandum[67] produced for Cabinet, titled *Savings Paper Social Security: Increased matching of records between Australian Taxation Office (ATO) and the Department of Social Security (DSS)* advocated matching DSS payments with prescribed payment system data in respect of self-employed people and details of interest paid by financial institutions held by the ATO with DSS payments. The memorandum noted by way of background that there was currently some very limited cross-checking of records: ATO provided the DSS with completed Employment Declaration forms to enable it to detect circumstances where recipients had commenced employment without telling DSS. There was, however, a question mark over that practice; the Privacy Commissioner had raised an issue about its legality in light of recent tax file number and privacy legislation. The memorandum observed, acutely:

> Existence of employment income in ATO records does not necessarily mean wrong payment of unemployment benefit because time periods may not coincide.

However, the proposed option would provide previously unavailable data for record-matching purposes. Cabinet adopted the measure.

6.2 Data matching under the Data matching Program (Assistance and Tax) Act 1990

On 23 January 1991 the *Data-matching Program (Assistance and Tax) Act 1990* commenced. It established a matching agency consisting of officers of the then Department of Social Security[68] and by section 6 permitted the transfer of data between agencies, and its matching by the matching agency or the tax agency (defined as the Commissioner of Taxation).[69] The results of the matching could be given to source agencies (which at that time included DSS and the Department of Employment, Education and Training (DEET)) in accordance with a data-matching program which was to be made up of data matching cycles in a form prescribed by the Act.[70]

Section 7 of the Act provided for the Commissioner of Taxation to be given a person's tax file number (TFN) and to return to the matching agency information including the income of the individual as declared in their tax return. The matching agency was then able to carry out income matching to compare the income the person had declared for benefit entitlement purposes with what they had declared to the Commissioner of Taxation. If the results indicated that someone who was not entitled was receiving any one of a variety of prescribed forms of assistance (including DSS benefits and pensions) the matching agency would give the relevant department the results. (In conjunction with the legislation, all social security recipients (except pensioners over 80) were now required to provide a TFN. In July 1994 the *Social Security Act 1991* was amended to make possession of a TFN a requirement of eligibility for a benefit.)

A media release from the Minister for Social Security, Senator Graham Richardson,[71] announced that the process would close two loopholes. The first related to eligibility for income support; the process would, he said, provide a reliable and efficient mechanism for reviewing income. In righteous-toned rhetoric of a kind often used by politicians announcing measures involving social security recipients, he continued:

> It means our income-support system is further protected against overpayments. This is only fair since the welfare system is funded by the taxpayers of Australia who expect it to be run fairly, efficiently and at the least possible cost. We should not be in the business of protecting cheats.

The second loophole to be closed was "double-dipping," where an individual claimed, in excess of their entitlements, payments from more than one income support agency.

As enacted, the *Data-matching Program Assistance and Tax Act* contained a sunset clause: it would expire after two years. Its operation was, however, repeatedly extended until 1998 when the sunset provision was repealed.[72]

Section 10 of the Act permitted DSS and DEET to take action on the basis of information received through data-matching to cancel, suspend or reject a claim for a benefit or to change the rate being paid or to recover an overpayment. It did not, however, give the information any particular evidentiary status. (In June 1992 the Act was amended to expand the possible action to include granting a claim for benefit or informing a person they might be entitled to it.) The department had 12 months to take any action under s 10(1) unless an extension was granted by its secretary or the Commissioner of Taxation.[73]

However, s 11 prohibited the taking of any such action unless the individual concerned had been given notice of the information and the proposed action and informed they had 21 days to show cause why it should not be taken. Under section 11(6)(b), where the person failed to show cause, any amount they were paid above the reduced rate of their benefit during the 21 days was a debt due to the Commonwealth; which was then recoverable by the Commonwealth. (Section 1224C of the *Social Security Act* 1991 contains a corresponding provision, making a debt due under subsection 11(6) recoverable by the Commonwealth.) Plainly enough, there is a distinction between the effect of section 7, which gives permission to use the information obtained for prescribed purposes, but does not ascribe it any particular status, and that of section 11(6)(b), which creates a statutory debt.

The data-matching process was under the supervision of the Office of the Privacy Commissioner, who could (and did in 1992) issue guidelines under the Act[74] and report on any matters requiring action in the interests of individuals' privacy. The Act was subsequently amended to require each agency using it to provide a report for presentation to Parliament.[75]

In 1997, the newly established Centrelink took responsibility for the functions of the data-matching agency[76] and continued to perform data matching under the Act.

6.3 Data matching outside the Data-matching Program Assistance and Tax Act

In the 2001-2002 financial year, Centrelink began to operate a parallel data-matching system which did not involve the use of TFNs. Instead, it took advantage of the newly introduced PAYG reporting system. A PAYG data-matching pilot was announced in the 2000-2001 Budget. The intention was that income details reported by a recipient to Centrelink would be compared with the details contained in the PAYG payment summary that their employer had provided to the ATO, and where discrepancies were detected, cases could be selected for review.

In 2004, in accordance with the Privacy Commissioner's Guidelines, Centrelink prepared a protocol for the new program (the 2004 PAYG Data-matching protocol).[77] It identified the source agencies supplying data as ATO and Centrelink, with Centrelink as both the matching agency and the primary user of the data.[78] Although the ATO's role featured heavily in the protocol and in the data-matching it purported to govern, the ATO does not appear to have played any part in its preparation; indeed, ATO officers who gave evidence before the Commission appeared to be largely oblivious to its existence.[79] As was the case under the *Data-matching Program (Assistance and Tax) Act 1990*, the protocol required all PAYG data to be destroyed within 12 months.[80]

The protocol cited sections 192, 195 and 196 of the Administration Act as the authority for Centrelink to request PAYG data.[81] (Section 192 enabled the DHS secretary to require a person to give information or produce a document relevant to whether an individual was qualified for a social security payment. Section

195 enables the DHS secretary to require the giving of information about classes of person in order to verify claims and detect overpayments, while section 196 provides for written notice of the information requirements to be given to the ATO.) However, the protocol noted that while the ATO was obliged to comply with notices issued under sections 192 and 195, it was currently providing information to Centrelink on a voluntary basis.

Clause 6 of the protocol prescribed the action which could result from the program. Before a review resulting from the data-match, Centrelink staff would check the recipient's record to determine if the discrepancy could be explained and, if not, contact the recipient by letter. If the recipient were unable to provide sufficient evidence of their income, the employer could be contacted to provide further information.

The 2004 PAYG Data-matching Protocol reveals that the PAYG Data-matching Program had been the subject of a pilot conducted in two phases between December 2001 and June 2003, involving some 33,000 case selections and 8,151 reviews. A customer contact letter was attached to the protocol. It advised the putative customer that the information received from the ATO had disclosed income from named employers between specified dates and requested that they make contact to confirm the details. Failing contact, the payment would be stopped. The letter was said to be an information notice given under the social security law. If the information received indicated a change to payments and an overpayment the customer would be contacted again.

The 2004 Protocol was gazetted in the Commonwealth Gazette. It was not subsequently made publicly available by, for example, publication on the Centrelink or DHS website.

In 2011, when Centrelink was folded into DHS, that department became the matching agency.[82] In the same year, the Minister for Human Services, the Hon Tanya Plibersek MP, and the Assistant Treasurer, the Hon Bill Shorten MP, jointly announced a new data-matching initiative which would involve automatic matching of data between Centrelink and the ATO on a daily basis, in conjunction with the automation of the tax garnishee process in respect of former recipients who had not entered a repayment arrangement.[83]

7 The history of income averaging in the social security context

Income averaging is not, *per se*, unlawful. Some provisions of the *Social Security Act* prescribe it as a method for calculating income, usually over short periods. For example, section 1068-G7A (part of the Newstart Rate Calculator) provided (and provides) that ordinary income is to be taken into account in the fortnight in which it is first earned, derived or received, with two exceptions, one of which is where a person receives arrears of periodic compensation (section 1068-G8A) and the other, where a person does not receive fortnightly wages in which case section 1068-G8 comes into operation.

Section 1068-G8 applies in the limited circumstance where a recipient is paid for work periods greater than a fortnight (the example given in the section as enacted was of someone paid $600 at 25-day intervals) and then only if the timing of the payments is reasonably predictable and regular and their quantum is reasonably predictable. The provision then allows calculation of a daily rate by division of the amount actually earned in the work period by the number of days in it, which can then be used to arrive at a fortnightly rate. It can be seen that it is likely to be applied across relatively short periods (not many people get paid at intervals longer than a month) and only where the result is likely to be a reliable indicator of the rate of earning.

Even when there is no specific provision for averaging, and income earned, derived or received in the fortnight must be worked out, it may be permissible to calculate that income using an averaging method if it can be shown that the person is on a regular wage with no variation in their hours. What cannot be done is to take income over a period of time and divide it into equal fortnightly amounts in the absence of information that it was actually received in that way, because the Act does not provide for entitlement on the basis of average fortnightly income. What matters is the income the person actually earned, derived or received in the fortnight.

7.1 Departmental documentation of income averaging

However, there is some evidence that the Department of Social Security, when it was responsible for welfare payments before the advent of Centrelink did at least threaten[84] the use of ATO income information where a recipient did not respond to a letter requiring income details; which suggests that income averaging was probably contemplated. That was in the context of data matching under the *Data Matching Program (Assistance and Tax) Act* which entailed comparing what the individual had declared in their tax return and what they had declared to Centrelink. It seems reasonable to infer that an individual would identify the dates between which they had worked more accurately than an employer, who had no need to refer to anything but the financial year; but it is still the case that variations in hours as between weeks would not be taken into account in that process. There is no evidence that that practice continued when Centrelink took over responsibility of payments and it seems clear, at the least, that it was not happening in connection with PAYG income data matching. The "approved version" of the customer contact letter attached to the 2004 PAYG data matching protocol requires the recipient to provide information pursuant to section 192 of the *Social Security (Administration) Act* and says that if the information received shows there may be a change to payments and an overpayment, Centrelink will write again; but there is no suggestion of any use of ATO information to calculate entitlement. The content of the initial letters sent to recipients during the balance of Centrelink's existence up to 2011 remained in similar terms, with no reference to use of ATO PAYG data to assess income and entitlement.[85]

That seems to have remained the case under DHS's watch. Historical letters provided by Services Australia for the period September 2011 to July 2015 advised the recipient that they needed to provide income details and if they did not, their employer might be contacted to confirm their earnings;[86] there was no reference to use of ATO data.

In addition to evidence in the form of those letters, Services Australia provided another record from the 2011-15 years a workflow procedure called Actioning Pay As You Go (PAYG) Reviews[87] which set out the steps a compliance officer was to follow in an entitlement review. Where a recipient was contacted about a PAYG review resulting from data matching, various steps were set out, including the sending of a letter of the type just described. If the recipient was not forthcoming with the information sought the compliance officer was to contact the employer for employment and income details. Where the employer, in turn, was not cooperative, a Request for Income and Employer Details form could be issued to the ATO (pursuant to what authority is not explained) for details of what the recipient had declared on their Income Tax Return. If all else failed, the workflow procedure, while noting that employment income was to be assessed for the fortnight in which it was earned, said that if every means of obtaining actual information had been attempted it was possible to use any evidence a compliance officer had, including an annual figure, to raise a debt. The workflow procedure did not go into details of how that was to be done.

DHS workers also had available to them what was called an Operational Blueprint,[88] the longer title of which was Acceptable Documents for Verifying Income When Investigating Debts.[89] (The Operational Blueprint remained in the same terms for the entirety of the Scheme period.) Consistently with the workflow procedure, where fortnightly income details were unobtainable, it said:

> Employment income for workforce age customer should be assessed for the fortnightly income as earned. Sometimes it is not possible to determine a fortnightly breakdown and the only means to assess the income is as an annual amount, such as using Income Tax Returns (ITRs), payment summaries (Group Certificates), or other annual amounts. If every possible means of obtaining the actual income information has been attempted, it is possible to use any evidence available to raise a debt including an annual figure.

However, the Operational Blueprint goes on to point out some of the hazards: if the recipient had only been employed for part of the year, averaging over 12 months would not give a correct result and if their income had varied greatly during the year the result might be incorrect. This caution was sounded: "The raising and recovering of debts must satisfy legislative requirements. Evidence is required to support the claim that a legally recoverable debt exists."

7.2 Evidence of actual use of averaging

Services Australia was unable to provide the Commission with figures for the incidence of averaging before the Scheme, because each individual debt in the system would have to be examined and the debt management information system was old and was not functional for that type of request.[90] However, it does not seem to have loomed large in DHS's practices. Mr Pratt, chief executive officer of Centrelink in 2008 and secretary of DHS from 2009 to 2013, was not aware, as DHS Secretary, of averaging ever being used as a means of determining and raising debt.[91]

Mark Withnell, who from 2008-2017 had been general manager of Business Integrity at DHS, said that income "smoothing" or "averaging" was able to be used in "exceptional cases."[92] By way of example, where an employer had gone out of business there would be discussion with a recipient about how to overcome that obstacle; if the person had a relatively consistent income they might reach an agreed position with DHS that averaging was appropriate.[93]

The evidence of Scott Britton, who had been national manager for the Compliance and Risk Branch, Participation Aged Care and Integrity Group of DHS between 2010 and 2016, was that if fortnightly pay slips were unavailable because businesses had failed or their records were lost and the recipient could not provide any evidence, a compliance officer, if the customer was agreeable, would apply averaging.[94] It was an "exceptions process."[95]

Christopher Birrer, a deputy chief executive officer with Services Australia, observed that the Operational Blueprint and all of the examples of staff guidance in the pre-Scheme period that he had seen, showed a marked and substantial difference from the staff guidance[96] issued for the 2015-16 manual process at the beginning of Robodebt, which used the methodology later adopted during the OCI iteration. He

explained that pre-Robodebt the PAYG information was used as part of a "broader review process, not as the primary tool in terms of identifying that potential overpayment and raising a debt on it."[97] Mr Birrer gave a hypothetical example of how the PAYG information might be used pre-Robodebt; if a recipient were providing PAYG information over a three-month period and could find fortnightly pay slips for two and a half months but could not find the last pay slip, it would be reasonable to apply averaging.[98] (It is questionable whether that is properly called income averaging, as opposed to drawing an inference from the consistency of someone's fortnightly income that the actual amount of their income in a particular fortnight was the same.)

A number of frontline compliance officers gave evidence of how they actually applied income averaging in the years leading up to the Scheme. Colleen Taylor, who had been a Centrelink compliance officer from 2010, said in her statement that it would be "very rare" to use income averaging over the period of a PAYG summary to calculate the debt, for the unsurprising reason that it resulted in inaccurate calculations. She found, through speaking to recipients, that they often had not worked for the full financial year, although the PAYG summary was for the entire period; and she also appreciated that most recipients did not earn their income evenly over fortnights. An additional unfairness associated with averaging was that because the income was applied uniformly across the relevant period, recipients could lose the benefit of accruing income bank benefits for the fortnights where they were not working or earning very much.[99]

Jeannie-Marie Blake, who had worked as a compliance officer at DHS from 2007, said that she had never herself used averaging but that her team had used it as a last resort after discussion with a customer; it was rarely used.[100]

Tenille Collins, who had worked in compliance review teams over some years, explained that if an employer did not respond to requests for information or the recipient did not want the employer approached, the compliance officer would talk to the recipient about the best approach to work out their income. Sometimes recipients would provide pay slips; on other occasions they would invite the use of the PAYG income. She would then look at the information on the recipient's file, conversations previously had, separation certificates, start and end dates of employment, and the reporting behavior to see if inferences could be drawn about whether the recipient's income was consistent.[101]

The consistent evidence was that income averaging was used relatively seldom, usually by agreement with the recipient, and in the context of other information which provided some assurance that it would give a reliable answer.

7.2 Post facto attempts to establish the incidence of averaging

In mid-2020, when the government was in the awkward position of having received advice from the Solicitor-General that it would fail in the impending class action *Prygodicz* and it was apparent that debts based on averaging would have to be reimbursed if they had been paid or written-off if they remained outstanding, some work was done to try and establish what support there was for the departmental and ministerial narrative that nothing had changed during the Scheme and that income averaging had a long history.

No doubt encountering the same difficulty as Services Australia had in responding to the Commission, that an antiquated system was incapable of giving the information, resort was had to sampling. An email produced to the Commission showed that a sample of 500 files was checked for each of the years 2009 and 2011. Figures were given for those said to involve debt raising through the "sole use of averaging" or the "partial use of averaging."[102] In 2009, the table in the email shows that 34 debts were raised through the sole use of averaging and 50 through its partial use, while in 2011 57 debts were raised through the sole use of averaging and 65 through its partial use. As a percentage of the thousand files sampled over the two years, 9.1 per cent involved debts raised solely through averaging and 11.5 per cent through the

partial use of averaging. The balance of the cases involved, over the two years, full verification of the debt in 75.6 per cent of cases: an inability to determine what had happened in 1.8 per cent of cases; while 2 per cent of cases were said to be "not relevant," for unexplained reasons.

There are some difficulties. There is no evidence as to how the files sampled were identified. Assuming they were sampled at random, there are still these problems. There is no definition of what was considered "partial" averaging, as opposed to "sole use." More importantly, there is no information as to the circumstances in which the averaging, sole or partial was undertaken. As has been explained, some income averaging was, in fact, prescribed by the Social Security Act, for example pursuant to section 1068-G8. Even where there was no such statutory prescription, averaging was a legitimate course of action if there were other evidence to show that the amount arrived at through it was representative of actual income; which might be the case if the recipient were able to confirm that they had, indeed, received a regular income for the period in question. Without that information, there is no way of knowing whether any of the sampled cases involved averaging as it was used in the Scheme. All the evidence of those who had worked for DHS was to the contrary.

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4 Andrew Herscovitch and David Stanton, '*History of Social Security in Australia*' (2008) (80) *Family* Matters 51, 54.
5 Andrew Herscovitch and David Stanton, '*History of Social Security in Australia*' (2008) (80) Family Matters 51, 55.
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7 Commonwealth, *Commonwealth of Australia Gazette*, No 46, 2 July 1951.
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17 ANO.9999.0001.0056, Submission by Sue Vardon AO, published 7 March 2023.
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19 South Australia, *The South Australian Government Gazette*, No 429, 27 October 2004.
20 Others included the Child Support Agency, CRS Australia, Australian Hearing, Health Services Australia and the Health Insurance Commission.
21 Commonwealth, *Commonwealth of Australia Gazette,* No S427, 27 October 2004.
22 Commonwealth, *Commonwealth of Australia Gazette,* No S17, 30 January 2007.
23 Commonwealth, *Commonwealth of Australia Gazette*, No S21, 25 January 2008.
24 Department of Human Services, *DHS Annual Report 2010-11* (Report, 2011) 3.
25 *Human Services Legislation Amendment Act 2011* (Cth).
26 *Human Services (Centrelink) Act 1997* (Cth) s 8A.
27 *Social Security (Administration) Act 1999* (Cth) s 234.
28 *Human Services (Centrelink) Act 1997* (Cth) s 12.
29 *Human Services (Centrelink) Act 1997* (Cth) s 7(2)(b).
30 Department of Human Services, *Annual Report 2014-15* (Report, 2015); *Department of Human Services 2015-16* (Report, 2016); Department of Human Services, *Annual Report 2016-17* (Report, 2017); Department of Human Services, *Annual Report 2017-18* (Report, 2018); Services Australia, *Annual Report 2018-19* (Report, 2019).
31 *Services Australia Governance Amendment Act 2020* (Cth) sch 2 cl 3; *Human Services (Centrelink) Act 1997* (Cth) s 7.
32 Commonwealth, *Administrative Arrangements Order and the Abolition, Establishment and Renaming of Departments of State,* No C2013G01404, 18 September 2013.
33 Commonwealth, *Administrative Arrangements Order,* 23 December 2014.
34 Exhibit 1-1223 – FPR.9999.0001.0001_R – 20221018 Statement of Finn Pratt dated 18 October 2022 (46125371.1).pdf [p 6: para 34]; Transcript p 843 at lines 10-14.
35 Exhibit 1-1224 - CTH.3001.0021.8820 - Attachment B BMA, 22 October 2014; Transcript, Finn Pratt, 10 November 2022 [p 855: lines 12-15].
36 *International Covenant on Economic, Social and Cultural Rights,* opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 9.
37 Professor Whiteford, in his Report, set out the eligibility conditions for most income support benefits, such as age requirements for aged pension, being unemployed and actively looking for work for unemployment benefit as well as a resident's requirements: Exhibit 4-8342 - RBD.9999.0001.0505 - Robodebt and social security policy_10 March [p 11: para 3.5].

38 *Social Security Act 1991* (Cth) s 1068-A1.
39 *Social Security Act 1991* (Cth) s 1064-A1.
40 *Payment Processing Legislation Amendment (Social Security and Veterans' Entitlements) Act 1998* (Cth).
41 *Social Security Act 1991* (Cth) s 1068-A1.
42 *Social Security Act 1991* (Cth) s 8.
43 Exhibit 4-8342 - RBD.9999.0001.0505 - Robodebt and social security policy_10 March_clean, RBD.9999.0001.0505, 10 March 2023.
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45 *Social Security Act 1991* (Cth) ch 2 pt 2.12.
46 *Social Security Act 1991* (Cth) ch 2 pt 2.11.
47 *Social Security Act 1991* (Cth) ch 2 pt 2.3.
48 *Social Security Act 1991* (Cth) ch 2 pt 2.11A.
49 *Social Security Act 1991* (Cth) ch 2 pt 2.2.
50 *Social Security Act 1991* (Cth) ch 2 pt 2.5.
51 *Social Security Act 1991* (Cth) ch 2 pt 2.10.
52 *Social Security Act 1991* (Cth) ch 2 pt 2.15.
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54 *Social Security Act 1991* (Cth) ch 2 pt 2.4.
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75 *Data-matching Program (Assistance and Tax) Act 1990* (Cth) s 6.
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77 Exhibit 1-1109 - CTH.3000.0028.6814 - PAYG Protocol 2004, May 2004.
78 Exhibit 1-1109 - CTH.3000.0028.6814 - PAYG Protocol 2004, May 2004, cl 3.
79 Transcript, Jeremy Hirschhorn, 4 November 2022 [p 425: lines 40-48], [p 451: lines 19-22]; Transcript, Tyson Fawcett, 12 December 2022 [p 1582: lines 2-46]; Exhibit 2-2303 - TFA.9999.0001.0002_R – Statement of Tyson Fawcett, 12 December 2022 [p 8: para 3.10]; Transcript, Michael Kerr-Brown, 12 December 2022 [p 1601: lines 1-18], [p 1607: lines 23-27]; Exhibit 2-2398 - MBR.9999.0001.0001_R – Statement of Michael Kerr-Brown [pp 10-11: para 3.17], [p 11: para 3.18], [pp 46-47: para 24.1].

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91 Transcript, Finn Pratt, 10 November 2022 [p 847: lines 14-18].
92 Transcript, Mark Withnell, 9 December 2022 [p 1496: lines 36-37].
93 Transcript, Mark Withnell, 9 December 2022 [p 1496: line 47 – p 1497: line 20].
94 Transcript, Scott Britton, 8 November 2022 [p 669: lines 25-31].
95 Transcript of evidence of Scott Britton, Day 9 (08/11/22), P-670 line 25-29.
96 Transcript, Christopher Birrer, 7 November 2022 [p 615: lines 10-25].
97 Transcript, Christopher Birrer, 7 November 2022 [p 615: lines 42-43].
98 Transcript, Christopher Birrer, 7 November 2022 [p 615: lines 32-38].
99 Exhibit 2-2528, RCW.0005.0001.0001 – Statement of Colleen Taylor, 8 December 2022 [p 3: para 22].
100 Transcript, Jeannie-Marie Blake, 21 February 2023 [p 3444: lines 20-38].
101 Transcript, Tenille Collins, 3 March 2023 [p 4304: line 32 – p 4305: line 26].
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Section 1: Chronology of the Robodebt Scheme

Chapter 2: Overview of the origins of Robodebt

1 The Robodebt scheme

The Australian system of government includes a number of checks and balances, protections against abuses of power, and mechanisms for external oversight and scrutiny. Ministers bear responsibility for their portfolios; secretaries have duties and responsibilities with respect to the departments they administer; and public servants have standards of conduct to which they must adhere, which include acting with care and diligence, integrity and, importantly, providing the government with advice that is frank and honest.

How, then, in such a system, did it come to pass that the government implemented, and continued, an unlawful scheme that has been described as a "shameful chapter in the administration of the Commonwealth social security system" and "a massive failure of public administration"?[1]

This part of the report tells the story of Robodebt – from the frenetic, confused machinations of a pressured bureaucracy, to its ignominious end, ultimately brought about by a legal advice which, in essence, made precisely the same point as had been made in the first legal advice provided on the concept of what would become the Robodebt scheme.

The Scheme's demise, for all of its seeming inevitability, took far longer than it should have, particularly for all of those harmed by a Scheme to which they should never have been subject.

2 From concept to Budget measure – an overview

Throughout 2014, officers of the Customer Compliance Branch of the Department of Human Services (DHS) had been developing "Concepts for Future Compliance Activity".[2]Jason Ryman was a Director in that Branch.[3] One of his Assistant Directors was Tenille Collins.[4] Mr Ryman reported to the National Manager of that Branch, Scott Britton.[5] Mr Britton reported to the General Manager of the Business Integrity Division of DHS, Mark Withnell.[6]

The Customer Compliance Branch was responsible for investigating possible instances of under-reporting by social security recipients of their income,[7] with a view to recovery of overpayments caused by that under-reporting. In the language of DHS at the time, this was known as "non-compliance", and the steps taken to investigate and act on it were "compliance activities," often undertaken as part of a process called a "review."

By November 2014, although it was still very much in development, one such "concept" had been discussed at more senior levels at DHS.[8] It was described as a "broad scale cleanup [sic] of the PAYG[9] reviews," which involved a new method of review by which a debt could be automatically calculated using employer-reported PAYG information received from the Australian Taxation Office (ATO). The email noted that for this PAYG concept, "the savings over 4 years will likely approach $1b."

In late 2014, DHS officers met with officers from the Department of Social Services (DSS) to discuss possible measures for the 2015-16 Budget. In a general sense, if one of the ideas were to be put forward as a Budget measure, it would eventually be developed into a proposal for government, known as a New Policy Proposal (NPP). NPPs would be presented to Cabinet under the umbrella of DSS. That meant that in circumstances where DHS had the idea for a proposal, or responsibility for its implementation, it was necessary for them to take part in a collaborative process with DSS, in order that both departments would have an understanding of the proposal and could advise their respective ministers.

In some of those meetings in late 2014, DHS told DSS about the PAYG concept upon which they were working. The reaction within DSS to the potential proposal was negative. A number of DSS officers recognised that the proposal, as they understood it, was likely contrary to both policy and law.[10] By December 2014, DSS had received internal advice, which was as they had expected: the proposal did not align with social security policy,[11] and it was unlawful.[12] The extent to which this advice was communicated to DHS, and at what points in time, is the subject of detailed consideration in the sections that follow.

Despite that advice, this did not necessarily mean the end of the proposal. It was possible that a proposal that was unlawful could be made lawful, by amending the legislation under which it would operate. As discussed further later, at this particular point in time, that was an unpalatable proposition for a minister; however, the possibility remained that, with legislative change, the proposal could be implemented.

In January 2015, in response to a request by the Minister for Social Services, the Hon Scott Morrison MP, for a brief on "options to strengthen the integrity of the welfare system," the PAYG proposal had progressed to him in the form of an "Executive Minute", through the Minister for Human Services, Ms Marise Payne. The PAYG proposal was one of a number of proposals in the Executive Minute, but it was the one from which the bulk of anticipated savings were to be derived. It was expected to result in an estimated $1.2 billion in savings, offsetting not only its own costs, but also the costs of the other proposals, and other contemplated initiatives.[13]

As a result of communications between DSS and DHS about the PAYG proposal, the Executive Minute said that "DSS has also advised that legislative change would be needed to implement this initiative. As a result, we have been working with DSS on developing this proposal and will continue to do so".

On 12 February 2015, Mr Morrison signed the Executive Minute, indicating a desire to pursue the PAYG proposal.[14]

DHS subsequently developed the Strengthening the Integrity of Welfare Payments (SIWP) NPP which included, as one element, the PAYG proposal. This document would form the basis of what would be presented to Cabinet at a meeting of the Expenditure Review Committee (ERC) in March 2015, and would subsequently become the Strengthening the Integrity of Welfare Payments Budget measure in the 2015-16 Budget. The PAYG element of that Budget measure provided the basis for the first iteration of the Scheme.

At the time the Scheme was developed into an NPP, approved by Cabinet, and announced as an element of a Budget measure, DSS already had advice that concluded that the Scheme, as it was introduced, was contrary to policy, and was unlawful.

3 How did this happen?

The environment in which the development of what would become the Scheme occurred was fraught. It was characterised by a powerful drive for savings, strongly expressed ministerial policy positions, cultural conflicts on an inter and intra-departmental level and intense pressure experienced by public servants, including those in positions of seniority. It was not an environment which was conducive to instances of careful consideration, well-reasoned decision making, and proper scrutiny and supervision.

3.1 The savings agenda and policy direction

An enthusiasm for savings would seem an anathema to the underlying policy and rationale for social security spending, of supporting those in need; however, it appears that the social security portfolio was generally perceived as a reliable source for such savings. It was understood within that portfolio that the government's ambition to achieve a Budget surplus depended for success on the delivery of substantial savings from departments that were responsible for a significant portion of Commonwealth expenditure.[15] There was also a requirement that the cost of policy proposals be fully offset by a reduction in spending or increase in revenue elsewhere.[16]

Mr Morrison was appointed as the Minister for Social Services in December 2014.[17] His approach as a minister, including as the Minister for Social Services, was to:

> Respect the experience, professionalism and capability that the Public Service brings to the table, both in terms of policy advice and implementation skills, and then having set the policy direction, expect them to get on and deliver it. [18]

The policy direction set by Mr Morrison in the Social Services portfolio, which was publicly communicated by him, was one of "ensuring welfare integrity".[19] The nature of that approach was coloured by notions of people who were "rorting the system" and Mr Morrison's presence as a "welfare cop on the beat".[20] Inadvertent non-compliance was often mentioned in the same breath as cases of fraud, and no pains were taken to emphasise any distinction.[21]

As would be expected, members of the senior executive of both DSS and DHS were aware of Mr Morrison's policy direction, and the drive for savings.[22] In this context, a pervasive sense of pressure filtered down the management hierarchy.

The evidence of Serena Wilson (deputy secretary, DSS) was that discussions with ministerial staff about addressing problems were rare, and instead, proposals were "directed at finding cost savings".[23] She felt pressure in her day-to-day work activities and felt constrained in the final years of her public service career, in respect of her role in the implementation of social security policies, which she perceived were limited by the government's focus on identifying options to cut social security expenditure.[24]

Andrew Whitecross (acting group manager, DSS) described a meeting in which the PAYG proposal was discussed with Mark Withnell (general manager, DHS). He formed the impression that "there was quite an attachment at more senior levels to that level of savings",[25] and that the estimated $1.2 billion in savings was not a number "that had come out of a methodology, but that the number itself was a goal of the process".[26]

Mr Withnell's evidence was that he recalled a sense of urgency to provide a brief to the new minister (Mr Morrison).[27] With respect to meetings and the proposals generally, he felt that he was "under considerable pressure from the [DHS] deputy secretary".[28] He was involved in the development and progression of the PAYG proposal, despite being of the view that the measure "still had a way to go".[29]

Mr Britton described feeling increasing pressure to put forward proposals that provided savings to the government.[30] The environment at the time, he said, was "unrelenting", with the focus on savings[31] as part of the government's budget recovery strategy.[32]

There were concerns within DHS that the proposal was not ready to be put forward as a Budget measure; however, its progress to being developed into an NPP was rapid and unchecked. Mr Morrison's expectation, having set the policy direction, that public servants would "get on and deliver it" was echoed in Mr Britton's sense of pressure to "...get on with it. Just get on with it...And we collectively got on with it".[33]

The suite of proposals in the SIWP NPP were, unsurprisingly, neatly aligned with both the policy direction of the social services portfolio and the drive for savings. The PAYG proposal was the lynchpin of that proposal. It provided most of the proposed savings for the measure, and offset not only its own costs, but also those of the other elements, and other potential initiatives.[34] It is no stretch to say that the suite of measures outlined in the NPP rose and fell on the acceptance of the PAYG proposal, in that the loss of that element, for whatever reason, would likely endanger the viability of the entire proposal.

3.2 A rushed proposal

There were misgivings at some levels of DHS about whether the PAYG proposal had been developed to a point where it could be progressed to the NPP stage.

Tenille Collins expressed reservations that the proposal was being put forward where the final process had not yet been determined, and where there had been no testing of the process with "policy, legal or external stakeholders".[35]

Jason Ryman shared Ms Collins' reservations, and the view that they "had not done enough work at that stage" to put the measure forward, but he had been instructed to develop it nonetheless.[36] He considered that they had not done the work necessary to "bring together something that we would have significant confidence in".[37] His team had not yet looked at the idea of an online process other than as a "broader concept" of engagement of customers online, and the application of data sources, such as ATO PAYG data.[38] They were "in really preliminary research stages".[39]

Mr Ryman gave evidence that ordinarily there would have been some level of testing.[40] They would have developed specifications for the process, including details of why and how customers would engage with an online process.[41] It would be a lot further developed than "we want a digital solution".[42] In late 2014, Mr Ryman's understanding was that a measure which utilised the proposed PAYG process would commence in July 2016, rather than July 2015, and that they would have sufficient lead time, some 12 months, to develop an online solution and do the necessary preparation.[43] However, he was then informed that all the preliminary work was to be ready by early January, including the data to inform discussions with DSS as to the possible savings attached to the measure.[44]

Mr Ryman accepted that the analysis done to inform the underlying assumptions for the Budget measures was "not a perfect way to do it".[45] However, given the time pressures under which his team were being asked to provide data, that was the way they were able to provide the information in the time that they had.[46]

Mr Britton similarly felt that the measure needed more work. He was worried about the pressure he felt was being applied by his manager, Mr Withnell. Though the proposal was, in his view, "hugely complex", there was an imperative "to get the savings, to get the investment, to build the platform". He said:

> … not only through this measure but, we will come to the other ones, there was a lot of pressure – like, a lot of pressure to get it – to get it through.[47]

Mr Withnell was also of the view that the measure still had some distance to go.[48] He said that DHS had been asked to bring forward possible ideas, rather than fully formed measures.[49] He had thought that there would have then been "robust discussion, as had often been the case in the past", about each of those proposals before deciding whether to proceed.[50] Those discussions would involve working through possible proposals in some detail, and determining which ones were ready to take forward.[51] That did not happen as he had hoped.[52] He recalled that:

> …a lot of time was spent on – how can I put it – finessing the brief, I guess, in terms of wording of the brief, rather than – I would have preferred to spend time on more robust discussion about the measures themselves. [53]

Mr Withnell considered that the scale and "transformative nature" of the PAYG proposal was significantly larger than other Budget measures in which he had been involved. Given the nature of the measure, the period of time in which it progressed from a concept into an NPP was "very quick".[54] Mr Withnell's experience was that for two other "transformational" measures that were much smaller than the PAYG proposal, DHS had much more lead time before they even put the measure forward.[55] Around this point in time, and with respect to meetings and the proposals generally, he felt that he was under considerable pressure from the deputy secretary, Ms Golightly.[56]

However, whether these concerns went unarticulated, or unheard, the receipt by DHS of the Executive Minute signed by Mr Morrison resulted in the inclusion of the proposal in an NPP to be developed in "unprecedented" timeframes.[57]

3.3 "We know boats"

There was also a level of reluctance in DHS to share information about the proposal with DSS.

This reticence was demonstrated in an email Mr Withnell sent to Mr Britton reproaching him for sending preliminary data about the proposal to officers of DSS, expostulating that DHS was "giv[ing] away control of it!"[58] The following day, Mr Britton seems ruefully to have commented to other DHS officers that the proposal would need to be advanced by DHS alone, with little to no involvement from DSS.[59] Mr Britton recalled that Mr Withnell's approach was that DHS "were the experts", and that "we know boats";[60] by which he meant that DHS knew the detail of the work that they did, and there was a particular level of expertise within DHS about that work.[61]

This hesitance about sharing information resulted in less collaboration between the two departments about the proposal than might otherwise have been expected.[62] Its effect was compounded by some DHS officers' lack of understanding of the fundamental legal or policy problems with the proposal early in its development, when it might have been modified or stopped.

4 Conclusions on why this happened

Mr Morrison's evidence was that the SIWP measure:[63]

> …was not a measure that the government initiated, ie, Ministers. This was a measure that was initiated within the Public Service and brought to us, which we agreed to take forward based on those representations.

On one view, that statement is entirely correct. However, to attribute the birth of the Scheme entirely to the public servants who initiated the measure is to ignore part of the story. It fails to take into account the context and environment in which the measure was conceived.

The proposal was precisely responsive to the policy agenda that had been communicated to the social security portfolio departments, both in private meetings and in the public sphere, by the Minister for Social Services.

It came into being against the backdrop of a drive for savings, in a pressured public service where officers were acutely aware of the importance of those savings to the government.

The perceived need to "just get it done" meant that concerns about the immature level of development of the proposal went either unexpressed or unheard.

The assumptions and estimates upon which the proposal was based were conceived in haste and were predicated on a process which was under-developed and untested.

The relationship between DSS and DHS meant that the sharing of information about the proposal had been somewhat inhibited, and this was further complicated by the sometimes direct communications between DHS and the Social Services Minister.

The ministerial imprimatur to pursue the process led to the presentation of the SIWP NPP to government, for inclusion in the 2015-16 Budget. Once it had been announced, it represented the beginning of a scheme that would unlawfully take money from social security recipients on a massive scale, and ultimately fail to come anywhere close to the savings which had been promised in order to justify its adoption.

1 Exhibit 2-2598 – RBD.9999.0001.0225 – Prygodicz v Commonwealth of Australia (No 2) [2021] FCA 634 [p 2: para 5].
2 Exhibit 1-0850 - CTH.3716.0001.0001_R – NM signed brief Concepts for future compliance activity.
3 Exhibit 1-1136 - JRY.9999.0001.0002_R - NTG-0019 - Statement of Jason Ryman 27.10.22 [p 3: para 20].
4 Exhibit 4-6379 - TCO.9999.0001.0008_R2 - Clean PDF - Statement of T Collins NTG-0166 amended 22 February 2023 [PDF] [p 8: para 21; p 8: para 24].
5 Exhibit 1-1136 - JRY.9999.0001.0002_R - NTG-0019 - Statement of Jason Ryman 27.10.22 [p 2-3: para 18].
6 Exhibit 1-1175 - SBR.9999.0001.0002_R - NTG - 0038 Response Statement (executed)[p 2: para 12]; Exhibit 2-2153 - MWI.9999.0001.0001_R - 2022.10.14 - NTG-0011 Mark Withnell - Response [p 2: para 6].
7 Department of Human Services, 2014-15 Annual Report (Report, 25 June 2015), p 99.
8 Exhibit 8999 - CTH.3061.0002.8190_R - Re- new compliance measure [DLM=Sensitive].
9 Pay As You Go.
10 Transcript, Cameron Brown, 3 November 2022 [p 304: line 40 – p 305: line 12; p 304: line 40; p 305: line 12]; Exhibit 2-2118 - DSS.5046.0001.0033_R – Compliance measure [SEC=UNCLASSIFIED].
11 Exhibit 1-0085 - DSS.8000.0001.1009_R - FW- Request for clarification on income testing rules. [DLM=For-Official-Use-Only].
12 Exhibit 1-0002 - DSS.5006.0003.1833_R - FW- Legal Advice – Data matching- notifications and debt raising [DLM=Sensitive-Legal].
13 Exhibit 2-2669 - DSS.5077.0001.0037_R - AHL6MFD2_2022-10-27_12-14-35-258.
14 Exhibit 2-2669 - DSS.5077.0001.0037_R - AHL6MFD2_2022-10-27_12-14-35-258.
15 See, for example: Transcript, Finn Pratt, 10 November 2022 [p 852: lines 4-9].
16 Exhibit 2-2527A - CDF.0001.0001.0001 - [2] October 2014 BPORs, [p 8: rule 15]. In very general terms, this concept means that, with some exceptions, all new policy proposals that have a negative impact on the Budget have to be "offset" by positive impacts, for example, reductions in expenses or increases in revenue. At the time, the Budget Rules said that it was preferable to present any offset proposals as separate NPPs, but they could be presented together with expenditure measures as part of a single proposal [Rule 15.3].
17 Exhibit 2-2258 - SMO.9999.0001.0002_R - [REDACTED VERSION] Response to NTG-0033 dated 11 November 2022 [p 1: para 2(a)].
18 Transcript, Scott Morrison, 14 December 2022 [p 1854: lines 40-46; p 1855: lines 22-25; p 1855: 40-44].
19 Transcript, Scott Morrison, 14 December 2022 [p 1855: line 46 – p 1856 line 7; p -1874: lines 19-27].
20 Exhibit 2-2601 - RBD.9999.0002.0002 - 'Strong welfare cop' – Scott Morrison's new self-proclaimed title; Exhibit 2-2602 - RBD.9999.0001.0227 – Sky News – 'Richo' Former Ministers and Parliamentary Secretaries.
21 See, for example: Exhibit 2-2525 - RBD.9999.0001.0231 - 4 September 2015 – Jailed for welfare fraud; Exhibit 2-2526 - RBD.9999.0001.0230 - Data match reveals $200,000 Queensland fraud Senator Marise Payne.
22 Exhibit 4-6875 - CTH.3095.0001.4731_R - Minister Morrison – media [DLM=For-Official-Use-Only]; Exhibit 1-1232 - FPR.9999.0001.0004 - Notebook entry for 22 January 2015(46374698.1); Exhibit 4-5731 - SWI.9999.0001.0006_R - Robodebt Royal Commission – Further Supplementary Statement of Serena Judith Wilson – 21 Feb 23 [p 1-2: para 4-7].
23 Exhibit 4-5731 - SWI.9999.0001.0006_R - Robodebt Royal Commission – Further Supplementary Statement of Serena Judith Wilson – 21 Feb 23 [p 2: para 8].
24 Exhibit 4-5731 - SWI.9999.0001.0006_R - Robodebt Royal Commission – Further Supplementary Statement of Serena Judith Wilson – 21 Feb 23 [p 1-2: para 4-7].
25 Transcript, Andrew Whitecross, 8 December 2022 [p 1376: lines 2-3].
26 Transcript, Andrew Whitecross, 8 December [p 1376: lines 9-16].
27 Exhibit 2-2155 - MWI.9999.0001.0002_R - 20221021 Robodebt Statement (NTG-0030) Mark Withnell 22006293(46181408.1) [p 2: para 20].
28 Transcript, Mark Withnell, 9 December 2022) [p 1538: lines 2-4].
29 Transcript, Mark Withnell, 24 February 2023 [p 3748: lines 36-37].
30 Exhibit 1-1175 - SBR.9999.0001.0002_R - NTG - 0038 Response Statement (executed) [p 15: para 89; p 16: para 94]; Transcript, Scott Britton, 8 November 2022 [p 652: lines 30-47].
31 Transcript, Scott Britton, 23 February 2023 [p 3706: lines 10-20].
32 Exhibit 1-1175 - SBR.9999.0001.0002_R - NTG - 0038 Response Statement (executed) [p 15: para 89]; Transcript, Scott Britton, 8 November 2022 [p 654: line 42 – p 655: line 9].
33 Transcript, Scott Britton, 23 February 2023 [p 3692: lines 27-28].
34 Exhibit 4-5617;Exhibit 2-2068 - CTH.4700.0001.2404_R - B15_125.
35 Exhibit 4-6379 - TCO.9999.0001.0008_R2 - Clean PDF - Statement of T Collins NTG-0166 amended 22 February 2023 [PDF] [p 165: para 607].
36 Transcript, Jason Ryman, 22 February 2023 [p 3545: lines 24-30; p 3546: lines 4-7; lines 11-19].
37 Transcript, Jason Ryman, 22 February 2023 [p 3546: line 45 – p 3547: line 2].
38 Transcript, Jason Ryman, 22 February 2023 [p 3547: line 34 – p 3548: line 7].

39 Transcript, Jason Ryman, 22 February 2023 [p 3548: lines 1-2].
40 Transcript, Jason Ryman, 22 February 2023 [p 3548: line 13].
41 Transcript, Jason Ryman, 22 February 2023 [p 3546: lines 13-16].
42 Transcript, Jason Ryman, 22 February 2023 [p 3546: lines 16-17].
43 Transcript, Jason Ryman, 22 February 2023 [p 3558: lines 7-21].
44 Transcript, Jason Ryman, 22 February 2023 [p 3557: lines 5-20].
45 Transcript, Jason Ryman, 22 February 2023 [p 3556: lines 37-41].
46 Transcript, Jason Ryman, 22 February 2023 [p 3556: lines 37-41].
47 Transcript, Scott Britton, 23 February 2023 [p 3692: lines 27-28].
48 Transcript, Mark Withnell, 24 February 2023 [p 3748: lines 36-37].
49 Transcript, Mark Withnell, 24 February 2023 [p 3748: lines 38-39].
50 Transcript, Mark Withnell, 24 February 2023 [p 3748: lines 39-42].
51 Transcript, Mark Withnell, 24 February 2023 [p 3749: lines 1-10].
52 Transcript, Mark Withnell, 24 February 2023 [p 3748: lines 39-42].
53 Transcript, Mark Withnell, 24 February 2023 [p 3750: lines 1-4].
54 Transcript, Mark Withnell, 24 February 2023 [p 3750: lines 31-33].
55 Transcript, Mark Withnell, 24 February 2023 [p 3750: lines 35-42].
56 Transcript, Mark Withnell, 9 December 2022 [p 1538: lines 2-4].
57 Exhibit 4-5626 - CTH.3000.0004.0551_R - CONFIDENTIAL – CCB Direction [DLM=Sensitive].
58 Exhibit 4-5506 - CTH.2004.0001.3468_R - RE- PAYG Match Analaysis [DLM=For-Official-Use-Only].
59 Exhibit 4-5507 - CTH.3000.0002.0010_R - PAYG Analysis [DLM=For-Official-Use-Only].
60 Transcript, Scott Britton, 23 February 2023 [p 3686: lines 38-46].
61 Transcript, Scott Britton, 23 February 2023 [p 3687: lines 5-10].
62 Transcript, Jason Ryman, 22 February 2023 [p 3549: lines 1-7]; Transcript, Scott Britton, 23 February 2023 [p 3690: lines 21-23; p 3691: lines 19-30].
63 Transcript, Scott Morrison, 14 December 2022, [p 1874: lines 42-45].

Chapter 3: 2014 - Conceptual development

1 The origins of Robodebt

Robodebt originated as an idea from within the Customer Compliance Branch of the Department of Human Services (DHS). In oral evidence, Jason Ryman (director, Customer Compliance Branch, DHS) outlined various forms of compliance activity, one of which was to use PAYG employer-reported income data obtained from the ATO and match it with the income social security recipients had reported to Centrelink to identify discrepancies between those two sets of data.[1] Those discrepancies would then be investigated, with a view to identifying and acting on instances of non-compliance.

By 2014, members of the Customer Compliance Branch, including Scott Britton (national manager, Customer Compliance Branch, DHS) and Mr Ryman, were under increasing pressure to increase the volume of the branch's compliance activity.

The primary driver seems to have been a general perception that the social security portfolio, and particularly the compliance areas within that portfolio, were fertile ground for the generation of savings and "efficiencies" for the government. The size of the social security portfolio, including the monetary amounts outlaid on social security payments, meant that even small percentage deviations in payment accuracy[2] could represent millions of dollars.[3]

There was a perception that the scale of possible non-compliance vastly exceeded the resources available to DHS to investigate and recover overpayments arising from it. Mr Britton said it was thought that historically, there had been significant levels of non-compliance in the welfare program, in volumes beyond what DHS was able to cope with.[4] Mr Ryman gave a similar account: each year, the Customer Compliance Branch identified a significantly higher volume of potential "non-compliance" than it had capacity to investigate and manage. A strategic priority for the branch was to close the gap between the volume of prospective instances of non-compliance and what it could deal with "within an affordable budget".[5]

At this time, Mr Britton felt increasing pressure to bring forward budget measures which would provide savings to the government.[6] That pressure had built from around 2010 or 2012, with an increase in the number of budget measures administered by the compliance area.[7] Mr Britton recalled the savings being described as part of the government's budget recovery strategy.[8]

In this context, in June 2014, Mr Ryman authored a Minute to Mr Britton, entitled Concepts for Future Compliance Activity, which Mr Britton approved (the June 2014 Minute).[9]

The June 2014 Minute proposed a Trusted Data Assessment process. It involved the essential features of what became the Scheme: the use of data obtained from a third party, such as PAYG income data received from the ATO; a reassessment of the relevant social security recipient's entitlement based on that data; and communication of the result of the assessment to the recipient, with the opportunity to dispute the assessment before it was applied to the recipient's record (by raising an overpayment and debt).

In particular, the June 2014 Minute proposed the use of averaging of PAYG income data to determine social security entitlement. The Minute identified some possible obstacles to the proposal, but said "…legislation itself is not a barrier as we are able to average income as per section 1068-G8 of the Social Security Act 1991".

That was a complete misunderstanding of that provision's effect. Section 1068-G8 of the *Social Security Act 1991* (the Social Security Act) authorised a form of averaging to calculate entitlement in specific circumstances which were expressly outlined in the terms of the section.[10] It contained no general authorisation to use income averaging, and it did not authorise averaging in the circumstances that occurred under the Scheme. On the contrary, the fact that it authorised income averaging in very limited circumstances positively suggested that outside those circumstances it would likely be unlawful.

The use of income averaging, in the way it was proposed, was in fact inconsistent with social security legislation (that is, it was unlawful). This was, in a general sense, because social security legislation required a person's income support entitlement to be calculated on the basis of the income that they had

actually "earned, derived or received" in a fortnight. The average of someone's income over a period was no indication of what they had earned in any particular fortnight, unless there was also evidence that they had earned their income at a regular fortnightly rate over that period.

Both Mr Britton and Mr Ryman explained that they believed that there was no inconsistency with the requirement to use fortnightly amounts, because using averaging resulted in a notional fortnightly income amount,[11] and had "always been used" to calculate debts.[12] It appears that this erroneous understanding was partly based on failure to distinguish between, on one hand, the use of averaging to arrive at a fortnightly figure and, on the other hand, the subsequent apportionment (or allocation) of that figure into each fortnightly period (within a total period under investigation) to calculate a debt. Their understanding seemed to be that the fact that, under the proposed process, income amounts were still allocated into discrete fortnights during the process of calculating a debt meant that it was still a calculation of the individual's income on a fortnightly basis.

The problem with this is that averaging, in the absence of other information, was liable to produce inaccurate fortnightly amounts, which were not representative of actual income. This meant that the proposed process was not actually assessing income on a fortnightly basis, regardless of the fact that the averaged (and likely inaccurate) amount was then allocated into fortnights to perform the calculation. It was also inconsistent with the social security policy rationale for assessing income on a fortnightly basis, which was that individuals received income support payments at the time (and in the fortnight) that they needed them.

Neither Mr Britton nor Mr Ryman is a lawyer, and there is no evidence that they knew then that the use of income averaging, as it was later used in the Scheme, was unlawful. That was part of the reason why close collaboration with the Department of Social Services (DSS), whose officers had expertise in general social security policy and legislation, was critical to the development of the proposal.

The June 2014 Minute did consider one aspect of policy, albeit at a departmental policy level, rather than with respect to the social security portfolio generally. The Minute identified, as a possible barrier to the proposal, "the current departmental policy" which was that "apportionment of match data is only suitable as a last resort where customer or third-party information cannot be obtained". That was a reference to DHS's practice that, in some limited circumstances, the process of income averaging was used to calculate a debt. That was to be overcome by "influencing policy through the de-regulation agenda". In other words, the Minute suggested that in order for the proposal to progress, income averaging would need to be used in a wider range of circumstances than DHS policy currently allowed, and the way to overcome that obstacle was to promote the proposed process' potential to relieve the regulatory burden on third parties. Those third parties were primarily employers and banks, who, under the current policy, were required to provide details to DHS to verify recipients' income.

DHS officers subsequently used the phrase "last resort" with metronomic regularity when they sought to defend the use of income averaging in the face of sustained public criticism of the practice in late 2016 and 2017. The narrative adopted was that averaging had always been used as a "last resort", and its use in the Scheme was merely the continuation of a longstanding practice. However, it is plain from the June 2014 Minute that the narrative was false. The explicit proposal in the Minute was that there be a departure from the stipulation that averaging could only be used as a "last resort", so that it would become the default methodology for calculating overpayment of social security benefits.

Despite what would later be said by those defending the Scheme, from the beginning, the Scheme involved a dramatic departure from how DHS had, in the past, assessed social security recipients' income and calculated overpayments. Importantly, the June 2014 Minute characterised this departure as a departure from "policy", rather than from legislative requirements, when it was in fact both.

2 Initial discussions of the concept between Human Services and Social Services

Over a number of meetings between DHS and DSS officers in October 2014, DSS was told about the proposal that would later become the Scheme. These meetings were relatively informal.[13] The officers from both departments were in buildings across the road from each other.[14] The meetings were not conducted according to any agenda and no minutes were taken.[15]

On Tuesday 14 October 2014, there was a meeting between DHS and DSS officers to discuss possible budget measures for the 2015/16 Budget.[16] Mr Britton was one of the DHS officers in attendance. The DSS officers attending were Murray Kimber, Cameron Brown and Mark Jones.[17] At the time, Mr Kimber was the branch manager of the Social Security Performance and Analysis Branch of DSS.[18] Mr Brown reported to Mr Kimber as the director of the Payment Integrity and Debt section,[19] and Mr Jones, an assistant director, reported to Mr Brown.[20] At the meeting, DHS officers outlined an initial description of what became the Scheme.[21]

Between 14 and 27 October 2014, when another meeting took place, DHS officers undertook more work on the proposal, and more details of the proposal were outlined to DSS personnel.[22] In an email on 14 October 2014 to other members of DHS, including Mr Ryman, Mr Britton indicated that there would be a "focus on PAYG…so we will need detail of what's in the pool for each year back to 2010/11".[23] In subsequent emails, DHS officers detailed analyses of PAYG data in the possession of DHS.[24] This included an email sent to Mr Britton and Mr Ryman on 24 October 2014, attaching "the PAYG information for DSS".[25] The document recorded that there was a total of 866,857 uninitiated PAYG compliance matches from the 2010/11, 2011/12 and 2012/13 financial years. A further email on 27 October 2014 clarified that the 866,857 figure represented unique recipients, and that there were 1,080,028 matches.[26]

What that meant was that DHS had "matched" the ATO PAYG information for each of those people with the amount of income that they had reported to DHS while they were on income support payments. That matching process had resulted in a discrepancy, or difference, between the two amounts.

On the afternoon of 27 October 2014, there was a meeting between DHS and DSS officers for "15-16 Budget follow up"[27] on the matters discussed earlier that month, including what would become the Scheme. At 8:36 am that morning, Mr Britton sent an email to DSS officers, including Mr Kimber, attaching the DSS-PAYG analysis "for discussion this afternoon."[28] At 8:41 am, Mark Withnell (general manager) replied to Mr Britton's email:

> Why has this gone to DSS? I haven't seen it, we have no authority even for the measure as yet and now we have given away control of it![29]

Mr Withnell's reluctance to share information about the proposal with DSS was a departure from what Mr Britton and Mr Ryman said was their usual experience of working with DSS. According to them, DHS had regular engagement with DSS and kept DSS informed of DHS's research and testing for ideas or concepts it was developing,[30] before the point at which a written briefing was provided to a Minister.[31] There would "traditionally be DSS – heavily DSS involvement, if not led, particularly through the formal phase".[32]

Mr Withnell's explanation for this departure was that there had been some lack of clarity as to which of DHS and DSS had ownership of information;[33] DHS was concerned that DSS would assume control over its information or projects.[34] He may also have regarded DHS as having greater expertise in the subject matter than DSS. Mr Britton could remember Mr Withnell being angry with him, though not why; but he recalled that Mr Withnell's approach was that it was DHS which had the expertise, delivered the detail and completed the work.[35]

According to Mr Britton, there was "definitely a view formed that we [DHS] wanted to take this forward".[36] That was reflected in an email another DHS officer sent on 28 October 2014, referring to a discussion with Mr Britton in which he said, "He [Mr Britton] thinks that a new initiative around the automation of debt notification will need to be put up by DHS alone (with minimal to no joint involvement from DSS)".[37] Mr Britton gave evidence that his state of mind as expressed in that email would have come from Mr Withnell directing him to that effect.[38]

The product of Mr Withnell's direction to Mr Britton was that DHS continued to work on the proposal until early 2015. This was without any further consultation with DSS about the proposal. According to Mr Britton, this was unusual.[39]

As will appear, after the meeting between DHS and DSS on 27 October 2014, DSS obtained legal advice to the effect that the use of income averaging in the way that had been proposed by DHS was unlawful. However, DSS was not informed of the further work that DHS was undertaking on the proposal until early 2015, after a meeting between DHS secretary, Kathryn Campbell, and Scott Morrison, Minister for Social Services, on 30 December 2014.

3 The Department of Social Services' reaction to the concept

While DHS continued to work on the proposal, the reaction to the concept within DSS was negative, to say the least.

In oral evidence, Mr Brown said that "almost immediately", his team recognised that the proposal was inconsistent with the legislative requirement that social security entitlement be based on fortnightly income.[40] In his mind, the proposal involved what he described as "speculative invoicing",[41] by which (he explained) he meant speculatively asserting en masse the existence of debts owed by social security recipients who then had the options of accepting the existence of the asserted debts or assuming the onus of disproving them.[42] He noted the difficulties that social security recipients, who included very vulnerable cohorts, would have in disputing the asserted debts, particularly where they related to periods of time years before.[43] This, he expected, would result in social security recipients entering into agreements to repay debts that they did not owe.[44] He had no doubt that the proposal was unethical.[45]

On 31 October 2014 Mr Jones, in consultation with Mr Brown, sought policy advice and legal advice in respect of the proposal DHS had outlined.[46] Both requests for advice described the proposal. He sought the legal advice from Anne Pulford (principal legal officer, Public Law Branch, Legal Services Group, DSS). Ms Pulford delegated responsibility for the advice to Simon Jordan (senior legal officer, Public Law Branch, Legal Services Group, DSS).[47]

The request for policy advice went to the Rates and Means Testing Policy Branch, whose acting director, David Mason, responded promptly with an advice (the 2014 DSS policy advice) a week later, on 7 November 2014.[48] His email said:

> Hi [Mr Brown and Mr Jones],
>
> Thanks for the opportunity to meet with you and discuss this proposal.
>
> Similarly to the view you expressed when we met, we would not support this proposal. It is flawed as the suggested calculation method (averaging employment income over an extended period) does not accord with legislation, which specifies that employment income is assessed fortnightly. It follows that the debt amount calculated could be incorrect according to law, and it is unclear how a DHS delegate could validly make a determination about the amount of a debt in these circumstances. Further, we can't see how such decisions could be defended in a tribunal or court, particularly when DHS have the legislative authority to seek employment income information from employers.[49]

Mr Mason sent the 2014 DSS policy advice to a number of people, including Ms Pulford.

Before the legal advice was provided, on 12 November 2014 Mr Kimber sent an email to DSS officers, including Serena Wilson (deputy secretary, Social Security Division, DSS) and copied Mr Brown.[50] Mr Kimber's email said:

> Hi Serena,
>
> A heads up on the development of the fraud + compliance NPP for 15-16. You will recall a week or so back we were tossing around the idea to streamline compliance matches and subsequent follow up / debt raising - in essence this would allow DHS to move toward a process that would bypass the current detailed investigation of fortnightly income match discrepancies, smooth the income reported over a period, notify the customer of a potential debt and then place the onus on the individual customer to either accept or challenge the debt. As a broad concept it sounded OK, however, as we discussed it did have a number of issues. Following further investigation we have confirmed as much. We expect legal advice in coming days to confirm that it is not appropriate under current provisions and would not be expected to hold up to scrutiny or challenge. We will now take this off the table for further consideration and advise DHS once we get the final legal advice.

In oral evidence, Ms Wilson accepted that the proposal discussed in that email contained the key features of what became the Scheme.[51] She accepted that it raised for her legal and policy questions about which it was DSS's responsibility to advise DHS.[52]

On 18 December 2014 Ms Pulford "second counselled"[53] the legal advice Mr Jordan had prepared in response to Mr Jones' request,[54] and Mr Jordan emailed the advice to Mr Jones that day (the 2014 DSS legal advice).[55] The question the advice answered was "whether a debt amount derived from annual smoothing or smoothing over a defined period of time [ie averaging] is legally defensible". The advice said, "a debt amount derived from annual smoothing [ie averaging] over a defined period of time may not be derived consistently with the legislative framework". The advice explained this conclusion by reference to the legislative requirement for social security entitlement to be calculated based on actual fortnightly income.

The reasoning set out in the email was not complex. It did not rely on obscure principles of law or use dense language. It simply identified that the legislative requirement for entitlement based on fortnightly income could not be met because "smoothing" (that is, averaging) might not correctly identify the amount of income a social security recipient earned or received in each fortnight under consideration.

The use of income averaging, as was being proposed by DHS, was unlawful.

In her oral evidence, Ms Pulford agreed that the gist of the legal advice was "a very strong 'no'".[56] She also agreed that, except in "unusual circumstances", the proposal to average income from a broader period and allocate it equally to fortnights during that period would not identify the actual amount of income the recipient received; that is, it would lead to, at least, inaccurate allegations of debt.[57]

Mr Brown was similarly emphatic as to his understanding of the implications of the legal advice. To him, the advice was clear, and should have meant the end of the DHS proposal.[58]

There is no clear evidence that the conclusions in the 2014 DSS policy and legal advices were communicated to DHS at this time; certainly the advices themselves do not appear to have been passed on. Mr Kimber had referred in his 12 November email to Ms Wilson to letting DHS know of the outcome once the final legal advice had arrived. Mr Jones thought the information would have been passed on, possibly by email, although none has come to light. He could not remember if he made a telephone call to let DHS know that DSS did not support the proposal on either a legal or policy basis.[59] While it seems likely that DSS would pass the effect of the advices on to DHS, it is possible that Christmas 2014 overtook the intention to do so and it was forgotten by the new year.

4 The Department of Human Services analysis and red flags

While officers of DSS sought internal legal and policy advice that could have resulted in the end of the DHS proposal, momentum towards its development accelerated in DHS.

From late October 2014, the Customer Compliance Branch continued to work on the concepts outlined in the June 2014 Minute, including further analysis with respect to the PAYG match data. One aspect of analysis was directed at the impact of apportionment (averaging) of match data on debt outcomes. A comparison was undertaken of approximately 100 compliance review outcomes, in which a "hypothetical" calculation was generated by averaging the PAYG match data, which was then compared against the original calculations undertaken and recorded on the customer record.[60]

The findings of this analysis were that 66 per cent of cases resulted in the debt being higher than the actual debt for the match period, and 31 per cent of cases resulted in the debt being lower the actual debt for the match period. Presciently, the document identified two important factors. Firstly, it noted that "where the debt is higher as a result of the hypothetical smoothing, this seems to be a result due to customers not actually working every day/week/fortnight during the match period"; and secondly, it recorded that "81 cases [out of the 106 total] had a match period over the whole financial year, however the verified earnings did not cover the whole financial year".

The analysis continued. On 6 November 2014, Tenille Collins (assistant director, Customer Compliance Branch, DHS) emailed Mr Ryman[61] attaching an analysis of 229 cases,[62] observing that "the findings have not differed from the first 100 cases". Consistent with Ms Collins' observation, the attachment demonstrated that 55.9 per cent of cases using apportioned data resulted in a debt higher than the originally calculated debt, and 39.3 per cent of cases using apportioned data resulted in a debt lower than the originally calculated debt. Out of the 229 cases, 94 had a match period over the whole financial year, and cases that resulted in a higher debt due to income smoothing seemed to result where there was casual employment income.

By November 2014, the analysis demonstrated that just over 95% of the debts calculated using income averaging differed from the manually calculated amount. The work to date had shown that using an income averaging methodology to calculate debts overwhelmingly resulted in an inaccurate result, whether the manually calculated debt amount[63] was lower (the majority of cases) or higher than the debt calculated using income averaging.

This was profoundly significant; social security legislation determined entitlement, and overpayment, on the basis of actual amounts of income, and these results showed that averaged income did not correspond with actual income, usually to the disadvantage of the recipient.

Ms Collins was also involved in developing process maps for the PAYG Trusted Data Process, which, by 5 November 2014, she referred to as "the budget measure".[64] On that day, she emailed the process maps to Mr Ryman with another officer's summary of the changes:

> I have amended the PAYG Trusted Data Process Maps as discussed to reflect that the customer will be required to confirm or update the match data information before an assessment on the income is undertaken.
>
> I have made some assumptions on the process pending further discussion, and in particular that where the customer does not contact or action digital intervention then the PAYG income data as provided in match will be applied to the customer record, and we will not go to third parties. The customer can then go through normal EIR processes if they disagree.[65]

5 One billion dollars

Despite what the internal DHS analysis revealed about the inaccuracy of debts which would be calculated under the proposal, momentum continued to build. It had apparently reached, or was about to reach, more senior levels at DHS. There were emails in November 2014, commencing with one from a DHS deputy secretary to Mr Withnell, seeking details that DSS may have been wanting, with respect to a possible new compliance measure. The details were sought for the information of Ms Campbell, the Secretary of DHS, who wanted to know "what they [DSS] might be looking at".[66] The deputy secretary asked for some key points to be provided for Ms Campbell's next meeting with Mr Pratt. Mr Withnell replied that there were two possibilities, one of which was "a clean up of PAYG matches"; however, he also noted that this was "less certain" because it depended on policy advice regarding treatment of income. He indicated that he would get some dot points put together.

A DHS officer duly provided a set of dot points for Mr Withnell's approval.[67] Under the heading "Streamlined PAYG reviews", the following point appeared:

> This measure is a broad scale cleanup of the PAYG reviews in preparation for One Touch Payroll due to roll out in 2016. It is proposed to introduce a new method of review that includes an automated debt calculation based on the information received from the ATO without verification from employers. **The measure is dependent on a variation to the policy on the treatment of earned income under the income test for welfare payments. It is proposed that income treatment for earned income include an option to annualise income rather than use the point of earnings calculation.** Each year DHS receives far more PAYG matches (260,000 customers for 2013/14 financial year) than we can process with the traditional method of review that requires verification from the employer and/or the customer. The department currently has the resources to process approximately 30,000 of the highest risk reviews this year under the traditional method. The new streamlined method of review would allow the department to review customers not captured in the high risk pool. The method of review would remain unchanged for the highest risk reviews.
>
> **The costs of these measures will be offset from the broader savings under the DSS proposals. The PAYG measure requires a policy change and DSS are yet to advise if this change is supported.**
>
> **[emphasis added]**

Mr Withnell replied with "a slight amendment", noting:

> In the last para I suspect the PAYG measure will need to offset against itself. I doubt that it figures in the DSS calculations. We could leave it open for DHS to use as an offset – the savings over 4 years will likely approach $1b.[68]

Two important features emerge from this exchange. First, the DHS view was that which Mr Ryman had expressed in the June 2014 Minute: the only prospective barrier to the proposal was that it would require a "change of policy". Evidently that view was persisting in DHS in November 2014, in contrast to DSS's concerns about the legality of the proposal. Secondly, DHS was aware by this time that the proposal could result in very substantial savings to government.

6 More evidence of inaccuracy

On 12 December 2014, Ms Collins emailed Mr Ryman about the PAYG measure.[69] Among the attachments to her email was a document which referred, among other things, to an analysis of the PAYG records for the 2010-11, 2011-12 and 2012-13 financial years. Although the methodology is unclear, the document said, "The analysis identified that debts were increased by 13.06 per cent when income smoothing was applied".[70]

Mr Ryman's understanding (as given in evidence) of how that 13 per cent figure was derived was that it was based on a review of recipients' actual files.[71] He described a process of comparing the actual debt raised through a manual compliance review with a hypothetical debt calculated using income averaging. The result of the analysis was that using income averaging resulted in debts that were, on average, 13 per cent higher than when they were calculated using a manual compliance review process.[72]

7 The New Policy Proposal – December 2014

By December 2014, initial drafts of an NPP for what would become the Scheme were being circulated within DHS. Mr Ryman's recall of how those drafts came about was that he would have been asked by Mr Britton to start to prepare Budgetary documentation.[73] The only "build-up" to that, that he could recall, were the discussions that Mr Britton and Mr Withnell had with DSS in late 2014, and subsequent discussions about bringing forward ideas for DSS.[74]

On 10 December 2014, a member of Mr Ryman's team sent Ms Collins[75] the first draft of the NPP, entitled "Digital Compliance for Customers with Earned Income".[76] Two days later, Ms Collins emailed[77] a further version of the draft NPP[78] to Mr Ryman. That version included the following words:

> …There would need to be a change in departmental policy in relation to the application of income smoothing to assess a customer's income from employment.

The reference to the need for a "change in departmental policy in relation to the application of income smoothing", and the absence of a reference to any need for legislative change, echoed the DHS misapprehension that the only barrier to the proposal lay in policy rather than law.

As has already been detailed, it is also evident that there was a drive from the higher levels of DHS to move the proposal forward at a rate that was faster than that at which staff at lower levels of DHS were comfortable. Ms Collins recalled that she was very surprised that the process was being considered for, and developed into, an NPP.[79] She had reservations about progressing to that stage in circumstances where there was not yet a final process, let alone one that had undergone testing and consultation.[80] She regarded it as "highly unusual" that, as of 8 December, it was proposed that further testing and development of the PAYG process would occur, but just two days later a draft NPP had been produced.[81]

Ms Collins said she expressed her reservations to Mr Ryman and another staff member,[82] both of whom agreed with her. Mr Ryman indicated his frustration, caused by "others" who were putting this forward";[83] Ms Collins inferred, given the management hierarchy, that he was referring to Mr Britton and Mr Withnell.[84]

Mr Ryman did not specifically recall such a conversation with Ms Collins, or feeling frustration, but he did recall sharing Ms Collins' reservations about putting the measure forward at that stage.[85] He was concerned that preliminary work which would normally have been done for the measure had not been done,[86] but he had been instructed to develop it nonetheless.[87]

Mr Britton recalled that in late 2014, he felt that the measure needed more work to "make sure that it was validated."[88] He was worried about the pressure that he felt was being applied.[89] From his perspective, the pressure came from Mr Withnell, who was "very hands on".[90] Mr Britton described the proposal as "hugely complex". There was an imperative "to get the savings, to get the investment, to build the platform",[91] and "a lot of pressure to get it – to get it through".[92]

8 2015 and the first Department of Human Services legal advice

On 8 January 2015 Mr Ryman sought legal advice from the Program Advice Legal and Ombudsman Branch of the Legal Services Division of DHS about the proposed PAYG process.[93] That request was centred around the ability of DHS to compel a recipient to provide information or perform certain tasks online, and the question of whether there could be an automatic application of an "assessment outcome" if a recipient did not act. It did not ask about income averaging. This was consistent with the position expressed in the June 2014 Minute, which referred to a need for legal advice with respect to "automatic applications of data to customer records". Questions associated with income averaging were considered to be policy-based.

On 14 January 2015 a government lawyer emailed Mr Ryman[94] attaching a memorandum of advice (the January 2015 DHS legal advice).[95] The advice was "second counselled" by John Barnett (deputy general counsel, DHS).

Presumably because of the way the instructions were framed, the advice assumed that the "information" involved in the process was derived from one of three sources: tip offs, internal profiling and data matching.[96] With respect to the third, data matching, the advice was confined in its analysis to information collected under the *Data-matching Program (Assistance and Tax) Act 1990* (Cth). None of the three categories reflected the nature of the PAYG information that was to be used in the process. Nonetheless, the advice still said some things relevant to the proposed process.

Firstly, the advice was that DHS could give customers a legal notice that required them to do something online, "provided the notice is of a kind that provides for the Secretary (or delegate) to prescribe the manner in which the information is to be provided". The advice concluded that the letter that DHS planned to send under the proposed process was *not* such a notice.

Because the letter was not a coercive notice, but was rather a "request" to a recipient to provide information voluntarily, there were no legal requirements as to the form that the letter should take. However, the advice recommended that, when sending a person such a letter, the process should allow a recipient sufficient time to provide the requested information. It also recommended that, if a recipient could not provide the information online, there be another means by which they could provide the information. The advice then stated:

> Additionally this may impact on the decision making process. That is if the information is not provided but known to exist then the veracity of the decision and the process may be brought into question by any review authority.

That was important, because one of the problems with the proposed process was that DHS already had the fortnightly income amounts that a recipient had reported to them while they were on income support payments. DHS had used that information to match with the ATO data to identify a discrepancy. What the advice was suggesting was that ignoring that information, or other information that was available to DHS (for example, on a recipient's Centrelink record), might compromise the decision-making process.

The advice also stated that, in circumstances where a person had been given sufficient time and opportunity to respond, and chose not to, it was open to a decision-maker to use the "new" information to inform their decision-making process.

The advice concluded:

> There is no discussion about the use of coercive information powers. If no information is provided by the customer then the fresh decision will be based on the available information. This may be an imperfect outcome and a process that may be challenged by customers and other stakeholders. Ultimately it is a matter of accepting the risks.

Accepting that the PAYG process was still being developed, and its precise formulation was as yet unclear, it is still obvious that the instructions provided to the Legal Services Division lacked sufficient detail and clarity, imposing limitations on the scope and depth of any advice that could be provided in response. Mr Ryman agreed, in his oral evidence, that none of the staff members in his project team or section were lawyers, and they were at a disadvantage in identifying legal issues that would require advice in the development of the project.[97]

Mr Barnett's evidence was that it was unclear to him what the term "assessment outcome" actually entailed,[98] and whether it meant an assessment of an income amount which was of itself to be used to assess a recipient's entitlements. However, he proceeded on the basis that the process described in the instructions involved an automated assessment of an income amount which would then be a piece of information to be used in the context of other information available to a decision maker in a decision-making process which was not automated.[99] As will be seen, that was not the process that was subsequently implemented under the Scheme.

9 Mr Morrison appointed as Social Services Minister

On 23 December 2014[100] Mr Morrison was appointed Minister for Social Services, an appointment which involved being a member of the Expenditure Review Committee (ERC), a committee of Cabinet.[101]

The Social Services Portfolio was comprised of DSS and DHS. At that time, Marise Payne was the Minister for Human Services, having commenced her appointment on 18 September 2013.[102] Both Mr Morrison and Ms Payne remained in their respective roles until 21 September 2015.

During that period, Finn Pratt was the secretary of DSS and Kathryn Campbell was the secretary of DHS. Mr Pratt and Ms Campbell were the principal policy advisors to their respective ministers.[103]

The framework in which Mr Morrison, Ms Payne and their respective departments operated was established by an Administrative Arrangements Order (AAO) made on 23 December 2014.[104]

Under the AAO, Mr Morrison was responsible for administering various pieces of legislation including the Social Security Act and the Social Security (Administration) Act (except to the extent they were administered by the Attorney-General or the Minister for Employment).[105] His department, DSS, was responsible for dealing with various matters including: income security and support policies and programmes for families with children, carers, the aged, people with disabilities and people in hardship; income support policies for students and apprentices; and income support and participation policy for people of working age.

DHS was responsible for dealing with development, delivery and co-ordination of government services, development of policy on service delivery and monitoring and management of service delivery arrangements including social security.

On the day of Mr Morrison's appointment, Ms Payne signed a letter to him,[106] noting an arrangement for Ms Campbell to meet with him in order to brief him on the key priorities and challenges for DHS. That meeting took place on 30 December 2014[107] while Ms Payne was on leave.[108]

Ms Campbell, who was also on leave at the time, travelled from Queensland to Sydney for the meeting.[109] As the Secretary of DHS, it was uncommon for Ms Campbell to meet directly with the Minister for Social Services, as she was not a "direct report" to that Minister. When she did meet with the Minister for Social Services, it was usually in the presence of the Minister for Human Services.[110]

Ms Campbell recalled that, at the time of the meeting with Mr Morrison, significant media attention was focused on "the integrity of welfare outlays"[111] a phrase which she said meant "payments to [sic] which the recipient may not be eligible".[112] It is likely Ms Campbell had some knowledge of the DHS PAYG proposal, a deputy secretary of DHS having sought information about it on her behalf in November 2014.[113] Ms Campbell could not remember if she was aware of whether DHS had sought or obtained policy advice or legal advice in respect of any particular proposal before she met with Mr Morrison.[114] As noted above, there is no clear evidence that either of the 2014 DSS policy or legal advice had been communicated to DHS at this time.

Mr Morrison described the purpose and content of the discussion with Ms Campbell in the following terms:[115]

> So the purpose of that conversation, which was, I think, sought in concert both with Ms Campbell as well as Minister Payne, was of a general nature to understand how the Department of Services (sic) operated, what their systems were, to understand how they communicated benefits and dealt with the processing of payments. I remember spending quite a bit of time as we went through the Centrelink handbook and the various benefits that were there, which was explained to me, and how they work through their very difficult task.

> …
>
> Within that discussion, I obviously expressed interest about how they ensured the integrity of the welfare system.
>
> …
>
> And as a result of that general conversation, I asked that they advise me of ways we could do that better, which seemed to me to be consistent with my responsibilities as Minister.
>
> This was a Budget which was a third of the Federal Budget, and I was very aware from that discussion that even the smallest changes to entitlements and programs and how things are managed can have very serious implications for taxpayers. Of course, social welfare system - the social security system is paid for by taxpayers, and the system needs to be fair to those who receive benefits as well as those who pay for them, the taxpayers. And that was a very strong view of our government and the principle of mutual obligation which was established in particular by Prime Minister Howard.

Mr Morrison said he talked with Ms Campbell about the number of social security payments and the interactions with recipients in Centrelink officers. He said that he was not aware, at the time of the meeting with Ms Campbell, that DHS was developing the PAYG proposal.[116] Given the content of the discussion as outlined by Mr Morrison (and the notes of Charles Wann below), and the likelihood that Ms Campbell was aware of the proposal in a general sense, it is likely that it was raised, at least in broad terms.

Mr Wann, senior advisor to Mr Morrison, took notes of the meeting.[117] Those notes contained the following references: "Policy – reliance on payment; entitlements based"[118] and a short list of matters under the heading "most excited" which included "MyGov website – move everyone online" and "Integrity package". It is inferred that it was Mr Morrison who was "most excited" about the integrity package.

Mr Morrison gave evidence that he considered that the brief prepared by DHS following his meeting with Ms Campbell, Executive Minute B15/125[119] (the Executive Minute), was responsive to his discussion with her on 30 December 2014.[120] The content of the Executive Minute was introduced under the heading "Key Points":

> Following your meeting with [Ms Campbell], the department was asked to prepare a brief outlining the department's current approach to protecting the integrity of the welfare system outlays and options for strengthening those arrangements, in particular those associated with fraud.

Mr Morrison explained in his oral evidence that his request for options to strengthen the integrity of the welfare system, particularly in relation to fraud, was focused on one of the most important issues that "Australians, and particularly taxpayers, had expressed great concern about"; they did not want to see the system "rorted".[121]

The AAO allowed for the possible overlap of the DSS responsibility for income support policy with the DHS responsibility for the development of policy on service delivery. It was in this context that Mr Morrison met with Ms Campbell and made the request to which the Executive Minute referred, and in which DHS offered to develop what would become the SIWP NPP. Under the AAO, that NPP fell within the responsibilities of both DSS and DHS. From DHS's perspective, it was within the scope of "development of policy on service delivery" and a matter "dealt with by [DHS as] a Department of State" in accordance with the AAO.

1 Transcript, Jason Ryman, 8 November 2022 [p 722: line 37 – p 724: line 10].
2 "Payment accuracy" refers to DHS's ability to pay the right person the right amount of money, through the right programme, at the right time, and takes into account customer and administrative error (See: Department of Human Services, 2014-15 Annual Report (Report, 25 June 2015) [p 99]).
3 In 2014-15, DSS managed a budget of $128.9 billion, which represented almost one third of the Commonwealth Government Budget (See: Department of Human Services, 2014-15 Annual Report (Report, 25 June 2015) [p 143]. At a general level, the monitoring of the accuracy of social security payments occurred through the "Random Sample Survey Programme." A random sample of persons representing each payment type administered through the social security income support portfolio was analysed to assess whether people had been payed accurately, and determine the reasons for any debt, error or change in payment rate. This process provided benchmark data on the level of inaccurate payments made (See: Department of Human Services, 2014-15 Annual Report (Report, 25 June 2015) [p 126].
4 Transcript, Scott Britton, 8 November 2022, [p 653: lines 19-21].
5 Exhibit 1-1136 - JRY.9999.0001.0002_R - NTG-0019 - Statement of Jason Ryman 27.10.22 [para 29].
6 Exhibit 1-1175 – SBR.9999.0001.0002_R – NTG-0038 – Response Statement (executed) [para 89, 94]; Transcript, Scott Britton, 8 November 2022, [p 652: lines 30-47].
7 Transcript, Scott Britton, 8 November 2022, [p 651: line 44 - p 652: line 11].
8 Exhibit 1-1175 – SBR.9999.0001.0002_R – NTG-0038 – Response Statement (executed) [para 89]; Transcript, Scott Britton, 8 November 2022, [p 654: line 42 - p 655: line 9].
9 Exhibit 1-0850; Exhibit 1-1207 - CTH.3716.0001.0001_R - NM signed brief Concepts for future compliance activity.
10 At the time, and subject to some exceptions, those circumstances were that a person received ordinary income payments in respect of periods greater than a fortnight, and there was reasonable predictability or regularity as to the timing and the quantum of those payments.
11 Transcript, Scott Britton, 23 February 2023 [p 3697: lines 33-47; p 3723: lines 22-30]; Transcript, Jason Ryman, 22 February 2023 [p 3563: lines 15-24; 41-45; p 3564: lines 1-5; 27-31].
12 Transcript, Jason Ryman, 22 February 2023 [p 3564: lines 1-5].
13 Exhibit 2-2114 - MKI.9999.0001.0002_R - 20221111 NTG-0062 Response (Kimber, M)(46393028.1) [para 31].
14 Exhibit 2-2114 - MKI.9999.0001.0002_R - 20221111 NTG-0062 Response (Kimber, M)(46393028.1) [para 31].
15 Exhibit 2-2114 - MKI.9999.0001.0002_R - 20221111 NTG-0062 Response (Kimber, M)(46393028.1) [para 31].
16 Exhibit 1-1185 - CTH.3000.0001.6195_R - 2015-16 Budget Measures [DLM=Sensitive].
17 Exhibit 2-2114 - MKI.9999.0001.0002_R - 20221111 NTG-0062 Response (Kimber, M)(46393028.1) [para 30].
18 Exhibit 2-2114 - MKI.9999.0001.0002_R - 20221111 NTG-0062 Response (Kimber, M)(46393028.1) [para 16].
19 Exhibit 2-2114 - MKI.9999.0001.0002_R - 20221111 NTG-0062 Response (Kimber, M)(46393028.1) [para 18].
20 Exhibit 1-0060 - MJO.9999.0001.0001_R - Statement of Mark Jones [para 9, 17].
21 Exhibit 2-2114 - MKI.9999.0001.0002_R - 20221111 NTG-0062 Response (Kimber, M)(46393028.1) [para 30].
22 Exhibit 2-2114 - MKI.9999.0001.0002_R - 20221111 NTG-0062 Response (Kimber, M)(46393028.1) [paras 31-35]; Transcript, Cameron Brown, 3 November 2022 [p 303: lines 40-46].
23 Exhibit 1-1185 - CTH.3000.0001.6195_R - 2015-16 Budget Measures [DLM=Sensitive].
24 Exhibit 2-2752 - CTH.3000.0001.6304_R - RE- 2015-16 Budget Measures [DLM=Sensitive].
25 Exhibit 4-5646 - CTH.3000.0001.8416_R - DSS - PAYG analysis [DLM=For-Official-Use-Only]; Exhibit 4-5647 - CTH.3000.0001.8417 - DSS - PAYG analysis.
26 Exhibit 2-2802 - CTH.3000.0001.8680_R - PAYG - Risk Category [DLM=For-Official-Use-Only].
27 Exhibit 4-5648 - DSS.5053.0001.0010 - Accepted- 15-16 Budget follow up mtg [SEC=UNOFFICIAL].
28 Exhibit 4-5506 - CTH.2004.0001.3468_R - RE- PAYG Match Analaysis [DLM=For-Official-Use-Only].
29 Exhibit 4-5506 - CTH.2004.0001.3468_R - RE- PAYG Match Analaysis [DLM=For-Official-Use-Only].
30 Transcript, Jason Ryman, 22 February 2023 [p 3549: lines 1-7]; Transcript, Scott Britton, 23 February 2023 [p 3690: lines 27-33].
31 Transcript, Scott Britton, 23 February 2023 [p 3690: lines 27 – 33].
32 Transcript, Scott Britton, 23 February 2023 [p 3691: lines 19-30].
33 Transcript, Mark Withnell, 24 February 2023 [p 3747: lines 29-34].
34 Transcript, Mark Withnell, 24 February 2023 [p 3747: lines 36-39].
35 Transcript, Scott Britton, 23 February 2023 [p 3687: lines 5-10].
36 Transcript, Scott Britton, 23 February 2023 [p 3687: lines 10-16].
37 Exhibit 4-5507 - CTH.3000.0002.0010_R - PAYG Analysis [DLM=For-Official-Use-Only].
38 Transcript, Scott Britton, 23 February 2023 [p 3688: lines 38-46; p 3689: lines 1–5].
39 Transcript, Scott Britton, 23 February 2023 [p 3690: lines 21 - 23].
40 Transcript, Cameron Brown, 3 November 2022 [p 304: line 40 – p 305: line 12].
41 Transcript, Cameron Brown, 3 November 2022 [p 305: lines 30-35].

42 Transcript, Cameron Brown, 3 November 2022 [p 306: lines 4-12].
43 Transcript, Cameron Brown, 3 November 2022 [p 306: lines 25-32].
44 Transcript, Cameron Brown, 3 November 2022 [p 306: lines 25-32].
45 Transcript, Cameron Brown, 3 November 2022 [p 306: lines 25-32].
46 Exhibit 1-0071 – DSS.8000.0001.1007_R – FW: Legal Advice – Data matching- notifications and debt raising [DLM=Sensitive]; Exhibit 1-0158 - DSS.5050.0001.0002_R - Email from Mark Jones to Cameron Brown dated 13-11-2014 FW- Legal Advice - Data matching- notifications and debt raising [DLM=Sensitive]; Exhibit 1-0159 – DSS.5050.0001.0008_R – FW: Request for clarification on income testing rules. {DLM=For-Official-Use-Only].
47 Exhibit 1-0072 – DSS.8000.0001.0603_R – RE: Legal Advice – Data matching- notifications and debt raising [DLM=Sensitive:Legal].
48 Exhibit 1-0085 - DSS.8000.0001.1009_R - FW- Request for clarification on income testing rules. [DLM=For-Official-Use-Only].
49 Exhibit 1-0085 - DSS.8000.0001.1009_R - FW- Request for clarification on income testing rules. [DLM=For-Official-Use-Only].
50 Exhibit 2-2118 - DSS.5046.0001.0033_R - Compliance measure [SEC=UNCLASSIFIED].
51 Transcript, Serena Wilson, 9 November 2022 [p 773: line 29].
52 Transcript, Serena Wilson, 9 November 2022 [p 773: line 36 – p 774: line 28].
53 This term referred, generally, to a process by which a second person would consider the advice, and either agree with it, or make suggestions for amendments or refinements.
54 Exhibit 1-0072 - DSS.8000.0001.0603_R - RE- Legal Advice - Data matching- notifications and debt raising [DLM=Sensitive-Legal].
55 Exhibit 1-0002 - DSS.5006.0003.1833_R - Email from Jordan Simon to Mark Jones copying Anne Pulford and preceding chain.
56 Transcript, Anne Pulford, 1 November 2022 [p 179: lines 38-41].
57 Transcript, Anne Pulford, 1 November 2022 [p 176: line 44 – p 177: line 1].
58 Transcript, Cameron Brown, 3 November 2022 [p 313: lines 5-11].
59 Transcript, Mark Jones, 1 November 2022 [p 144: lines 3-30].
60 Exhibit 4-6388 - CTH.3002.0006.1506_R - PAYG findings [DLM=For-Official-Use-Only]; Exhibit 4-6389 - CTH.3002.0006.1507 - PAYG FINDINGS.
61 Exhibit 4-6392 - CTH.3030.0008.7724_R - FW- PAYG findings - 1st phase [DLM=For-Official-Use-Only].
62 Exhibit 4-6393 - CTH.3030.0008.7725 - PAYG FINDINGS 04112014.
63 A manually calculated debt was based upon a compliance officer performing calculations based on relevant information obtained for the purposes of that calculation. Whilst that process would necessarily involve the possibility of error, through factors such as deficiencies in information or human error, it must nonetheless be assumed to represent an accurate calculation of debt in the majority of cases.
64 Exhibit 4-6390 - CTH.3030.0008.7359_R - FW- Updated PAYG [DLM=For-Official-Use-Only].
65 Exhibit 4-6390 - CTH.3030.0008.7359_R - FW- Updated PAYG [DLM=For-Official-Use-Only].
66 Exhibit 8999 - CTH.3061.0002.8190_R - Re- new compliance measure [DLM=Sensitive].
67 Exhibit 8999 - CTH.3061.0002.8190_R - Re- new compliance measure [DLM=Sensitive].
68 Exhibit 8999 - CTH.3061.0002.8190_R - Re- new compliance measure [DLM=Sensitive].
69 Exhibit 4-6596 - CTH.3002.0006.5491_R - PAYG measure [DLM=Sensitive].
70 Exhibit 9003 - CTH.3002.0006.5508 - PAYG High Level Assumptions.
71 Transcript, Jason Ryman, 22 February 2023 [p 3554: lines 11-30].
72 Transcript, Jason Ryman, 22 February 2023 [p 3554: lines 32–45].
73 Transcript, Jason Ryman, 22 February 2023 [p 3546: lines 11-19].
74 Transcript, Jason Ryman, 22 February 2023 [p 3546: lines 21-30].
75 Exhibit 4-6397 - CTH.3031.0004.0701_R - PAYG NPP draft [DLM=Sensitive].
76 Exhibit 4-6398 - CTH.3031.0004.0702 - NPP_ PAYG v0.1.
77 Exhibit 4-6596 - CTH.3002.0006.5491_R - PAYG measure [DLM=Sensitive]. Other attachments to the email included a proposed process map for the "PAYG – New Compliance Process" (Exhibit 4-6403 - CTH.3002.0006.5496 - PAYG - New Compliance Process (Proposed) v0.16), a document entitled "PAYG High Level Assumptions" (Exhibit 9003 - CTH.3002.0006.5508 - PAYG High Level Assumptions) and a spreadsheet entitled "Trusted Data – Draft De regulation" (sic) (Exhibit 4-6404 - CTH.3002.0006.5514 - Trusted Data- Draft De regulation).
78 Exhibit 4-6597 - CTH.3002.0006.5492 - NPP_ PAYG v0 2.
79 Exhibit 4-6379 - TCO.9999.0001.0008_R2 - Clean PDF - Statement of T Collins NTG-0166 amended 22 February 2023 [para 607].
80 Exhibit 4-6379 - TCO.9999.0001.0008_R2 - Clean PDF - Statement of T Collins NTG-0166 amended 22 February 2023 [para 607].

81 Transcript, Tenille Collins, 3 March 2023 [p 4302: lines 13-15].
82 Exhibit 4-6379 – TCO.9999.0001.0008_R2 – Clean PDF – Statement of T Collins NTG-0166 amended 22 February 2023 [para 607].
83 Exhibit 4-6379 – TCO.9999.0001.0008_R2 – Clean PDF – Statement of T Collins NTG-0166 amended 22 February 2023 [para 607].
84 Transcript, Tenille Collins, 3 March 2023 [p 4302: line 44; p 4303: lines 6-31].
85 Transcript, Jason Ryman, 22 February 2023 [p 3545: lines 24-30].
86 Transcript, Jason Ryman, 22 February 2023 [p 3546: line 45 – p 3547: line 2].
87 Transcript, Jason Ryman, 22 February 2023 [p 3545: lines 24-30; p 3546: lines 4-7, lines 11-19].
88 Transcript, Scott Britton, 23 February 2023 [p 3691: lines 45-47; p 3692: lines 1-8].
89 Transcript, Scott Britton, 23 February 2023 [p 3692: line 15].
90 Transcript, Scott Britton, 23 February 2023 [p 3692: line 17].
91 Transcript, Scott Britton, 23 February 2023 [p 3692: lines 18-19, lines 26-27].
92 Transcript, Scott Britton, 23 February 2023 [p 3692: lines 27-28].
93 Exhibit 2-2204 - CTH.3002.0007.1628_R - FW- Legal Advice - Proposed digital intervention process [DLM=Sensitive-Legal].
94 Exhibit 2-2204 - CTH.3002.0007.1628_R - FW- Legal Advice - Proposed digital intervention process [DLM=Sensitive-Legal].
95 Exhibit 2-2205 - CTH.3002.0007.1631_R - Lex 17990 - Online mandating - data matching etc - advice.
96 Mr Ryman's evidence was that "tip-offs" referred to information provided by members of the public to DHS. "Internal profiling" referred to the identification of anomalies in data held internally by DHS (Transcript, Jason Ryman, 8 November 2022 [p 722: lines 37-43]).
97 Transcript, Jason Ryman, 8 November 2022 [p 733: lines 3-18].
98 Transcript, John Barnett, 10 March 2023 [p 4930: lines 16-19].
99 Transcript, John Barnett, 10 March 2023 [p 4930: line 24 - p 4931: line 13].
100 Exhibit 2-2558 - SMO.9999.0001.0002_R - [REDACTED VERSION] Response to NTG-0033 dated 11 November 2022, [para 2(a)].
101 Exhibit 2-2558 - SMO.9999.0001.0002_R - [REDACTED VERSION] Response to NTG-0033 dated 11 November 2022, [para 2(a)].
102 Exhibit 2-2558 - SMO.9999.0001.0002_R - [REDACTED VERSION] Response to NTG-0033 dated 11 November 2022, [para 2(a)].
103 Public Service Act 1999 (Cth), s 57.
104 Exhibit 2-1985 - RBD.9999.0001.0045 - 1. Administrative Arrangements Order made on 23 December 2014.
105 The Attorney General's responsibilities under these Acts were only with respect to specific payments for disaster recovery and victims of overseas terrorism. The Minister for Employment's responsibilities under these Acts were only with respect to participation and activity test requirements, and compliance obligations for participation payment recipients. These responsibilities were not material for the purposes of the Robodebt Scheme.
106 Exhibit 2-2496 - CTH.3732.0001.0007_R - B14-1288 BR 1 350167-1; Exhibit 2-2497 - CTH.3732.0001.0008_R - B14-1288 SF 3 393527-1.
107 Transcript, Kathryn Campbell, 7 March 2023 [p 4527: lines 18-22].
108 Exhibit 2-2497 - CTH.3732.0001.0008_R, B14-1288 SF 3 393527-1 [p 1, 5]. Ms Payne was on leave from 24 December 2014 until 9 January 2015.
109 Transcript, Kathryn Campbell, 10 November 2022 [p 916: lines 42-43].
110 Exhibit 1-1237 – KCA.9999.0001.0002_R, 2022.10.13 – NTG-0013 Kathryn Campbell - Response, 13 October 2022 [page 3: para 13].
111 Transcript, Kathryn Campbell, 10 November 2022 [p 918: lines 8-11].
112 Transcript, Kathryn Campbell, 10 November 2022 [p 918: line 22].
113 Exhibit 8999 - CTH.3061.0002.8190_R - Re- new compliance measure [DLM=Sensitive].
114 Transcript, Kathryn Campbell, 10 November 2022 [p 918: lines 24-28].
115 Transcript, Scott Morrison, 14 December 2022 [p 1765: lines 1-36].
116 Transcript, Scott Morrison, 14 December 2022 [p 1763: lines 32-42].
117 Exhibit 4-5206 - CWA.9999.0001.0005_R - Supplementary Statement of Mr Charles Wann together with Amended Statement of Mr Charles Wann(61304596.1), Annexure A.
118 Transcript, Charles Wann, 20 February 2023 [p 3332: line 7].
119 Exhibit 2-2665 - CTH.3053.0044.0425_R - B15-125 Deputy Secretary signed brief, 12 February 2015.
120 Transcript, Scott Morrison, 14 December 2022 [p 1769: lines 34-37].
121 Transcript, Scott Morrison, 14 December 2022 [p 1768: lines 28-36].

Chapter 4: 2015 - Articulations of the Scheme

1 Drafting the Executive Minute

On Monday 5 January 2015, Kathryn Campbell (secretary, DHS) met with Malisa Golightly (deputy secretary, DHS) (since deceased), and asked for a brief to be prepared in response to a request from the Minister for Social Services, Scott Morrison.[1] This brief was later titled an Executive Minute. The work that had been done on the New Policy Proposal (NPP) in 2014 was provided to Mark Withnell (general manager, Business Integrity, DHS), who developed this into the first draft of the brief.[2]

By that Friday, Mr Withnell had sent an email attaching the first draft of the brief to Scott Britton (national manager, Customer Compliance Branch) and others within DHS.[3] The draft referred to risks to the integrity of the welfare system, and outlined how traditional compliance reviews were a "staff intensive verification process involving obtaining information from customers and third parties."[4]

The brief described a limited ability to change the process "due to legislative and policy constraints" but outlined how the estimated "PAYG clean-up" savings "would more than offset the cost of all other proposals." The draft referred to the fact "that this specific proposal requires changes to the treatment of income away from fortnightly attribution" and that changes to the PAYG clean-up process would relate "to the application of income smoothing to assess a customer's income from employment."

DHS communicated its intention to develop the Executive Minute to DSS at an early stage, and a meeting was proposed for 12 January 2015 between representatives of the two departments.[5]

2 Social Services' concerns with the proposal

On 12 January Andrew Whitecross (who acted in Paul McBride's position as group manager, Social Policy Group, DSS until 2 February 2015) was invited to a meeting which had been arranged by Cath Halbert (group manager, Payments Policy Group, DSS).[6] The meeting was likely an internal DSS meeting in advance of the discussion between DSS and DHS later that day, which was attended by Murray Kimber (DSS), and Mr Withnell (DHS).

After the meeting Mr Kimber sent an email to Ms Halbert, Alanna Foster and Mr Whitecross in which he expressed some uncertainty, shared by both DSS and DHS, as to the "particular focus that the Minister [Mr Morrison] may take." Mr Kimber identified one of the options proposed by DHS in the following terms:[7]

> PAYG / income declaration data matching debt clean up thru application of streamlining of income process - consistent with idea that was being considered as part of initial 15-16 Budget thinking – does require lego change and also different way of considering how debt is established…

Mr Kimber also referred to "a Dep Secs [meeting] later today at which this will be explored."[8]

3 The significance of legislative change

Mr Kimber's indication that the PAYG proposal, at that point, "does require lego change" was a reference to DSS's view that if the proposal were to be pursued legislative change would be required. The effect of the 2014 DSS legal advice was that, if there were to be no change to legislation, the proposal would be unlawful.

DSS's view that legislative change was required to implement the DHS proposal presented a significant problem for the viability of the proposal.

The issue was not that a requirement for legislative change would, in and of itself, necessarily spell the end of any proposal. It may be accepted that it is generally not unusual for a Department to put forward proposals that may require policy or legislative change.[9] The issue was that in the specific context of this particular proposal, a need for legislative change presented to two obstacles to the progress of the proposal.

Firstly, at the time, the composition of the Senate meant that there was very little prospect of being able to pass contentious legislation.[10] There was a number of measures from the previous year's Budget that were awaiting passage through the Senate.[11] There was a significant number of members on the crossbench, and it was necessary to have the support of "a substantial subset" of them to get more "difficult" legislation through.[12] Legislative change which required a fundamental change to the nature of assessment of income under social security legislation was likely to be just such a "difficult" piece of legislation.[13]

Secondly, and relatedly, there was little likelihood that the necessary legislative change could have been achieved in the timeframes anticipated for the commencement of the measure (which, it should be noted, were explicitly stated in the NPP, but not in the Executive Minute). Finn Pratt considered that it was practically impossible to achieve legislative change in the confined period between the approval of the measure for inclusion in the Budget in March 2015, and the intended commencement of the measure on 1 July 2015, for reasons including the proposal's potential for controversy.[14]

Those difficulties were obvious considerations for the development of any proposal.[15]

In any event, Mr Morrison's evidence was that:

> …had [the DHS proposal] required legislation, then we may well not have pursued it. In fact, it would have been unlikely that we would, because there were many other issues that we were pursuing.[16]

4 Human Services briefs Ms Payne

Although Mr Morrison made his request directly to Ms Campbell, Ms Payne was responsible for the administration of DHS's policy development on service delivery. Ms Payne met with Ms Campbell on 13 January 2015.[17] Ms Payne's notes confirm that they discussed Mr Morrison's meeting with Ms Campbell on 30 December 2014 and the prospect of an NPP which addressed his request:[18]

> Minister Morrison – compliance;
>
> Focus on integrity of system + integrity of outlays;
>
> NPP compliance now/ options for further?

The brief to Mr Morrison was to be provided to him through Ms Payne. Ms Golightly finalised an early draft of the Morrison brief as an attachment to a brief to Ms Payne (B15/39), on 15 January 2015. Ms Golightly sent Ms Payne's brief (including the attachment comprising the draft brief to Mr Morrison) by email to a departmental liaison officer (DLO) who was in Ms Payne's office that evening.[19] Ms Golightly then sent the brief to Ms Campbell and said:[20]

> [I]it incorporates the changes we discussed and hopefully addresses the issues you raised. I did confirm with [Mr Withnell] that the income smoothing option (ie, the Business Integrity $1.2 billion gross savings measure) has been discussed with DSS. I also raised it with Serena [Ms Wilson] this afternoon to make sure.

Ms Payne's brief was forwarded to Megan Lees (Ms Payne's chief of staff), with the following note:[21]

> I understand the Secretary is very keen to get this brief in front of the Minister ASAP, to give her as much time as possible to consider it before the meeting on Tuesday.

The brief was sent to Ms Payne by email on 16 January 2015 and she later received a hard copy.[22]

The attached draft brief to Mr Morrison (by way of Executive Minute) itself included four attachments, of which two are relevant.[23] The first described the "current arrangements to maintain the integrity of welfare payment outlays," and the second set out a range of suggested proposals to "strengthen the integrity of welfare payments," for Mr Morrison's consideration.

The existing process for ascertaining overpayment of welfare payments was described as follows:

> 16. The traditional compliance reviews are a manual staff intensive verification process involving obtaining information from customers and third parties often going back over a number of years. The ability to change the process is limited due to legislative and policy constraints on the need to apply income fortnightly to determine overpayments even if they occurred over several months or years and even if income data is only available on an annual basis (for example, income is determined annually by the Australian Tax Office so is therefore only available on an annual basis).
>
> …
>
> 19. However, the department cannot ignore the fact that there is a stock of payments already in the system which are likely being paid in error. When left in the system, such payments can continue for long periods of time, meaning that even small weekly overpayments can add up to significant levels of wasteful expenditure. Addressing this in a cost effective manner will require reconsideration of the policy and legislative constrains [sic] that mean income has to be determined and applied fortnightly instead using the data available from the Australian Tax Office (ATO) on an annual basis as discussed in paragraph 16 above.[24]

There were 10 Potential Priority New Policy Proposals contained in the draft. The introductory section, Proposed Changes to Strengthen the Integrity of the Welfare System, stated:

> The first option outlined below (and others) would need policy, and possibly legislative, changes to proceed. However, the estimated savings are substantial and would more than off-set the cost of all other proposals. This specific proposal requires changes to the treatment of income away from fortnightly attribution to an annualised approach.[25]

The first option was called "PAYG clean up." It was DHS's proposed solution to the problem of recovering "wasteful expenditure" said to have been caused by erroneous overpayments to social security recipients, and noted the prospect of the significant savings that could be recovered if policy, and possibly legislation, were able to be changed to accommodate its implementation.[26] It was described in these terms:

> **Potential Priority New Policy Proposals**
>
> PAYG clean-up
>
> a) The proposal will introduce a digital approach to interventions with customers when historical information from the ATO indicates the customer may have incorrectly declared income from employment.
>
> b) Interventions will be undertaken in a digital environment using the myGov portal. The customer will be presented, via their online account, with the information obtained from the ATO and an assessment of their correct welfare entitlement based on this information. **The assessment will use an income smoothing methodology to apportion the customer's income over the time of employment (rather than the current cumbersome process whereby the department has to determine and apply income on a fortnightly basis).** The customer will have an opportunity to update the information prior to it being applied to their Centrelink record.
>
> c) The proposal removes the need for the department to be dependent on customer and business information as the default and instead relies on the use of data already collected by the ATO as the default unless customers want to, and are able to, provide information that varies the outcome. The digital process will enable the department to undertake a much greater number of compliance reviews.
>
> d) The proposal will provide for a four year measure to undertake 866,857 interventions for customers at risk of undeclared or under declared income from employment. It is anticipated that this would result in an estimated $1.2 billion gross savings and debt due to returned outlays.
>
> e) **There would need to be a change of policy to enable the application of income smoothing to assess a customer's income. It may also need change to legislation. As a result, we have been working with DSS on developing this proposal and will continue to do so.**[27]
>
> [emphasis added]

The emphasised sub-paragraph shows that by the time Ms Golightly finalised the B15/39 brief on 15 January 2015, DSS had advised DHS that implementation of the "PAYG clean-up" proposal raised a real question about the need for legislative change. Mr Whitecross and Mr Kimber (and possibly Ms Halbert) were likely to have provided that advice to Mr Withnell on 12 January 2015 with Ms Wilson confirming it to Ms Golightly on 15 January 2015.

Ms Payne, Ms Campbell, Ms Golightly and Mr Withnell subsequently met on 20 January 2015.[28] Ms Payne did not sign the brief with which she had been provided.[29] Her note of the meeting referred to the "Data Matching Act," but otherwise no record was made of the brief, or any discussion about it.[30] It seems likely, however (for reasons which appear below) that at the meeting there was a suggestion that the draft brief to Mr Morrison be divided into two briefs, reflecting the two matters he was most interested in, fraud and participation compliance.

5 Social Services becomes concerned

On the same day that the brief had been sent to Ms Payne, 16 January 2015, Serena Wilson (deputy secretary, DSS), received advice from Mr Whitecross.

Ms Wilson gave evidence that she could not recall what led to her request for advice from Mr Whitecross.[31] Mr Whitecross gave evidence that he thought a deputy secretaries' meeting had occurred on 16 January 2015 which involved Ms Wilson, who had "visibility of this idea" and wanted his advice.[32]

Earlier that day, at Mr Whitecross's request, Mark Jones (assistant director, DSS) had sent him a chain of emails which included the 2014 DSS policy advice and the 2014 DSS legal advice.[33]

In his email to Ms Wilson, Mr Whitecross strongly advised against the DHS proposal.[34] Mr Whitecross set out that proposal, as DSS understood it, which involved identifying and raising employment income related debts based upon data received from the ATO. He understood that the ATO data would be assumed to have been earned evenly, or "smoothed," across a financial year to calculate a debt.

Mr Whitecross said that this was very different from the current approach, under which income support entitlements (and debts) were calculated using amounts of employment income earned in fortnightly increments, which were allocated to the fortnight in which they were actually earned. That approach was consistent with the principle that income support payments should be available for people when they were most in need of support.

Mr Whitecross informed Ms Wilson that DSS did not support the proposal, for a number of reasons. He set out DSS's concerns in detail, including the substance of the 2014 DSS legal advice: DSS Public Law Branch had confirmed that the smoothing method proposed did "not accord with social security legislation," which specified that employment income was assessed fortnightly. It followed that the debt amount calculated would not be supported by law.

He also pointed out that the proposal was "counter to the policy rationale for assessing employment income on a fortnightly basis, which is to ensure that income support payments are made when income support recipients are most in need."

Other problems Mr Whitecross identified with the proposal were the dubious ability of an algorithm to accurately identify incorrectly declared income, "problematic" review rights, a lack of clarity on how much detail would be provided to recipients as to how any purported debt had been calculated, and an effective "reversal of onus" onto a recipient to provide information to enable accurate calculation of a debt.

Essentially, Mr Whitecross's advice set out many of the problems which later emerged in the Scheme. At least for someone with Mr Whitecross's level of experience in the social security portfolio and knowledge of the proposed process, these problems were both obvious and inevitable.

6 Ms Wilson's discussions with Mr Pratt and Ms Golightly

Ms Wilson replied to Mr Whitecross the following Monday, 19 January 2015, saying:

> Thanks - I was concerned when [Ms Golightly] described it to me. I will go back to [Ms Golightly] and let Finn [Pratt] know.[35]

In her evidence, Ms Wilson agreed that the legal advice described by Mr Whitecross "was unequivocal"[36] and the policy advice weighed heavily against the DHS proposal.[37]

Ms Wilson could not recall telephoning Ms Golightly;[38] however, she said that it would have been her practice to give Ms Golightly a call and let her know DSS's concerns.[39]

In circumstances where Ms Wilson indicated in her email to Mr Whitecross that she would inform Ms Golightly of DSS's position, and that it was her practice to telephone her in such circumstances, it is likely that Ms Wilson did telephone Ms Golightly as her DHS counterpart and convey the substance of DSS's concerns with the proposal to her. It is consistent with the later communications between DSS and DHS staff at lower levels about those concerns.

It is likely that the call took place on or around 19 or 20 January 2015, between Ms Wilson's email on 19 January expressing her intention to call Ms Golightly[40] and her email on 20 January (detailed below) stating that she had "expressed her reservations to Malisa" about the proposal.[41]

Ms Wilson agreed that the subject of Mr Whitecross's advice was significant and there was no reason to doubt that she conveyed it to Mr Pratt as she said she would.[42] Ms Wilson recalled the nature of that conversation as follows:

> Because the nature of the conversation was at a very general level, it didn't focus on the detail, because I, clearly foolishly, didn't at that point in time have concerns about how it would go forward. So I let him know that we were doing this work, we had had this – that this work was proceeding by DHS, that we had had this conversation, that DHS was intending to proceed. **We had had this conversation, that they were seeking to scale up PAYG data-matching in a way that didn't require legislation**. And I have no record for this, so I can't say what his response was.[43]
>
> [emphasis added]

Mr Pratt did not recall receiving Mr Whitecross's advice at the time, but after having the opportunity to peruse it briefly in oral evidence, remarked that "frankly, the advice is excellent advice."[44] Mr Pratt had no doubt that Ms Wilson would have talked to him, although he could not specifically recall the conversation.[45]

The Commission accepts that the conversation occurred as Ms Wilson described, probably at a high level of generality.[46] However, it is more likely than not that it involved Ms Wilson conveying to Mr Pratt the fact of the proposal and DSS's concerns with it, which would logically have included the information that DHS was seeking to advance the proposal in a way that did not require legislation.

7 Social Services communicates its concerns to Human Services

On 20 January 2015 Ms Halbert sent a draft of the Executive Minute (which had been received from DHS) to Ian Joyce, Mr Kimber and Mr Whitecross, copying Ms Wilson.[47] Ms Wilson replied to everyone that afternoon, saying:

> I am concerned about the smoothing proposal on assessing debts rather than looking fortnight by fortnight. I expressed my reservations to Malisa as I am not sure it can be done without fundamentally changing basis of eligibility away from current income which is also where we want to get to in family payments. Happy to be convinced otherwise if possible but would need very strong advice. Apparenbtly [sic] they are going to pslit [sic] into two docs and Morrison most interested in hard edged fraud stuff and participation compliance each of which hwould [sic] be a separate brief.[48]

Ms Wilson's reference to the brief being split into two documents reflecting "hard edged fraud stuff and participation compliance" is consistent with a brief, B15/65,[49] signed by Ms Golightly on 23 January 2015 (addressed below). It stated that following the meeting with Ms Payne the brief to Mr Morrison had been divided into two separate briefs. The brief to Ms Payne referred to a further brief to be prepared for Mr Morrison "in relation to the current arrangements re eligibility and participation requirements for job seeker and opportunities to strengthen these arrangements" which was to be provided to Ms Payne "shortly."

At 4:43 pm Mr Kimber replied to Ms Wilson, Ms Halbert, Mr Joyce, Mr Whitecross and others.[50] He attached a document he described as "our input to any responses back to DHS," [51] and made the following points:

> In particular
>
> \~ We are highlighting that the smoothing income proposal fundamentally changes the way SSL[52] is constructed. It also potentially deals in the matter of retrospectivity (think Keating) if it was used for past year income etc.
>
> \~ The rest are potentially less problematic, however, the details and impacts are scant. As a general comment the deal of increased regulatory burden for customers is evident – how the measure stacks up in terms of net savings when DHS costs and increased reg burden are factored in is not clear at this stage.

The attached document was part of the draft brief to Mr Morrison, comprising the introductory section and the "Potential Priority New Policy Proposals" section, with comments by DSS on each of the proposals in text boxes throughout the document.[53]

Ms Wilson subsequently amended the document,[54] and at 5:08 pm Ms Halbert sent the amended document (the DSS Dot Points) to Ms Ryan and Mr Withnell at DHS, copying in Ms Wilson, Mr Kimber, Mr Joyce, Ms Foster and others at DSS.[55] Ms Halbert said:

> As discussed, here are our comments on the compliance part of the brief. We feel particularly strongly about the clean up PAYG measure – you will see the comments.

The DSS Dot Points in respect of the PAYG measure stated:[56]

- Whilst potentially attractive in terms of the level of savings and capacity to clean up a significant under of cases, the proposal fundamentally changes the assessment of income within the social security system and is not supported by current policy or legislation.
- DSS Public Law Branch confirms that the suggested calculation method does not accord with social security legislation, which specifies that employment income is assessed fortnightly.
- The legislation is framed to support the policy rationale for assessing employment income on a fortnightly basis, which ensures that income support payments are made when the recipient is most in need. This proposal would introduce an arrangement that runs counter to that rationale.
- The proposal would introduce dual mechanisms for the calculation of debt i.e. in some instance on a fortnightly basis and others on an annual basis.
- Smoothing income on an annual basis is not consistent with the policy directions DSS wishes to pursue for all payments, including family assistance, under welfare reform, taking the opportunity provided by the ATO single touch payroll development to implement this should government agree.
- The Keating High Court decision, limiting the application of legislative changes retrospectively, may impact on this proposal. For example the first year that annual smoothing could take place would be in financial 2016-17. As a result, the saving may be overstated over the forward estimates as there may be issues in applying the smoothing retrospectively to past financial years.
- It also raises issues concerning the potential for recipients not being able to effectively exercise their review rights to ensure they are not being disadvantaged.
- For example constraining review rights by suggesting that debts could only be challenged if the income support recipient provides fortnightly earnings data, shifts the responsibility entirely to the recipient to ensure their debt was correctly calculated, and does not take into account administrative error.
- Annual data matching will by its nature lead to the raising of large debts rather than identifying non-compliance earlier. Larger debts are more difficult to recover and would result in a significant increase in the debt base.
- The introduction of the ATO Single Touch Payroll initiative will ultimately provide DHS with access to accurate, real time employment income details on a fortnightly basis. This would provide:

    a) a ready basis to calculate debts on a fortnightly basis, in accordance with current legislation and policy intent and without the issues involved in changing to a smoothed approach.

    b) assist in more accurately assessing entitlements in the first instance, reducing the risk of debts occurring.

On 20 January 2015 Ms Ryan forwarded the DSS Dot Points to Mr Withnell and Ms Golightly.[57]

8 Human Services responds to Social Services' concerns

While it is not clear whether DSS had, up to this point, communicated its 2014 legal or policy advice about income averaging to DHS, or simply identified that the proposal raised the question of legislative change, the fact that the DSS Public Law Branch had given advice, and the substance of that advice, was communicated to DHS by Ms Halbert's email of 20 January 2015 and the attached DSS Dot Points, which also conveyed the policy problems DSS had identified.

It appears that Mr Withnell sought assistance from DHS officers in responding to the DSS Dot Points, and sent Ms Halbert's email with the DSS Dot Points to Mr Britton and Mark Brown "for [their] consideration."[58] His email said, "DO NOT FORWARD."

Despite that firm direction, it appears that Mr Britton provided it to Jason Ryman (director, Customer Compliance Branch, DHS) in some form because later that day Mr Ryman sent Mr Britton an email with the subject line "DSS Response Dot Points" which contained a response in respect of "PAYG Clean-Up."[59]

Before sending his email to Mr Britton, Mr Ryman had consulted with members of his team, including Ms Collins,[60] asking, "Hand on heart time – any exposure?."[61] Ms Collins answered in the negative.[62] Her evidence was that Mr Ryman's dot points response email was prepared for Mr Withnell "to use in discussions with DSS and the Department of Finance as part of the costing process;"[63] she recalled Mr Ryman informing her and a colleague of that.[64]

Mr Ryman's email to Mr Britton opened with the words "as requested," and gave the following response to the DSS Dot Points:

- The information received by DHS for PAYG matches include the period the individual was employed as well as the total gross amount paid during the period. The proposal will provide this information to the recipient and advise them of what action they need to undertake.
- The recipient will have an opportunity to provide the fortnightly breakdown of this income so DHS can assess any possible debts on a fortnightly basis. This will be clear in both the initial notice to the recipient as well as when they commence a digital process.
- If the recipient does not respond to a legal notice or chooses not to provide a fortnightly breakdown of income, it is proposed that the income would be 'smoothed' over the period of employment reported by the employer to the Australian Taxation Office. This would involve equal attribution of the income to each fortnight within the employment period.
- This approach is consistent with current Debt Policy (no legislation existing which states how a debt is to be calculated).[65]
- DHS currently applies a similar process for Data Matching Program (DMP) and PAYG compliance interventions where it is unable to obtain the required information from the employer. This can occur when the employer can't be identified (for example ceased operations), or the employer does not respond or provide a suitable response.
- The proposed process does not change a recipients [sic] right of review and is consistent with Guideline 6 of the Guidelines on Data Matching in Australian Government Administration as it provides the recipient an opportunity to respond before administrative action is undertaken.

- The proposal provides for an automated assessment of debt. This will reduce administrative error.
- The introduction of Single Touch Payroll will provide DHS with more timely employment income details. The full benefits of this are not likely to be realised until 2018 or 2019 and will not address historical non-compliance. As this [sic] estimated savings from this proposal are largely debt, Single Touch Payroll would not impact estimated savings.

> Exerpt [sic] from Debt Policy Advice a couple of years ago - we are not aware of any changes but will follow up to be sure.
>
> Generally when calculating a debt due to employment income we would attempt to gain fortnightly employment information to allow direct alignment with the applicable Centrelink fortnight however, no legislation exists which states how a debt is to be calculated. A debt is purely the difference between what the customer was paid and what they were entitled to.

By the time he prepared that response, Mr Ryman had received the DHS legal advice about aspects of the PAYG process,[66] but it was not concerned with income averaging.

Mr Britton emailed Mr Ryman's dot points to Mr Withnell, noting the email was "in response to the points raised by DSS,"[67] and adding a further dot point which stated:

> There would be no requirement to seek and/or apply retrospective legislative change based on the above.

The email also set out sections 72 and 196 of the *Social Security (Administration) Act 1999* (Cth)(the Administration Act).[68]

As Mr Ryman,[69] Mr Britton[70] and Mr Withnell[71] all accepted in oral evidence, Mr Ryman and Mr Britton's response to the DSS Dot Points did not provide any sensible response to the legal advice in the DSS Dot Points. Neither Mr Britton nor Mr Ryman is a lawyer and they were in no position to advise on the legal issues the DSS Dot Points raised. Nor did Mr Britton's or Mr Ryman's emails address the fundamental policy issue of the incompatibility between income averaging and the policy rationale of social security legislation identified in the DSS Dot Points.

Mr Withnell does not appear to have further communicated Mr Britton's (and Mr Ryman's) response to the DSS Dot Points. Instead, on 21 January 2015 he sent an email to Ms Golightly which attached a "Revised new draft brief to Minister Morrison" and said:

> I have attached the new draft brief. … I have done very little to Att A but substantial revision of the covering brief and Att B. The proposals are essentially the same but I have repackaged them … . I have also in places tried to address or raise some of the issues raised by DSS - but not exhaustively.[72]

Mr Withnell's revisions did not change the sentence in the PAYG proposal which included an express reference to "income smoothing":

> "[t]he assessment will use an income smoothing methodology to apportion the customer's income over the time of employment (rather than the current cumbersome process whereby the department has to determine and apply income on a fortnightly basis).[73]

On 22 January 2015, one of Mr Ryman's team emailed him regarding a proposed request for legal advice on the PAYG proposal, "as per our discussions yesterday."[74] The proposed request for advice, which effectively sought legal advice on the legality of the use of income averaging in the PAYG proposal, described the process, emphasised that DHS was "already using income smoothing as a last resort in current processes," and said that the proposed process would use "verification of income documents" outlined in the *Guide to Social Security Law*.[75] It asked:

> Are you aware of any impediments to applying income smoothed information to a customer record in the process proposed above?[76]

However, the request for advice was not sent at this time. Mr Ryman replied to the email later that afternoon:

> Just hold on this at the moment. I think we are very safe based on the policy advice we have to date.

The assumption that income averaging was a policy, not a legal issue, persisted.

On 23 January 2015 Mr Britton sent a further email to Mr Withnell quoting section 1068-G8 of the Administration Act, the same provision that Mr Ryman had relied on in the June 2014 Minute, and stating his (misconceived) view that "it supports our proposition of averaging earning over the period of employment."[77]

8.1 Mr Withnell's understanding

Mr Withnell's oral evidence to the Commission was that he understood the message that had been communicated to him by Ms Halbert and the DSS advice at all times (including at the time of the ERC meeting on 25 March 2015).[78] He accepted that in the DSS Dot Points, DSS was emphatically expressing a position that "the use of income smoothing to assess a customer's social security entitlements was both unlawful and contrary to policy."[79]

8.2 Mr Britton's and Mr Ryman's understanding

Both Mr Britton and Mr Ryman gave evidence they had been unaware of the DSS legal and policy advice prior to giving evidence to the Commission.[80]

Mr Ryman said he did not see the DSS Dot Points in January 2015; and he first saw them when he was given the document to prepare for his evidence before the Commission.[81] According to Mr Ryman, his "DSS Response Dot Points" email, which he sent to Mr Britton, was not an attempt to respond to DSS's criticisms in the DSS Dot Points, or any other document.[82] He had prepared the DSS Response Dot Points email because he was requested by Mr Britton to "provide some dot points for DSS."[83]

Mr Ryman said the subject line of the email, "DSS Response Dot Points," was a reference to his having prepared them for Mr Britton to respond to DSS about something.[84] He could not recall, exactly, the purpose, but thought that Mr Britton may have asked him something along the lines of "Can you prepare some dot points of why we think we can do this."[85] His dot points were fairly general and went to "why we think we can do this, why we think this is a doable thing."[86] He acknowledged that both the DSS Dot Points document and the DSS Response Dot Points email used the words "PAYG Clean-up," but maintained that he did not know where he got those words from when drafting the email.[87]

There is no direct evidence that Mr Ryman saw the DSS Dot Points, but the evidence supports an inference that Mr Britton communicated them to him in some manner and sought Mr Ryman's assistance in preparing a response to them.

The subject line of Mr Ryman's email to Mr Britton, *on the same day* that Mr Withnell forwarded the DSS Dot Points to Mr Britton is one factor supporting that inference. The email said that because income information reported to the ATO would be "smoothed," the process "would involve equal attribution of the income to each fortnight within the employment period;" which looks very much like an attempt to address the legal advice in the DSS Dot Points that income "smoothing" was inconsistent with the requirement that social security entitlement be calculated on the basis of fortnightly income. The assertions in the email about the consistency of the proposal with social security policy also support an inference that Mr Ryman understood and was trying to respond to the policy advice conveyed in the DSS Dot Points.

The inference that Mr Ryman was responding to the DSS Dot Points is not inconsistent with Ms Collins's evidence about what he told her: that the response was for the purpose of assisting Mr Withnell with discussions with the Department of Finance, but also for the purpose of communications with DSS. The fact that Mr Ryman sent his email after consulting his team members and asking them in relation to "MP/TC – review my comments. Hand on heart time – any exposure?"[88] suggests that he was conscious that he was dealing with a serious subject.

The Commission concludes Mr Ryman was aware of the DSS Dot Points, so it follows that he was aware that DSS had advised that the proposal was inconsistent with social security legislation and policy.

There is no doubt that Mr Britton received and read the DSS Dot Points which Mr Withnell emailed to him; he sought Mr Ryman's assistance with a response to them, and provided that response to Mr Withnell. In evidence, he accepted that the response did not address the DSS point[89] that:

> the suggested calculation method does not accord with social security legislation, which specifies that employment income is assessed fortnightly.

Mr Britton was asked by Senior Counsel Assisting about that statement, but he could not recall what he had made of it at the time.[90] However, he said, he had not actually seen any legal advice from DSS, and the advice he was consistently given was that there was no legal issue with what they were proposing.[91] That may have had some connection with the fact that, by the time the DSS Dot Points arrived, Mr Ryman had received the DHS legal advice already described, but it did not include advice on the lawfulness of income averaging.

Also, in response to questions about this DSS dot point, Mr Britton explained that the results of averaging were "applied on a fortnightly basis;"[92] which he seems to have regarded as meeting the requirement that income be assessed fortnightly. Also, he said, he perceived that averaging in the proposed process would be used in "exceptional circumstances," and would be "applied as we had historically applied it."[93] That gave him the confidence to add the final dot point in his email to Mr Withnell which stated "There would be no requirement to seek and/or apply retrospective legislative change based on the above."[94] At the time, his perception was that the internal advice was that the proposal was lawful; DHS already applied averaging in particular circumstances;[95] and he had not seen an "alternate" piece of advice to displace his general view that "we were on solid ground."[96]

9 Welfare cop

Mr Morrison's "welfare cop" approach to the Social Services portfolio has been discussed previously. In an interview on 21 January 2015, Mr Morrison highlighted the relationship between the Social Services portfolio and the government's objective to provide a balanced budget.[97]

That interview caught the attention of Ms Golightly, who sent Ms Campbell a link to it.[98] Ms Campbell gave evidence that she recalled the interview and the language used by Mr Morrison.[99] She agreed that the language was significant to her, and to Ms Golightly, because it indicated the direction Mr Morrison wanted to take in his leadership of the portfolio.[100] It is unremarkable that the senior executives of both DHS and DSS would keep abreast of such knowledge.

On Wednesday 21 and Thursday 22 January 2015, Mr Pratt and Ms Wilson met with Mr Morrison. In the Wednesday meeting, Mr Morrison asked for information on DHS compliance activity, including data matching.[101] Mr Pratt's notes of the Thursday meeting include the phrases, "Welfare cop" and "Integrity package by Budget."[102]

Neither Mr Pratt nor Ms Wilson raised problems DSS had identified with the PAYG proposal, but that was not unreasonable. The PAYG proposal was still in fairly early stages of development, DSS had communicated their views on the problems with it, and DHS had not yet responded to those concerns. The precise substance and content of the meeting with Mr Morrison is unclear, but it can be accepted that it was a high-level meeting at which the "integrity package" may have been discussed, but not necessarily the PAYG proposal.

By 22 January 2015 Mr Morrison had clearly communicated to the public, the secretaries of DSS and DHS, and deputy secretaries Wilson and Golightly his intention to achieve budget savings through his portfolio. He had also conveyed the approach he intended to take to the portfolio generally, including through the language of a "crackdown" on welfare cheats, "rorting" the system, and the concept of himself as a "welfare cop."

In doing so, Mr Morrison contributed to a certain atmosphere in which any proposals responsive to his request would be developed. The context was apt to encourage the development of proposals which reflected the approach and tone of his powerful language.

10 The 22 January meeting

Also on 22 January 2015 Ms Halbert and Mr Whitecross held a teleconference with Ms Rule and Mr Withnell of DHS.[103] Mr Whitecross recalled the purpose of the meeting was to discuss the DSS Dot Points that Ms Halbert had sent to Ms Ryan and Mr Withnell late on Tuesday, 20 January 2015, after Mr Withnell had met with Ms Payne.[104]

During their meeting, Mr Whitecross advised Ms Rule and Mr Withnell that:

a) income averaging could be used to identify potential discrepancies where an individual received social security payments for the entire period to which the PAYG data related;

b) however, income averaging could not be used to determine an overpayment in a given fortnight; and

c) small discrepancies identified using income averaging were unlikely to reflect misreporting of income and were not cost effective to investigate; they could not, therefore, be included in estimates of savings.[105]

Mr Whitecross recalled that Mr Withnell appeared to find DSS's feedback "frustrating."[106] Mr Withnell and Ms Rule indicated that "DHS did not have sufficient resources to collect and evaluate information as advised, and that the estimated savings of $1.2 billion would not be achieved if individuals with smaller discrepancies or who were not receiving social security payments for the entire PAYG data period were excluded."[107] Mr Withnell seemed to be particularly displeased at the suggestion that the estimated savings would not be realised;[108] Mr Whitecross formed the impression that "there was quite an attachment at more senior levels to that level of savings."[109] It seemed to Mr Whitecross that the $1.2 billion estimate was not a figure "that had come out of a methodology, but that the number itself was a goal of the process."[110]

Mr Whitecross discussed the proposal with Mr Kimber after the meeting. They identified a possible difficulty involved in making the required legislative change retrospective, so Mr Whitecross drafted an email to Ms Halbert (copied to Mr Kimber) who contacted the DSS Public Law Branch to obtain a tentative opinion.[111]

11 Updates to the brief to Mr Morrison

On 23 January 2015 Ms Wilson took leave until 9 February 2015. Ms Halbert acted in her role as deputy secretary. Ms Golightly sought a further response from DSS on the PAYG proposal that day. She sent an email to Ms Halbert, copied to Ms Rule and Mr Withnell, thanking her for the time spent the previous day with Ms Rule and Mr Withnell on the "fraud and compliance options" for Mr Morrison's draft brief, and explaining that some revisions had been made to it:

> … to try and explain more clearly what the proposals involve and also to address the comments you had provided the other day.

Further feedback would be appreciated, Ms Golightly said, and Ms Rule and Mr Withnell would be happy to "talk through" the changes. Ms Halbert was welcome to telephone her.[112]

The attachment to that email was a "Revised new draft brief to Minister Morrison"[113] in which Mr Withnell had changed the wording of the PAYG proposal[114] to remove any reference to "smoothing," "averaging," "apportioning" or the need for legislative change. It did, however, describe the PAYG proposal as introducing:

> a new approach to reconciling information declared to us by the customer with information from the ATO that indicates the customer may have incorrectly declared income from employment.

It seems that, DSS having raised legal and policy issues with income averaging, DHS's solution was simply to remove reference to income averaging in the brief. After participating in the meeting with Mr Whitecross about the issues raised by the DSS Dot Points, including the problem with income averaging, Mr Withnell sent an email to Ms Golightly that afternoon (22 January 2015).[115] The email said "I have made some amendments to try and tighten up and make clearer." It attached a version of the draft brief, with references to averaging (or smoothing) removed, and no reference to the need for legislative change.[116] It was this brief that was subsequently amended by Ms Golightly, and sent to Ms Halbert on 23 January.

The draft brief also made the points that the proposed process "treats the ATO data as a trusted source and removes the need for the department to be dependent on customer and business information," and still provided the recipient "the opportunity to provide evidence to correct the calculation of entitlement should they choose to." The use of a digital process, and the reliance on the ATO data "as the primary evidence rather than just a trigger" would enable DHS to undertake a much greater number of compliance reviews than was currently the case.

Ms Halbert sent Ms Golightly's email and the attached brief to Mr Morrison, Mr Whitecross, Mr Kimber, and others at DSS, effectively requesting their advice and input.[117]

Mr Whitecross gave evidence that neither he nor Mr Kimber thought that removing the reference to "smoothing" was a substantive change to the proposal; rather, it was merely a change to the way the proposal was presented.[118] The following exchange occurred in his oral evidence:

> COMMISSIONER: So you were not fooled by the changed language and presumably were placed on alert by the reference to the ATO data being primary?
>
> MR WHITECROSS: Well, the ATO data was intrinsically annual - was annual data. So the use of the language "smoothing" - there was no real smoothing. It was just data collected over an annual period and then applied fortnightly. So - I mean, so it wasn't like - yes, anyway, I never thought "smoothing" was a very good description of what was actually being proposed. But we didn't think that the change in language was a change in the proposal.[119]

Later on 23 January 2015, Mr Kimber replied with a draft covering email for Ms Halbert to send to Ms Golightly,[120] and an amended version of the draft brief to Mr Morrison.[121] His suggested email to Ms Golightly said:

> Hi Malisa
>
> Thank you for the opportunity to provide comments on the briefing. We have made some suggestions in the attached. These are highlighted. They are at a high level and reflect the cautionary note re some of the proposals in particular that we feel needs to be added.
>
> Some of the issues that we would expect that will need to be explored if the PAYG proposal is further developed are:
>
> - Leaving aside the potential fundamental shift that this proposal has in assess income for social security purposes, it may not potentially might not be possible to amend the legislation that has a retrospective nature and application to authorise **a different methodology for calculating overpayments and debts**.
>
> - Even if it were possible, we think that the numbers may be overstated because any strategy would need to be refined to avoid 'false positives. This refinement would be necessary because the methodology is inherently not precise. **There is a significant risk in initiating a reassessment process if the reporting has been done correctly and the apparent overpayment is the result of weaknesses in the shortcut methodology for calculating the overpayment.**
>
> [errors in original, emphasis added]

In the attached draft brief,[122] Mr Kimber added general observations with respect to all of the proposals that they would need to be assessed as to their consistency with policy.[123] In respect of the PAYG proposal, Mr Kimber said (and highlighted):

> It is important to note that this proposal fundamentally changes the assessment of income within the social security system and is not supported by current policy or legislation. Any change to legislation to give effect to such arrangements may not stand scrutiny including any provisions that are introduced that that [sic] have a retrospective nature and application.

Later that afternoon, Mr Whitecross forwarded Mr Kimber's email to Ms Halbert with further amendments to the attachment.[124] He informed her that he had "pared back the edits in the brief and the covering words [of Mr Kimber's draft email for Ms Halbert to Ms Golightly] to cover the main points."

In respect of the PAYG proposal, Mr Whitecross replaced Mr Kimber's draft with something much less strongly worded:

> This approach would involve legislative change and questions may arise about whether such changes can be made retrospectively.[125]

His evidence was that he made the changes at Ms Halbert's direction. She had telephoned him to say that Ms Golightly had "expressed to her concerns about the strength of DSS's comments in relation to the PAYG Data Clean Up proposal," and "in particular the criticisms of the proposed method of calculating overpayments."[126] As a result, Ms Halbert wanted to "tone down" Mr Kimber's comments to DHS,[127] and considered it sufficient to note that legislative change was required, because this would require DHS to work with DSS if the proposal were to be pursued.[128]

Mr Whitecross said Ms Halbert indicated that Ms Golightly wanted the language to convey that DHS would still work with DSS on the proposal.[129] That point caused a disagreement between them because he considered a firmer response was merited. He explained the point of difference:

> It's poor form to create the impression that there is more latitude in relation to an option than there really is. I think she felt that we needed to have more regard to the relationship. I took it as an instruction to make changes, that then I had to consider what - what those changes would need to look like.[130]

Mr Whitecross still recalled this conversation with Ms Halbert years later. In an email he sent on 24 February 2020,[131] he again referred to his being told (by Ms Halbert) that Ms Golightly had particular concerns about the "specific language criticising the method of calculation," and that she "wanted only a reference to the requirement for policy and legislative consideration." Ms Halbert said she did not

recall the conversation with Mr Whitecross, or asking him to soften the language, but did say that they frequently had "different styles of writing."[132]

The Commission agrees with Mr Whitecross's observation that changing the language of DSS's comments in this way would have created the impression that there was more "latitude" than there really was. DSS's position was that the proposed use of income averaging under the PAYG proposal was unlawful. Not only would legislative change be required to implement the proposal, such change would involve a fundamental shift in the assessment of income within the social security system. It was important to emphasise that, in clear language, so that there could be no doubt about such an important concern.

Ms Golightly's concerns, expressed to Ms Halbert and conveyed to Mr Whitecross, about the criticisms of the proposed method of calculating overpayments are particularly noteworthy. This sensitivity would prove highly significant to the eventual amendment to the wording of the PAYG proposal in the NPP, and to DHS's response to scrutiny and criticism of the compliance review process over the years to come.

At 2:59 pm on 23 January 2015, Catherine Dalton (acting director, Payment Integrity and Debt Strategy, Social Security Performance Analysis, DSS), sent the draft brief to Anne Pulford (principal legal officer, DSS) and another government lawyer in the DSS Public Law Branch,[133] requesting "advice on any legal implications/impediments, what action would need to be undertaken to resolve legal issues as well as some indication of the lead time required to obtain legislative change." The version of the draft brief that was attached to that email was the one that had Mr Kimber's stronger comments (on the PAYG proposal) about the "[fundamental] changes [to] the assessment of income."[134]

In the days that followed, the DSS Public Law Branch worked on Ms Dalton's request for advice. Ms Pulford forwarded Ms Dalton's request to Ms Wong, a lawyer in the Branch, on 28 January 2015.[135] Ms Wong gave advice in respect of all of the proposals in the brief on 4 February 2015.[136] In respect of the PAYG proposal, she advised:

> 7. PAYG clean up Comment: Please refer to the advice by Simon Jordan dated 18 December 2014 in relation to this issue.

That was a reference to the 2014 DSS legal advice.

By late afternoon on Friday, 23 January 2015, Ms Halbert had collated the DSS advice. She further softened the language in the introduction to the brief:

> "Some of the options listed in Attachment A would need legislative and/or policy changes. The department has consulted DSS on the proposals. DSS has advised that some of the proposals may have significant implications for~~fundamental impacts on~~ social security policy and legislation. ~~and it could be expected that some proposals will come under significant scrutiny as not being consistent with the overall beneficial nature of Social Security law~~. [sic] The proposals will also need to be assessed as to their consistency with the policy directions being pursued for all payments under welfare reform, and the Government's commitment to reduce regulatory burden.[137]
>
> [Formatting in the original].

Ms Halbert replied to Ms Golightly, advising her that DSS had "made some suggestions" in the attachment and that those suggestions were "at a high level and reflect the cautionary note re some of the proposals in particular that we feel needs to be added."[138] She also said:

> Some of the issues that we would expect that will need to be explored if the PAYG proposal is further developed are:
>
> - As noted in the edits, it may not be possible to amend the legislation with a retrospective application to authorise a different methodology for calculating overpayments and debts under the PAYG clean-up. This will need to be further explored, if the Minister wants to pursue this option.[139]

Significantly, one of the tracked amendments that DSS had made to the draft brief was the insertion of the following sentence in the description of the PAYG proposal:

> This approach would involve legislative change and questions may arise about whether such changes can be made retrospectively.[140]

Ms Golightly replied to Ms Halbert: "Many thanks Cath for getting back so quickly. Will make the changes you suggest. Certainly happy to keep working on any leg issues and costings etc."[141]

Ms Golightly forwarded Ms Halbert's email to Mr Withnell for comment, describing some of the changes to the brief as "a little frustrating."[142] Mr Withnell replied, stating:[143]

> In relation to the legislative change – I got hold of Murray but he had left for the day so couldn't give me specifics on which provision in the legislation – his only comment is that it relates to attribution of income. This suggests maybe Section 1073 but he had no idea really. I left a message for Andrew Whitecross which he didn't return but I have just tried him again and he has just got back to me – his advice is that they believe that several provisions in Chapter 3, General Provisions Relating to Payability and Rates would need to be changed and possibly others. I think if just change their 'would' to 'may' and go with that? Or we indicate that DSS have advised that they believe that legislative change would be required. We will be unable to get a clear resolution tonight and we have flagged potential legislative or policy impacts elsewhere. The other key thing is that the measure could still be done using the existing arrangements – just at a higher cost…

Ms Golightly replied to Mr Withnell's email and agreed with his suggestions.[144] With respect to his statement that the process could be done under existing arrangements, but at a higher cost, Ms Golightly wrote that "…we might keep that up our sleeve for the moment in case we need it as a contingency later on."

Mr Withnell's evidence was that he knew, at the time of receiving the DSS Dot Points, that DSS was emphatically expressing a position that "the use of income smoothing to assess a customer's social security entitlements was both unlawful and contrary to policy."[145] What the email exchange between him and Ms Golightly seems to indicate is that although they were both aware of the substance of DSS's legal advice, they did not know which particular legislative provisions would require amendment.

It was later that evening that Mr Britton sent the email to Mr Withnell quoting section 1068-G8 of the Administration Act and stating his view that "it supports our proposition of averaging earning over the period of employment."[146]

12 Ms Golightly signs the brief

On 22 January 2015, Ms Golightly had sent Ms Campbell two emails, each attaching a version of the revised brief to Ms Payne.[147] Ms Campbell replied to the second email, providing feedback on the brief and correcting a typographical error.[148]

On 23 January, Ms Golightly signed a revised brief to Ms Payne, version B15/65, which attached the draft Executive Minute to Mr Morrison.[149] The "key points" noted that following the meeting with Ms Payne in Sydney earlier in the week, the brief to Mr Morrison was to be revised and divided into two parts. The description of the DHS proposal noted the need for policy change but Ms Golightly had not added any reference to legislative change. It is possible, however, that she signed it before receiving the suggested amendments from Ms Halbert, which, she had indicated to Ms Halbert, DHS would "add to the brief."

Ms Payne signed the brief on 30 January 2015, making notations and corrections.[150] A further meeting was planned with Ms Campbell and Ms Golightly for 2 February 2015.[151]

13 The 2 February discussion

Prior to the meeting with Ms Payne on 2 February 2015, on 28 January Ms Golightly again amended the draft brief to Mr Morrison and emailed a copy to Mr Withnell.[152] Ms Golightly reinstated the reference to the need for legislative change in respect of the PAYG proposal, but did not include any express reference to income averaging.

On 2 February 2015 a telephone conference took place between Ms Payne and Ms Golightly, and probably Ms Campbell; it was her first day back from leave and she did not recall attending but Ms Payne's notes of the meeting include the word "Secretary."[153] Ms Payne's notes also contain an entry, "'cracking down' – what can we do [without] having to legislate."[154]

It is inferred that Ms Payne's reference to "cracking down" was a general reference to the approach to be taken to the social services portfolio. That approach had most recently been publicly expressed by Mr Morrison during the radio interview on 21 January 2015.[155] It is also inferred that Ms Payne's question "what can we do [without] having to legislate" referred to difficulties in passing legislation through the Senate (discussed above).

The results of the discussion on 2 February 2015 appear in a revised brief which Ms Golightly drafted and sent to Ms Campbell, noting that she had "[taken] up Minister Payne's feedback as much as possible."[156] Ms Campbell instructed an assistant to print the draft brief for her.[157]

There were no material changes to the wording of the PAYG proposal in this version of the brief, as compared to the version Ms Golightly had created on 28 January. It too noted, with respect to the PAYG proposal:

> DSS has also advised that legislative change would be needed to implement this initiative. As a result, we have been working with DSS on developing this proposal and will continue to do so.[158]

Given that Ms Golightly had already re-inserted that statement into the draft brief prior to the meeting with Ms Payne, the logical inference is that she did so pursuant to the express request of DSS given on 23 January 2015 to insert the statement, which she had indicated to both Ms Halbert and Mr Withnell she intended to do.[159]

14 The finalisation of the brief to Mr Morrison

Paul McBride (group manager, Social Policy Group, DSS) returned from leave on 2 February 2015 and Mr Whitecross returned to his substantive position.[160]

Mr McBride was "brought up to speed"[161] on the events in his absence: the DSS legal advice and the interactions between DSS and DHS in respect of the DHS proposal, including the legal and policy concerns expressed by DSS about the use of income averaging. Mr McBride gave evidence that he understood that if DHS were to use income averaging in the calculation of a debt it would require legislative change.[162] He also understood that DHS was required to calculate income on a fortnightly basis and believed that DHS did not use income averaging for that purpose.[163]

Ms Wilson returned from leave on 9 February 2015.

Ms Payne reviewed and amended further drafts of the Executive Minute up to 11 February 2015.[164] The Executive Minute was finalised as version "B15/125" on 12 February 2015, when it was signed by Ms Golightly and sent to Ms Lees, to be sent from Ms Payne's office to Mr Morrison's office.[165] Ms Campbell had reviewed drafts of the brief and received the final version.[166] The Executive Minute was addressed to Mr Morrison for action and Ms Payne for information.

The Executive Minute described the DHS proposal in a series of dot points. Those dot points:[167]

- retained the original features of the DHS proposal:
    - the application of PAYG data from 2010-13 to 866,857 customers via an online process
    - the transfer of the obligation on the recipient to ensure the record is correct by providing evidence to support their claim
    - the use of the ATO data as the trusted source/primary evidence not just the trigger for a compliance review
    - the estimated gross savings of $1.2 billion (to be agreed with DSS)
- recognised that the application of the PAYG data to calculate fortnightly income and hence entitlement could not be relied on to produce accurate results by observing that:

  It [the use of the PAYG data] still provides a customer the opportunity to provide evidence to correct the calculation of entitlement should they choose to…[168]

  conveyed the effect of the 2014 DSS legal advice with the words "DSS has also advised that legislative change would also be needed to implement this initiative"
- concluded with the statement, "As a result, we have been working with DSS on developing this proposal and will continue to do so."

Irrespective of some variations to the language used in the drafts of the Executive Minute, from the version of the Executive Minute that Mr Withnell provided his colleagues on 9 January 2015,[169] every iteration of the Executive Minute (that is, all draft versions and the final version provided to Mr Morrison) described the following as being features of the proposed measure:

- that the recipient would be presented with "information obtained from the ATO" and "an assessment of their correct welfare entitlement based on this information" and
- that the recipient would "have an opportunity to update the information prior to it being applied to their Centrelink record."

Though some iterations of the Executive Minute (including the final version provided to Mr Morrison) did not make express reference to the practice of income averaging (or any synonym of the term), the

Commission's view is that these common features, in and of themselves, contemplated the use of income averaging based on ATO-supplied information to determine overpayment of social security entitlement.

In this respect, the Commission notes the following:

- The "information obtained from the ATO" upon which the assessment was based was PAYG data, which was almost invariably provided for periods considerably longer than a fortnight and commonly was annualised. Recipients' welfare entitlements were determined on a fortnightly basis. Consequently, to conduct an assessment of a recipient's "welfare entitlement" based only upon PAYG data amounts necessarily required averaging of those amounts
- The assertion that, "The customer will have an opportunity to update the information *prior to it being applied to their Centrelink record*" [emphasis added] clearly contemplated that, if customers did not take that "opportunity to update the information" the averaged ATO information would be applied to their record and
- The reference to ATO information being "applied to [a customer's] Centrelink record" is a reference to the ATO information being used to determine overpayment of social security benefits. It is difficult to conceive of any other meaning that could be attached to those words, particularly in circumstances where the whole purpose of the measure was to assess the entitlements of welfare recipients with a view to determining overpayments.

In addition to the language used in the Executive Minute, other language included in descriptions of the Scheme evinces DHS's intention (through the senior officers responsible for the proposal) to use averaging to determine an overpayment of social security entitlement. In particular:

- following the draft version of the Executive Minute distributed in mid-January 2015,[170] every version of the Executive Minute (including the final version) referred to ATO data as either being "the default," "the trusted source" or "the primary evidence rather than just a trigger"
- between 9 January 2015 and 23 January 2015, draft iterations of the Executive Minute explained that the assessment would "use an income smoothing methodology to apportion the customer's income over the time of employment."[171]

There is another reason why the language of the Executive Minute suggested that income averaging continued to be integral to the proposal. As Ms Campbell accepted in evidence, the number of interventions that could be achieved, and consequently, the amount of savings that could be realised under the measure, could only occur with the level of automation that averaging allowed.[172] The Executive Minute specifically noted that without this level of automation, the cost of the proposal would be much greater as it would rely on significant additional staff numbers to conduct compliance reviews:

> [The DHS proposal] can be undertaken under current policy settings and would require over 1000 staff for three years to achieve the savings. However if the proposed policy changes outlined in this brief were available, the reduction in required staff is considerable. The required staff would reduce to approximately 600 staff for the first two years and 60 in the third year. Savings in Operation XXXX2 could be used to offset the costs of both initiatives as well as other potential initiatives being developed to strengthen customer compliance…

The proposal would not have been the same without averaging.

The Commission concludes that the proposal in the Executive Minute contemplated the use of income averaging of PAYG data as the sole basis for determining social security entitlement, and it was for this reason that legislative change was required.

However, on the face of the document itself, the use of income averaging in the proposed process, and the fact of its being the reason for the need for legislative change, was not immediately obvious.[173] Whether any given individual reading the Executive Minute understood that the proposed process contemplated the use of income averaging, or that this was the reason for the need for legislative change, depended on what else they knew. Those officers who had been involved in its drafting – Ms Campbell, Ms Golightly and Mr Withnell – knew that income averaging was intended.

15 Mr Morrison signs the Executive Minute

Mr Morrison signed the Executive Minute on Friday 20 February 2015.[174] He retained pages 12 to 17 inclusive, being "Attachment B" to the document, which set out the current arrangements with respect to DHS's management of the "integrity" of the welfare system.[175] In evidence, Mr Morrison said this was to "refer and to read more carefully after an initial read. And the normal practice is that that would then be usually destroyed."[176]

Two passages of the signed Executive Minute were highlighted; both referred to the need for legislative change.[177] One highlighted passage was contained in the general section referring to all the proposals, and the other was the reference specifically pertaining to the PAYG proposal, which stated "DSS has also advised that legislative change would also be needed to implement this initiative." However, it is unclear whether it was Mr Morrison who applied the highlighting to those passages.[178]

Mr Morrison had marked the Executive Minute to instruct DHS to pursue the PAYG proposal (which was by now called "Increased use of Employment Income matching") and to indicate that:[179]

- he agreed to the development of a package of NPPs (including the PAYG proposal).
- he agreed to DHS continuing to work with DSS to progress "consideration of additional policy and legislative changes in relation to payment integrity."
- he noted the current arrangements.

Mr Morrison gave the following evidence about the significance of the information contained in the Executive Minute:

> MR GREGGERY: Now, in your statement - and correct me if I'm wrong - I understand what you say is that this document was the first principal source of information about the proposal that ultimately became the Budget Measure, strengthening the - that's right?
>
> THE HON. SCOTT MORRISON MP: Yes.
>
> MR GREGGERY: And so what's contained within it reflects -
>
> THE HON. SCOTT MORRISON MP: Where it was at that time.
>
> MR GREGGERY: The high-water mark of your knowledge at this particular point.
>
> THE HON. SCOTT MORRISON MP: The only knowledge.[180]

Mr Morrison said that at the time he signed the Executive Minute, he understood that legislative change would be needed to implement the PAYG proposal.[181]

In evidence, Mr Morrison was taken to the description of DHS's current arrangements, and in particular the following sentence:

> The ability to change the [compliance review] process is limited due to legislative and policy constraints on the need to apply income fortnightly to determine overpayments, even if they occurred over several months or years and even if income data is only available on an annual basis (for example, income is determined annually by the ATO so is therefore only available on an annual basis).[182]

Mr Morrison said that he understood that sentence had flagged the legislative need to calculate fortnightly income in contrast to the annual nature of PAYG data.[183] He knew that entitlement for income support payments according to the legislation was worked out on the basis of actual fortnightly income.[184]

Mr Morrison accepted it was obvious to him as Minister for Social Services that:

> …many social security recipients do not earn a stable or constant income and any employment they obtain may be casual, part time, seasonal or intermittent and may not continue throughout the year.[185]

He understood there would sometimes be very good reasons for discrepancies between PAYG data and the total amount a recipient had declared in relation to their fortnightly income, and that the existence of a discrepancy did not necessarily equate to a debt.[186] Mr Morrison said he understood that might be the case for persons who did not have stable or consistent income.[187] He also gave evidence that he understood the concept of income averaging was involved in the DHS proposal.[188]

15.1 The signed Executive Minute is given to Human Services

The copy of the Executive Minute signed by Mr Morrison, but not including pages 12 to 17, was returned to DHS on Monday, 23 February 2015.

On 24 February 2015 at 9:42 am, Mr Withnell emailed Mr Britton, Mr Brown, Rhonda Morris and Jan Bailey,[189] and attached a copy of pages 1 to 11 of the Executive Minute.[190]

What was *not* contained in the first eleven pages of the Executive Minute was a paragraph contained on page 14, one of the pages that Mr Morrison retained, which stated:

> The traditional compliance reviews are a manual staff intensive verification process involving obtaining information from customers and third parties often going back over a number of years. **The ability to change the process is limited due to legislative and policy constraints on the need to apply income fortnightly to determine overpayments even if they occurred over several months or years and even if income data is only available on an annual basis (for example, income is determined annually by the ATO so is therefore only available on an annual basis)**.
>
> [emphasis added]

The version of the Executive Minute which was circulated at this time, comprising only the first eleven pages of the document, did not contain this information.

However, this information was contained in earlier versions of the Executive Minute, including the version entitled "Revised draft brief to Minister Morrison 3 Feb,"[191] which was provided, along with the signed Executive Minute, to various DHS officers.

By 26 February 2015 each of Mr Withnell, Mr Britton and Mr Ryman had been provided by email with a copy of the first 11 pages of the signed Executive Minute, and the 3 February version of the Executive Minute.[192]

15.2 Mr Britton and Mr Ryman's understanding of the Executive Minute

On 26 February 2015, at 8:37 am, Mr Britton sent an email to "Directors" stating:

> We have now received authority to submit an NPP to include the measures we have been discussing.
>
> It needs to be fully costed and supported by stakeholders by COB Monday which is unprecedented so I may need you to do work at short notice. I will clear my diary for the next few days and Leanne will re-arrange meetings…[193]

At 9:24 am on the same day, Mr Withnell forwarded Mr Britton[194] a copy of the version of the draft brief to Mr Morrison which was current as at 3 February 2015.[195] Shortly after that, Mr Britton emailed both the 3 February 2015 version of the draft brief,[196] and a copy of the first eleven pages of the Executive Minute signed by Mr Morrison,[197] on to Mr Ryman.

Mr Ryman could not recall reading the Executive Minute.[198] However, in circumstances where: he was asked to draft an NPP, which would necessarily be based on the description of the proposal that had been approved by the minister; the email providing the Executive Minute which contained that description was addressed to him alone; and he accepted in evidence that, despite being unable to recall, he would, "in the normal course," have read it;[199] the Commission is satisfied that Mr Ryman read the Executive Minute.

When asked about the PAYG proposal (contained in the "Increased use of Employment Income Matching" part of the Executive Minute), Mr Ryman said he could not see "where it talks about income averaging specifically."[200] He accepted that the use of income averaging in the proposed process could be implied.[201]

Mr Ryman was taken to the part of the PAYG proposal section that stated:

> There may need to be a change of policy to enable the use of the ATO data in this way. DSS has also advised that legislative change would also be needed to implement this initiative. As a result, we have been working with DSS on developing this proposal and will continue to do so.

The following exchange occurred:

> MR SCOTT: Do you agree with me that aligns with the position that had been communicated by DSS in January 2015 that the proposal to use income averaging to calculate and raise debts would not be consistent with legislation?
>
> MR RYMAN: Yes. It provides a very brief summary of that, yes.[202]

It is apparent that the words of the Executive Minute stating "DSS has also advised that legislative change would also be needed to implement this initiative" is a reference to the legal issue with the proposal that the DSS Dot Points had conveyed to him.[203] This is because there were no other issues, of which Mr Britton or Mr Ryman would have been aware at that time, which would give rise to a need for legislative change, other than those outlined in the DSS Dot Points. It may be inferred that Mr Ryman understood this when he read the Executive Minute and understood that DSS had identified a legal impediment to what was proposed in it.

Mr Britton was taken to the same part of the document. His evidence was that he did not have a recollection of making a connection, at the time, between the words "DSS has also advised that legislative change would also be needed to implement this initiative" reference, and the effect of the DSS legal advice communicated in the DSS Dot Points.[204] He accepted in evidence that it was reasonable to make the link.[205]

16 The meeting between Ms Golightly and Ms Wilson

On 25 February 2015 Ms Golightly telephoned Ms Wilson. They discussed the fact that Mr Morrison had signed the Executive Minute.[206]

Ms Golightly sent Ms Wilson an email on 26 February 2015 in which she noted their discussion about the Executive Minute the previous day.[207] Ms Golightly also referred to a meeting between Mr McBride and Mr Withnell which was scheduled for Friday, 27 February 2015. Mr McBride gave evidence that the purpose of that meeting was, in part, to resolve the question of how the proposal would be implemented in view of Mr Morrison's support and the need for legislative change.[208]

In her email to Ms Wilson, Ms Golightly said:

> Minister Morrison has supported all three overarching recommendations (basically, that he agrees to the development of a package of measures, that we continue to work with you on the policy and legislation aspects of the package and that he notes the current arrangements in place to protect the integrity of welfare payments).
>
> …
>
> We will need to progress the relevant NPP(s) quickly to fit in with the Portfolio Budget Submission timetable. Once Mark [Withnell] and Paul [McBride] and the others have met and worked up a substantive draft, maybe it would be a good idea for us to get together to discuss the NPP to make sure we have covered off any issues?

Ms Wilson recalled meeting Ms Golightly in her office in "about late February 2015 or very early March" with "at least one other DHS officer" whom she could not identify.[209] Ms Wilson believed that the meeting occurred after Mr Kimber sent an email on 26 February 2015 copied to Ms Wilson, Mr McBride and Ms Halbert which informed the recipients that:

> we have just received advice from DHS that Minister Morrison has indicated that he wants a number of potential proposal in the attached briefing re compliance to be brought fwd in his portfolio PBS.[210]

Ms Wilson's recollection of the meeting is set out in her supplementary statement:

- Ms Golightly advised her that Mr Morrison had "expressed an interest" in developing the "PAYG proposal" as part of the 2015-16 Budget but that it was "difficult to pass legislation through the Senate at the time" as the Government required the support of at least six non-coalition Senators. Ms Golightly said that Mr Morrison "wanted to implement the measure in a way that did not require legislative change."
- Ms Wilson "reiterated [her] earlier reservations with respect to income smoothing" and that it was important that there be opportunities for customers to engage and clarify what their earnings might have been.
- Towards the end of the discussion Ms Wilson "…agreed to consider what might be possible."[211]

In evidence, Ms Wilson said the meeting with Ms Golightly and the person from DHS took "around 30 to 40 minutes" and Ms Golightly told her that "[Mr] Morrison wished to pursue a number of options but in particular the PAYG proposal." Ms Wilson gave evidence as follows:

> MS WILSON: Well, according to this of *[sic]* conversation, as I recall, it was about can we find a way to do more *[sic]* this in a way that doesn't transgress or undermine the DSS concerns, that increases the activity in terms of PAYG income-matching as the basis for exploring whether there's an overpayment or a debt. Is there something possible here? And so what I undertook to do was, having pressed back that income smoothing or income averaging could not be part of a design and that there ought to be sufficient opportunities for the record to be corrected.

MR GREGGERY: What record?

MS WILSON: The PAYG data to be explained.

MR GREGGERY: By whom?

MS WILSON: Between the customer and Human Services, potentially with the assistance of other information that might be available at that time.

MR GREGGERY: It assumes that there has been some suggestion that the PAYG data has been applied to income fortnights, which requires explanation.

MS WILSON: That's not how I read it at the time.[212]

Ms Wilson said that after the meeting she called Mr Kimber and discussed "the ways in which the employment income needs to be assessed" and the 2014 DSS policy advice and the 2014 DSS legal advice.[213]

In Ms Wilson's supplementary statement she said that she then called Ms Golightly and told her:

> **…that the 'bottom line' was that there could be no income smoothing** and that I was concerned about the design of the proposal as customers needed to have an opportunity to comment on employment income. **I requested that the New Policy Proposal include the words that there would be no change in the way PAYG income and debt was calculated for social security purposes or words to that effect.**[214]
>
> [emphasis added]

In evidence, Ms Wilson said she believed that Ms Golightly "…understood the concerns" that she had expressed and accepted her position.[215]

17 The 27 February meeting and amendments to the New Policy Proposal

Mr Kimber, much later, gave an account of a meeting he attended with Mr McBride, Mr Withnell and Mr Britton the following day, 27 February 2015. Mr Ryman was also included in the meeting invitation; however, it is unclear whether or not he actually attended. He had no recollection of doing so.[216] The day prior, Mr Ryman had emailed Mr Britton the most recent draft of the NPP to be submitted to Cabinet for the measure;[217] it explicitly acknowledged that income averaging was to be used in the proposed process.

None of the attendees had any recollection of the meeting. The only evidence of the discussion that took place is a January 2017 email sent by Mr Kimber to Emma-Kate McGuirk, Ms Halbert, Ms Wilson and Mr McBride setting out his recollection of what occurred.[218] He said:

From memory Mark Withnell, Scott Britton, Murray Kimber and Paul McBride attended.

At the 27 February meeting DHS outlined a revised proposals [sic] that would use newly available data sources and analytical tools; such that the new approach will not change how income is assessed or overpayments calculated.

It had the following key components:

- DHS would target identified discrepancies based on analysis of the Pay as You Go (PAYG) file obtained from the Australian Taxation Office compared with the reported earnings data that DHS holds.
- Where a significant discrepancy is detected this information will be presented to the recipient. This would not be a debt notice but rather the recipient would be afforded the opportunity to explain, correct, update or challenge that information.
- Any subsequent debt raised would take into account the information provided by the recipient.
- DHS also advised that there would be no change to how income is assessed or overpayments calculated as part of this proposal.

The period of time between the meeting and Mr Kimber's email raises a question about the extent to which his memory is accurate, and there is also the question of whether his recollection was affected by the wording of the NPP which was developed following the meeting on 27 February 2015, from which he refreshed his memory in January 2017.

The Commission takes the view, however, that Mr Kimber's email account is likely to be reliable. He had been closely involved in the development of the DSS position up to that point in time and had a strong working knowledge of the issues with the DHS proposal. The statement attributed to "DHS" that "there would be no change to how income is assessed or overpayments calculated as part of this proposal" corresponded with what Ms Wilson had, the previous day, asked Ms Golightly to include in the NPP. And, following the meeting, on the same day, Mr Ryman emailed Mr Britton,[219] attaching a copy of a further draft of the NPP which added words to the effect of what Ms Wilson had requested.[220]

Mr Ryman's email stated "Here is the latest version. I would like to ensure it is going in the right direction so we don't get to the end of the day and have to start again." In contrast to the draft of the NPP that Mr Ryman had emailed to Mr Britton just the day prior,[221] the updated draft removed the reference to the use of income averaging. The amendment appeared as follows:[222]

> The new approach will not change how income is assessed or overpayments calculated, ~~is assessment will be based on the fortnightly attribution of the income advised by the ATO, equally distributed over the duration of employment for the period the customer was on payment.~~ but it will enable the department to undertake a significant clean-up of potential incorrect payments for 866,857 customers for the 2010-13 financial years. The ~~PAYG~~ clean-up addresses historical non-compliance and will not be impacted by Single Touch Payroll.

Mr Ryman's evidence was that he made the amendments at the direction of either Mr Withnell or Mr Britton.[223] He could not specifically recall why he was directed to make those updates.[224] Mr Britton could not recall the circumstances that led to this amendment.[225]

The same day, Mr Britton emailed Mr Withnell,[226] attaching the draft NPP that had been sent to him by Mr Ryman, with minor amendments.[227]

There was, plainly, a connection between Ms Wilson's instruction to Ms Golightly to include in the NPP words to the effect that there would be no change in the way PAYG income and debt was calculated,[228] and the events of 27 February 2015; the representations of no change made by Mr Withnell and Mr Britton to DSS at the 27 February 2015 meeting and the amendments to the NPP made by Mr Ryman.

Despite the wording change, the senior officers in DHS responsible for the proposal (Ms Campbell, Ms Golightly and Mr Withnell) understood that income averaging would form part of the NPP if it were approved by the ERC. That view is consistent with the following:

- that at all times from 1 July 2015 the scheme did in fact involve the "fortnightly attribution of the income advised by the ATO" to determine social security entitlement
- that the projected number of interventions or customers remained unchanged (886,857)
- that the financial years to which the proposal related remained unchanged (2010 to 2013)
- that the projected savings as between the Executive Minute and the NPP were similar
- that the concept of presenting PAYG data to a recipient in an online account and requiring them to confirm or update the information remained unchanged
- that the transfer of the obligation to the customer to ensure the record was correct remained unchanged
- that there is no evidence that DHS and DSS worked together to "progress consideration of additional policy and legislative changes in relation to payment integrity" as outlined in the Executive Minute
- that there is no evidence that Ms Campbell, Ms Golightly or Mr Withnell proposed or required any change in substance to the DHS proposal after Mr Morrison signed the Executive Minute, and

that there is no record of either Mr Morrison or Ms Payne being provided with any confirmation that the DHS and DSS worked together to "progress consideration of additional policy and legislative changes in relation to payment integrity" as outlined in the Executive Minute.

The evidence before the Commission clearly showed that DHS did not abandon its intended use of income averaging in the PAYG proposal after the conversation between Ms Wilson and Ms Golightly. The changes made were to the wording of the NPP document, not to the substance of the proposal itself.

Mr Ryman's evidence was that at the time he made the change to the NPP he did not believe that the new PAYG process represented a fundamental change to how income was assessed or overpayments calculated. That was because, he said:

> At the time, obviously income was still being assessed on a fortnightly basis. Debts were calculated on the difference between the fortnightly amount and the amount declared to the Agency. The - the way by which the Agency determined that fortnightly amount using averaging was still the same, but on a lot higher scale.
>
> …
>
> So I'm saying that, you know, the way by which we determine the fortnightly amount is to use the period of employment and to calculate it to a fortnightly amount. And so that was - that was happening at that point.[229]

Mr Britton subscribed to a similar view:

> But, again, the thinking throughout this - and until - until things started to unravel, the genuine thinking was, as I very simply explained earlier, around, well, it was being applied on a fortnightly basis. Our understanding was now we obviously recognise and accept that it was wrong, but it was - and certainly my - my genuine reflection and recollection was it was being applied fortnightly. So even though this was a fair way in, and this is moving towards the development and introduction of the OCI as the system, I do genuinely believe that there was a view formed, now we know wrongly, but at the time around averaging being acceptable in the circumstances.[230]

18 The misleading effect of the New Policy Proposal

The description of the PAYG proposal in the NPP that was submitted to the Expenditure Review Committee (ERC)[231] on 25 March 2015 contained no material change from the draft NPP amended on 27 February 2015. The version that was submitted to the ERC omitted any explicit reference to the use of income averaging and contained the representation that "there would be no change to how income is assessed or overpayments calculated as part of this proposal."

The use of income averaging to determine social security entitlement remained, in substance, a feature of the proposal. It was therefore necessary that any NPP considered by Cabinet disclose:

- the nature of the averaging component and
- the legal impediments to the implementation of that component (being the need for legislative change).

For the reasons articulated below, the Commission finds that the language used in the NPP that was submitted to the ERC on 25 March 2015 had the effect of obscuring the fact that, in substance, the PAYG proposal contemplated a process involving the use of income averaging.

While the NPP referred to the involvement of ATO information, the language used in the NPP did not explain how that information would be used, nor did it disclose the intended use of income averaging to determine social security entitlement.

Additionally, the NPP did not make any reference to any legal impediments associated with the use of income averaging. References to the need for legislative change of the kind that had appeared in the Executive Minute were not included in any iteration of the NPP.

The representation that "there would be no change to how income is assessed or overpayments calculated as part of this proposal" was liable to mislead Cabinet because it disguised a significant aspect of the nature of the proposed measure, and its associated legal and policy impediments. As Ms Campbell accepted in her evidence, the no change representation was untrue.[232] Income averaging, in the absence of further information to confirm that the income was earned regularly, could not be relied on to indicate what a recipient had earned in any given fortnight. Nonetheless, where the recipient had not responded or had not provided acceptable information, the calculation of social security entitlement would be based on an average of their income, not on their actual fortnightly income. This was undoubtedly a departure from how "income [was] assessed or overpayments calculated."

Absent from the NPP was any identification of the method for which, it was claimed, there had been no change. The assertion that there would be no change to the method of assessing income and calculating overpayments was meaningless and would not have disclosed to a reader, even one who was aware that averaging had previously been used in some limited circumstances to calculate social security entitlement, that the proposal contemplated of the use of averaging on a regular basis.

The misleading nature of the statement was not confined to what it failed to disclose. It had the effect of positively insinuating to the reader that, because there was to be no change to the way income was assessed or overpayments calculated, the implementation of the proposal would be unlikely to encounter legal or policy barriers.

The NPP considered by the ERC on 25 March 2015 did not disclose to Cabinet the averaging component of the proposal, or the legal and policy impediments to its implementation, or that DSS advice had indicated that the implementation of the measure in the way intended could not lawfully occur without legislative change. At the time of the ERC, the use of income averaging was contemplated as part of the proposal, and DSS had advised that the proposed use of averaging to determine social security entitlement was

unlawful. Consequently, those members of Cabinet who had no knowledge of the proposal's development were likely to be misled as to the true nature of the proposed measure and the legal and policy impediments associated with it.

18.1 Mr Ryman's and Mr Britton's knowledge

When asked about removing any reference to averaging in the draft NPP, Mr Ryman stated:

> I certainly haven't done that to mislead anyone. I have been operating under instructions, is my belief, because every other version I had had been part of – back from 2014 through, had included it.[233]

Mr Britton also denied suggestions of any collusion with DSS, or deception of DSS, with respect to the removal of the reference to averaging.[234] Any suggestion of such "intent" was not what he observed or felt at the time.[235] It was:

> Certainly not part of any conversation I had was, okay, we are going to exclude this so that it doesn't go forward. Like, that – that wasn't part of anything I was having a conversation about.[236]

The Commission is unable to conclude that either Mr Ryman or Mr Britton intended to mislead Cabinet when they were involved in the removal of the reference to income averaging from the NPP and the insertion of the "no change" statement. There seems a strong possibility that they actually believed their own rhetoric: that they thought DSS had not understood what was obvious to them - that if the results of income averaging were applied in each fortnight, that was the assessment of income on a fortnightly basis; that the Social Security Act recognised averaging, so it must be all right; and that it had happened in the past (although, Mr Britton said, as an "exceptions process" where the recipient agreed[237]), so this was not a change; and the hope was (despite the analysis to date) that everyone would go online, so it would hardly happen at all. From their perspective, more senior officers of DHS were pressing ahead with this proposal, which might have given them the idea that those senior officers agreed with their view and disagreed with the view of DSS.

There is no doubt that Cabinet should have been given the details of what the proposal involved and what DSS's advice about it had been; but Mr Ryman and Mr Britton were not at the top of this chain. There were a deputy secretary, Ms Golightly, and their immediate superior, Mr Withnell, making decisions on the NPP, and Mr Ryman and Mr Britton were not party to all the interactions and communications that were occurring. They tended to attend to what they were told needed doing, and were not given to deep reflection; to be fair, they were not given much time for it. The Commission cannot be satisfied that they were alive to the implications of the omissions from the NPP.

18.2 Mr Withnell's knowledge

Mr Withnell is in a different position. He knew of and understood the 2014 DSS legal advice to the effect that the use of averaging to determine social security entitlement in the way proposed was unlawful, including at the time of the ERC meeting on 25 March 2015.[238] He had an intimate understanding of the language used to describe the measure in the NPP and he was heavily involved in the document's development. Occasions where Mr Withnell either provided, or was provided with, draft versions of the NPP included 27 February 2015,[239] 3 March 2015,[240] 4 March 2015,[241] 7 March 2015,[242] 11 March 2015[243] and 18 March 2015.[244] All of these draft versions omitted any reference to the averaging component to the proposal and any mention of the legal impediments to that component's implementation.

In evidence Mr Withnell admitted that "… if there was still contemplation of using the ATO data as a basis for calculating overpayments, [versions of the NPP after 27 February 2015] would in large part be misleading."[245] However, he did not accept that the NPP that had been put to Cabinet was "apt to mislead."[246] He maintained that, to his knowledge, the use of averaging to determine social security benefits was not a component of the measure at the time of the ERC meeting. Indeed, he had never

become aware that it was a feature of the Scheme.[247] Although averaging had been contemplated by DHS early in the development of the proposal, on his version, it had been abandoned before the Scheme's implementation.

Mr Withnell gave conflicting evidence about when this supposed abandonment occurred. Initially, his evidence was to the effect that, by the time of the Executive Minute being sent to Mr Morrison, any notion that averaging would be involved in the Scheme had been abandoned.[248] However, in later evidence, Mr Withnell said that Mr Ryman's 27 February 2015 draft of the NPP represented "…the point at which [DHS] moved away from the use of income averaging… to a different approach."

The Commission does not accept either that income averaging was abandoned (it so clearly was not) or that Mr Withnell thought it was. He could not have been under such a fundamental misunderstanding as to the true nature of the Scheme. He held a senior position within DHS and had heavy involvement in the development of the proposal to Cabinet. His contribution included drafting and amending parts of the Executive Minute and NPP. He received regular instruction from Ms Golightly, gave instruction to Mr Britton and Mr Ryman and was a central figure in negotiations between DHS and DSS. In his evidence, Mr Britton said that throughout the development of the proposal, he had engaged in numerous discussions with Mr Withnell regarding the averaging component of the measure and how it would be applied.[249] At no point had Mr Withnell done "anything to indicate that he did not understand that [averaging to calculate and raise debts] was part of the process."[250]

Throughout the Scheme's development, Mr Withnell understood that the use of income averaging was a feature of the proposal.[251] He did a variety of things after the ERC meeting which are only consistent with his knowing of the Scheme's averaging component, including the following:

- On 27 April 2015, Mr Withnell settled a template letter to recipients under the Scheme's pilot program.[252] The material that Mr Withnell reviewed described an "apportionment methodology" where, upon being presented with "PAYG match data," recipients had the option to either "provide updated information" or to "allow the data to be applied as received from the Australian Taxation Office''
- In early July 2015, Mr Withnell settled a draft brief to Ms Campbell in relation to the Pilot program and its progress.[253] That draft clearly described how, as part of the Pilot, customers were having debts raised against them on the basis of "matched PAYG data"
- In March 2016, Mr Withnell was involved in briefings to Ms Harfield in relation to the 2015/16 budget measures.[254] Mr Withnell (together with Mr Britton and Mr Ryman) told Ms Harfield that the Scheme involved "a customer being presented with the ATO data and invited to correct it, and if they didn't, the data would be applied" in "an averaged form"[255]
- In January 2017, Mr Withnell was involved in preparing a summary of historical budget measures relating to "employment income matching" for the then Social Services Minister, Mr Porter. Mr Withnell provided a draft of that summary to Ms Golightly on 5 January 2017.[256] Part of the summary clearly described a "method of averaging" used under the Scheme to raise debts,[257] and
- On 12 January 2017, Mr Withnell sent an email to Ms Golightly (and others) where he described the EIM (Employment Income Matching) process under the Scheme.[258] Mr Withnell stated, "The averaging of employment income over the period worked (or advised by the ATO) is only used by Compliance and as a last resort if other information is unavailable eg customer fails to engage."

It is clear from the documents and emails he wrote or sent that Mr Withnell had a clear understanding of the averaging component of the Scheme.

Given his role, Mr Withnell could not have been under some illusion that the averaging aspect had been abandoned in the NPP proposal development stage, when it so plainly was not; and it is obvious that he knew the Scheme was implemented with averaging as a key component. It can be inferred that he knew the use of averaging to determine social security entitlement was intended to be a feature of the proposal at the time of the Cabinet's consideration of the NPP on 25 March 2015.

Mr Withnell did not misunderstand the true nature of the proposal and was not under some misapprehension that DHS had abandoned the concept of averaging. He knew that the NPP did not describe the averaging component to the proposal, or the legal impediments to it and he knew that it was likely to mislead Cabinet by those omissions. He was a party to that process.

Ultimately, in the Commission's view, based upon (a) Mr Withnell's knowledge that averaging was intended to be a feature of the proposal, (b) his awareness of the DSS advice and (c) his awareness of the language used in the NPP, Mr Withnell knew that the description of the measure in the NPP would be apt to mislead Cabinet as to the true nature of the Scheme. There is no evidence of Mr Withnell taking any steps to ensure that Cabinet was properly informed of the averaging component of the measure. To the contrary, Mr Withnell was a central figure in formulating the language used in the NPP ultimately considered by the ERC on 25 March 2015. The Commission's view is that Mr Withnell engaged in deliberate conduct designed to mislead Cabinet.

18.3 Ms Golightly's knowledge

The Commission is reliant on oral and documentary evidence in making findings with respect to Ms Golightly, and recognises the problems inherent in making findings against someone who cannot challenge the evidence.

Ms Golightly was the deputy secretary with responsibility for the PAYG proposal. She was engaged in the process of drafting, settling and signing the Executive Minute, and the development of the NPP. She was involved in meetings and conversations with Ms Payne, Ms Campbell, and Mr Withnell, and DSS officers including Ms Wilson and Ms Halbert.

Ms Golightly was aware from an early stage that the use of income averaging in the manner described in the proposal would require legislative and policy change. She was also aware that the final NPP that went to Cabinet contained no mention of averaging.

Ms Golightly had been asked by Ms Campbell to prepare the brief for Mr Morrison.[259] Ms Golightly was subsequently heavily involved in the settling, signing, and distribution of the numerous versions of the Executive Minute,[260] some, but not all, of which contained references to the use of income averaging (or "smoothing") in the PAYG proposal, and the indication that the proposal would require policy change, and may require legislative change.

Ms Golightly was informed of DSS's concerns about the proposal through conversations with Ms Wilson and Ms Halbert, and through the DSS Dot Points.[261] She knew that DSS's advice was that the use of income smoothing to assess a customer's social security entitlements was both unlawful and contrary to policy. She was heavily involved in the drafting, settling and distribution of the NPP, which did not indicate that legislative change would be required for the measure.[262]

Ms Wilson had told Ms Golightly on 26 February 2015 that the "bottom line" was that the proposal could not involve income smoothing, and that was clearly supported by the DSS legal and policy advice, of which Ms Golightly was aware. But there is no evidence that Ms Golightly did anything to remove averaging from the proposal, which of course would have had significant consequences for the ability to automate the process, and achieve the same number of reviews.

The Commission infers that the statement that the proposal did not change how "income was assessed or overpayments calculated" was made at the 27 February 2015 meeting in consequence of a direction from Ms Golightly. Corresponding amendments were made to the then draft of the NPP, on 27 February 2015, shortly after the meeting between DHS and DSS, which added those words and removed any reference to the use of averaging. Ms Golightly was responsible for the development of the NPP, and was a senior public servant. She was heavily involved in clearing the draft NPP, and engaging with Mr Withnell in developing the NPP. The Commission concludes that she was aware that, as presented to Cabinet, it was misleading.

19 The New Policy Proposal arrives at Social Services

By late on Monday 2 March 2015, DSS officers had obtained a copy of the draft NPP. The evidence produced to the Commission does not identify how or when the NPP was provided to DSS. An email from Anthony Barford (policy manager, DSS) to Ms Dalton at 4:17 pm referred to the NPP and (presumably) a telephone conversation with a lawyer from the DSS Public Law Branch, which referred to the NPP.[263]

While the draft NPP did not contain any explicit mention of averaging, it was clear to those with an understanding of the proposal that averaging would be involved in the measure. The NPP referred to the same number of interventions that would be conducted as did the Executive Minute, and also asserted that the same amount of savings would be achieved. The vast scale of those interventions was only achievable with the level of automation that averaging permitted.[264]

Mr Barford confirmed that irrespective of the language used in the NPP, he understood that income averaging was intended to be used to raise debts[265] and that those around him had the same understanding.[266] His emails to his colleagues confirm his contemporaneous understanding that averaging was being used.[267] Mr Barford could not identify any basis on which anyone in DSS would not have understood the NPP involved income averaging. He explained that the NPP progressed to the ERC without reference to the need for legislative change by reference to the dynamics of DSS:

> So, at some point, given all the information that has been provided and is visible in these documents, a decision would have been made by the senior executive to progress this. A decision clearly - in the signed document that we have seen by the Minister to support a particular proposal, you go away and find a way to make it work.[268]

He added that he understood no NPP could proceed without approval from either the secretary or deputy secretary.[269]

Mr Barford's understanding of the position is reflected in an email request he made for legal advice, and actions taken as a result of that advice. In the email, which he drafted for Ms Dalton to send to the DSS Public Law Branch, he said in relation to the SIWP NPP:

> …[W]e anticipate significant legislative change to ring it into effect, DSS however has concerns about potentially reversing the onus of prof [sic] and responsibility onto customers and any implications that may have for the purpose and intent of social security law.[270]

Ms Dalton duly sent an email to the DSS Public Law Branch saying:

> Urgent advice is required as the following strategies have been cleared by Minister Morrison for DHS to take forward as an NPP. The checklist in DHS's draft NPP states that no legislation is required. However, we are concerned that the strategies may require legislative change (perhaps significant) and are seeking your advice as to the possible extent.[271]

Mr Barford then sent an email to Ms Dalton in which he set out his comments on the draft NPP.[272] In his email, Mr Barford identified what he considered to be a number of flaws in the NPP, which included the reversal of legal obligation and the Due Diligence Checklist which said no legislation was required, in circumstances where DSS was waiting for legal advice.

Mr Hertzberg of the DSS Legal Branch provided his legal advice in response to Ms Dalton's request on 4 March 2015,[273] sending it to her, Mr Kimber, other Public Law Branch lawyers and Mr Barford. He referred to the earlier legal advice of Ms Wong of 4 February 2015 which in turn referred to the legal advice of Simon Jordan dated 18 December 2014 (the 2014 DSS legal advice). Mr Hertzberg advised:

> I have also discussed some of the other issues with [Ms] Wong and note her earlier advice, from 4 February, on some of the issues is still applicable. In general, I think it is clear that at least some legislative amendments will be required for the NPP and that there should be a Bill for this. The extent of the amendments will depend upon the detail of what is proposed.

In addition to his reference to Ms Wong's advice, Mr Hertzberg identified a number of legal issues with the proposal: whether PAYG data would be obtained from the ATO as part of the current cycle under the *Data-matching Program (Assistance and Tax) Act 1990*; the need to consider the secrecy provisions in the taxation legislation and particularly s. 355B in the Schedule to *Taxation Administration Act 1953*; whether social security law accommodated the role of PAYG data as "primary evidence" of income; and, in that regard, whether new rules needed to be inserted in respect of the employment income and ordinary income tests in Par 3.10 of the Social Security Act.

On Wednesday 4 March 2015 Ms Wilson, Ms Halbert, Mr McBride and others at DSS received a copy of the NPPs developed by DHS for the DSS portfolio budget submission.[274] The NPPs included a draft of the Strengthening the Integrity of Welfare Payments measure.[275]

20 Social Services' knowledge of the continued proposal for the use of averaging

Later that day Mr Kimber sent an email to Mr McBride and others which attached DSS costing information for the NPP and a legal advice prepared earlier that afternoon by a DSS lawyer.[276] Mr Kimber said in his email:

> Hi Paul – for info – the following has been provided to DHS thru our Budget area.
>
> Details of our costing for DHS Compliance NPP (PAYG component) and also based on preliminary legal advice we believe that there may be some lego changes required – this will depend on the specific of implementation. We are suggesting that this be noted in the NPP so that govt is then not surprised if that it becomes a requirement.
>
> [errors in original]

Mr McBride replied to Mr Kimber's email and agreed that Mr Kimber's suggestion to note the prospect of legislative change in the NPP made sense.[277]

That sequence reflects a recognition that, notwithstanding the representations made by DHS at the 27 February 2015 meeting and the consequent changes in the wording to the NPP, legislative change might still be required in relation to the proposed measure, including the PAYG element.

However, Mr Kimber's suggestion to note the prospect of legislative change in the NPP went no further. While Mr McBride told Mr Kimber that his suggestion made sense, there is no evidence that he, Mr McBride, conveyed that suggestion to Ms Wilson.

20.1 Mr McBride's knowledge

Mr McBride's evidence was that he believed that the proposal to use of averaging had been abandoned.[278] He relied on the fact that the drafts of the NPP which he saw did not state that averaging would be involved in the proposed measure,[279] which in his view meant that DHS could not use averaging in implementing the measure because it had not been authorised by Cabinet.[280] Mr McBride did not ask how the projected savings, which mirrored those in the Executive Minute, could be achieved without resort to income averaging.[281] He also did not ask how the measure would be implemented despite his evidence that it was the responsibility of DSS to ensure that DHS delivered the savings which were to be specified in the NPP.[282]

Mr McBride said that DHS had explained that the predicted number of interventions would be achieved through the use of new technology and analytics tools.[283] He was, however, unable to give anything but the most general description of what he says he was told about these things.[284] There is, however, no basis to conclude that he knew at the time the NPP went to Cabinet that, in fact, there had been no change to the substance of the proposed measure, and that it still contemplated income averaging.

20.2 Ms Wilson's knowledge

Ms Wilson's experience of Ms Golightly was that "She was a very forceful character. She didn't enjoy being questioned and made that pretty clear."[285] Ms Wilson had a "very unhappy relationship with her" when Ms Golightly was her direct manager, but did not make a formal complaint because that was "a very fraught area in the Australian Public Service."[286] However, Ms Wilson said she did not perceive Ms Golightly as

a "deliberately untruthful person,"[287] and had no reason not to believe that Ms Golightly would act in accordance with the advice that DSS, including Ms Wilson, had given to DHS and to Ms Golightly herself. Ms Wilson's evidence was that she believed that DHS had agreed to change the proposal so that income averaging would no longer form part of it.[288]

Ms Wilson said that she recalled checking the NPP before it was lodged with the Portfolio Budget Submission and saw that it said words to the effect that there would be no change to the way in which income was assessed or overpayments calculated.[289] She said in her evidence that, in hindsight, she wished she "had asked more questions."[290]

The Commission accepts that Ms Wilson's conversation with Ms Golightly took place as she said: that she did not know that DHS would proceed using income averaging, and that she was not involved in any misleading of Cabinet. But the Commission also concludes that Ms Wilson refrained from enquiring too closely into how the measure was to be implemented without the use of income averaging, or returning to the question later, because DHS was resistant to DSS advice and the minister wanted the proposal to proceed. Her later conduct points to that conclusion.

Although she may have hoped for the best when she negotiated with Ms Golightly in 2015, it must have been obvious to Ms Wilson from information she received about the Scheme's development in 2016 (detailed later) that income averaging was involved, but she did not react. Her response, when the fact of averaging's use became public knowledge in early 2017 (also detailed later), was simply not consistent with that of someone taken by surprise and feeling betrayed. It was the reaction of someone who felt she had some degree of responsibility for what occurred and was anxious to obscure what had really happened.

21 The Expenditure Review Committee meeting

The ERC consideration of the NPP occurred in the afternoon and evening of 25 March 2015. It was attended by Ms Payne, Ms Lees, Ms Campbell, Mr Morrison and Mr Pratt.[291] The final content of the NPP considered by the ERC did not materially differ from the draft first received and approved by Ms Payne on 3 March 2015.[292]

Mr Morrison accepted that there was very little change between the description of the DHS proposal in the Executive Minute and the PAYG measure in the NPP.[293] Mr Morrison identified two points which distinguished the Executive Minute from the NPP; firstly the addition of the sentence, "The new approach will not change how income is assessed or overpayments calculated"[294] and secondly, the assertion that legislative change was not required.[295] Mr Morrison accepted that the process described in the Executive Minute and the NPP was the same in relation to the use of income averaging and the way overpayments were calculated.[296]

21.1 Knowledge of Ms Campbell

Ms Campbell was copied to emails to Ms Payne's office attaching drafts of the NPP on 3 March 2015.[297] It is more likely than not that Ms Campbell reviewed at least one of those drafts because she both had access to the Secretary's Office email address to which they were sent and was routinely provided print outs of documents emailed to her or her office.[298] She kept a close eye on the development of matters relevant to the upcoming Budget consideration of DHS.[299] The drafts of the NPP contained the words, "The new approach will not change how income is assessed or overpayments calculated" and did not refer explicitly to smoothing or averaging, or refer to the need for legislative change.

On 11 March 2015 at 12:35 pm, Emily Canning emailed Ms Campbell and Ms Golightly with an update on the Portfolio Budget Submission and DHS NPPs indicating that comments had been provided on the Strengthening the Integrity of Welfare Payments NPP.[300] Ms Campbell responded at 3:35 pm thanking Ms Canning.

At 8:06 pm, Ms Canning emailed Ms Campbell to confirm that the DHS NPPs had been signed off by Ms Payne and were now with DSS and advised that a hard copy of them had been delivered.[301] Ms Campbell responded at 8:12 pm thanking Ms Canning. Given her "close eye" on "matters relevant to the upcoming Budget consideration of DHS,"[302] it is more likely than not that she reviewed the hard copy of the NPP that she was provided.

It is impossible to reconstruct the precise wording of the draft that was printed for Ms Campbell from the documents produced to the Commission. However, given that the following facts are true of the prior drafts of the NPP that Ms Campbell received on 3 March 2015, as well as the final NPP, it can be inferred that the hard copy provided to Ms Campbell also asserted that the new approach would not change how income was assessed or overpayments calculated and made no reference to averaging or the need for legislative change.

On 12 March 2015 Ms Ahmer emailed Ms Campbell a wording change for the Portfolio Budget Submission for her approval which Ms Campbell approved by saying "Ok with me."[303] The subject line of that email was "For clearance: Recommendation in relation to increasing the SES cap for Strengthening Integrity proposal in the PBS." Ms Golightly responded stating:

> Hi Kathryn – following our brief conversation on Monday we left the NPP wording non-committal re level as we were not sure what level the AFP would be able to provide…

While this particular exchange apparently referred to a different element of the measure from the PAYG element, it is apparent that Ms Golightly was working closely with Ms Campbell on the content of the NPP.

A meeting was scheduled on 18 March 2015 for an ERC briefing including Ms Campbell, Ms Lees and Ms Golightly.[304]

On 24 March 2015 at 11:14 am, Ms Golightly emailed Ms Canning and Ms Ahmer to indicate that Ms Campbell had called with questions on some of the ERC briefs and to indicate that some of the ERC briefs and NPPs would be updated.[305]

Ms Canning emailed Ms Campbell at 2:00 pm on 24 March 2015 saying that work had been done to polish the talking points (for the ERC) based on the comments that had been received,[306] and asking whether Ms Campbell was content with them. It was proposed to give them to Ms Payne's office and to Mr Morrison.[307] The talking points attached to that email did not refer to the methodology for the proposal (which was to use averaging of ATO data) or to the need for legislative change.[308]

On Wednesday 25 March 2015 Ms Payne received a briefing from Ms Campbell, Ms Golightly and Mr Withnell in preparation for attendance at the ERC.[309] Ms Lees gave evidence that the usual practice for the preparation of Ms Payne for attendance at the ERC involved giving her a briefing folder for the DHS NPPs (but not DSS NPPs) and relevant Cabinet documentation, the Finance green brief, talking points and any other relevant documents.[310] That evidence is consistent with an email sent within DHS from Ms Golightly the previous day.[311]

The ERC meeting was held on 25 March 2015 at 4:00 pm.[312] The Business List records that in respect of the 2015-16 Budget for Social Services the Portfolio Budget Submission (TA15/0154 and Finance Green Brief) was item 5(a).[313]

Ms Campbell does not recall if she was present at the ERC at the relevant time,[314] but the Attendance Record has here there for item 5(a) only.[315] Regardless, Ms Campbell accepted that "if [she] were present, it would be because [she] could speak to the new policy proposal under consideration" and "that would require [her] to have technical knowledge of what was involved in the proposal so she could answer questions about it."[316] The documentary record supports a finding that Ms Campbell was present at the consideration of the NPP or was at least intended to be present and accordingly that she would have been prepared to defend it if she were.

The preceding paragraphs demonstrate that Ms Campbell was provided with drafts of the NPP and had knowledge of the contents of those drafts. By virtue of her position and her involvement in and oversight of the preparation of material for the ERC, including the NPP, Ms Campbell was in a position to require that the drafts be amended if she considered it necessary.

Ms Campbell knew that the PAYG proposal involved averaging and also had knowledge of the DSS advice conveyed in the Executive Minute that legislative change was required in order to implement the proposal.[317] She did not receive any legal advice which contradicted the effect of the DSS advice referred to in the Executive Minute.[318] She knew that neither the fact of averaging nor the advice that legislative change was required appeared in the NPP. There is no evidence that she asked that the description of the NPP be changed to accord with the Executive Minute.

On the contrary, Ms Campbell gave evidence that she reviewed emails, asked for and reviewed documents but "found no evidence"[319] that DHS worked with DSS in respect of the DHS proposal, despite the statement in the Executive Minute that DHS would do so. Ms Campbell said she did not consult with any person about the need for legislative change after the Executive Minute was sent to Mr Morrison.[320] DHS had left the issue of legislative change to DSS as the department with the responsibility for the legislation[321] and she could not recall whether she had asked in 2015 whether legislative change had occurred.[322]

Irrespective of whether Ms Campbell attended the ERC, the NPP, in which she had involvement, and of which she had oversight, was likely to mislead Cabinet because it contained no reference to income averaging or the need for legislative change. Ms Campbell did not request any relevant amendment to the

NPP which would have averted that possibility. Nor is there any evidence which would indicate that she otherwise corrected the position. (For example, the ERC Talking Points also make no reference to income smoothing or averaging or the need for legislative change, and there is no evidence that Ms Campbell sought that they be amended to present the true position).

In oral evidence, Ms Campbell accepted that the NPP was apt to mislead Cabinet.[323] She contended that her failure to eliminate its misleading effect was an "oversight."[324] That would be an extraordinary oversight for someone of Ms Campbell's seniority and experience. The weight of the evidence instead leads to the conclusion that Ms Campbell knew of the misleading effect of the NPP but chose to stay silent, knowing that Mr Morrison wanted to pursue the proposal and that the Government could not achieve the savings which the NPP promised without income averaging.[325]

21.2 Knowledge of Ms Payne

Ms Payne was provided with, and read, four drafts of the Executive Minute. She was also provided, for her information, with the final version which was eventually signed by Mr Morrison. The evidence before the Commission reveals Ms Payne closely read material DHS provided to her. The evidence also confirms that Ms Payne involved herself in the structure and drafting of the Executive Minute by DHS from her meeting with Ms Campbell and others on 20 January 2015 onwards.

The first draft prepared by DHS was B15/39. It was provided to Ms Payne electronically and in hard copy in advance of her meeting with Ms Campbell, Ms Golightly and Mr Withnell on 20 January 2015. This draft is the only draft that contained a reference to an "income smoothing" methodology. Although Ms Payne did not sign B15/39, it seems evident from Ms Golightly's subsequent briefing to her that it had been divided into two parts (the first part being redrafted in the form of B15/65 on 23 January 2015) "following the meeting," that it was discussed at that meeting. The Commission finds that Ms Payne was informed about the existing compliance process and the nature of the proposed changes to that process by the contents of B15/39 and the subsequent briefs and draft briefs in which the Executive Minute was developed.

The information about the existing compliance process remained almost unchanged from B15/39 to the final version of the Executive Minute. The proposed new approach could not be understood without an understanding of the existing process. Although the language of the proposed new approach changed over the course of these briefs, the reference to the need for legislative change was introduced after the meeting on 20 January 2015. The question of what could be done without legislative change was discussed in the 3 February meeting.

The final version of the Executive Minute to Mr Morrison stated, with respect to all of the proposals (except the creation of a Taskforce, which is not relevant for present purposes), that they "could be undertaken under existing arrangements but would be significantly strengthened if the suggested policy and legislative changes were adopted."[326] It also stated "It is recommended that the department continues working with the DSS to undertake the above analysis and develop a package of policy and legislative changes for you to take forward."[327]

The evidence of Ms Lees, Ms Payne's chief of staff, was that any engagement between DHS and DSS in pursuit of working together on the potential policy and legislative changes would not typically be reported to the Minister's office, unless there was a problem.[328] That was consistent with Ms Payne's evidence to similar effect.[329]

Ms Payne was first provided with the draft NPP on 3 March 2015.[330] This was after the explicit reference to income averaging had been removed, and the NPP instead stated "The new approach will not change how income is assessed or overpayments calculated."[331] The answer to the question in the NPP "Due Diligence Checklist" of "Is legislation required?" was "NO."[332]

Those two features of the draft NPP, namely, the reference to no change to "how income is assessed or overpayments calculated," and the indication in the due diligence checklist that legislation was not

required, remained unchanged for each version of the NPP received and or revised by Ms Payne.[333] They also remained unchanged in the final material that went to Cabinet.[334]

In considering whether Ms Payne knew that it was intended that DHS would use income averaging in the proposed "new approach" described in the NPP, and that the NPP for that reason would be likely to mislead the ERC and Cabinet, there are a number of matters to be considered.

Ms Payne knew that the use of income averaging was the primary basis of the "new approach" described in the Executive Minute and that DSS had advised DHS that legislative change was required to implement the DHS proposal in that way, and no individual or brief informed her that DSS had changed its position on the need for legislative change. On the face of the documents, there had been a change with respect to the documented need for legislative and policy change between the final version of the Executive Minute, and the first version of the NPP that was received by Ms Payne. Ms Payne could not recall whether or not, at the time, she had recognised that there had been such a change, or whether or not she had contemplated how the proposal would be implemented as a result of that change.[335]

There is an obvious consistency in the projected number of interventions and savings as between the Executive Minute and the NPP from which it can be inferred that the intended process by which those interventions and savings were achieved had not changed.

Against that, Ms Payne was entitled to rely on her senior departmental officers, in this case, Ms Campbell and Ms Golightly, to bring matters requiring her personal consideration to her attention.[336] She was also entitled to assume they would perform their functions according to the obligations and responsibilities imposed on them by the *Public Service Act 1986* (Cth) (Public Service Act).[337]

The Executive Minute had contemplated further engagement between the two departments, and the evidence was that the results of that engagement would not ordinarily be raised with the Minister's office, so it was possible something might have happened in that regard without Ms Payne's knowledge. The language of the NPP drafted in response to Mr Morrison's direction stated "The new approach will not change how income is assessed or overpayments calculated" in direct contrast to the language in the Executive Minute. Ms Payne could conceivably have understood that sentence to mean that DHS was not proposing to use income averaging in the proposal.

Mr Morrison, not Ms Payne, was the Cabinet minister in the portfolio and it was his direction to DHS to develop the NPP. The Cabinet Handbook imposed a positive obligation upon Mr Morrison as the "sponsoring" minister of the NPP to the ERC to ensure that the NPP provided sufficient detail on risk and implementation challenges to ensure that Cabinet could make an informed decision on the efficacy of the NPP.[338] It also imposed responsibility on Mr Morrison for the content, quality and accuracy of the advice contained in the NPP.[339]

Weighing all of those matters, the Commission cannot find that Ms Payne knew that the intention was for DHS to use income averaging in the proposed "new approach" described in the NPP, or, accordingly, that the NPP was apt to mislead the ERC and Cabinet. The question then is whether she ought to have inquired how DHS did intend to proceed. There is no record or other of Ms Payne seeking information from Ms Campbell or Ms Golightly between 23 February 2015 and 25 March 2015 about how the NPP was to be implemented if it did not involve the use of income averaging. Ms Payne was unable to recall whether she did inquire or not due to the long passage of time. The Commission infers that Ms Payne did not make any such inquiry.

In considering whether Mr Payne ought to have asked how DHS intended to implement the NPP, the same considerations which are relevant to her actual knowledge apply. There are two additional considerations which are relevant and point in different directions. How the NPP was to be implemented was directly relevant to the matter of service delivery by DHS and was therefore relevant to Ms Payne's administration of DHS. It was significant because it involved the question of potential lawfulness (raised by the DSS advice) and because of the proposal's large scale, which affected hundreds of thousands of current and former social security recipients. On the other hand, to suspect that averaging might still be involved, Ms Payne would have had to entertain the possibility that the department's senior executive officers had

deliberately concealed the fact by language to the opposite effect in the NPP. That is not something one would expect a minister readily to contemplate.

Weighing up all the considerations, the Commission concludes that Ms Payne was entitled to regard the assurance she received in the NPP as sufficient. There was no reason for her to anticipate that DHS officers intended to implement the NPP by the use of income averaging contrary to the language of the NPP.

There is, of course, the broader question of ministerial responsibility. Ms Payne was responsible for a department which instituted the flawed Scheme and officers of which misled Cabinet as to what it involved. Those are matters for Parliament and the electorate, not this Commission.

21.3 Knowledge of Mr Morrison

Mr Morrison gave evidence of his usual practice that if he wished to convey something to the department beyond the available options on a brief, he would write his request or direction underneath his signature on the front page of the brief.[340] His markings on the Executive Minute conveyed simply that he agreed to DHS developing a package of New Policy Proposals which included the PAYG measure, and that he agreed to DHS continuing to work with DSS to progress consideration of the additional policy and legislative changes related to those proposals. He did not seek an advice on the DSS advice in respect of the legislative change referred to in the Executive Minute.[341] Mr Morrison described the effect of his markings on the Executive Minute to be:

> … as it says on the final bullet point that: "As a result, we have been working with DSS on developing this proposal and will continue to do so." And so I said, "Yes. Pursue that. Keep having those discussions." There was no response here by me which said that, you know, I don't agree to legislation.[342]

Mr Morrison gave evidence that after he signed the Executive Minute, which contained his instructions, the "package of policy or legislative changes" he expected DHS to develop with DSS was not produced.[343] He did not see any advice from DSS after he signed the Executive Minute which addressed why DSS appeared to reverse its position on the need for legislative change, nor did he ask for any advice or clarification.[344]

Having received the NPP, Mr Morrison said, he understood that the use of income averaging remained part of the method by which the NPP would be implemented despite the change in characterisation of that process between the Executive Minute and the NPP.[345] He said:

> [T]hat there was a fundamental change between the [Executive Minute] and the [NPP]. And those two changes were (1) the inclusion of a statement which said the approach on how income is assessed, and overpayments calculated has not changed, ie, that means what we've been doing as a government for more than 20 years is unaltered; and, secondly, that legislation previously thought to be required is no longer required.[346]

Mr Morrison said, in effect, that his understanding was that the NPP "countermanded" the position communicated in the Executive Minute.[347]

For these reasons, after he received the NPP, Mr Morrison said, he had no need for clear legal advice on the question of legality raised in the Executive Minute;[348] and did not question why the package of policy and legislative changes he expected DHS and DSS to pursue work on was not produced.[349] He expanded on his position, saying that:

- using income averaging as the sole basis for raising a debt where a recipient did not respond to a request for income information was a practice undertaken by DHS for at least 20 years. He was informed of the practice in 2015 as "just a foundational way of the way DHS worked."[350] For this reason he did not accept that the use of income averaging in the DHS proposal was a "new approach to reconciling information;" it was the technologies and the scale of the interventions which were new;[351]

- the resolution of the issue of the need for legislative change was communicated to him (and Cabinet) by the NPP Due Diligence Checklist on the draft NPP dated 3 March 2015 received by Mr Wann from Ms Payne's office which advised no legislative change was required[352] (although Mr Morrison did not recall seeing that version but did see later versions of the NPP to the same effect);[353] and
- "[He] had instructed in [the Executive Minute], that any of these issues were to be resolved, and it followed, from the NPP Due Diligence Checklist that '…they were'."[354]

Mr Morrison not told that averaging was an established practice prior to 25 March 2015

Mr Morrison accepted that he did not receive a written briefing about the DHS practice of income averaging,[355] and could not recall who told him or when he was told about the DHS practice of averaging.[356] He said that he was not provided with any document which supported the information.[357] He said "It would have come up in verbal briefings." [358]

Mr Morrison's oral evidence that he was informed of the practice of income averaging is not contained anywhere in his statement. His statement confirms that he did not receive any specific advice or further briefing from DSS or DHS in respect of the proposals, design or lawfulness of the Scheme following the Executive Minute and prior to the ERC.[359] Mr Morrison did not mention the longstanding practice in his explanations for why the Scheme was introduced as part of the 2015/16 DSS Portfolio Budget Submission.[360]

It is very unlikely that his own department would have given Mr Morrison such information. Ms Wilson, Mr Whitecross, Mr McBride and Mr Kimber, all of whom were involved with advising on the Executive Minute and the development of the NPP, gave evidence to the effect that they had no knowledge of a practice, longstanding or otherwise, of income averaging by DHS. They had advised against its adoption on policy and legal grounds, as was documented in the 2014 DSS policy advice and the 2014 DSS legal advice, and in emails sent by them in January 2015. Mr Pratt had been chief executive officer of Centrelink in 2008 and DHS secretary from 2009 until he became DSS secretary in 2013; he was unaware of income averaging ever being used by DHS to determine and raise debt.[361]

Mr Withnell and Mr Britton, the DHS officers who developed the proposal, were aware, respectively, that DHS had in fact used income averaging in the past, in "exceptional cases" where the recipient might agree that it was appropriate;[362] and as an "exceptions process" where the recipient was agreeable.[363] They were unlikely to have described it to Mr Morrison as a "foundational way" that DHS worked.

If Mr Morrison were told of a practice of using income averaging of ATO data as the sole basis for debt raising where a recipient did not respond to a request for information, it would have directly contradicted the information about existing compliance processes contained in the Executive Minute, at pages 12 to 17, which he retained. There the points were made that traditional compliance reviews were "a manual staff intensive verification process involving obtaining information from customers and third parties" and that the ability to change that process was limited because of "legislative and policy constraints on the need to apply income fortnightly to determine overpayments," even if income data were only available on an annual basis, as the ATO data was.

Similarly, the information about the PAYG proposal in the Executive Minute prepared by DHS is inconsistent with an established DHS practice of income averaging. The references to the need for policy and legislative changes are only explained by the use to which the PAYG data was put, and the proposal to use income averaging as the sole basis for debt raising where a response was not received, requiring no human intervention and enabling the automation of debt recovery.

As set out in detail above, the Executive Minute was developed at group manager and deputy secretary level within DHS, reviewed by the secretary and with consultation of the Minister for Human Services. Advice was sought from DSS which resulted in the provision of the DSS Dot Points. At no stage during that

process did anyone assert to DSS that income averaging as contemplated by the Executive Minute was a longstanding practice.

The assertions made by Ms Harfield and others in DHS in January 2017 to Mr Tudge, Mr Porter and Ms Wilson to the effect that income averaging was a longstanding practice are addressed elsewhere in this Report. They do not provide any basis for inferring that that those statements would have been made to Mr Morrison in 2015. Finally, Mr Morrison's evidence that he was told of the longstanding practice of income averaging in 2015 is inconsistent with his oral evidence that the Executive Minute was the sole source of his information at that point in time.

The Commission rejects as untrue Mr Morrison's evidence that he was told that income averaging as contemplated in the Executive Minute was an established practice and a "foundational way" in which DHS worked.

No established practice of PAYG income averaging where a recipient did not respond

In addition to his evidence that he was told of the established practice of raising debts by using income averaging, without more, where a recipient did not respond to a request for information, Mr Morrison sought to prove that DHS in fact had such a practice.[364] He relied on different sources of information for that assertion: two ministerial media releases, two DSS letters, and some sampling done in 2020. All of them are the subject of more detailed consideration in chapter 1 - Legal and Historical Context of the Scheme, in the section "The history of data matching in the social security context" and "The history of income averaging in the social security context."

Briefly, however: The first of the media releases, *Computer matching press release,* on 21 August 1990 was issued on behalf of then Minister for Social Security, Senator Richardson.[365] It announced the automation of tax file numbers to verify income information supplied by clients seeking income support payments[366] and the computerised provision of income taxation information from the ATO to DSS. The second media release, *New data matching to recover millions in welfare* dollars on 29 June 2011 was jointly issued by then Minister for Human Services, Tanya Plibersek, and then Assistant Treasurer, Bill Shorten.[367] It announced daily computerised data matching between Centrelink and the ATO in respect of former income support recipients who had a social security debt and an anticipated increase in the recovery of social security debts by tax garnishee notice. Neither media release dealt with income averaging or automated debt recovery.

The DSS letters both dated from 1994.[368] One appears to be a template and the other a copy of a letter actually sent, but they are in identical terms. Each states that it is a request for information under the Social Security Act in relation to Newstart Allowance; alludes to a difference between DSS records and taxable income information which the ATO has provided under the *Data Matching Program (Assistance and Tax) Act 1990*; warns that a failure to provide information in response can lead to a cancellation or suspension of payment; warns that any response may be checked against third party information, such as from employers and banks; and advises that if no response is given, the ATO taxable income information will be used and DSS will write to the recipient about how much money they need to pay back.

Those letters were different in a number of respects from those sent in the course of the Scheme. They were sent only to current income support recipients; they were notices under the Social Security Act which imposed an obligation to respond; they related to income tax return information, not PAYG data; they contemplated verification of information from third parties using DSS's evidence gathering powers; and it was not suggested that the data would be applied through automation or without human assessment.

There was no evidence about when or how often DSS sent such letters but, in any event, there is no evidence that they were used by Centrelink when it assumed responsibility for service delivery. Nor does it appear that they were used in relation to PAYG income information. Centrelink's letters to recipients when it began its PAYG data-matching program made no similar suggestion of applying ATO data, as the template

customer contact letter[369] attached to the 2004 PAYG data matching protocol makes clear. Services Australia outlined the content of the initial letters sent to recipients during the 2004 to 2011 period, which remained in similar terms and made no reference to use of ATO PAYG data to assess income.[370] Copies of letters provided by Services Australia for the period September 2011 to July 2015,[371] after DHS became the responsible department, similarly make no reference to use of ATO PAYG data to calculate entitlement.

Finally, Mr Morrison relied on an email[372] in relation to sampling done in 2020 of 500 files for each of the years 2009 and 2011. According to it, over the two years, 9.1% of the debts in the thousand files sampled in total were raised based on the sole use of averaging, while 11.5% were based on its partial use; which, Mr Morrison said, demonstrated that one in five debts was raised using income averaging and automation. However, there is no evidence about how the sampling took place; what constituted "partial" as opposed to "sole" use of averaging; whether the averaging was done in circumstances where it was actually provided for by the Social Security Act; and whether it was done in circumstances like those explained by DHS officers where, for example, the recipient was able to confirm that their income was of a regularity which made averaging reliable. Given those limitations, the Commission does not regard the email as informative, whether or not the figures are correct.

For those reasons the Commission did not find the documentary evidence to which Mr Morrison pointed compelling. In any event, Mr Morrison was not provided with any documents in 2015 which provided any support for his assertion of a longstanding practice, let alone its legality. If Mr Morrison wanted to question the advice in the Executive Minute that legislative change was required for income averaging, given his asserted belief that it was a long-standing practice, he could have followed his usual practice of writing beneath his signature.[373] The more likely explanation is that he did not question the advice because he knew that entitlement for income support payments according to the legislation was worked out on the basis of actual fortnightly income.[374]

The effect of the oral and documentary evidence is that DHS did not have any "foundational way" of working which involved income averaging as the sole basis for debt raising where the recipient did not respond, and Mr Morrison could not have supposed that it did. The Executive Minute informed Mr Morrison that the use of income averaging in the DHS proposal required legislative change.

The meaning of the New Policy Proposal due diligence checklist

Mr Morrison's evidence was that he relied on the checklist in the NPP as showing that DSS did not, after all, consider that legislative change was needed for the proposal to use income averaging:

> Because no legislation was required. That was the clear advice from the Department, included in a Cabinet checklist titled NPP Due Diligence Checklist, for which Secretaries hold very significant responsibilities. And their advice was that no legislation was required.[375]

The content of the NPP follows the subheadings: Minister, Authority for NPP, Affected Agencies, Appropriation Source, Constitutional risk, Financial implications, Proposal Description, Policy Case, Implementation and Delivery, Regulatory Impact and NPP Due Diligence Checklist (Checklist). The Checklist for the final NPP contained three categories: General Implications, Legislation and [Regulatory] Impact Statements.[376] Under the 'Legislation' heading, three questions were asked:

- Has the Australian Government Solicitor assessed the constitutional and legislative authority risk?
- If yes, has the advice been provided to Finance?
- Is legislation required?

The first two were answered in the affirmative, the third in the negative.

Mr Morrison's evidence led to consideration of the meaning of the three questions, particularly the third. Rules 26 and 27 of the Budget Process Operational Rules (BPORs)[377] provided for how the question of Constitutional Support and Legislative Authority was to be addressed in an NPP. They required:

> 26.1 the Constitutional risk rating (i.e. 'high', 'medium' or 'low') as assessed by the Australian Government Solicitor; and
>
> 26.2 the proposed source of legislative authority for the expenditure (if required), as informed by legal advice by the Australian Government Solicitor as to whether primary legislation or an item in the Schedules to the *Financial Framework (Supplementary Powers) Regulations 1997 (FF(SP) Regulations)* may be appropriate, noting that new or significantly changed spending activities proposed to rely on the *FF(SP) Regulations* must be authorised through new or amended legislative authority.
>
> [emphasis added]

That suggested that the third question related to the source of the authority for the expenditure. Mr Morrison, however, said that in his view, the question "Is legislation required" was directed to whether legislation was required to implement the NPP, not the question of legislative authority for expenditure addressed in the BPORs.[378] He based his evidence upon his experience as a member of the ERC, not the words of rule 26 of the BPORs, and asserted the suggestion to the contrary involved a narrow reading of the BPORs.[379]

There was some support for Mr Morrison's understanding of what the question related to, but not where the answer would come from, in the evidence of Mr Turnbull.[380] Mr Turnbull understood the effect of the Checklist was that AGS had advised whether or not legislation was required to implement the proposal; "you couldn't read it any other way." He agreed that if that had not in fact occurred, members of the ERC would be misled by the NPP to think that AGS had so advised.[381]

The role of the Australian Government Solicitor in the checklist

It is worth exploring what part AGS played in responding to the Checklist, because Mr Turnbull was not the only minister who gave evidence to think that the third answer represented the advice, not of the department advancing the proposal, but of AGS or the Attorney-General's Department.[382] Kathryn Graham (national leader, Office of General Counsel, AGS) was the author of the AGS Constitutional risk advice in respect of the NPP.

In her statement, Ms Graham explained that the primary role of the AGS advice in the Budget process did not extend to the legality of the measure itself but was confined to the question of expenditure of Commonwealth funds (appropriation):[383]

> [The] assessment is a narrow and specific one relating to constitutional risk; it is not directed to broader questions of lawfulness and legal risk.
>
> …
>
> Our instructions do not extend to considering whether there are any other legal issues raised by a NPP beyond the question of constitutional risk and legislative authority for expenditure. In the event that a very obvious legal issue is apparent on the face of the NPP, we may include a comment to that effect in our assessment, however, this is rare in practice given the volume of NPPs, the tight timeframes, the narrow focus of the assessment and the broader complexity of many of the proposals.

Ms Graham provided her advice on 5 March 2015 after DHS provided her with the draft NPP on 4 March 2014.[384] Her advice was confined to the question of whether legislation was necessary to authorise the spending (Budget appropriations) sought by the NPP. This approach was consistent with the requirement of the BPORs for the Checklist and her lengthy experience in providing such advice. Ms Graham advised:

> No legislation is required to authorise any of the spending contemplated by the NPPs (although it may be necessary to amend legislation to implement them).
>
> …
>
> For the purposes of this assessment we have not considered other legal issues associated with the NPP (e.g., compliance with the *Privacy Act 1988*).[385]

It is clear that Ms Graham's advice dealt with whether legislation was required to authorise the spending for the proposal in the NPP, not whether legislation was required to *implement* it. In any case, the lack of detail in the NPP would have made it impossible for AGS to advise on the lawfulness of the proposed use of averaging in the proposal in any event.

What did the third question and answer really relate to?

Having made that short digression, the Commission accepts Mr Morrison's evidence that the third answer in the checklist could extend beyond the issue of whether authorisation was needed for expenditure, and could involve the advice of the relevant department. After Mr Morrison gave evidence he sought, and was granted, access to a number of other NPPs contained in the 2015-16 DSS Portfolio Budget Submission. They demonstrate, at least in some instances, when the question "Is legislation required?" was answered in the affirmative, it related to the need for legislation to implement the proposal, not to authorise expenditure.

Mr Morrison's understanding that DSS was involved in answering the question was consistent with the conduct of those at DSS below SES level after Mr Barford received the first draft of the NPP on 2 March 2015. Mr Barford, Ms Dalton and Mr Kimber were each involved in seeking advice from the DSS Public Law Branch as a matter of urgency by 4 March 2015 on the proposals.

Was Mr Morrison entitled to rely on the third question and answer?

The PAYG proposal in respect of which the third question was answered "No" contained no reference to income averaging and, in fact, suggested the contrary position by the "no change" representation. Answering it did not require DSS to reverse its position that legislative change would be required if that were part of the proposal. (DSS had not in fact changed its position on the use of income averaging as contemplated by the Executive Minute.)

Mr Morrison had, in signing the Executive Minute, directed DHS to "work with [DSS] to progress consideration of additional policy and legislative changes" and he was entitled to assume they had done so. A Minister can expect senior executive staff of a Department to follow his or her directions perform their functions in accordance with their obligations and responsibilities under the Public Service Act.[386] Mr Morrison would not ordinarily suspect that DHS officers would conceal the intended use of income averaging from DSS so as to prevent DSS from providing legal advice that it was unlawful.

However, Mr Morrison was responsible for administering the Social Security Act according to law and it was his department which provided the advice referred to in the Executive Minute that legislative change was required. He had directed DHS to develop the NPP, and as the Cabinet minister for the Social Services Portfolio, he was its sponsor.[387] The *Cabinet Handbook, 8th Edition* provided:

> 23. In upholding the principles of collective responsibility and Cabinet solidarity, Ministers must:
>
> …
>
> (f) ensure that Cabinet submissions provide enough detail on risk and implementation challenges to ensure the Cabinet can make an informed decision on the efficacy of the proposal
>
> …

> 80. Ministers are expected to take full responsibility for the content, quality and accuracy of advice provided to the Cabinet under their name. Ministers bringing forward submissions are also responsible for ensuring that the consultation necessary to enable a fully informed decision to be taken occurs at both ministerial and officials [sic] levels. It is particularly important that there is agreement on factual matters, including costs.[388]

The language of the NPP drafted in response to Mr Morrison's direction stated "The new approach will not change how income is assessed or overpayments calculated" in direct contrast to the language in the Executive Minute. Although Mr Morrison understood the NPP to involve the use of income averaging, it was objectively impossible for any reader without further knowledge to appreciate that. To a reader with knowledge of DHS's past averaging practices, the "no change" sentence would convey the contrary: that DSS was not proposing to use income averaging as contemplated in the proposal, because it had never previously been used in that way.

The NPP was directly relevant to the DSS responsibility for income support policy and was therefore relevant to Mr Morrison's administration of the department. He knew from the Executive Minute that the use of income averaging might require a change of that policy. It was significant because it involved the question of potential unlawfulness (raised by the DSS advice that the proposal needed legislative change) and because of the large scale of the DHS proposal which affected hundreds of thousands of current or former social security recipients.

Mr Morrison knew that the use of income averaging was the primary basis of the "new approach" described in the Executive Minute and that DSS had advised DHS that legislative change was required to implement the DHS proposal in that way. The NPP represented a complete reversal of the legal position without explanation. Mr Morrison was not entitled without further question to rely upon the contradictory content of the NPP on the question of the DSS legal position when he proposed the NPP to the ERC. The proper administration of his department required him to make inquiries about why, in the absence of any explanation, DSS appeared to have reversed its position on the need for legislative change. If he had asked Ms Wilson, she would have told him that it was because DHS had (ostensibly) reversed its position on using income averaging. He chose not to inquire.

Mr Morrison allowed Cabinet to be misled because he did not make that obvious inquiry. He took the proposal to Cabinet without necessary information as to what it actually entailed and without the caveat that it required legislative and policy change to permit the use of the ATO PAYG data in the way proposed in circumstances where: he knew that the proposal still involved income averaging; only a few weeks previously he had been told of that caveat; nothing had changed in the proposal; and he had done nothing to ascertain why the caveat no longer no longer applied. He failed to meet his ministerial responsibility to ensure that Cabinet was properly informed about what the proposal actually entailed and to ensure that it was lawful.

The Budget process, which was "built to ensure that Ministers can have confidence that when submissions come before it that those checks and balances have been applied through the workings of the Public Service,"[389] failed to expose the fundamental flaws in the savings assumptions and the assumption of legality underlying the proposal.

Why was Mr Morrison not given the legal and policy advices?

Mr Morrison's evidence that senior public servants, at both DSS and DHS, should, before the measure became part of the Budget, have given him the 2014 DSS legal advice, and the legal advice DSS had provided to DHS in January 2015 (in the DSS Dot Points), is accepted. Mr Morrison was invited to consider possible contributing factors for the failure to clearly advise him of the legal position during the development of the NPP. He did not accept those possible contributing factors. The following exchange then occurred:

> MR GREGGERY: Given that you don't consider any of those reasons to justify the withholding of the advice, and you consider the withholding to be inconceivable and inexplicable broadly, are you able to identify what it was that led to the withholding of the advice, given the duty of the public servants to bring it to your attention and [to the attention of] subsequent Ministers?
>
> THE HON. SCOTT MORRISON MP: No, I'm not. And that is distressing.[390]

It may be observed that the advice provided by DSS to DHS in the development of the Executive Minute did comply with the duty to give full and frank advice about the need for legislative change. The candour of that advice stopped, at least on the part of DHS, after Mr Morrison instructed DHS to develop the NPP by signing the Executive Minute which specifically advised of the need for legislative change.

Mr Morrison made clear to DSS that he wanted the DHS proposal progressed by way of NPP for the upcoming DSS Portfolio Budget Submission without legislative change. Ms Wilson's evidence is consistent with the body of evidence which confirmed the substantial difficulty in progressing the DHS proposal if it required legislative change due to:

- the number of Senate crossbench members
- the related need for the savings proposal to be a genuine offset under the BPORs.

There are additional indicators which provide some explanation for the failure by the public servants to be active in communicating to Mr Morrison during the development of the NPP that DSS had not changed its advice that income averaging required legislative change.

Mr Morrison recalled that, during his meeting with Ms Campbell on 30 December 2014, he expressed an interest about DHS's management of integrity of the welfare system.[391] The Executive Minute, provided to Mr Morrison by DHS on 12 February 2015, was responsive to the conversation that he had with Ms Campbell.[392]

Mr Morrison accepted that his approach as a minister, including as the Minister for Social Services was "… having set the policy direction, expect them to get on and deliver it."[393] That policy direction, as Mr Morrison made public, was one of "ensuring welfare integrity"[394] from his position as a "welfare cop on the beat."[395] Coupled with this was an ongoing need to identify savings in the social security sector, as part of the Government's agenda to reduce debt and balance the Budget.[396] It was a requirement that proposals be fully offset.[397]

Members of the senior executive of both DSS and DHS were acutely aware of Mr Morrison's policy direction, and the drive for savings.[398] As previously described, there was a resulting sense of pressure which filtered through the management of both departments.[399] There were concerns within DHS that the proposal was not ready to be put forward as a Budget measure; however, its progress to being included in the NPP was rapid and unchecked. As Mr Britton said, there was pressure to "…get on with it. Just get on with it… And we collectively got on with it."[400]

The SIWP NPP met both Mr Morrison's declared policy direction and the drive for savings. The PAYG proposal was critical to the success of the NPP as a whole. It provided the majority of the proposed savings for the measure, and offset not only its own costs but also those of the other elements and other potential initiatives.[401] If it could not be pursued, the viability of the entire proposal would be threatened.

The failure of DSS and DHS to give Mr Morrison frank and full advice before and after the development of the NPP is explained by the pressure to deliver the budget expectations of the government and by Mr Morrison, as the Minister for Social Services, communicating the direction to develop the NPP through the Executive Minute.

1 Exhibit 2-1745 - KCA.9999.0001.0008_R - 20221025 NTG-0057 Statement of K Campbell with Annexure(46203336.1) [p 1: para 9].
2 Although the exact mechanism of transmission to Mr Withnell is unclear, the wording was almost identical to significant parts of the NPP sent by Ms Collins to Mr Ryman on 12 December 2014, including the typographical error contained in the reference to the "Australia [sic] Taxation Office."
3 Exhibit 2-2158 - CTH.2004.0001.9608_R - For your reading pleasure - DO NOT FORWARD [DLM=Sensitive].
4 Exhibit 2-2159 - CTH.2004.0001.9609 - Min Morrison brief.
5 Exhibit 2-2032 - DSS.5018.0002.4231_R - RE- Options to strengthen eligibility and participation requirements [DLM=Sensitive] [p 2].
6 Exhibit 2-2032 - DSS.5018.0002.4231_R - RE- Options to strengthen eligibility and participation requirements [DLM=Sensitive] [p 2]. Mr Whitecross was invited by Ms Alanna Foster, DSS.
7 Exhibit 2-2032 - DSS.5018.0002.4231_R - RE- Options to strengthen eligibility and participation requirements [DLM=Sensitive] [p 2].
8 Exhibit 2-3194 - DSS.5091.0001.0965_R - FW- Options to strengthen eligibility and participation requirements [DLM=Sensitive].
9 Transcript, Marise Payne, 13 December 2022 [p 1666: lines 23-31].
10 Transcript, Cath Halbert, 9 December 2022 [p 1469: lines 14-22]; Transcript, Finn Pratt, 10 November 2022 [p 853: lines 18-19].
11 Exhibit 2-2497 - CTH.3732.0001.0008_R - B14-1288 SF 3 393527-1.pdf, [p 2]; Transcript, Finn Pratt, 10 November 2022 [p 852: lines 11-13].
12 Transcript, Finn Pratt, 10 November 2022 [p 853: lines 18-19]; Transcript, Marise Payne, 13 December 2022 [p 1648: line 22 – p 1649: line 12]; Transcript, Cath Halbert, 9 December 2022 [p 1469: lines 14-22].
13 Transcript, Finn Pratt, 10 November 2022 [p 877: line 39 – p 879: line 20].
14 Transcript, Finn Pratt, 10 November 2022 [p 877: line 39 – p 879: line 20]. The Commission notes the evidence of Ms Campbell at P-4636 line 1- P-4637 line 45 about the legislation that increased the asset test free areas and the taper rate by which a pension is reduced in the Social Services Legislation (Fair and Sustainable Pensions) Bill 2015. However, that legislation did not involve the controversial legislative change that would be required to make lawful the use of averaging in the Robodebt Scheme.
15 Exhibit 4-5206 - CWA.9999.0001.0005_R, Supplementary Statement of Mr Charles Wann together with Amended Statement of Mr Charles Wann (61304596.1), [p 5]; Transcript, Charles Wann, 20 February 2023 [p 3333: line 41].
16 Transcript, Scott Morrison, 14 December 2022 [p 1874: lines 5-7; p 1880: lines 21-31].
17 Exhibit 2-2498 - MPA.0001.0001.0052 - Catchup with Kathryn - Megan.
18 Exhibit 2-2499 - MPA.0001.0002.0082 – 20150113, 13 January 2015 [p 2]; Transcript, Marise Payne, 13 December 2022 [p 1651: lines 5-8].
19 Exhibit 4-5207 - CTH.4000.0308.1766_R - Fwd- B15-39 - Cover brief - Compliance processes and options for improvement [DLM=For-Official-Use-Only]; Exhibit 4-5208 - CTH.4000.0399.0151 - Appendix 1; Exhibit 4-5209 - CTH.4000.0399.0148_R - B15 39 Cover brief for Minister Payne.
20 Exhibit 2-1938 - CTH.3008.0007.7938_R - FW- B15-39 - Cover brief - Compliance processes and options for improvement [DLM=For-Official-Use-Only]; Exhibit 2-1942 - CTH.3008.0007.7939 - Appendix 1; Exhibit 2-1943 - CTH.3008.0007.7969_R - B15 39 Cover brief for Minister Payne.
21 Exhibit 4-5207 - CTH.4000.0308.1766_R - Fwd- B15-39 - Cover brief - Compliance processes and options for improvement [DLM=For-Official-Use-Only]; Exhibit 4-5208 - CTH.4000.0399.0151 - Appendix 1; Exhibit 4-5209 - CTH.4000.0399.0148_R - B15 39 Cover brief for Minister Payne.
22 Exhibit 4-5210 - CTH.4000.0399.0009_R - B15-39 - Current compliance processes and options for improvement [DLM=Sensitive]; Exhibit 4-5211 - CTH.3078.0001.0235_R - B15-39 - Current compliance processes and options for improvement [DLM=Sensitive]; Transcript, Marise Payne, 2 March 2023 [p 4281: lines 1-13].
23 Exhibit 4-5208 - CTH.4000.0399.0151 - Appendix 1.
24 Exhibit 4-5208 - CTH.4000.0399.0151 - Appendix 1 [p 7-8].
25 Exhibit 4-5208 - CTH.4000.0399.0151 - Appendix 1 [p 11].
26 Exhibit 4-5208 - CTH.4000.0399.0151 - Appendix 1 [p 7-8].
27 Exhibit 4-5208 - CTH.4000.0399.0151 - Appendix 1 [p 11].
28 Exhibit 2-2502 - MPA.0001.0001.0086 - Meeting Kathryn Campbell - Malisa GoLightly - Mark Withnell - Megan; Exhibit 4-5204 - MLE.9999.0001.0001_2_R - 20230124 NTG-0161 (M Lees) Signed Statement(46952747.1) [para 36-37].
29 This was the B15/39 version of the brief.
30 Exhibit 10018 - MPA.0001.0002.0085 - 20150120.pdf.
31 Transcript, Serena Wilson, 9 November 2022 [p 776: lines 11-14].
32 Transcript, Andrew Whitecross, 8 December 2022 [p 1348: line 36 - p 1349: line 2].

33 Exhibit 2-2033 - DSS.5006.0001.2529_R - FW- Legal Advice - Data matching- notifications and debt raising [DLM=Sensitive-Legal].
34 Exhibit 1-0065 - DSS.5031.0001.0108_R - RE- Information about the DHS proposal to change the approach to identifying and raising debts [DLM=For-Official-Use-Only]; Transcript, Andrew Whitecross, 8 December 2022 [p 1350].
35 Exhibit 1-0065 - DSS.5031.0001.0108_R - RE- Information about the DHS proposal to change the approach to identifying and raising debts [DLM=For-Official-Use-Only].
36 Transcript, Serena Wilson, 9 November 2022 [p 780: lines 5-19].
37 Transcript, Serena Wilson, 9 November 2022 [p 780-782].
38 Transcript, Serena Wilson, 9 November 2022 [p 785: lines 22-29].
39 Transcript, Serena Wilson, 9 November 2022 [p 784, lines 21-22].
40 Exhibit 1-0065 - DSS.5031.0001.0108_R - RE- Information about the DHS proposal to change the approach to identifying and raising debts [DLM=For-Official-Use-Only].
41 Exhibit 1-1210 - DSS.5022.0001.0486_R - RE- Appendix 1 (20 Jan) [DLM=Sensitive].
42 Transcript, Serena Wilson, 9 November 2022 [p 772: lines 1-17].
43 Transcript, Serena Wilson, 9 November 2022 [p 828, lines 16-30].
44 Transcript, Finn Pratt, 10 November 2022 [p 863: line 16].
45 Transcript, Finn Pratt, 10 November 2022 [p 899: lines 9-25].
46 Transcript, Serena Wilson, 9 November 2022 [p 772: lines 41-46; p 828: lines 16-30; p 3624: lines 41-16]; Transcript, Finn Pratt, 10 November 2022 [p 899: lines: 10-25; p 863: lines 9-16].
47 Exhibit 2-2039 - DSS.5061.0001.0012_R - FW- Appendix 1 (20 Jan) [DLM=Sensitive]; Exhibit 2-2040, DSS.5061.0001.0013 - Appendix 1 (20 Jan).
48 Exhibit 1-1210 - DSS.5022.0001.0486_R - RE- Appendix 1 (20 Jan) [DLM=Sensitive].
49 Exhibit 1-1269; Exhibit 1-1273; Exhibit 2-2171 - CTH.4700.0001.2356_R - Executive Minute.
50 Exhibit 1-1210 - DSS.5022.0001.0486_R - RE- Appendix 1 (20 Jan) [DLM=Sensitive]; the email copied Ms Dalton, Mr Jones and Mr Barford.
51 Exhibit 1-1214 - DSS.5022.0001.0488 - DSS comments on DHS Welfare integrity options.
52 Presumably an abbreviation for "Social Security Law."
53 Exhibit 1-1214 - DSS.5022.0001.0488 - DSS comments on DHS Welfare integrity options.
54 Exhibit 2-2090 - DSS.5064.0001.0071_R - DSS comments on DHS Welfare integrity options (2) [SEC=PROTECTED, DLM=Sensitive-Cabinet]; Exhibit 2-2091 - DSS.5064.0001.0072 - DSS comments on DHS Welfare integrity options (2) [p 2-3].
55 Exhibit 2-2094 - DSS.5024.0001.0191_R - DSS comments on DHS Welfare integrity options (2) [SEC=UNCLASSIFIED]; Exhibit 2-2095 - DSS.5024.0001.0192 - DSS comments on DHS Welfare integrity options (2).
56 Exhibit 2-2095 - DSS.5024.0001.0192 - DSS comments on DHS Welfare integrity options (2).
57 Exhibit 10019 - CTH.2004.0002.0316_R - FW: DSS comments on DHS Welfare integrity options (2).docx [DLM=Sensitive]; Exhibit 10020 - CTH.2004.0002.0317 - DSS comments on DHS Welfare integrity options (2).docx.
58 Exhibit 2-2066 - CTH.2004.0002.0332_R - FW- DSS comments on DHS Welfare integrity options (2) [DLM=Sensitive].
59 Exhibit 4-5511; Exhibit 2-2215 - CTH.3023.0013.3028_R - FW- DSS Response Dot Points [DLM=For-Official-Use-Only].
60 Exhibit 2-2219 - CTH.3027.0004.9379_R – 14 day requirement [DLM=For-Official-Use-Only].
61 Exhibit 2-2214; Exhibit 4-5587 - CTH.3027.0004.9371_R – DSS Response Dot Points [DLM=For-Official-Use-Only].
62 Exhibit 2-2218; Exhibit 4-5585 - CTH.3027.0004.9368_R – RE: DSS Response Dot Points [DLM=For-Official-Use-Only].
63 Transcript, Tenille Collins, 3 March 2023 [p 4310: lines 32-34].
64 Transcript, Tenille Collins, 3 March 2023 [p 4312: lines 2-3].
65 In an email to Mr Ryman later that afternoon, following discussions with Debt Policy and Means Test, a DHS officer suggested removing this sentence. However, this does not seem to have occurred.
66 Exhibit 2-2204 - CTH.3002.0007.1628_R – FW: Legal Advice – Proposed digital intervention process [DLM=Sensitive:Legal]; Exhibit 2-2205 - CTH.3002.0007.1631_R – Lex 17990 – Online mandating – data matching etc – advice.doc.
67 Exhibit 2-2216 - CTH.2004.0002.0342_R - RE- DSS comments on DHS Welfare integrity options (2) [DLM=Sensitive].
68 Sections 72 and 196 referred to the requirements for particular notices given to require recipients to provide information about certain changes in circumstances, or more generally.

69 Transcript, Jason Ryman, 22 February 2023 [p 3573: lines 8-11].
70 Transcript, Scott Britton, 23 February 2023 [p 3703-3704].
71 Transcript, Mark Withnell, 9 December 2022[p 1532: line 31 – p 1533: line 10].
72 Exhibit 2-2163 - CTH.2004.0002.0345_R - new draft [DLM=Sensitive].
73 Exhibit 2-2164 - CTH.2004.0002.0346 - Revised new draft brief to Minister Morrison.
74 Exhibit 2-2223; Exhibit 4-5555 - CTH.3027.0003.9827_R - FW- Legal Advice - Proposed digital intervention process [DLM=Sensitive:Legal].
75 This was a "set of online resources that [DSS]…maintained to assist decision-makers in [DHS]" and "the overarching authority…of translating both the Social Security Act and the Social Security Administration Act into a somewhat more accessible form" – See: Transcript, Serena Wilson, 9 November 2022 [p 760: lines 12-19].
76 Exhibit 2-2223; Exhibit 4-5555 – CTH.3027.0003.9827_R – FW: Legal Advice – Proposed digital intervention process [DLM=Sensitive:Legal].
77 Exhibit 4-5581; Exhibit 2-1310 - CTH.3034.0032.7254_R - Some reading..... [SEC=UNCLASSIFIED].
78 Transcript, Mark Withnell, 9 December 2022 [p 1511: lines 13-22].
79 Transcript, Mark Withnell, 9 December 2022 [p 1511: lines 13-22].
80 Transcript, Jason Ryman, 22 February 2023 [p 3567: lines 1-12]; Transcript, Scott Britton, 23 February 2023 [p 3696: lines 6-35].
81 Transcript, Jason Ryman, 22 February 2023 [p 3567: lines 1-12].
82 Transcript, Jason Ryman, 22 February 2023 [p 3569: lines 19-32; p 3570: lines 1-8].
83 Transcript, Jason Ryman, 22 February 2023 [p 3570: lines 10-12].
84 Transcript, Jason Ryman, 22 February 2023 [p 3570: lines 26-28].
85 Transcript, Jason Ryman, 22 February 2023 [p 3570: lines 14-17].
86 Transcript, Jason Ryman, 22 February 2023 [p 3570: lines 45-46].
87 Transcript, Jason Ryman, 22 February 2023 [p 3572: lines 28-35].
88 Exhibit 2-2219 - CTH.3027.0004.9379_R - 14 day requirement [DLM=For-Official-Use-Only]; Exhibit 4-5585; Exhibit 2-2218 - CTH.3027.0004.9368_R - RE- DSS Response Dot Points [DLM=For-Official-Use-Only]; Exhibit 4-5510; Exhibit 2-2220 - CTH.3027.0004.9373_R - Email Trail Using IRMD as last resort for raising debt rtf; Exhibit 4-5587; Exhibit 2-2214 - CTH.3027.0004.9371_R - DSS Response Dot Points [DLM=For-Official-Use-Only].
89 Transcript, Scott Britton, 23 February 2023 [p 3703: lines 30-42].
90 Transcript, Scott Britton, 23 February 2023 [p 3696: lines 30-35].
91 Transcript, Scott Britton, 23 February 2023 [p 3696: lines 22-26].
92 Transcript, Scott Britton, 23 February 2023 [p 3697: lines 33-47].
93 Transcript, Scott Britton, 23 February 2023 [p 3698: lines 4-9].
94 Transcript, Scott Britton, 23 February 2023 [p 3740: lines 42-45].
95 Transcript, Scott Britton, 23 February 2023 [p 3740: lines 24-26].
96 Transcript, Scott Britton, 23 February 2023 [p 3740: lines 26-28].
97 Exhibit 2-2602 - RBD.9999.0001.0227 - Sky News - 'Richo' _ Former Ministers and Parliamentary Secretaries; Exhibit 4-6875 - CTH.3095.0001.4731_R - Minister Morrison - media [DLM=For-Official-Use-Only].
98 Exhibit 4-6875 - CTH.3095.0001.4731_R - Minister Morrison - media [DLM=For-Official-Use-Only].
99 Transcript, Kathryn Campbell, 7 March 2023 [p 4351: lines 12-25].
100 Transcript, Kathryn Campbell, 7 March 2023 [p 4351: line 44 – p 4352: line 1].
101 Exhibit 1-1235E - FPR.9999.0001.0005_R - RE- URGENT & important - products-comebacks for Minister [DLM=Sensitive].
102 Exhibit 1-1232 - FPR.9999.0001.0004 - Notebook entry for 22 January 2015(46374698.1).
103 Exhibit 2-2031 - AWI.9999.0001.0005_R - 20221121 Whitecross A Statement - NTG-0069(46505876.1) [para 57].
104 Exhibit 2-2031 - AWI.9999.0001.0005_R - 20221121 Whitecross A Statement - NTG-0069(46505876.1) [para 57].
105 Exhibit 2-2031 - AWI.9999.0001.0005_R - 20221121 Whitecross A Statement - NTG-0069(46505876.1) [para 57(b)-(d)].
106 Exhibit 2-2031 - AWI.9999.0001.0005_R - 20221121 Whitecross A Statement - NTG-0069(46505876.1) [para 57(e)].
107 Exhibit 2-2031 - AWI.9999.0001.0005_R - 20221121 Whitecross A Statement - NTG-0069(46505876.1) [para 57(e)].
108 Transcript, Andrew Whitecross, 8 December 2022 [p 1375: line 45 – p 1376, line 2].
109 Transcript, Andrew Whitecross, 8 December 2022 [p 1376: lines 2-3].
110 Transcript, Andrew Whitecross, 8 December 2022 [p 1376: lines 9-16].
111 Exhibit 2-2053 - DSS.5037.0001.0049_R - RE- PAYG clean-up [SEC=UNCLASSIFIED].
112 Exhibit 2-2169 - DSS.5060.0001.0490_R - New version of draft brief on fraud and compliance [DLM=Sensitive].
113 Exhibit 2-2170; Exhibit 2-2224 - DSS.5060.0001.0491_R - Revised new draft brief to Minister Morrison.
114 Exhibit 2-2170; Exhibit 2-2224 - DSS.5060.0001.0491_R - Revised new draft brief to Minister Morrison [p 8 – 9].

115 Exhibit 2-2167 - CTH.2004.0002.0460_R – old b with revisions [DLM=Sensitive]; Exhibit 2-2168 - CTH.2004.0002.0461 – revision of old att b.docx.
116 Exhibit 2-2167 - CTH.2004.0002.0460_R – old b with revisions [DLM=Sensitive]; Exhibit 2-2168 - CTH.2004.0002.0461 – revision of old att b.docx.
117 Exhibit 2-2064 - DSS.5024.0001.0002_R - FW- New version of draft brief on fraud and compliance [DLM=Sensitive]; Exhibit 2-2065 - DSS.5024.0001.0003_R - Revised new draft brief to Minister Morrison.
118 Transcript, Andrew Whitecross, 8 December 2022 [p 1382: lines 32-39].
119 Transcript, Andrew Whitecross, 8 December 2022 [p 1382: line 41 – p 1383: line 2].
120 Exhibit 2-2058 - DSS.5024.0001.0017_R - RE- New version of draft brief on fraud and compliance [DLM=Sensitive].
121 Exhibit 2-2059 - DSS.5024.0001.0019_R - Revised new draft brief to Minister Morrison (2) (3).
122 Exhibit 2-2059 - DSS.5024.0001.0019_R - Revised new draft brief to Minister Morrison (2) (3).
123 Exhibit 2-2059 - DSS.5024.0001.0019_R - Revised new draft brief to Minister Morrison (2) (3) [p 2].
124 Exhibit 2-2060 - DSS.5022.0001.0460_R - FW- New version of draft brief on fraud and compliance [DLM=Sensitive]; Exhibit 2-2061, DSS.5022.0001.0462_R - Revised new draft brief to Minister Morrison (2) (3).
125 Exhibit 2-2061 - DSS.5022.0001.0462_R - Revised new draft brief to Minister Morrison (2) (3) [p 10].
126 Transcript, Andrew Whitecross, 8 December 2022 [p 1384: line 30 - p 1385: line 10]; Exhibit 2-2031 - AWI.9999.0001.0005_R - 20221121 Whitecross A Statement - NTG-0069(46505876.1) [para 65].
127 Transcript, Andrew Whitecross, 8 December 2022 [p 1385: lines 6-10].
128 Exhibit 2-2031 - AWI.9999.0001.0005_R - 20221121 Whitecross A Statement - NTG-0069(46505876.1) [para 65].
129 Transcript, Andrew Whitecross, 8 December 2022 [p 1385: lines 31-39].
130 Transcript, Andrew Whitecross, 8 December 2022 [p 1385: line 45 – p 1386: line 8].
131 Exhibit 2-2109 - DSS.5024.0001.0001_R - Fraud and compliance measures [SEC=OFFICIAL-Sensitive].
132 Transcript, Cath Halbert, 8 December 2022 [p 1428: lines 25-39].
133 Exhibit 2-3214 - DSS.5091.0001.0865_R - FW- New version of draft brief on fraud and compliance [DLM=Sensitive]; Exhibit 2-3215 - DSS.5091.0001.0866_R - Revised new draft brief to Minister Morrison (2) (3).
134 Exhibit 2-3215 - DSS.5091.0001.0866_R - Revised new draft brief to Minister Morrison (2) (3) [p 11].
135 Exhibit 2-3219 - DSS.5091.0001.0840_R - FW- New version of draft brief on fraud and compliance [DLM=Sensitive].
136 Exhibit 2-3219 - DSS.5091.0001.0840_R - FW- New version of draft brief on fraud and compliance [DLM=Sensitive].
137 Exhibit 2-2063 - DSS.5024.0001.0056_R - Revised new draft brief to Minister Morrison (2) (3) (2) [p 2].
138 Exhibit 2-2062 - DSS.5024.0001.0054_R - FW- New version of draft brief on fraud and compliance [DLM=Sensitive]; Exhibit 2-2063 - DSS.5024.0001.0056_R - Revised new draft brief to Minister Morrison (2) (3) (2).
139 Exhibit 2-2062 - DSS.5024.0001.0054_R - FW- New version of draft brief on fraud and compliance [DLM=Sensitive].
140 Exhibit 2-2063 - DSS.5024.0001.0056_R - Revised new draft brief to Minister Morrison (2) (3) (2) [p 10].
141 Exhibit 2-2100 - DSS.5024.0001.0086_R - RE- New version of draft brief on fraud and compliance [DLM=Sensitive].
142 Exhibit 4-5650 - CTH.3095.0001.4993_R - RE- New version of draft brief on fraud and compliance [DLM=Sensitive].
143 Exhibit 4-5650 - CTH.3095.0001.4993_R - RE- New version of draft brief on fraud and compliance [DLM=Sensitive].
144 Exhibit 4-5650 - CTH.3095.0001.4993_R - RE- New version of draft brief on fraud and compliance [DLM=Sensitive].
145 Transcript, Mark Withnell, 9 December 2022, [p 1511: lines 13-22].
146 Exhibit 4-5581; Exhibit 2-1310 - CTH.3034.0032.7254_R - Some reading..... [SEC=UNCLASSIFIED].
147 This was version B15/65 of the brief. Exhibit 2-1953 - CTH.3008.0007.8534_R – Revised Compliance Brief [DLM=Sensitive]; Exhibit 2-1954 - CTH.3008.0007.8535 – Revised new draft brief to Minister Morrison.docx; Exhibit 2-1964 - CTH.2007.0002.6780_R – Revised Compliance brief and attachments [DLM=Sensitive]; Exhibit 2-1965 - CTH.2007.0002.6781_R – Revised new draft brief to Minister Morrison.docx.
148 Exhibit 2-1966 - CTH.2007.0002.6796_R – Re: Revised Compliance brief and attachments [DLM=Sensitive].
149 This was version B15/65 of the brief. See: Exhibit 1-1269; Exhibit 1-1273; Exhibit 2-2171 - CTH.4700.0001.2356_R - Executive Minute; Exhibit 4-5204 - MLE.9999.0001.0001_2_R - 20230124 NTG-0161 (M Lees) Signed Statement(46952747.1) [para 45].
150 Exhibit 1-1269; Exhibit 1-1273; Exhibit 2-2171 - CTH.4700.0001.2356_R - Executive Minute.
151 Exhibit 9061 - CTH.4000.0399.0018_R - Re: Compliance brief [SEC=UNOFFICIAL].
152 Exhibit 9978 - CTH.3008.0008.0217_R - [DLM=For-Official-Use-Only]; Exhibit 9979- CTH.3008.0008.0218_R - Revised new draft brief to Minister Morrison.docx.

153 Exhibit 2-2504 - MPA.0001.0001.0066, Malisa Golightly - Henry.
154 Exhibit 2-2505 - MPA.0001.0002.0092 - 20150202.
155 Exhibit 4-6875 – CTH.3095.0001.4731_R, Mr Morrison – media [DLM=For-Official-Use-Only].
156 This version of the brief was B15/92. Exhibit 2-1939 - CTH.3008.0008.1654_R - Fwd- Draft Compliance Brief [DLM=Sensitive]; Exhibit 2-1940 - CTH.3008.0008.1655_R - img-203191607-0001; Exhibit 9980 - CTH.3008.0008.1656_R – Revised draft brief to Minister Morrison Feb.docx.
157 Exhibit 2-1939 - CTH.3008.0008.1654_R - Fwd- Draft Compliance Brief [DLM=Sensitive].
158 Exhibit 2-1940 - CTH.3008.0008.1655_R - img-203191607-0001.
159 Exhibit 2-2100 - DSS.5024.0001.0086_R - RE- New version of draft brief on fraud and compliance [DLM=Sensitive]; Exhibit 4-5650 - CTH.3095.0001.4993_R - RE- New version of draft brief on fraud and compliance [DLM=Sensitive].
160 Exhibit 4-7907 - PMB.9999.0001.0003_R - NTG-0215 Paul McBride Statement - Amended Doc IDs 47354008.1 [para 42].
161 Transcript, Paul McBride, 9 March 2023 [p 4803: line 43-45].
162 Transcript, Paul McBride, 9 March 2023 [p 4815: line 45 – p 4816: line 21].
163 Transcript, Paul McBride, 9 March 2023 [p 4815: line 33 – p 4816: line 21].
164 Minister Payne signed version B15/92 on 11 February 2015 – See: Exhibit 2-2172 - CTH.4700.0001.2386_R - Executive Minute. Minister Payne signed version B15/119 on 11 February 2015 – See: Exhibit 4-5217 - CTH.3008.0008.4320_R - B15-119 - Current compliance processes and options for improvement - brief for Minster for Social Services - signed-noted by Minister with amendments [DLM=Sensitive]; Exhibit 1-1268 - CTH.3008.0008.4321 - 11022015174213-0001.
165 It appears that process was followed, because the copy signed by Mr Morrison on 20 February 2015 was first stamped by a DLO in Ms Payne's office on 12 February 2015. See: Exhibit 4-5218 - CTH.4000.0399.0024_R - B15-125 - Signed brief for Minister Morrison and B15-126 - Cover brief to B15-125 [DLM=Sensitive]; Exhibit 4-5219 - CTH.3008.0008.4360_R - B15 126 - Cover brief for B15 125 - Signed brief for Minister Morrison; Exhibit 4-5220 - CTH.3078.0001.0284_R - For advice re B15-125 - Signed brief for Minister Morrison and B15-126 - Cover brief to B15-125 for urgent progressing to the Minister [DLM=Sensitive].
166 Exhibit 2-1938 – CTH.3008.0007.7938_R – FW: B15/39 – Cover brief – Compliance processes and options for improvement [DLM=For-Official-Use-Only]; Exhibit 2-1942 – CTH.3008.0007.7939 – Appendix 1.docx; Exhibit 2-1943 – CTH.3008.0007.7969_R – B15 39 Cover brief for Minister Payne.docx; Exhibit 2-1953 – CTH.3008.0007.8534_R – Revised Compliance Brief [DLM=Sensitive]; Exhibit 2-1954 – CTH.3008.0007.8535 – Revised new draft brief to Minister Morrison.docx; Exhibit 2-1964 - CTH.2007.0002.6780_R – Revised Compliance brief and attachments [DLM=Sensitive]; Exhibit 2-1965 – CTH.2007.0002.6781_R – Revised new draft brief to Minister Morrison.docx; Exhibit 2-1966 – CTH.2007.0002.6796_R – Re: Revised Compliance brief and attachments [DLM=Sensitive]; Exhibit 2-1939 – CTH.3008.0008.1654_R – Fwd: Draft Compliance Brief [DLM=Sensitive]; Exhibit 1-1237 - KCA.9999.0001.0002_R – 2022.10.13 – NTG-0013 Kathryn Campbell – Response.pdf [p 7-8].
167 Exhibit 2-2669 - DSS.5077.0001.0037_R - AHL6MFD2_2022-10-27_12-14-35-258 [p 10].
168 Exhibit 2-2669 - DSS.5077.0001.0037_R - AHL6MFD2_2022-10-27_12-14-35-258 [p 10].
169 Exhibit 2-2158 - CTH.2004.0001.9608_R - For your reading pleasure - DO NOT FORWARD [DLM=Sensitive]; Exhibit 2-2159 - CTH.2004.0001.9609 - Min Morrison brief.
170 Exhibit 4-5208 - CTH.4000.0399.0151 - Appendix 1; Exhibit 2-2034 - DSS.5061.0001.0288_R - FW- ATTACHMENT B - Welfare integrity options [DLM=Sensitive]; Exhibit 2-2035 - DSS.5061.0001.0289 - ATTACHMENT B - Welfare integrity options.
171 Exhibit 2-2034 - DSS.5061.0001.0288_R - FW- ATTACHMENT B - Welfare integrity options [DLM=Sensitive]; Exhibit 2-2035 - DSS.5061.0001.0289 - ATTACHMENT B - Welfare integrity options; Exhibit 2-2167 - CTH.2004.0002.0460_R - old b with revisions [DLM=Sensitive]; Exhibit 2-2168 - CTH.2004.0002.0461 - revision of old att b; Exhibit 2-1964 - CTH.2007.0002.6780_R - Revised Compliance brief and attachments [DLM=Sensitive]; Exhibit 2-1965 - CTH.2007.0002.6781_R - Revised new draft brief to Minister Morrison; Exhibit 2-2169 - DSS.5060.0001.0490_R - New version of draft brief on fraud and compliance [DLM=Sensitive]; Exhibit 2-2170; Exhibit 2-2224 - DSS.5060.0001.0491_R - Revised new draft brief to Minister Morrison.
172 Transcript, Kathryn Campbell, 11 November 2022 [p 939: line 46 – p 940: line 6].
173 Except the draft of the Executive Minute that expressly stated that income averaging would be used.
174 Exhibit 4-5221 - CTH.3095.0002.2853_R - B15-125 - Information on current compliance processes and options for improvement - signed by Minister Morrison [DLM=Sensitive]; Exhibit 2-2669 - DSS.5077.0001.0037_R - AHL6 MFD2_2022-10-27_12-14-35-258.
175 Exhibit 4-5221 - CTH.3095.0002.2853_R - B15-125 - Information on current compliance processes and options for improvement - signed by Minister Morrison [DLM=Sensitive].
176 Exhibit 2-2669 - DSS.5077.0001.0037_R - AHL6MFD2_2022-10-27_12-14-35-258; Transcript, Scott Morrison, 14 December 2022 [p 1787: lines 32-44].

177 Exhibit 2-2669 - DSS.5077.0001.0037_R - AHL6MFD2_2022-10-27_12-14-35-258 [p 2, 10].
178 Transcript, Scott Morrison, 14 December 2022 [p 1789: line 31 – p 1795: line 30].
179 Transcript, Scott Morrison, 14 December 2022 [p 1795: lines 32-41].
180 Transcript, Scott Morrison, 14 December 2022 [p 1799: lines 18-30].
181 Transcript, Scott Morrison, 14 December 2022 [p 1821: line 44 – p 1822: line 1].
182 Exhibit 2-2669 - DSS.5077.0001.0037_R - AHL6MFD2_2022-10-27_12-14-35-258 [p 14].
183 Transcript, Scott Morrison, 14 December 2022 [p 1823: lines 31-46].
184 Transcript, Scott Morrison, 14 December 2022 [p 1860: lines 14-18].
185 Transcript, Scott Morrison, 14 December 2022 [p 1858: lines 5-20].
186 Transcript, Scott Morrison, 14 December 2022 [p 1827: lines 20-37].
187 Transcript, Scott Morrison, 14 December 2022 [p 1865: lines 36-43].
188 Transcript, Scott Morrison, 14 December 2022 [p 1814: lines 29-34; p 1838: lines 22-32].
189 Exhibit 4-5515; Exhibit 2-2232 - CTH.3023.0013.8662_R - FW- Minister Morrison signed brief [DLM=Sensitive].
190 Exhibit 4-5617; Exhibit 2-2068 - CTH.4700.0001.2404_R - B15_125.
191 Exhibit 4-5518; Exhibit 2-2237 - CTH.2004.0002.5318_R - Revised draft brief to Minister Morrison 3 Feb.
192 Exhibit 4-5515; Exhibit 2-2232 - CTH.3023.0013.8662_R - FW- Minister Morrison signed brief [DLM=Sensitive]; Exhibit 4-5617; Exhibit 2-2068 - CTH.4700.0001.2404_R - B15_125; Exhibit 4-5517 - CTH.2004.0002.5316_R - FW- Draft Compliance Brief [DLM=Sensitive]; Exhibit 4-5518; Exhibit 2-2237 - CTH.2004.0002.5318_R - Revised draft brief to Minister Morrison 3 Feb; Exhibit 9000 - CTH.3023.0013.9068_R - FW- Draft Compliance Brief [DLM=Sensitive]; Exhibit 9001 - CTH.3023.0013.9070_R - Revised draft brief to Minister Morrison 3 Feb; Exhibit 4-5574 - CTH.2002.0005.4677_R - FW- Minister Morrison signed brief [DLM=Sensitive].
193 Exhibit 4-5626; Exhibit 2-2234 - CTH.3000.0004.0551_R - CONFIDENTIAL - CCB Direction [DLM=Sensitive].
194 Exhibit 4-5517 - CTH.2004.0002.5316_R - FW- Draft Compliance Brief [DLM=Sensitive].
195 Exhibit 4-5518; Exhibit 2-2237 - CTH.2004.0002.5318_R - Revised draft brief to Minister Morrison 3 Feb.
196 Exhibit 9000 - CTH.3023.0013.9068_R - FW- Draft Compliance Brief [DLM=Sensitive]; Exhibit 9001 - CTH.3023.0013.9070_R - Revised draft brief to Minister Morrison 3 Feb.
197 Exhibit 4-5574 - CTH.2002.0005.4677_R - FW- Minister Morrison signed brief [DLM=Sensitive]; Exhibit 4-5617; Exhibit 2-2068 - CTH.4700.0001.2404_R - B15_125.
198 Transcript, Jason Ryman, 22 February 2023 [p 3574: line 34 – p 3576: line 4].
199 Transcript, Jason Ryman, 22 February 2023 [p 3576: lines 11-18].
200 Transcript, Jason Ryman, 22 February 2023 [p 3574: line 15].
201 Transcript, Jason Ryman, 22 February 2023 [p 3574: lines 17-19].
202 Transcript, Jason Ryman, 22 February 2023 [p 3575: lines 9-13].
203 Transcript, Jason Ryman, 22 February 2023 [p 3574-3575].
204 Transcript, Scott Britton, 23 February 2023 [p 3708: lines 44-47; p 3709: lines 1-16].
205 Transcript, Scott Britton, 23 February 2023 [p 3708: lines 44-47; p 3709: lines 1-16].
206 Exhibit 4-5651 - CTH.3095.0002.4674_R - Compliance Brief [DLM=Sensitive].
207 Exhibit 4-5651 - CTH.3095.0002.4674_R - Compliance Brief [DLM=Sensitive].
208 Transcript, Paul McBride, 9 March 2023 [p 4827: lines 5-13].
209 Exhibit 1-1213 – SWI.9999.0001.0005_R - Supplementary statement for Serena Wilson (Final signed) [para 25].
210 Exhibit 1-1213 – SWI.9999.0001.0005_R - Supplementary statement for Serena Wilson (Final signed) [para 25]; Exhibit 2-2137- DSS.5046.0001.0002_R.
211 Exhibit 1-1213 – SWI.9999.0001.0005_R - Supplementary statement for Serena Wilson (Final signed) [para 25].
212 Transcript, Serena Wilson, 9 November 2022 [p 822: line 35 – p 823: line 8].
213 Exhibit 1-1213 – SWI.9999.0001.0005_R – Supplementary statement for Serena Wilson (Final signed) [para 25(c)].
214 Exhibit 1-1213 – SWI.9999.0001.0005_R, Supplementary statement for Serena Wilson (Final signed) 8 November 2022 [para 25(d)].
215 Exhibit 1-1213 – SWI.9999.0001.0005_R - Supplementary statement for Serena Wilson (Final signed) [para 25(d)].
216 Transcript, Jason Ryman, 22 February 2023 [p 3577: lines 30-42].
217 Exhibit 4-5521; Exhibit 2-2235 - CTH.3023.0001.5316_R - NPP [DLM=For-Official-Use-Only].
218 Exhibit 4-5575; Exhibit 2-2104 - DSS.5023.0002.2174_R - RE- Background to issue [DLM=Sensitive].
219 Exhibit 4-5526; Exhibit 2-2244 - CTH.3023.0001.5380_R - NPP Latest Version [DLM=For-Official-Use-Only].
220 Exhibit 2-2245; Exhibit 4-5527 - CTH.3023.0001.5381_R – Strengthening the Integrity of Welfare Payments NPP (6).docx.
221 Exhibit 4-5521; Exhibit 2-2235 - CTH.3023.0001.5316_R - NPP [DLM=For-Official-Use-Only]; Exhibit 4-5522; Exhibit 2-2236 - CTH.3023.0001.5317_R - Strengthening the Integrity of Welfare Payments NPP.
222 Exhibit 2-2245; Exhibit 4-5527 - CTH.3023.0001.5381_R – Strengthening the Integrity of Welfare Payments NPP (6).docx.

223 Transcript, Jason Ryman, 22 February 2023 [p 3586: lines 19-29].
224 Transcript, Jason Ryman, 22 February 2023 [p 3586: lines 31-35].
225 Transcript, Scott Britton, 23 February 2023 [p 3715: lines 27-33].
226 Exhibit 4-5524; Exhibit 2-2246 - CTH.2004.0002.5570_R - NPP [DLM=For-Official-Use-Only].
227 Exhibit 4-5525; Exhibit 2-2247 - CTH.2004.0002.5571_R - Strengthening the Integrity of Welfare Payments NPP (7).
228 Exhibit 1-1213 - SWI.9999.0001.0005_R - Supplementary statement for Serena Wilson (Final signed) [para 25(d)].
229 Transcript, Jason Ryman, 22 February 2023 [p 3563: lines 15-24].
230 Transcript, Scott Britton, 23 February 2023 [p 3723: lines 22-30].
231 The Expenditure Review Committee (ERC) is a committee of Cabinet which advises on Budget matters. The ERC considers most NPPs with actual or potential financial implications before they are considered by Cabinet. For more detailed information, see the chapter – Failures in the Budget Process.
232 Transcript, Kathryn Campbell, 7 March 2023 [p 4576: line 5 – p 4577: line 1].
233 Transcript, Jason Ryman, 22 February 2023 [p 3587: lines 8-19].
234 Transcript, Scott Britton, 23 February 2023 [p 3715: line 45 – p 3716: line 10].
235 Transcript, Scott Britton, 23 February 2023 [p 3716: lines 20-22].
236 Transcript, Scott Britton, 23 February 2023 [p 3716: lines 20-24].
237 Transcript, Scott Britton, 8 November 2022 [p 669: lines 25-31; p 670: lines 25-29].
238 Transcript, Mark Withnell, 9 December 2022 [p 1511: lines 13 – 22].
239 Exhibit 2-2176 - CTH.2004.0002.5630_R - Fwd- NPP [DLM=Sensitive]; Exhibit 2-2177; Exhibit 2-2252 - CTH.2004.0002.5631_R - Strengthening the Integrity of Welfare Payments.
240 Exhibit 4-5629; Exhibit 2-2018 - CTH.3006.0001.6065_R - NPP final version [DLM=Sensitive]; Exhibit 4-5628; Exhibit 2-2019 - CTH.3006.0001.6066_R - Strengthening the Integrity of Welfare Payments NPP (10).
241 Exhibit 2-2259 - CTH.3006.0001.6079_R - RE- URGENT- Strengthening the Integrity of Welfare Payments NPP [DLM=Sensitive]; Exhibit 2-2260 - CTH.3006.0001.6081 - Strengthening the Integrity of Welfare Payments 040315.
242 Exhibit 4-5249 - CTH.3023.0001.5966_R - Strengthening the Integrity of Welfare Payments NPP [DLM=Sensitive]; Exhibit 4-5250 - CTH.3023.0001.5967_R - Strengthening the Integrity of Welfare Payments 040315; Exhibit 2-2270 - CTH.3006.0001.6116_R - Re- For review and-or clearance- 001944 - Strengthening the Integrity of Welfare Payments costing [DLM=Sensitive]; Exhibit 2-2271 - CTH.3006.0001.6117_R - RE- For review and-or clearance- 001944 - Strengthening the Integrity of Welfare Payments costing [DLM=Sensitive].
243 Exhibit 4-6435 - CTH.3027.0001.5004_R - FW- NPP changes as discussed [DLM=Sensitive]; Exhibit 4-6436 - CTH.3027.0001.5007_R - NPP Strengthening the Integrity of Welfare Payments 110315.
244 Exhibit 2-2020 - CTH.3006.0001.6664_R - Updated NPP - Single Touch Payroll [DLM=Sensitive]; Exhibit 2-2021 - CTH.3006.0001.6665_R - NPP Strengthening the Integrity of Welfare Payments.
245 Transcript, Mark Withnell, 24 February 2023 [p 3766: lines 16 – 17].
246 Transcript, Mark Withnell, 24 February 2023 [p 3778: lines 31 – 34].
247 Transcript, Mark Withnell, 9 December 2022 [p 1515: lines 28 – 35].
248 Transcript, Mark Withnell, 9 December 2022 [p 1515, lines 20 – 26].
249 Transcript, Scott Britton, 23 February 2023, [p 3735: lines 21 – 29].
250 Transcript, Scott Britton, 23 February 2023, [p 3735: lines 31 – 39].
251 Transcript, Scott Britton, 23 February 2023, [p 3733: lines 45 – 46; p 3735: lines 21 – 29 and 31 – 39].
252 Exhibit 8995 - CTH.2004.0002.9872_R – FW: URGENT GM CLEARANCE PLEASE – Approval of PAYG Alpha Test Letter [DLM=For-Official-Use-Only]; Exhibit 8996 - CTH.2004.0002.9873 – PAYG Initiation Letter v0 5 – clean.docx.
253 Exhibit 4-5653 - CTH.3023.0002.0501_R – Urgent – Secretary Brief – PAYG Brief [DLM=For-Official-Use-Only]; Exhibit 4-5654 - CTH.3023.0002.0503 – GM feedback.pdf; Exhibit 4-5655 - CTH.3023.0002.0506 Secretary Brief – PAYG Pilot v0 7 – clean.doc; Exhibit 4-5656 - CTH.3023.0002.0509 – Secretary Brief – PAYG Pilot v0 7.doc; Exhibit 4-5657 - CTH.3023.0002.0512 – Attachment A – PAYG Intervention Letter.docx.
254 Transcript, Karen Harfield, 15 December 2022 [p 1890: lines 8-15].
255 Transcript, Karen Harfield, 15 December 2022 [p 1891: lines 17-37].
256 Exhibit 4-5660 - CTH.3001.0032.3297_R – Update 1.2 [DLM=For-Official-Use-Only].
257 The language that Mr Withnell included in this draft was derived from a summary of the "assessment methodology" under the Scheme that Ms Harfield had prepared on 4 January 2017. See: Exhibit 4-5659 - CTH.3001.0032.3127_R – FW: Averaging Income [DLM=For-Official-Use-Only].
258 Exhibit 4-5661 - CTH.3001.0033.2103_R – possible sentence [DLM=For-Official-Use-Only].
259 Exhibit 2-1745 - KCA.9999.0001.0008_R - 20221025 NTG-0057 Statement of K Campbell with Annexure(46203336.1) [p1: para 9].

260 Exhibit 2-2500 - CTH.3784.0001.0002_R - B15-39 Current Compiance Processes and Options for Improvement (Agency Signed); Exhibit 2-2501 - CTH.3784.0001.0004 - B15-39 Current Compiance Processes and Options for Improvement (Attachment); Exhibit 4-5207 - CTH.4000.0308.1766_R, Fwd- B15-39 - Cover brief - Compliance processes and options for improvement [DLM=For-Official-Use-Only]; Exhibit 2-1938 – CTH.3008.0007.7938_R, FW: B15/39 – Cover brief – Compliance processes and options for improvement [DLM=For-Official-Use-Only]; Exhibit 1-1269; Exhibit 1-1273; Exhibit 2-2171 - CTH.4700.0001.2356_R - Executive Minute; Exhibit 2-1939 - CTH.3008.0008.1654_R - Fwd- Draft Compliance Brief [DLM=Sensitive]; Exhibit 2-1940 - CTH.3008.0008.1655_R - img-203191607-0001; Exhibit 9980 - CTH.3008.0008.1656_R – Revised draft brief to Minister Morrison.docx; Exhibit 4-5218 - CTH.4000.0399.0024_R - B15/125 - Signed brief for Minister Morrison and B15/126 - Cover brief to B15/125 [DLM=Sensitive]; Exhibit 4-5219 – CTH.3008.0008.4360_R - B15 126 - Cover brief for B15 125 - Signed brief for Minister Morrison; Exhibit 4-5220 - CTH.3078.0001.0284_R - For advice re B15/125 – Signed brief for Minister Morrison and B15/126 - Cover brief to B15/125 for urgent progressing to the Minister [DLM=Sensitive]; Exhibit 2-2170; Exhibit 2-2224 - DSS.5060.0001.0491_R - Revised new draft brief to Minister Morrison.

261 Exhibit 10019 - CTH.2004.0002.0316_R – FW: DSS comments on DHS Welfare integrity options (2).docx [DLM=Sensitive]; Exhibit 10020; CTH.2004.0002.0317 - DSS comments on DHS Welfare integrity options (2).docx.

262 Exhibit 4-5227 - CTH.3004.0001.4260_R - proposed words [DLM=Sensitive]; Exhibit 4-5230 - CTH.3006.0001.6036_R - Compliance NPP [DLM=Sensitive]; Exhibit 4-5231 - CTH.4000.0399.0127_R - Strengthening the Integrity of Welfare Payments NPP (8), p 2; Exhibit 4-5629; Exhibit 2-2018 - CTH.3006.0001.6065_R - NPP final version [DLM=Sensitive]; Exhibit 4-5628 - CTH.3006.0001.6066_R - Strengthening the Integrity of Welfare Payments NPP (10).

263 Exhibit 2-2556 – DSS.5091.0001.0900_R - Possible legislative amends to enable DHS mesaures [SEC=PROTECTED, DLM=Sensitive-Cabinet].

264 Exhibit 2669 – DSS.5077.0001.0037, Executive Minute B15/125, 20 February 2015 [page 6 of 17]; Transcript, Kathryn Campbell, 11 November 2022 p 939: line 46 – p 940: line 6].

265 Transcript, Anthony Barford, 24 January 2023 [p 2323: lines 25-29].

266 Transcript, Anthony Barford, 24 January 2023 [p 2323: line 46 – p 2324: line 1].

267 Exhibit 2-2555; DSS.5060.0001.0551_R - FW- New version of draft brief on fraud and compliance [DLM=Sensitive]; Exhibit 3-3520 - DSS.5091.0001.0118_R - Docs for Thursday meeting - Potential legislative amends - DHS Strengthening Welfare NPP package [SEC=PROTECTED, DLM=Sensitive-Cabinet]; Exhibit 3-3524 - DSS.5091.0001.0136_R - Costing Agreement 11779 Strengthening the Integrity of Welfare Payments (Departmental).

268 Transcript, Anthony Barford, 24 January 2023 [p 2322: lines 44-47].

269 Transcript, Anthony Barford, 24 January 2023 [p 2323: lines 37-42].

270 Exhibit 2-2556 – DSS.5091.0001.0900_R - Possible legislative amends to enable DHS mesaures [SEC=PROTECTED, DLM=Sensitive-Cabinet].

271 Exhibit 3-3517 - DSS.5067.0001.0311_R - RE- New version of draft brief on fraud and compliance [DLM=Sensitive].

272 Exhibit 9874 - DSS.5105.0001.8847_R - Tony - Comments on DHS NPP [SEC=PROTECTED, DLM=Sensitive:Cabinet]; Exhibit 9875 - DSS.5105.0001.8848_R - Tony - Comments on DHS NPP [SEC=PROTECTED, DLM=Sensitive:Cabinet].

273 Exhibit 4-7911 - DSS.8500.0001.1145_R2 - RE- New version of draft brief on fraud and compliance [DLM=Sensitive]; Exhibit 4-7097 - RBD.9999.0001.0476 - 1A. Population Identification Process Map - Pre Robodebt to OCI_20230303 [para 58-62].

274 Exhibit 4-7907 - PMB.9999.0001.0003_R - NTG-0215 Paul McBride Statement - Amended Doc IDs 47354008.1, [para 56]; Exhibit 4-7908 - DSS.8500.0001.1928_R2 - DHS NPPs for inclusion in the 2015-16 PB Sub [SEC=PROTECTED, DLM=Sensitive-Cabinet].

275 Exhibit 4-7909 - DSS.8500.0001.1936_R - [NPP B.35] - 204 Strengthening the integrity of Welfare payments (v.8).

276 Exhibit 2-3234 - DSS.5091.0001.0206_R - FW- 11779 - Strengthening the Integrity of Welfare Payments - PAYG component [SEC=PROTECTED, DLM=Sensitive-Cabinet].

277 Exhibit 2-3235 - DSS.5081.0001.9189_R - RE- 11779 - Strengthening the Integrity of Welfare Payments - PAYG component [SEC=PROTECTED, DLM=Sensitive-Cabinet].

278 Transcript, Paul McBride, 9 March 2023 [p 4820: line 37 – p 4821: line 2].

279 Transcript, Paul McBride, 9 March 2023 [p 4828: lines 31-41, p 4803: lines 1-12].

280 Transcript, Paul McBride, 9 March 2023 [p 4828: lines 31-41, p 4803: lines 1-12].

281 Transcript, Paul McBride, 9 March 2023 [p 4828: lines 16-26].

282 Transcript, Paul McBride, 9 March 2023 [p 4826: lines 15-25].

283 Transcript, Paul McBride, 9 March 2023 [p 4807: line 30 – p 4808: line 10].
284 Transcript, Paul McBride, 9 March 2023 [p 4807: line 30 – p 4808: line 10].
285 Transcript, Serena Wilson, 23 February 2023 [p 3622: lines 18-25].
286 Transcript, Serena Wilson, 23 February 2023 [p 3622: line 29 – p 3623: line 26].
287 Transcript, Serena Wilson, 23 February 2023 [p 3628: line 45].
288 Transcript, Serena Wilson, 9 November 2022 [p 791: lines 7-14]; 23 February 2023 [p 3645: lines 19-21].
289 Transcript, Serena Wilson, 9 November 2022 [p 825: lines 32-37].
290 Transcript, Serena Wilson, 23 February 2023 [p 3680: lines 34-35].
291 Exhibit 2-2507 - PMC.0001.0010.9005_R - PMC.001.0054.001 - 15-03-25 - ERC - Attendance Sheet [redacted]_ v2; Exhibit 2-2507A - PMC.0001.0010.9004_R - 15-03-25 - ERC - Business List [redacted] Exhibit 2305AA.
292 Exhibit 2-2022 - PMC.001.0002.017_R - PMC-001-0002-017_Redacted.
293 Transcript, Scott Morrison, 14 December 2022 [p 1833: line 37 – p 1834: line 21].
294 Transcript, Scott Morrison, 14 December 2022 [p 1834: lines 28-40].
295 Transcript, Scott Morrison, 14 December 2022 [p 1837: lines 38-41].
296 Transcript, Scott Morrison, 14 December 2022 [p 1838: lines 22-34].
297 Exhibit 4-5230 - CTH.3006.0001.6036_R - Compliance NPP [DLM=Sensitive]; Exhibit 4-6891 - CTH.3006.0001.6037_R - Strengthening the Integrity of Welfare Payments NPP (8); Exhibit 4-5235 - CTH.3006.0001.6072_R - Final Version of Compliance NPP [DLM=Sensitive]; Exhibit 4-5236 - CTH.3006.0001.6073_R - Strengthening the Integrity of Welfare Payments NPP (10).
298 Exhibit 5257 – CTH.3094.0001.9242_R, Re- revised NPPs have been signed off by Minister and are now with DSS [SEC=UNCLASSIFIED].pdf, 11 March 2015; Exhibit 6916 – CTH.2007.0002.7344_R, Re- [printed] update on PB Sub and DHS NPPs [DLM=Sensitive], 11 March 2015; Exhibit 5267 – CTH.3095.0003.1275_R, RE: ERC Briefs [DLM=For-Official-Use-Only], 24 March 2015.
299 Transcript, Kathryn Campbell, 7 March 2023 [p 4550: lines 41–44].
300 Exhibit 4-6916 - CTH.2007.0002.7344_R - Re- [printed] update on PB Sub and DHS NPPs [DLM=Sensitive].
301 Exhibit 4-5257 - CTH.3094.0001.9242_R - Re- revised NPPs have been signed off by Minister and are now with DSS [SEC=UNCLASSIFIED].
302 Transcript, Kathryn Campbell, 7 March 2023 [p 4550: lines 41-44].
303 Exhibit 4-6918 - CTH.3095.0002.8018_R - Re- For clearance- Recommendation in relation to increasing the SES cap for the Strengthening Integrity proposal in the PBS [DLM=Sensitive].
304 Exhibit 4-6934 - CTH.4000.0399.0054_R - FW- ERC Briefing - Kathryn - Grant - Barry - Malissa - David - Megan.
305 Exhibit 4-5267 - CTH.3095.0003.1275_R - RE- ERC Briefs [DLM=For-Official-Use-Only].
306 Exhibit 4-6945 - CTH.2007.0002.7534_R - Final version of talking points [DLM=Sensitive].
307 Exhibit 6945 – CTH.2007.0002.7534_R, Final version of talking points [DLM=Sensitive], 24 March 2015.
308 Exhibit 9376 - CTH.2007.0002.7535_R - ERC Talking Points v2.docx.
309 Exhibit 4-5204 - MLE.9999.0001.0001_2_R - 20230124 NTG-0161 (M Lees) Signed Statement(46952747.1), [p 12: para 69]; Transcript, Megan Lees, 20 February 2023 [p 3323: line 46 – p 3324: line 8]; Exhibit 2-2506 - MPA.0001.0001.0058 - ERC Briefing - Kathryn - Grant - Barry - Malissa - David - Megan.
310 Exhibit 4-5204 - MLE.9999.0001.0001_2_R - 20230124 NTG-0161 (M Lees) Signed Statement(46952747.1), [p 9: para 57]; Transcript, Megan Lees, 20 February 2023 [p 3326: lines 1-47].
311 Exhibit 4-5267 - CTH.3095.0003.1275_R - RE- ERC Briefs [DLM=For-Official-Use-Only].
312 Exhibit 2-2507A - PMC.0001.0010.9004_R - 15-03-25 - ERC - Business List [redacted] Exhibit 2305AA; Exhibit 2-2507 - PMC.0001.0010.9005_R - PMC.001.0054.001 - 15-03-25 - ERC - Attendance Sheet [redacted]_v2; Exhibit 4-5694 - PMC.001.0054.001_R - EXPENDITURE REVIEW COMMITTEE (ERC) ATTENDANCE RECORD.
313 Exhibit 2-2507A - PMC.0001.0010.9004_R, 15-03-25 - ERC - Business List [redacted]; Exhibit 2-2507 - PMC.0001.0010.9005_R - PMC.001.0054.001 - 15-03-25 - ERC - Attendance Sheet [redacted]_v2; Exhibit 4-5694 - PMC.001.0054.001_R - EXPENDITURE REVIEW COMMITTEE (ERC) ATTENDANCE RECORD.
314 Transcript, Kathryn Campbell, 7 December 2022 [p 1297: lines 11-27].
315 Exhibit 3-5081 - PMC.0001.0011.0266_R2 - PMC.001.0054.001 - 15-03-25 - ERC - Attendance Sheet - ABBOTT - 2015_Redacted (003).
316 Transcript, Kathryn Campbell, 7 December 2022 [p 1297: lines 35-40].
317 Transcript, Kathryn Campbell, 11 November 2022 [p 949: lines 15-20; p 964: lines 22-44]; 7 December 2022 [p 1254: lines 17-21; p 1259: lines 25-46; p 1284: lines 36-47]; 7 March 2023 [p 4540: lines 10-19].
318 Transcript, Kathryn Campbell, 11 November 2022 [p 965: lines 14-39; p 1295: lines 14-34]; 7 March 2023 [p 4546: lines 11-17].
319 Transcript, Kathryn Campbell, 10 November 2022 [p 915: lines 40-45].
320 Transcript, Kathryn Campbell, 10 November 2022 [p 915: lines 1-8].
321 Transcript, Kathryn Campbell, 10 November 2022 [p 913: lines 23-26].
322 Transcript, Kathryn Campbell, 11 November 2022 [p 944: lines 15-17].

323 Transcript, Kathryn Campbell, 7 March 2023 [p 4575: line 44 – p 4577: line 1].
324 Transcript, Kathryn Campbell, 7 March 2023 [p 4577: line 3 – p 4578: line 29].
325 Transcript, Kathryn Campbell, 11 November 2022 [p 939: line 46 – p 940: line 6]; Exhibit 2-2669 - DSS.5077.0001.0037_R - AHL6MFD2_2022-10-27_12-14-35-258 [p 6].
326 Exhibit 2-2669 - DSS.5077.0001.0037_R - AHL6MFD2_2022-10-27_12-14-35-258 [p 2].
327 Exhibit 2-2669 - DSS.5077.0001.0037_R - AHL6MFD2_2022-10-27_12-14-35-258 [p 2].
328 Transcript, Megan Lees, 20 February 2023 [p 3327: lines 1-19].
329 Transcript, Marise Payne, 2 March 2023 [p 4292: lines 5-10].
330 Exhibit 4-5230 - CTH.3006.0001.6036_R - Compliance NPP [DLM=Sensitive]; Exhibit 4-5231 - CTH.4000.0399.0127_R - Strengthening the Integrity of Welfare Payments NPP (8); Exhibit 4-5237 - CTH.4000.0399.0030_R - RE- Final Version of Compliance NPP [DLM=Sensitive]; Transcript, Megan Lees, 20 February 2023 [p 3314: lines 5-18].
331 Exhibit 4-5231 - CTH.4000.0399.0127_R - Strengthening the Integrity of Welfare Payments NPP (8) [p 3].
332 Exhibit 4-5231 - CTH.4000.0399.0127_R - Strengthening the Integrity of Welfare Payments NPP (8) [p 6].
333 Exhibit 4-5249 - CTH.3023.0001.5966_R - Strengthening the Integrity of Welfare Payments NPP [DLM=Sensitive]; Exhibit 4-5250 - CTH.3023.0001.5967_R - Strengthening the Integrity of Welfare Payments 040315; Exhibit 4-5258 - CTH.4000.0308.2411_R - ACION more NPPS for clearance [DLM=Sensitive]; Exhibit 4-5259 - CTH.4000.0399.0192_R - NPP integrity; Exhibit 4-5263 - CTH.4000.0308.2441_R - FW- Updated NPP - Strengthening the Integrity of Welfare Payments [DLM=Sensitive]; Exhibit 4-5264, CTH.4000.0308.2442_R - NPP Strengthening the Integrity of Welfare Payments 110315.
334 Exhibit 2-2022 - PMC.001.0002.017_R - PMC-001-0002-017_Redacted.
335 Transcript, Marise Payne, 2 March 2023 [p 4291: line 15 – p 4293: line 45].
336 Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; DCM20 v Secretary of Department of Home Affairs [2023] HCA 10, [24-26], in the context of the contemplation by Parliament of the conferral of statutory power on Ministers, also citing Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24, 65-66.
337 Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; DCM20 v Secretary of Department of Home Affairs [2023] HCA 10, [24-26], in the context of the contemplation by Parliament of the conferral of statutory power upon Ministers.
338 Exhibit 2-2597 – RBD.9999.0001.0033, 15-03-30_cabinet-handbook_8th-edition, at _0017.
339 Exhibit 2-2597 – RBD.9999.0001.0033, 15-03-30_cabinet-handbook_8th-edition, at _0017.
340 Transcript, Scott Morrison, 14 December 2022 [p 1795: lines 35 to 41].
341 Transcript, Scott Morrison, 14 December 2022 [p 1796: lines 1 to 5].
342 Transcript, Scott Morrison, 14 December 2022 [p 1821: lines 19 to 25].
343 Transcript, Scott Morrison, 14 December 2022 [p 1801: lines 11-15].
344 Transcript, Scott Morrison, 14 December 2022 [p 1841: lines 41-42].
345 Transcript, Scott Morrison, 14 December 2022 [p 1838: lines 21-34].
346 Transcript, Scott Morrison, 14 December 2022 [p 1837: lines 36-41].
347 Transcript, Scott Morrison, 14 December 2022 [p 1844: lines 25-31].
348 Transcript, Scott Morrison, 14 December 2022 [p 1856: lines 31-36].
349 Transcript, Scott Morrison, 14 December 2022 [p 1801: line 17; p 1802: lines 22-27].
350 Transcript, Scott Morrison, 14 December 2022 [p 1805: line 36 – p 1866: line 16; p 1866: line 45 – p 1867 line 22; p 1842: lines 11-16; p 1863: lines 35-40].
351 Transcript, Scott Morrison, 14 December 2022 [p 1808: lines 4-41; p 1814: lines 7-13 and lines 20-24].
352 Transcript, Scott Morrison, 14 December 2022 [p 1802: lines 43-46; p 1803: lines 5-29].
353 Transcript, Scott Morrison, 14 December 2022 [p 1796: lines 9-44].
354 Transcript, Scott Morrison, 14 December 2022 [p 1802: lines 28-29; p 1785: lines 5-8].
355 Transcript, Scott Morrison, 14 December 2022 [p 1863: lines 27-34].
356 Transcript, Scott Morrison, 14 December 2022 [p 1863: lines 36-46].
357 Transcript, Scott Morrison, 14 December 2022 [p 1864: lines 1-4].
358 Transcript, Scott Morrison, 14 December 2022 [p1860: line 1-3].
359 Exhibit 2-2559 - SMO.9999.0001.0009_R2 – 20221125 Statement of Mr Scott Morrison – PII redactions.pdf [paras 22-29].
360 Exhibit 2-2559 - SMO.9999.0001.0009_R2 – 20221125 Statement of Mr Scott Morrison – PII redactions.pdf [para 72].
361 Transcript, Finn Pratt, 10 November 2022 [p 847: lines 14-18].
362 Transcript, Mark Withnell, 9 December 2022, [p 1496: line 47 – p 1497: line 20].
363 Transcript, Scott Britton, 8 November 2022 [p 669: lines 25-31; p 670: lines 25-29].
364 Transcript, Scott Morrison, 14 December 2022 [p 1808: line 26 – p 1812 line 41].
365 Exhibit 2-2685 – SMO.9999.0001.0105 - Media Release of Senator Richardson dated 21 August 1990.

366 Exhibit 2-2685 – SMO.9999.0001.0105 - Media Release of Senator Richardson dated 21 August 1990.
367 Exhibit 2-2686 – SMO.9999.0001.0106 - Media Release dated 29 June 2011; Transcript, Scott Morrison, 14 December 2022 [p 1809: line 21 – p1810: line 2].
368 Exhibit 2-2686 – SMO.9999.0001.0106, Media Release dated 29 June 2011; Transcript, Scott Morrison, 14 December 2022 [p1809: line 21 – p1810: line 2].
369 Exhibit 1-1109 - CTH.3000.0028.6814 - PAYG Protocol 2004, May 2004.
370 Exhibit 9494 - CTH.9999.0001.0219 - SA response to NTG-0260.pdf [p 3 para 2.11].
371 Exhibit 4-6598 - CTH.3708.0001.2914_R - 11003110-November-2011.
372 Exhibit 10084 - ATU.9999.0000.0043_R
373 Transcript, Scott Morrison, 14 December 2022 [p 1795: lines 35-45].
374 Transcript, Scott Morrison, 14 December 2022 [p 1860: lines 14-18].
375 Transcript, Scott Morrison, 14 December 2022 [p 1802: lines 43-46].
376 Exhibit 2-2022 – PMC.0001.0002.017_R, PMC-001-0002-017_Redacted.
377 Exhibit 2-2527A – CDF.0001.0001.0001, [2] October 2014 BPORs.
378 Transcript, Scott Morrison, 14 December 2022 [p 1832: lines 23-27; p 1843: lines 4-10].
379 Transcript, Scott Morrison, 14 December 2022 [p 1843: line 40 - p 1844: line 12].
380 Transcript, Malcolm Turnbull, 6 March 2023 [p 4426: line 42 – p 4427: line 38].
381 Transcript, Malcolm Turnbull, 6 March 2023 [p 4426: line 42 – p 4427: line 38].
382 Transcript, Alan Tudge, 1 February 2023 [p 2899: lines 2-13].
383 Exhibit 4-6720 - AGS.9999.0001.0001_R - 20230222 NTG-0213 Graham 22006293(47225144.1) [page 2: para 14; page 3: para 19].
384 Exhibit 4-8157 - CTH.3793.0001.1158_R3 - FW- DHS - constitutional risk assessment of 6 NPPs [SEC=OFFICIAL-Sensitive, ACCESS=Legal-Privilege].
385 Exhibit 4-8157 - CTH.3793.0001.1158_R3 - FW- DHS - constitutional risk assessment of 6 NPPs [SEC=OFFICIAL-Sensitive, ACCESS=Legal-Privilege].
386 Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; DCM20 v Secretary of Department of Home Affairs [2023] HCA 10, [24-26], in the context of the contemplation by Parliament of the conferral of statutory power upon Ministers.
387 Exhibit 2-2597 - RBD.9999.0001.0033 - 15-03-30_cabinet-handbook_8th-edition.
388 Exhibit 2-2597 - RBD.9999.0001.0033 - 15-03-30_cabinet-handbook_8th-edition [p 18].
389 Transcript, Scott Morrison, 14 December 2022 [p 1785: lines 8-10].
390 Transcript, Scott Morrison, 14 December 2022 [p 1875: lines 26-31].
391 Transcript, Scott Morrison, 14 December 2022 [p 1765: lines 21-23].
392 Transcript, Scott Morrison, 14 December 2022 [p 1769: lines 34-37].
393 Transcript, Scott Morrison, 14 December 2022 [p 1854: lines 40-46; p 1855: lines 22-25 and lines 40-44].
394 Transcript, Scott Morrison, 14 December 2022 [p 1855: line 46 – p 1856: line 7; p 1874: lines 19-27].
395 Exhibit 2-2601 - RBD.9999.0002.0002 - Strong welfare cop'- Scott Morrison's new self-proclaimed title; Exhibit 2-2602 - RBD.9999.0001.0227 - Sky News - 'Richo' _ Former Ministers and Parliamentary Secretaries.
396 See, for example: Transcript, Finn Pratt, 10 November 2022 [p 852: lines 4-9].
397 Exhibit 4-8161; Exhibit 2-2527A - CDF.0001.0001.0001 - [2] October 2014 BPORs [rule 15].
398 Exhibit 4-6875 - CTH.3095.0001.4731_R - Minister Morrison - media [DLM=For-Official-Use-Only]; Exhibit 1-1232 - FPR.9999.0001.0004 - Notebook entry for 22 January 2015(46374698.1); Exhibit 4-5731 - SWI.9999.0001.0006_R - Robodebt Royal Commission - Further Supplementary Statement of Serena Judith Wilson - 21 Feb 23 [para 4-7].
399 Exhibit 4-5731 – SWI.9999.0001.0006_R, Robodebt Royal Commission - Further Supplementary Statement of Serena Judith Wilson - 21 Feb 23 [para 7- 8]; Transcript, Mark Withnell, 9 December 2022 [p 1538: lines 2-4]; Transcript, Andrew Whitecross, 8 December 2022 [p 1376: lines 2-16]; Exhibit 1-1175 – SBR.9999.0001.0002_R, Statement of Scott Britton in response to Notice NTG-0038, 25 October 2022 [paras 89 and 94]; Transcript, Scott Britton, 8 November 2022 [p 652: lines 30-47].
400 Transcript, Scott Britton, 23 February 2023 [p 3692: lines 27-28].
401 Exhibit 4-5617 – CTH.4700.0001.2404_R, Exhibit 5617B15_125.

Chapter 5: 2015 to 2016 - Implementation of the Scheme

1 The lead up to the pilot

The New Policy Proposal (NPP) presented to the Expenditure Review Committee (ERC) on 25 March 2015 proposed 1 July 2015 as the commencement date for the process which would become the Robodebt scheme (the Scheme). The estimated savings for the measure were based on an assumption that it would commence at that time. However, at the time of the ERC meeting, Department of Human Services (DHS) officers had not completed the design of the proposed process, or tested or modelled it, and the Department of Finance continued to hold concerns about the costings that underpinned it.

So it is perhaps not surprising that the focus of DHS officers after the ERC meeting on 25 March 2015 was fixed on overcoming any remaining barriers to the launch of the Scheme on 1 July 2015, rather than on undertaking any critical analysis of its underpinnings that might reveal its fundamental flaws. This focus is reflected in an email that Jason Ryman (director, Customer Compliance Branch, DHS) sent to other DHS officers on the day of the ERC meeting:

> I have until the 27th of April to have process [sic] designed, agreed and ready for testing for early May. The process will essentially mirror what we will be looking to develop as an online solution, recognising there will be manual processes (such as initiation)…[1]

The design of the process in the intervening three-month period involved various requests for legal and policy advice about aspects of the process while DHS deliberated about its details. These requests came, at times, frustratingly close to identifying the fundamental flaws in the scheme.

In one email, sent on 27 March 2015, a DHS officer queried whether legal advice should be obtained about any issue arising in the application of match data once an income support recipient failed to provide additional information after having been requested by DHS to do so.[2] On 9 April 2015, Mr Ryman sent an email to a lawyer in the Legal Services Division, DHS, requesting further advice with respect to the proposed PAYG process.[3]

Mr Ryman asked a number of questions relating to the design of the process. The first related to whether there were any legal issues associated with the detail proposed to be contained in the initial letter to recipients at the commencement of the process. The second and third related to whether, in certain circumstances, a statutory provision had to be cited in that letter. The final question described, in general terms, the process of income averaging under the Scheme, and asked if there were "any impediments to this approach." The final question was:

> Applying the matched information to the customer record means that the total gross income (advised on the PAYG) will be evenly distributed across all fortnights in the employment period (advised on the PAYG), and then standard fortnightly attribution of income will be applied. It is important to note that the matched information will only be used for retrospective earnings related to debt calculations and not for the assessment of income in relation to ongoing rates of payment. We already apply this method as a last resort in current processes where we are unable to identify the employer or unable to contact [sic] the employers (e.g. out of business) or where the customer and/or employer have not complied with the request for information. Using this method upfront reduces the red tape burden on third parties, and we are using acceptable 'verification of income documents' for the purposes of coding income in relation to a debt being raised (guide to SSLaw 2.2.3). Are you aware of any impediments to this approach noting it is consistent with current policy and it does not change how debts are calculated or the policy associated with the fortnightly attribution of income?

The advice provided in response to the question did not address the question of whether income averaging, as it was used in the Scheme, was lawful.

Instead, it contained observations that it was "best practice" to give income support recipients the opportunity to respond to DHS information; that the decision-maker had a discretion to accept information from the ATO and act on it if it was reliable, verifiable and credible to raise a debt, but "best practice" principles should be in place to mitigate the risk of doing so; and that where a recipient did not receive the notice, they could appeal, which was a matter of "risk assessment from an operational viewpoint."[4]

John Barnett, the DHS lawyer who settled the advice in response to Mr Ryman's request, gave evidence before the Commission. He had not understood that question to be asking whether it was lawful to use income averaging to calculate debts in the absence of other evidence to support the calculation.[5] He thought that what was being proposed was that calculations reached with income averaging would be considered "in light of all of the other circumstances and not in isolation."[6]

In April 2015, a PAYG Pilot Stakeholder group was formed.[7] The group met on a regular basis (usually weekly) in the months of April to June 2015. At its meeting on 20 April 2015, the Board considered an agenda item which plainly concerned Mr Barnett's advice.[8] The minutes record, "Legal advice on the initiation letter received," and note that "Advise [sic] supports the inclusion of data in the letter, that no coercive reference is required and the application of ATO data."

On 24 April 2015, policy advice was sought from Emma Kate McGuirk, who then held the position of director of DHS's Income Support Means Test Section, in relation to the income test for the program. She had participated in a walk-through of the proposed business processes for it.[9] The email seeking her advice[10] said that matched PAYG income information would be applied to income support recipients' records using income averaging if those recipients did not respond after an initial letter notifying them. It asserted that the method was already used "as a last resort" in current processes where attempts to get the information from the recipient or employer had failed; now the method would be used "upfront," reducing the red tape burden on third parties. Notwithstanding that the email clearly indicated a proposed departure from "last resort" use of income averaging, Ms McGuirk gave her advice in response by email dated 1 May 2015, indicating policy support for the process:

> …as long as the customer is given the opportunity to correctly declare against each fortnight and apportionment is the last resort, we support what you are doing. Good luck![11]

The apparent inconsistency between Ms McGuirk's qualified "last resort only" support for the proposed process and the description of that process in the earlier 24 April 2015 email does not seem to have caused any reflection within DHS. The departure from the use of income averaging "as a last resort," making it instead the default position where the recipient did not, or could not, correct the ATO data, remained an integral feature of the Scheme throughout its implementation.

2 The initial pilot program

Between May and June 2015, a pilot program was conducted to test the effectiveness of the manual process that was being used while the online platform used for the Scheme was under development.[12] While the pilot involved a manual process, it incorporated key principles of the Scheme. This included an initial contact letter "inviting" income support recipients to contact DHS and discuss the ATO data provided in relation to them.[13] The pilot was undertaken in two phases, the first involving 1000 recipients, and the second involving 1600.[14]

In an email to Mr Ryman dated 6 May 2015, copied to Scott Britton (national manager, Customer Compliance Branch, DHS) and Owen Lange (director, Business Integrity Support Centre, DHS), pointed out:

> We are going to have a percentage of customers that do not contact despite our invitation, and these customers will have their debts raised regardless of the 21 day mark.[15]

Mr Ryman responded the same day:

> Hey Owen, you are right in your assessment. One of the unknowns is how many will not contact and then how many will contact after being advised of the debt via letter. What we are thinking is those who choose not to contact are satisfied with the information in the letter and the process we will apply in calculating the debt.[16]

It is clear that those involved in the pilot, including Mr Ryman, expected that there would be a number of recipients who would not respond to the initial letters to them from DHS. Some of the documents prepared during the development of the NPP used historical data to predict that 35 per cent of income support recipients who were sent letters under the Scheme would not respond to those letters.[17]

In the event, about 60 per cent of income support recipients involved in the pilot did not respond to DHS's attempts to contact them,[18] a much higher proportion than had been assumed for the measure during the budget process.

Following the pilot, a draft brief to the secretary of DHS was prepared, reporting on this development. The draft was provided to Mark Withnell (general manager, Business Integrity, DHS) through Mr Britton's Branch Coordination Team by email on 30 June 2015.[19] Mr Withnell returned the draft on 2 July 2015, with notations indicating that he wanted amendments to it.[20] Mr Ryman later the same day made changes to the draft in accordance with Mr Withnell's feedback, and sought Mr Britton's clearance for them.[21] Later again that same day, the amended brief was emailed back to Mr Withnell through Mr Britton's Branch Coordination Team.[22] The brief was ultimately not delivered to the secretary.[23]

It is a reasonable inference that both Mr Britton and Mr Ryman were familiar with, and accepted as correct, the contents of the draft brief. It contained this information:

> An unexpected outcome is the percentage of customers who are not contacting the Department within the prescribed 21 days. At this stage, approximately 60 per cent are not contacting. These customers have debts raised on the match / matched PAYG data and are sent a debt notice.
>
> By providing details of their employment (including period and amount earned) in the original letter to customers, it is possible that the customer is able to make an informed decision to not respond. This possibility is supported by:

- when customers contact, over 50 per cent agree with the data and request any debt be calculated on this information. This indicates a high level of acceptance of the matched / match data.
- for customers who did not contact, only 1 per cent of customers have contacted to provide information after receiving a debt notice. This indicates a level of acceptance of the debt.

The assertion[24] that income support recipients were able to make informed decisions about whether to respond to letters sent to them was speculative, untested and unsupported by any evidence. Those statistics cited in support were an entirely unconvincing basis for the assertion, which was also contrary to the facts known to both Britton and Mr Ryman. Both knew that income support recipients might

not receive letters sent to them by DHS, so the fact they had not responded to them did not amount to acceptance of what the letters asserted.[25]

In any case, the initial letters sent to recipients, supposedly the basis for "informed decisions," did not reveal that income averaging was going to be used to calculate their entitlements.[26] That remained the case for the letters sent out when the Online Compliance Intervention was implemented in 2016.[27] All that the letters told their recipients was that DHS possessed ATO information in the form of total amounts of income they had earned from particular employers over particular periods, and that there was a discrepancy between that information and what the recipients had told DHS about their income.

It was entirely possible in any given case that the amounts reported to the ATO and the information that a recipient had reported to DHS were both correct, and there were a range of circumstances in which the discrepancy between the two amounts could be explained. One pertinent example was that an employer might have inaccurately reported the dates of a recipient's employment to the ATO, so that it gave the impression the recipient was working and receiving a full benefit at the same time, when in fact, a more accurate date range would confirm that there had been no overlap, or a more limited overlap, between the period in which the person was employed and the period in which they were paid a benefit.

A recipient could receive a letter and see no need to respond because they accepted the ATO figure as correct, without appreciating that it would be averaged to calculate fortnightly income, determine entitlement and raise a debt.[28] In circumstances where the letters did not disclose that DHS was proposing to use income averaging, a failure to respond to those letters could not be understood to amount to an acceptance of the resulting debt calculations as accurate.

In fact, what the pilot revealed was alarming. If the results of the pilot were replicated once the Scheme was implemented at full scale, it could be expected that 60 per cent of the interventions that were planned for the Scheme would involve debts being raised against recipients which were probably inaccurate, because they were based on averaging.[29] This evidence invalidated Mr Britton's expectation that income averaging would be used to calculate and raise debts under the scheme on an exceptional basis, and would only involve low numbers of people.[30]

The draft brief to the Secretary represented an attempt to put a positive spin on the alarming results of the pilot. It ought to have contained a candid assessment of the results of the pilot, including the prospect that inaccurate debts would be raised on a massive scale because recipients did not respond or unwittingly accepted the ATO data. The brief failed to give a realistic picture of the results of the pilot.

In a submission to the Commission, Mr Britton said that he "verbally raised concerns about the Pilot with Karen Harfield and Mr Withnell and suggested that bulk initiations be delayed." However, that submission is directed to events during the manual iteration of the Scheme, which is discussed further below, and was often also referred to as a "pilot" within DHS, in the lead up to the full operation of the online platform. Ms Harfield had not commenced employment with DHS at the time of the initial pilot program.[31]

The failure to confront fundamental flaws in the operation of the Scheme appears to have been a product of the culture within DHS at the time. In evidence before the Commission, Mr Britton said:

> …my own experience was there was difficulty in giving bad news or alternate [sic] views to the Deputy [Secretary], Golightly. I had had a number of personal experiences with project reports that were red, didn't like red, had to change it, update it. It may be that. I don't know. I'm - I'm basing it purely on my personal experience. I think there was a general cultural view around no one gives bad news. So fix it - get on with it and fix it.[32]

The brief was not given to the Secretary.[104] An email dated 25 November 2015 advised "GM [Mr Withnell] advised this brief is not progressing to the Secretary…."[105] One possible explanation for this is that Ms Campbell was informed of the results orally, preferring not to receive them in writing. She said when asked about this that she had no recollection of such a thing occurring, and her solicitors submitted that no such finding could, therefore, be made. The other possibility is that the results were not given to her because of the same fear of delivering "bad news" that Mr Britton described in his evidence. It is difficult to conceive of any explanations other than those. Neither reflects well on Ms Campbell's management of the department.

3 The PAYG Manual Compliance Program

The PAYG Manual Compliance Intervention program commenced operation on 1 July 2015 (the Manual Program).[33] Although under the Manual Program reviews were undertaken by compliance officers, the program was designed to "mirror" the process that was to be implemented online the following year.[34]

The matches that were to be dealt with in the Manual Program were taken from what DHS considered to be the highest risk categories of matches. Structuring the measure in this way was intended to ensure that matches associated with a higher likelihood of the existence of a debt, or a higher debt amount, or both, were dealt with in the first year. This was considered necessary for the proposed measure to produce a saving in each year, because in its first year any such savings would be diminished by expenditure on ICT costs associated with the development of the new online platform, and by the limits on the number of matches that compliance staff could process manually while the online platform was being developed.[35]

The NPP had referred to the first year of the PAYG process being "undertaken using existing business processes."[36] The imprecision with which this is expressed makes it difficult to assert that it is wholly incorrect. However, there was a number of features contemplated in the proposed manual process which were not part of the business processes that existed pre-Robodebt, including the following:

- the ATO PAYG data was to be regarded as the primary source of earned income information, and could be acted upon to raise debts even in the absence of confirmation by a recipient or employer
- if a recipient did not engage with the department upon receiving the initial correspondence, there would be little to no investigation or information-gathering by compliance officers with, for example, the recipient or an employer
- where alternative information had not been provided, the ATO PAYG data would be averaged across an employment period in order to determine a recipient's entitlement during the period benefit was received and calculate any overpayment and resulting debt. Although this had previously occurred on a limited basis, it was now contemplated that it would occur in all instances where the recipient had not provided further information.

The process for the Manual Program was known as the "Rapid Response" model. Under that process, the letter sent to recipients contained a telephone number for the Department. If a recipient contacted the Department in response to the letter, a compliance officer would determine how to proceed with the review, using whichever of the following three options was applicable:

- Firstly, with a recipient's agreement, the ATO PAYG data would be used for the review. In those circumstances, the data would be apportioned (averaged) evenly across the employment period specified in the ATO data. If the calculation could be performed while a recipient was on the phone, the outcome would be explained, and a compliance officer would make a decision about whether a penalty fee was to be applied. A debt would then be raised.[37]
- Secondly, a recipient could provide a verbal update to their information, either on the initial phone call or by arranging to call back at a later time. Any further information would be assessed by a compliance officer, who would determine if the update was "reasonable," before using the information to inform the calculation of whether a debt was owed. Depending on the type of information provided by a recipient, the assessment of any debt amount could still involve the use of income averaging.[38]
- Thirdly, a recipient could provide documentation to update their information. The compliance officer would then assess the information to determine if it was "reasonable," and proceed with the calculation of whether a debt was owed. If a debt was raised, the recipient was to be advised through a telephone call from the compliance officer.[39] Where the documentation provided by a recipient was considered to require clarification, the compliance officer would make a further call to the recipient to obtain further information. If, after this process, sufficient documentation was not provided, the PAYG match data was averaged across the PAYG period for the purposes of determining entitlement and raising any debt.[40]

If the recipient did not contact the Department in response to the initial letter, the PAYG match data was apportioned (averaged) across the PAYG employment period.[41]

Just under 105,000 compliance reviews were commenced during the 12-month period of the Manual Program's operation.[42] That was a fivefold increase from an average 20,000 compliance reviews conducted annually before the Scheme began.

The operation of the Manual Program resulted in a dramatic increase in the scale of DHS' use of income averaging. Although the precise extent of the use of income averaging prior to the Scheme is unclear, the limitations that departmental procedures imposed on its use,[43] coupled with evidence given before the Commission,[44] lead to a clear inference that it was used infrequently, and it was certainly not used in the majority of cases.[45] The proportion of debts raised using income averaging under the Manual Program was 90.1 per cent. Not only did that represent most of the recipients subject to review, but it was applied in circumstances where the underlying pool of recipients had increased fivefold in number.

3.1 Staff concerns

In 2015, Colleen Taylor was a compliance officer at DHS. At that time, Ms Taylor had been a public servant for over 30 years, with extensive experience including frontline customer service roles in Commonwealth social welfare entities including Centrelink and its predecessors.[46]

Ms Taylor's knowledge and experience were such that her work would, at times, involve quality checking of work done by other compliance officers.[47] She had detailed knowledge of the income support payment system, departmental practices for dealing with overpayments and debts, and reviewing customer records.[48]

In 2015, Ms Taylor was informed of the changes to compliance practices that had been introduced under the Manual Program's Rapid Response model.[49] Under that process, from around September 2015, compliance officers would no longer contact employers to obtain information.[50] From January 2016, compliance officers would no longer perform checks on a recipient's departmental record.[51]

Ms Taylor became concerned about the inability of the process to identify all of the information necessary to properly investigate a discrepancy and calculate any subsequent debt, including information from employers and the recipient's own departmental record.[52] She considered that the changes "would result in a large number of debts being issued to people when they did not really owe a debt, or any debt they did have was lower,"[53] and that "relying on averaging would not produce a result which was even close to right in many cases."[54]

Ms Taylor said:

> It seemed to me at the time that the purpose of the changes was to massively increase the number of debts being issued, to churn out debts on an industrial scale, based on the assumption that there were huge levels of debt which could be recovered. It also seemed to me that it was going to proceed despite the fact that many of the claimed debts would not be correct.[55]

In early 2016, Ms Taylor raised some of her concerns with departmental officers including her supervisor and the "Compliance Help Desk."[56] She pointed to an instruction given to compliance officers to the effect that they did not need to check a recipient's record for documents that might have been supplied prior to the start date of the compliance intervention. She provided an example of where, if the instruction were followed, relevant documents on a recipient's file (such as payslips or employment separation certificates) would be ignored. This could result in raising a debt where none existed, or raising a higher debt than was warranted. Ms Taylor expressed her earnest concern, "…as a Compliance unit, we should not be the ones stealing from our customers." When asked about that comment in oral evidence, she responded:

> Well, if we know there's no debt, and yet we're sending a debt notice out to someone, isn't that stealing?[57]

The Help Desk response to Ms Taylor's concerns was to the effect that recipients were given the opportunity, through the initial letter, to "tell [DHS] about any documents they may have provided in the past that [were] relevant to the match data," and that "where a customer chooses not to contact, they are aware that the match data will be applied to their record."[58] The response indicated that while there was nothing to stop staff looking at the record, there was no expectation that they would do so. It said "Basically, the policy is, if the customer does not contact we apply the match data."

Undeterred, Ms Taylor sent further correspondence, including to her director and assistant director, about her concerns.[59] As to the implication in the Help Desk response that recipients had made active decisions not to contact the department in response to the initial letter, Ms Taylor made the obvious point that "[i]n most instances, non-current customers do not receive our initial letter because they no longer live at that address." She remonstrated:

> …I know that not all our customers have the capacity to engage in meaningful discussion about what their circumstances were and what they have provided to Centrelink and to request a review…There will be customers who will repay debts that they should never have had.
>
> …we are being asked to ignore evidence that no debt exists and to 'collude' in raising a debt where none should exist.
>
> **That is, we are being asked to commit a fraudulent act.**[60]
>
> [emphasis in original]

Ms Taylor's clearly articulated expression of her well-founded concerns did not produce any amendments to the Manual Program process.

3.2 Reaction to the PAYG Manual Program

Despite its similarities in process to the OCI iteration of the Scheme, the Manual Program did not attract the same levels of criticism and publicity during its operation. There is a number of possible reasons for that.

Firstly, the review process was still an interaction, or series of interactions, involving human contact and a manual application of a compliance officer's skills and experience during the review process. Despite the limitations imposed on a compliance officer by the procedures they were required to follow, there was still potential in the manual process for the officer to exercise discretion and reason throughout the review. That would depend on individual officers: whether their approach to conducting the review was one of strict adherence to the procedure under which they were operating, or was more flexible and tailored. The interaction between a recipient and a compliance officer also carried with it the opportunity for explanations, assistance and collection of further information from a recipient. Although the manual interaction under the Manual Process did little to reduce the use of averaging (and consequent debt inaccuracy), the human element may have contributed to the Manual Program attracting less criticism and publicity than OCI.

Secondly, the cases that had been targeted for review under the Manual Program were those that had been assessed by DHS as involving the "highest risk" of non-compliance. Putting to one side the issue with the ultimate legitimacy of those debts, at the time they were raised many recipients may have accepted they had a debt, particularly given it had been raised manually by a compliance officer.

Thirdly, the Manual Program involved the initiation of fewer compliance reviews, over a much longer period of time, than OCI,[61] and a collective awareness of the system DHS was using had yet to develop. The higher numbers of affected recipients, concentrated over a shorter period of time, under OCI, were bound to attract more attention and publicity.

On one view, staff like Ms Taylor may seem to have been prescient in identifying, very early in the Scheme's operation, a range of problems so neatly aligned with what later emerged as the central criticisms of the Scheme (particularly its OCI iteration). The reality is, though, that the Scheme's deficiencies were so

fundamental and obvious they were readily identifiable, even at an early stage, by those with knowledge of the social security system, especially DHS staff.

Had the senior officers responsible for the design of the concept and the implementation of the Scheme had the desire, or the time, to develop a system capable of accurately capturing and calculating actual debt amounts, one of the first ports of call should have been the experience and knowledge held by their own department's staff. Not only did they not seek it, but when staff members like Ms Taylor raised concerns, they were ignored or dismissed.

At the level at which decisions about the Scheme were being made, attention was entirely centred on implementing it to ensure it achieved "success," measured in terms of the numbers of reviews completed and the amount of savings achieved. The focus was on how to do this. There was no critical analysis or reflection on whether it should, or even could, be done. The alarm bells were ringing loud and clear for anyone who cared to listen, but they were falling on deaf ears.

In December 2015, the "Enhanced Welfare Payment Integrity – income data matching" measure (the EWPI measure) was introduced through the Mid-Year Economic and Fiscal Outlook 2015-16 (MYEFO).[62] The original SIWP measure had applied to income discrepancies for the 2010-11, 2011-12 and 2012-13 financial years. The EWPI measure extended that measure to allow for the examination of discrepancy data and resulting compliance activity for the 2013-14 and 2014-15 financial years.[63]

4 The Online Compliance Intervention system

While the Manual Process was in operation, the ICT platform that would become OCI was being developed.

The development of the OCI platform was complex and it is unnecessary to traverse it in great detail. However, two significant points emerge. Firstly, problems arose during the design and testing phases that demonstrated that there were deficiencies in the system's capacity to accurately calculate debts. Secondly, DHS management, particularly Ms Golightly, applied intense pressure to ensure that enough reviews were commenced to meet the requirements of the Budget measures, with the result that system issues were not resolved prior to the OCI system's commencing full operation.

In March 2016, a new Division was created in DHS to deal with the area of customer compliance.[64] Ms Harfield joined the department as the general manager of this newly created "Customer Compliance Division"[65] and became general manager for the EWPI budget measure.[66] Mr Withnell remained as the general manager of the Business Integrity Division, and continued to be the Senior Responsible Officer for the SIWP budget measure.[67]

When Ms Harfield started in the role, Mr Ryman, Mr Britton and Mr Withnell briefed her on the Budget measures.[68] From those briefings, Ms Harfield learned that the Budget measures involved a process by which a recipient would be presented with ATO data and invited to either accept it, or correct it by providing further information;[69] that where a recipient did not respond, the data would be applied using a process of averaging;[70] that it was anticipated that recipients would engage with the process of the compliance review, so that "the number of times averaging would need to be used would be less;" and that averaging was a last resort where other information could not be obtained.[71]

By the time Ms Harfield began as general manager, the system build for the OCI platform was behind schedule, and was encountering technical issues.[72] The underlying program functionality had been scheduled to be provided for a March 2016 release, to enable "robust verification testing to be undertaken prior to commencement of online compliance activity from 1 July 2016."[73] However, the deadline was not met, and the delivery was rescheduled for a June 2016 release.[74]

4.1 Testing and development

The testing with respect to the development of the ICT platform was undertaken in various phases, some of which overlapped. Those phases were system integration testing, user acceptance testing and business verification testing.

On 8 June 2016, a contractor who was working as a test manager in the Enterprise Testing Branch produced a report summarising the outcome of the "System Integration Testing" (SIT) that had been undertaken for the systems underlying the OCI project.[75] The testing team's recommendation was negative for release to the next stage.[76] The test manager's view was that certain components within the system had been tested and worked well "completely in isolation," and there was "a considerable level of confidence" in some of the components that had been tested.[77] However, the report concluded, despite that level of confidence, "more in depth and complex customer scenarios have not been undertaken at this stage." It was recommended that "further robust/vigorous testing and analysis of more complex customer scenarios be undertaken for this task, to provide a more reliable/dependable level of confidence."[78]

However, that same evening, staff in ICT advised Mr Britton that they had "obtained conditional sign off to release [the platform] to production in a dormant state as we discussed at today's board meeting."[79]

On 9 June 2016, Mr Britton sent emails seeking clarification of the final position, querying how the differing positions in the reports could be reconciled, and seeking "further details so that I can understand how the test report went from recommending that EIM[80] does not go into this weekend release to now being (conditionally) OK."[81]

On 10 June 2016, less than 48 hours after the first report had been provided, the Enterprise Testing Branch provided a further report.[82] In stark contrast to the first report, this report recommended the conditional release of the OCI product to the next stage.[83] The writer of the covering email stated that the "draft report" previously provided "was not accurate and did not reflect the state of testing;" "a negative recommendation should never have been the outcome."[84] The test manager who had written the first report was clearly not in favour. The email said of him:

> For some context, we were having issues with [the contractor]'s approach to testing within this project, the accuracy and timeliness of his daily reporting…As a result his contract was ended with effect 8 June…

Mr Britton forwarded the further report to Mr Ryman and Gary Clarke, director of Capability Delivery Management, for their review.[85] Mr Clarke replied that he could not "reconcile the significant differences between this report and the one produced by the Test Manager who was on the ground for the entire time of the SIT exercise." He did not think the differences could not be explained away by the explanation testing staff had given in the email to Mr Britton. The original report, Mr Clarke said, "matches with the feedback being received 'on the ground' by our PM[86] from the testers just hours before the original report was received," who "advised that [the] end to end [process] was still not working, and only basic test scenarios had been completed." The second report, he pointed out, was "almost devoid of useful information…to determine some level of confidence in the product being delivered."

But the second report prevailed. Later that day, Mr Britton replied to Mr Clarke and Mr Ryman, saying "Mark [Mr Withnell] and I spoke with the A/g GM[87] and he provided assurance that we can rely on the final test report received this morning." The documents the Commission has been able to obtain do not shed any light on how the issues were resolved, but it appears that the "Core Online Compliance Solution was delivered as part of [the] 11 June release,"[88] and that further systems integration testing was performed until it was considered "completed" as reported to the SIWP ICT Program Board on 15 July 2016.[89]

A further phase of testing was "user acceptance testing." The aim of this phase was to "validate [that] the products due to be released are fit-for-purpose and ready for operational use."[90] Part of this testing was to identify gaps between "how the completed system works" and "how the business operational processes are performed according to what the project expects."[91] Ultimately, the user acceptance testing was designed to occur at "the final phase of end-to-end testing to verify whether the system meets a customer's requirements and ultimately whether it is ready for deployment into production."[92]

It was clearly important to ensure that the system was tested with staff, who represented a significant cohort of "users" of the system. But perhaps the most obvious cohort of "users" was that of recipients themselves. Testing could hardly "verify whether the system meets a customer's requirements" without involving any recipients in the process.

However, that is exactly what occurred. The testing involved departmental staff "running through scenarios as 'customers' to identify any issues."[93] No testing involving recipients was undertaken outside the pilot,[94] and the pilot did not provide any information as to potential difficulties with the process from the recipients' point of view.[95] There was apparently a "draft plan" to undertake user testing, with a view to seeking recipient feedback, in early 2017.[96] That timeline, self-evidently, did not contemplate such testing as part of the design and implementation of the initial OCI system, which was planned to commence in mid-2016.

On 23 June 2016, members of the SIWP Board decided to delay the next phase of testing, which was "Business Verification Testing."[97] The Board held concerns about the lack of complex scenarios that had been completed in the user acceptance testing phase, and concerns about the customer interface "which could result in inaccurate data being pushed through to the debt calculation."[98] There was a need to "understand better the issue with debt calculations, and the variation seen across systems."[99] The commencement of business variation testing was delayed pending further user acceptance testing.[100]

4.2 "Our future is here"

On 11 July 2016, the OCI system went live into a production environment.[101] Approximately one week later, Mr Britton emailed Ms Harfield, Mr Ryman and others with the subject line "OCI – Our future is here."[102] He informed them that the first online intervention had successfully gone through the system.

The delay in Business Verification Testing (BVT) was not a long one; it commenced on 15 July 2016.[103] The BVT Plan was based upon an assumption that the system integration and user acceptance testing phases were completed prior to the commencement of BVT.[104]

During the initial BVT phase, 1000 recipient records were randomly selected to test the system functionality.[105] Ten compliance officers, supported by technical staff, oversaw the process by which those 1000 recipients completed the review process through the OCI.[106]

The BVT phase subsequently became known as the "Staged Implementation Phase" (usually referred to as SIP),[107] following which it was anticipated that the OCI system would start initiating increased volumes of compliance interventions.[108]

During the staged implementation phase, OCI interventions were subject to a system "switch," which prevented an assessment from being displayed to a recipient until it was checked for accuracy.[109] This check included a process by which any debts that had been automatically calculated by the OCI system were also manually calculated by a compliance officer to check the accuracy of the automatic calculation.[110] The results of this analysis were presented in reports entitled "SIP Reporting Dashboard + Issues," which reflected cumulative data presented on a daily and weekly basis.

There was an obvious problem, reflected in the figures provided in those reporting dashboards, with the accuracy of the automatically calculated debts.[111] By the end of the staged implementation phase, on 30 September 2016, compliance officers had completed 919 manual "validations" to check the accuracy of the automatic calculation.[112] That process revealed that 29 per cent of the debts automatically calculated by the OCI system were "incorrect."[113] The inaccuracy of debts calculated as part of a reassessment process was even higher, with 37 per cent out of a total of 63 reassessments being found to be incorrect.[114]

Another concerning feature the SIP reports revealed was the recipient response rate to the online process. Seventy percent of customers had taken no action in response to the process. Of the 30 per cent who had engaged in the process, 83 per cent had "accepted" the ATO data. Ninety five percent of reviews had been completed without any action by a compliance officer, which necessarily meant that even where a recipient had accepted the ATO data, they had done so without any explanation or assistance from a compliance officer. Overwhelmingly, therefore, the default mechanism of calculation, for both those customers who had not responded, and those who had accepted the ATO data, was averaging of the ATO data to calculate their fortnightly income.

This information was extremely concerning, for at least three reasons.

Firstly, it revealed that, if the operation of the system at full capacity reflected the results of the staged implementation phase, the majority of recipients would not engage with the process. This was in circumstances where the system placed the onus on the recipient to update, correct, or provide further information to prevent it automatically using ATO data to calculate any debt.

Secondly, it demonstrated that income averaging would be used on a massive scale, far higher than had been anticipated at any point in the process thus far. It would be the default mechanism of calculation, used in the majority of reviews; certainly not a "last resort" or limited to exceptional cases.

Thirdly, the results of the staged implementation phase indicated that the automatic calculation of debts by the system had a high rate of inaccuracy (29 per cent). That rate was concerning in and of itself. However, it is even more so in view of the likelihood that it was actually an underestimation of the number of "incorrect" debts, for the following reason. Although it is unclear from the SIP reports by what methodology a compliance officer would manually calculate the debts under the "validation" process, it seems likely that it was the same or similar to that used by the Rapid Response Teams under the Manual Process. A manual validation that used income averaging to check an automatically calculated averaged debt would find that the automatic debt (also calculated using averaging) was "correct." However, where a recipient's income was variable fortnight to fortnight, which was the case for the vast majority of recipients,[115] a calculation that used income averaging was most unlikely to produce an accurate debt amount.

From a more cynical perspective, the results of the SIP demonstrated that, despite the obvious shortcomings in the process, the OCI system was capable of completing reviews and calculating debts with very little human engagement or intervention, in a very short space of time. For anyone unconcerned with fairness, accuracy, or, indeed, lawfulness, the testing results suggested that the system could quickly and automatically generate the savings and the numbers required to fulfil the promises made under the Budget measures, on a scale limited only by the number of discrepancies revealed by the data matching process.

4.3 Pressures and priorities

During August and September 2016, Ms Harfield described Ms Golightly as being "very focused" on what she regarded as a lack of progress in achieving the number of reviews required to deliver the Budget measures.[116] Ms Harfield perceived that "the heavy emphasis on my role, from Ms Golightly, was to push myself and my team to achieve the volume targets for reviews as required in the Budget measures."[117]

Mr Britton described Ms Golightly as having a "deliver at all costs approach;" she was "very uncompromising, directive and sometimes aggressive in her communication."[118] There was pressure to achieve savings at the early stages of the PAYG measure, and a suggestion that initiations should be brought forward. He emailed Ms Golightly, outlining the risks of this strategy in circumstances where a number of IT issues remained outstanding.[119]

In early September, Ms Harfield said, she told Ms Golightly that the IT delays with the OCI system meant that review numbers would increase later than expected.[120] Ms Golightly asked for a brief on the subject (the Combined OCI Brief).[121] Ms Harfield delegated that work to Mr Britton, who asked Tenille Collins to start work on that brief.

On 7 September 2016, Mr Britton emailed Ms Golightly regarding the OCI IT problems, saying that some of them were critical, and would need to be resolved before large scale initiations of compliance interventions were commenced.[122] The following day, Mr Britton sent a further update to Ms Golightly expressing confidence that there would be sufficient volumes of work to commence large scale initiations from October 2016. However, some of the technical problems presented a risk to the project because of the unanticipated manual effort that might be required to finalise those reviews.[123]

On 8 and 9 September 2016, Ms Golightly was making inquiries in tones of urgency about the Project Status Report for the EWPI measure,[124] asking whether the number of planned interventions would "get us to where we need to be re target for the year?" (if it did not, Mr Britton was to "call [her] urgently")[125] and whether "we are still confident that we will meet the targeted completions."[126]

On 11 September 2016, Mr Britton emailed Ms Harfield, outlining the discussions he had had with Ms Golightly about the IT issues with the OCI project and the latter's anxiety "about our ability to meet the volume of cases required for 16/17."[127] Mr Britton said that he had advised Ms Golightly that "we can step her through the initiation forecast that will ensure we meet the numbers. I am looking at options now where we could increase the numbers quickly over the coming weeks prior to 10 October when we are planning to increase the numbers dramatically."[128]

Soon after, Mr Britton emailed Ms Harfield to let her know that Ms Golightly no longer wanted the Combined OCI Brief that she had requested from Ms Harfield. Instead, Mr Britton said, he had "covered all issues and actions through other emails and discussions."[129] Mr Britton's email attached the draft of the Combined OCI Brief that had been developed to date (which Ms Golightly no longer wanted), which set out a range of IT issues, and noted the risk of unexpected manual effort to finalise the reviews that had been initiated.[130]

Ms Collins, who was involved in drafting the Combined OCI Brief, recalled a conversation with Mr Britton and Ms Harfield, in which Ms Harfield "indicated that she was still interested in pursuing the issues" that were outlined in the Combined OCI Brief.[131] Essentially, Ms Golightly had indicated that she no longer wanted the Combined OCI Brief, but Ms Harfield was concerned enough about the issues addressed in the brief to arrange for work on it to continue. On 16 September 2016, Ms Collins updated the brief.[132] The fate of the Combined OCI Brief is discussed further below.

According to Ms Harfield, Ms Golightly "made it very clear [to her] that the interventions were to increase in line with the Budget measure requirements and that this was to happen as soon as possible"[133] and instructed her to produce a proposal to increase the number of compliance reviews initiated in the OCI system by the end of September 2016.[134] Ms Collins agreed with the proposition that the "push" to escalate the scale of reviews came from Ms Golightly.[135]

Mr Ryman recalled that, around this time, he was concerned about the risks of increasing the volume of reviews, because there were aspects of the OCI system that needed further refinement, and they had "not been afforded a sufficient opportunity to iron out any bumps."[136] He thought the decision to increase the number of reviews may have been a response to "significant performance expectations which had costs savings attached to it."[137]

On 20 September 2016, as instructed, Ms Harfield sent an email to Ms Golightly about "re-planning… to ensure that a significant increase in the volume of initiated interventions occurs by the end of September."[138] In order to reach the figure of 75,000 interventions for the July/September quarter of 2016-17, 63,000 additional interventions would be initiated over the course of the week commencing 26 September 2016. Those interventions would be a combination of those identified under the employment income matching element of the SIWP measure, and those under the EWPI measure.

Ms Harfield indicated that there would be manual work associated with the increased interventions, in order to overcome known system issues that would prevent a review from being automatically processed or finalised.[139] She noted a number of ICT fixes scheduled for deployment on 30 September 2016, which were "required to ensure customer debts are calculated correctly, and manual effort was reduced." Those fixes would be monitored, as would the results coming out of the staged implementation phase, which would continue as the number of initiated interventions was scaled up. After some clarification of detail, Ms Golightly responded that "on this basis I think we should proceed if you and Mark [Mr Withnell] (as acting for me) are comfortable." Ms Harfield emailed Mr Withnell, asking him to call her about Ms Golightly's "request."[140]

Ms Collins recalled a conversation between herself, Mr Withnell, Ms Harfield and Ms Golightly (Ms Golightly by telephone) in late September 2016, about "whether or not we should proceed to scale up this measure" and "the various issues that we were seeing."[141] The conversation was "unusual" in that Ms Golightly was on leave at the time, and Mr Withnell was the acting deputy secretary.[142]

At the end of that meeting, Ms Collins said, she was instructed to "redo the forecasts…to scale up to 75,000 initiations by the end of September, which was about a week away at that point."[143] Ms Collins raised some of the associated risks; Ms Golightly was "very upset with me, was screaming at me."[144] Ms Collins proposed that she update the Combined OCI Brief, because she thought there were additional risks, but Ms Golightly replied, "under no circumstances are you to put this in writing."[145] The Combined OCI Brief was never finalised.[146]

In the face of the sustained pressure from Ms Golightly, the plan set out in Ms Harfield's email of 20 September 2016 was adopted. Increased initiation of reviews began from 26 September 2016.[147]

4.4 Papering over the cracks

Following the commencement of large scale initiations of compliance reviews under OCI, there were attempts to manage the problems in the OCI system. Mr Britton signed a brief on 5 October 2016 which outlined a number of those problems, and the strategies to deal with them.[148]

By early October, four "critical" ICT issues remained,[149] which were considered to "represent a risk to the accuracy of the automated assessment provided through the OCI platform."[150]

There was a plan to deliver "fixes" to resolve those issues on 15 October 2016.[151] A number of strategies was implemented to mitigate their impact until then, and until there was greater confidence in the accuracy of automated assessments and debt calculations.

One of those strategies was to pre-identify cases affected by those issues, and prevent their release into OCI for review until such time as the fixes had been released. However, this only applied to two out of the four critical issues. There remained "a risk associated with the accuracy of the automated assessment and debt calculation with two of the four issues." The relevant brief on this issue stated "Analysis undertaken has identified the incorrect debt outcome relating to these issues are always to the customer's advantage." The brief indicated that the Debt Management Branch had been consulted about the debt accuracy risk and accepted it "until the fix has been released."[152]

Notwithstanding the problems, on 5 October 2016, Mr Britton approved the removal of the "switch" which had hitherto prevented the assessment from being displayed to the recipient before it had been checked for accuracy.[153] He told Ms Harfield, "we have been able to put mitigation in place as described within the attached brief so we are confident that cases with potential errors can be identified and treated."[154]

5 Savings and targets

Ms Golightly's anxiety about meeting targets continued. On 18 October 2016, having reviewed the September "Debt and compliance report" to be sent to the minister's office, she asked for more commentary in the footnotes to explain why there was a "low achievement against the targets" although the measures were still described as "on track."[155] After Ms Harfield updated the document, Ms Golightly again queried the number of interventions, and whether it would result in the department's reaching the target number of compliance reviews.

In November 2017, Ms Golightly again commented on the debt and compliance report, querying the number of reviews being undertaken in relation to the SIWP measure, and the measure extending its operation to later years.[156] She addressed Mr Britton and Ms Harfield:

I know that Oct was the first few weeks of our increased numbers of interventions but these savings figures (on the surface of it) seem very low. Are we happy that the savings are commensurate with the interventions? In other words are the savings being achieved as expected for the number done?...

In response, Mr Britton maintained that, although the figures appeared relatively low in comparison to the target, the measures were on track, and they were confident of reaching the targets for savings and intervention numbers.[157] He stated that activity for the Budget measures had been scheduled against various factors, and that "a linear delivery of interventions and associated savings should not be anticipated."

Mr Britton also raised the fact that recipients were not taking any action in 70 per cent of interventions, which was higher than the "60 per cent built in to assumptions."[158] There were higher volumes of work than had been anticipated, mainly because of the recovery work necessary to deal with system errors.[159]

The problems began to emerge almost immediately once large scale initiations of compliance reviews began:

- Between 21 and 24 October 2016, an issue with the OCI system resulted in a number of people being affected, with the details recorded as follows. Seventy-five Age Pension recipients had their payments cancelled.[160] Eight of those recipients did not subsequently receive their payment on time, with at least one payment being received six days late. Twenty eight former recipients were also affected by the error, in an unspecified way. Approximately 600 recipients received an incorrect payment, which the department would have to either waive or seek to recover. Some 2,700 recipients had possibly had an incorrect debt amount raised, when they did not, in fact, have any debt at all. An "emergency change" to the system had been made, it was reported, and it was "now working correctly."
- On 26 October 2016, Ms Harfield emailed Ms Golightly about an OCI issue relating to interventions having been finalised with "incorrect outcomes."[161] The system was not applying rules to ensure manual processing occurred in specific scenarios. One hundred and three recipients were affected, and the system code was updated to rectify the issue.
- On 7 December 2016, a problem with the system caused a recipient's entitlement to be "rejected."[162] She had attempted to report earnings, but was unable to do so using the OCI system. When a compliance officer attempted to assist her, a system error had occurred, causing a rejection of the recipient's payment and a false record of a $34,330.33 overpayment. The recipient was in hardship because her payment was rejected, and she had a medical condition which was exacerbated by the situation.
- On 16 December 2016, the Centrelink Online system was unavailable, and recipients (some 119 of them) were unable to access online compliance reviews.[163]
- On 22 December 2016, it became apparent that debt reminder letters were not being issued for people who had not repaid their OCI debt. 71,332 cases were identified in this category.[164]

5.1 A rushed release

Mr Britton's view was that the decision to initiate reviews earlier than planned, in large volumes, when the core system was not fully functional and tested, may have been behind many of the early OCI problems.[165] He considered it should have been staged over a longer period, but savings expectations meant that timeframes were truncated and, in his opinion, unrealistic.[166] The focus, urgency, expectation of, and pressure to deliver unprecedented savings removed the opportunity to ensure design accuracy and customer experience were fully considered and effective before full implementation.[167] The push from above to show early success and to deliver the forecast savings created pressure to initiate large volumes of reviews, despite the risk of additional manual effort costs or "inherent risk" due to residual ICT errors.[168] The required volumes of reviews to achieve savings were high, and relied on the success of new ICT platforms. If more time had been available to fully test the systems and processes prior to implementation, the risk of error may have been reduced.[169]

The consensus among the witnesses who worked with Ms Golightly was that it was difficult to tell her about problems or convince her that the implementation should proceed more slowly, if it meant falling behind targets. She was not an easy person to work for, and was not receptive to the views of others, apart from Mr Withnell. Mr Ryman described the culture within the Branch, during late 2016 and into early 2017, as "particularly intense."[170] From the time in 2016 that issues started to emerge with the system, he had increasing contact with Ms Golightly,[171] whom he felt intimidated by; she was given to shouting at him.[172]

Ms Collins said that, between September 2016 and May 2017, on occasions where she had attempted to raise problems or risks with Ms Golightly, Ms Golightly told her that she would lose her job, or that her career was over.[173] Ms Golightly's behaviour, Ms Collins considered, discouraged people from giving her information clearly and comprehensively setting out risks and problems, which "affected the quality of information and advice provided to the Secretary and to the government."[174]

Ms Harfield recalled that "when I offered any insight or advice about the issues identified with the Scheme, they were soundly rejected. Ms Golightly appeared to rely exclusively on Mr Withnell for strategic insight as the authority on the measures."[175] Ms Collins offered some confirmation for that perspective. She had noticed during the late September conversation about whether the large-scale OCI roll-out should proceed that Ms Golightly was "very dismissive of Ms Harfield… she kept talking over the top of her and deferring to Mark Withnell."[176] Ms Harfield thought Ms Golightly was just as dismissive of Mr Britton's opinions.[177] Mr Britton said that at the end of November 2016 he was temporarily transferred to another role outside of the Department "at the direction of Deputy Secretary Golightly," though he returned temporarily throughout December 2016 and January 2017 to assist with managing the issues arising as a result of the OCI system.[178] He left feeling a mixture of relief and disappointment.[179]

The workplace environment was an intense one, in which departmental staff were under a high level of pressure. Given the circumstances in which the system commenced full operation, it is not at all surprising that there were multiple system issues. Though some of the problems which emerged might be regarded as "teething problems" in a new system, some represented serious and fundamental flaws in its operation. They were one more warning sign in a sequence of many. But the continued focus on savings and numbers, and fulfilling the promises made under the measures, meant that it was never an option to stop.

6 The Minister for Human Services

Alan Tudge commenced as the Minister for Human Services on 18 February 2016. By that point in time, the SIWP and EWPI measures were in place.

The importance of these measures to Mr Tudge's portfolio was emphasised early in his tenure as minister, both by DHS and his ministerial colleagues.

Mr Tudge was briefed by DHS on a number of aspects of his portfolio, including an overview of the administration of payments, compliance activities and debts.[180] In the context of Mr Tudge's understanding that the government was striving for a balanced Budget,[181] that briefing served to emphasise that the measures underlying the Scheme were significant in that "almost all" of the savings in his portfolio resulted from the SIWP measure.[182]

Soon after his appointment as minister, Mr Tudge was asked by the Minister for Finance, Mathias Cormann, if there were further opportunities for savings measures in the area of welfare compliance.[183] DHS developed a ministerial briefing,[184] and subsequent NPPs,[185] which Mr Tudge understood "buil[t] on existing measures,"[186] and he informed Mr Cormann about those possible further measures.[187] The proposed measures were designed to return "significant additional savings to government," and included a proposed extension to the Employment Income Matching (PAYG) element of the SIWP measure.[188]

Consistent with this early emphasis on the importance of savings, Mr Tudge demonstrated a desire to monitor the progress of the announced measures, and to promote the government's agenda through public announcements of the achievement of "milestones" under those measures.[189]

Media articles, and a media release by Mr Tudge, in early 2016 touted the government's success in its efforts to "crack down" in the context of a "war on welfare rorting," which had resulted in savings recovered ahead of schedule.[190]

On 2 March 2016, Mr Tudge, along with the Minister for Social Services, Christian Porter, issued a joint media release signalling the government's intention to introduce a Budget Savings (Omnibus) Bill, in order to "ensure people pay back their welfare debts if they have received payments they are not entitled to."[191] Mr Porter was quoted in the media release as saying that, under the Bill, "the government will impose an interest charge on debts, remove the six year limit on debt recovery and prevent social security debtors from leaving the country."

On 10 March 2016, Mr Tudge's acting advisor communicated an "urgent" request to DHS, from the minister, about the savings figures from the SIWP measure.[192] He stated:

> [the] Minister is keen to announce that SIWP has achieved the first year savings expectations already. He wants to announce on the day the amount is reached…

On 18 March 2016, Mr Tudge's advisor requested a meeting with departmental officers to discuss debt and compliance.[193] The request described setting up an ongoing reporting system on the debt and compliance measures, and "how they were tracking." It suggested the creation of a document which would allow the department and the minister's office to "track and report on progress against all measures, ensuring both accountability and milestones are achieved. It would also provide the MO with easy access to a single data source to enable public announcements to be made when appropriate."

On 28 April 2016, DHS provided information to staff in Mr Tudge's office, in response to a request for a "forecast of significant business or service delivery events from May 2016 to July 2016."[194] The briefing stated:

> From 1 July 2016, the Online Compliance Intervention (OCI) will be implemented, which will significantly increase the volume of compliance activity undertaken by the Department and will return significant savings to government.[195]

7 General approach to media

In an approach that was entirely consistent with the policy direction and messaging of recent years in the social security portfolio, Mr Tudge adopted an approach to media that focused on "cracking down" on non-compliance by income support recipients.

On 3 March 2016, an article was published in the Herald Sun, entitled "Cheats cop whack."[196] The article described overpayments "identified in a government crackdown," and stated that the government had "declared war on welfare rorting after identifying $1.9 billion in fraud and overpayments." Mr Tudge was quoted as saying that "the government had originally budgeted to claw back $329 million by July, but the program had been so successful they would hit that target next week."

On 11 March 2016, Mr Tudge issued a media release entitled "Welfare compliance measures ahead of schedule."[197] The media release described the Government's "crack down" on welfare fraud and overpayments, and outlined the achievement of savings under the 2015-16 Budget measures, ahead of the previously planned timeframes. Similar language was picked up in an article published in The Weekend Australian the next day.[198]

The NPPs that had been developed by the department, and provided to the minister, formed the basis of part of the Coalition's election commitments announced in June 2016.[199] On 29 June 2016, the Daily Telegraph published an article entitled "$1B better off after curb on cheats," which reported that planned welfare and compliance measures would result in savings of approximately $2 billion over forward estimates.[200]

Following the announcement of the Federal Election in 2016, the Coalition released its policy for "Better Management of the Social Welfare System."[201] One of the key commitments described in that policy was the further strengthening of the integrity of Australia's social welfare system by, relevantly, "enhancing the integrity and compliance of social welfare payments through improved employment income and non-employment income data-matching." The policy indicated that the proposed improved employment income measures, in combination with other welfare integrity measures, would "increase the amount of fraud and quantum of overpayments detected and ensure social welfare payments are targeted at the people who need them most." It contained the assurance:

> No one who genuinely needs social welfare support and who is honestly disclosing their employment income and non-employment income will be worse-off under our commitment.

That sentiment was later echoed by Mr Tudge, who was quoted in the Weekend Australian as saying "A small number deliberately cheat the system and take more than they are entitled to…these measures will not adversely affect any welfare recipients who are honestly complying with their…requirements."[202]

8 No turning back

In December 2016, the NPPs that had been developed earlier in the year, and had formed the basis of part of the Coalition's election commitments, were approved by the government and announced in the 2016-17 MYEFO under the *Better Management of the Social Welfare System* measure.[203]

By the end of 2016, the importance of the measures underpinning the Scheme to the government was firmly established. The savings made a significant contribution to the Coalition's plan for a balanced Budget. Welfare compliance was a popular policy, and formed part of the platform upon which the government had been re-elected. There had been repeated public emphasis, largely through the media, on the connection between the government's commitments in respect of savings and management of the Budget and the integrity of the welfare system. By the end of the year, the government's efforts to fulfil those commitments had been publicly and explicitly connected to specific measures underpinning the Scheme.

Mr Tudge knew about the importance of the measures in the context of each of those factors.[204] He had been appointed as minister when the SIWP and EWPI measures were already in place, and was conscious of what he felt was an obligation to implement decisions that had already made by Cabinet with respect to his portfolio.[205] He had proposed further measures to ministerial colleagues, which were relied upon by the government in its election platform, and were ultimately approved by Cabinet. He had relied upon the purported "success" of the measures to publicly promote the government's achievement of "milestones" under the measures. He was aware that a failure to follow through on the measures, particularly those parts that had underpinned the government's recent election commitments, would open up potential criticism of the government.[206]

Staff of DHS were also acutely aware of the importance of the measures. Throughout 2016, the intense pressure applied by senior management had resulted in reports to the minister of the resounding success of the measures, through the achievement of unprecedented numbers of compliance reviews and subsequent savings success. The staff concerns and system problems that had arisen throughout the period prior to December 2016 formed no part of the briefings to the minister, which instead provided information to support his public promotion of the success of the measures.

By December 2016, the effect of the position adopted by both Mr Tudge and his department was that the continued effective implementation of the measures was crucial in order to maintain the foundation for the public narrative of success. Any serious problems with the Scheme would now inevitably be an embarrassing backdown and would attract censure and criticism on a departmental and ministerial level.

9 Conflating and inflating fraud

On 16 July 2016, shortly after the announcement of the Federal Election and the release of the Coalition's social welfare policy platform, Mr Tudge was quoted in the Weekend Australian as saying "A small number deliberately cheat the system and take more than they are entitled to…these measures will not adversely affect any welfare recipients who are honestly complying with their…requirements."[207]

In November 2016, the minister's office requested an update on the achievement of savings under the SIWP and EWPI measures, including the question "When will the department achieve $500 million in gross fiscal savings?"[208]

On 23 November 2016, Mr Tudge issued a media release entitled "New technology helps raise $4.5 million in welfare debts a day."[209] The media release described the OCI system, which the minister asserted was "making a major contribution to the government's fraud and non-compliance savings goals." With respect to the new system, he stated:

> This is a great example of the Government using technology to strengthen our compliance activities with faster and more effective review systems.

The media release was closely followed, on 5 December 2016, by an article in The Australian newspaper about the OCI, entitled "Welfare debt squad hunts for $4bn." Mr Tudge was reported as saying:

> Our aim is to ensure that people get what they are entitled to – no more and no less. And to crack down hard when people deliberately defraud the system.

On the same day, 5 December 2016, Mr Tudge was interviewed on radio station 2GB by Chris Smith.[210] Mr Smith observed that, from the media coverage he had seen, he had not been able to get an understanding of what percentage of overpayments were a result of deliberate fraud. Mr Tudge replied that "It's very hard to assess."

However, it did not appear that it was too difficult to assess, particularly if the question had been asked. The very next day, on 6 December 2016, Mr Tudge's advisor was provided with a copy of a brief to the Minister for Social Services, Mr Porter, which contained data that was current as at 30 June 2016.[211] The brief contained detailed information about social security debt, sourced from Mr Tudge's own department's systems. That information revealed that fraud accounted for 0.1 per cent of the debt raised in the 2015-16 financial year, and just 1.2 per cent of the outstanding debt base as at 30 June 2016. Mr Tudge's advisor indicated to departmental officers that he was going to show the brief to Mr Tudge "over the next day or so."

Mr Tudge did not have a specific recollection of the brief.[212] However, in circumstances where the brief was copied to Mr Tudge "for his information," the data was sourced from his own department, and where his advisor had indicated that he was going to show Mr Tudge the brief "over the next day or so," it can be inferred that Mr Tudge had knowledge of the contents of that brief.

On the same date, Mr Tudge appeared on TV's A Current Affair in a segment on welfare debt, dealing with some of the measures that had been implemented by the department, including the "new automated system" and the "welfare debt recovery squad." The segment opened with Mr Tudge stating:

> We will find you, we will track you down, and you will have to repay those debts, and you may end up in prison.

The comment drew immediate criticism, including from the Chief Executive Officer or the Australian Council of Social Service (ACOSS), Dr Cassandra Goldie AO, who described the comment as "appalling," "false" and "highly irresponsible."[213]

Mr Tudge's evidence before the Commission was that he made the statement in response to a question by the interviewer about his message for persons who intentionally defraud the Commonwealth,[214] and that the program did not show the question that had been put to him to elicit that response.[215]

The Commission accepts that this was what occurred. However, the circumstances in which Mr Tudge's comment was made, and publicly portrayed, were symptomatic of the larger issues with the public rhetoric with respect to the welfare system, and welfare recipients, and the associated media reporting.

It was well known that there was often conflation of the concepts of welfare fraud and inadvertent overpayment in the media. At the very least, there was a tendency not to make an explicit distinction between the two. The Commission heard evidence including from ACOSS,[216] a departmental media manager,[217] and Mr Tudge himself[218] that this conflation occurred. In Dr Goldie's experience, many people who were dealing with the department did not know the difference between welfare fraud and overpayments, and were confused about whether or not they were being accused of something criminal.[219] A failure to clearly distinguish between the two concepts in public messaging served to fuel that confusion.[220]

Both DHS and Mr Tudge were aware that sufficient clarity of communication was required to draw the distinction between the concepts, and to overcome the conflation that commonly occurred.[221]

Regardless of Mr Tudge's intention with respect to his messaging,[222] the segment on A Current Affair did not make the distinction between fraud and inadvertent overpayment with any degree of clarity, and the story had conflated the two concepts. So much so was accepted by Mr Tudge.[223]

Over a month later, on 11 January 2017, Mr Tudge took part in an interview on the ABC's Radio National in which he explained that his comment on A Current Affair was specifically directed towards circumstances of fraud, and not inadvertent overpayment.[224]

Mr Tudge did not issue a media statement to clarify the distinction between fraud and inadvertent overpayment because it was not his practice to do so,[225] and he did not think a press release would have the same impact as doing a segment on A Current Affair.[226] He acknowledged that he "could have gone further" in media interviews to clarify that fraud represented a very small part of welfare compliance.

Mr Tudge knew that conflation of fraud and inadvertent overpayment occurred, most specifically from his experience with respect to the segment on A Current Affair. He knew that fraud represented a very small proportion of welfare compliance. Despite this, he took no action to issue a media release to clarify and emphasise the distinction between fraud and inadvertent overpayment, and he did nothing to draw attention to the fact that fraud represented a very small part of welfare compliance.

This was the media environment which existed when criticisms of the Scheme began to emerge and develop in late 2016 and into 2017. It was during this time that Mr Tudge and his office implemented a media strategy as detailed further below.

10 Increasing concern and criticism

Throughout December 2016, public expressions of discontent with the OCI system began to gather momentum.

A media release by independent MP Andrew Wilkie criticised Centrelink's new IT system[228] for "spitting out numerous incorrect debt notices," some of which dated "back as far as 2010," and that people were "given three weeks to provide documentation to Centrelink to prove they were not overpaid."[229]

This resulted in a request from the minister's office for information about the circumstances of the recipients who had liaised with Mr Wilkie.[230] The departmental briefing in response indicated that of the four people who had contacted Mr Wilkie, three involved debts resulting from a review under the OCI system. No definitive conclusions could reliably be drawn from a sample of cases that was limited in number, and represented people who had been dissatisfied enough to complain to Mr Wilkie. However, the briefing was, at least, unlikely to inspire confidence in the OCI system. With respect to the three cases:

- DHS determined that the first required further information, and arrangements had been made for a re-assessment at a later date
- The debt in the second case was unchanged after a manual assessment; however, during that process the recipient had advised they were computer illiterate, and that their employer was no longer available to obtain the details required
- Following contact with the third person, the department conducted a re-assessment, and reduced the debt from $6464.94 to $426.88. The debt was then waived entirely.

The briefing also indicated that a validation exercise undertaken by DHS during the design of the measure had demonstrated that there was a 13 per cent positive or negative variance between debts calculated manually, and debts calculated using income averaging.[231] The variance occurred as a result of "a range of things including the weekly variability of customer earnings, and the correctness of start and end dates for employment."

On 13 December 2016, DHS received a request from a journalist from The Guardian newspaper, asking "is the department aware of any issues that are causing the automated compliance system to issue higher rates of incorrect debt notices?"[232]

By this point in time, Ms Golightly was aware that there had been issues with the system, including with respect to incorrect debt amounts advised to recipients.[233] Despite this, Ms Golightly approved a response to the journalist, which was also provided to and cleared by the minister, which stated "The department is confident the online compliance system, and associated checking process with customers, is producing correct debt notices."[234]

At the time of providing that clearance, the minister was not advised of the system issues of which Ms Golightly was aware, or indeed any issues with the online compliance system.

On 20 December 2016, the Commonwealth Ombudsman's office contacted DHS to request information about the OCI system.[235] The Ombudsman's office advised that it had been receiving a large number of calls from people concerned about the calculation of debts through the OCI platform, and the use of averaging had been particularly mentioned. There had also been complaints about a lack of telephone assistance from DHS, and recipients being advised that DHS officers were unable to assist them because certain actions could only be done via the online compliance platform.

The following day, on 21 December 2016, Ms Golightly sent an email to Ms Harfield and Craig Storen, which forwarded a newspaper article entitled "Ombudsman asked to investigate if Centrelink wrongly pursuing welfare debts."[236] Ms Golightly asked whether the department had had any contact from the Ombudsman. She indicated that "In any case, we should contact them ASAP…to get on the front foot with this. We just need to make sure what the process is and all the safeguards we have in place." It is unclear what "safeguards" would be necessary with respect to any potential communications with the Ombudsman's office.

On 21 December 2016, Dr Cassandra Goldie AO, CEO of ACOSS, wrote to Mr Tudge about the department's debt recovery under the OCI system.[237] Dr Goldie outlined a number of concerns that were consistent throughout the experiences of people who had raised issues with ACOSS. These included:

1. **Automated data matching leading to inaccurate assessments of overpayments**

   Reports are consistent that the system is detecting a debt by averaging out annual income over 26 fortnights and then correlating that to receipt of income support. As you are aware, people (generally) must report income fortnightly rather than annually. However, people appear to be receiving debt notices on the basis of their annual income as opposed to the fortnightly income they earned whilst receiving income support. The system therefore generates a false notice of overpayment. This is a serious problem that would likely be producing large numbers of inaccurate notices, wasting recipients and the Department's time and resources as well as causing much unnecessary stress and anxiety amongst recipients.

2. **Routine imposition of 10 per cent recovery fee**

   We are gravely concerned about the 10 per cent recovery fee that is being applied. The decision to apply a 10 per cent recovery fee must be separate from the decision to raise a debt and must be considered using discretion. It may be applied where a person refuses to provide information, knowingly or recklessly provides false information or fails without a reasonable excuse to provide information. Where contact cannot be made with a person, a recovery fee charge should not be applied because it cannot be verified that they have received information about a debt from Centrelink (and therefore they are unable to provide a reasonable excuse).

3. **Length of time since the debt was incurred**

   Currently, the Department may seek to retrieve a debt from up to six years ago. As of 1 January 2017, there will be no limitation period (due to a legislative amendment passed in the Omnibus Bill 2016). For people to contest a debt, they are having to find old records of income or approach their former employer to get old payslips. This will be even more difficult if debts are sought from beyond six years ago. ACOSS calls for a time limit to be imposed for the collection of debts.

Dr Goldie also raised further issues in the letter. She noted that there had been consistent complaints that people had not been able to use the online system, either due to technical problems with the system or because they did not have access to the internet. The letter sent by DHS only offered online contact details, and did not provide a telephone number; this was, Dr Goldie pointed out, "inappropriate considering the importance of these letters and the requirement for people to engage with Centrelink within 21 days."

Dr Goldie stated that she had reliable information that Centrelink offices were refusing to assist recipients with the process, and were instead directing them to go online.

With respect to debt collection, Dr Goldie noted that communication of a debt was occurring by mail, and that this was insufficient in circumstances where people had moved. She suggested that Centrelink should call people who had not responded to other means of communication. The scale and timing of the debt recovery process was "alarming," particularly given the reduced capacity of people to engage with Centrelink at that time of year, due to factors including the limited seasonal operation of welfare rights centres, former employers and Centrelink itself.

Dr Goldie referred to the "consistent and alarming level of distress and concern this process is creating," and urged the minister to take a number of actions including suspension of correspondence pending rectification of the system issues, waiver of the recovery fee in all cases, and suspending automated processes for reviews that had already been commenced pending personal contact by the department with recipients. She requested the convening of a "roundtable" with stakeholders in early 2017 to bring together key groups representing the interests of income support recipients and to work with the minister and the department to address the issues with the process.

On the same date, 21 December 2016, Senator Nick Xenophon wrote to Mr Tudge about Centrelink's automated compliance system.[238] Mr Xenophon raised similar issues to some of those outlined in Dr Goldie's correspondence, including incorrect debt amounts, recipients being required to prove a debt is incorrect and recipients being requested to find records up to six years old.

On 23 December 2016, The Guardian newspaper published an article "Centrelink officer says only a fraction of debts in welfare crackdown are genuine."[239] The article reported that a Centrelink compliance officer had described the OCI system as "grossly unfair" and "error-prone."

On 28 December 2016, the Shadow Minister for Human Services, Linda Burney, wrote to Mr Tudge about Centrelink's correspondence to customers about alleged overpayments.[240] Ms Burney sought clarification on various parts of the process, and asked that debt recovery action be paused while the issues were investigated.

On 30 December 2016, Terese Edwards (CEO, National Council of Single Mothers) wrote to Mr Tudge about Centrelink's debt letters. Her organisation had been "overwhelmed" by women seeking guidance following the receipt of a letter claiming that they had a debt or overpayment. She noted that the letters did not contain an explanation of how the debt was calculated, and that the system did not appear to be capable of identifying circumstances where an employer and a trading name were the same business. She urged the minister to take a number of actions, including immediately ceasing the letters and undertaking a manual review of those that had been sent to determine if they were correct.

By December 2016, the OCI system had become the subject of increasing public criticism and complaint.[241] Criticisms of the OCI system, particularly in the media, continued into the new year.[242]

1 Exhibit 9887 - CTH.3002.0007.6024_R - RE: PAYG [DLM=For-Official-Use-Only].
2 Exhibit 9887 - CTH.3002.0007.6024_R - RE: PAYG [DLM=For-Official-Use-Only].
3 Exhibit 4-5584;Exhibit 2-2275 - CTH.3027.0004.9345_R - Legal Advice - Proposed digital intervention process [DLM=Sensitive-Legal].
4 Exhibit 4-6449 - CTH.3027.0001.5679_R - RE- Legal Advice - Proposed digital intervention process [DLM=Sensitive-Legal]; Exhibit 4-5590; Exhibit 2-2277 - CTH.3027.0046.5345_R - 18594 JB SH.
5 Transcript, John Barnett, 10 March 2023 [P-4933: line 42-46].
6 Transcript, John Barnett, 10 March 2023 [P-4933: line 42-46].
7 Exhibit 4-6451 - CTH.3091.0027.0589_R - PAYG Pilot Stakeholder Meeting_Minutes 14042015 v0 1.
8 Exhibit 4-6326 - CTH.3715.0001.0401 - Online Compliance Interventions Meeting Minutes 20042015.
9 Exhibit 4-6323 - EKM.9999.0001.0008_R - EMC.000262238; Exhibit 4-6324 - EKM.9999.0001.0007 - EMC.000163237; Exhibit 4-6326 - CTH.3715.0001.0401 - Online Compliance Interventions Meeting Minutes 20042015; Exhibit 4-6327 - CTH.3002.0008.0165_R - Online Compliance Intervention Meeting Draft Minutes-Action Items 20 Apr 2015 [DLM=For-Official-Use-Only]; Exhibit 4-6328 - CTH.3002.0008.0166 - Online Compliance Interventions Action Item Register 20042015; Exhibit 4-6329 - CTH.3715.0001.0636_R - PAYG Pilot Stakeholder Meeting_Minutes 21042015 v0 1; Exhibit 4-6330 - CTH.3023.0004.8451_R - PAYG Online Compliance Intervention Detailed Requirements Document - Signed.
10 Exhibit 4-5577 - CTH.3023.0021.7097_R - FW- Proposed PAYG process [DLM=For-Official-Use-Only]; Exhibit 4-6334 - CTH.3023.0004.6562_R - FW- Online Compliance- PAYG matching [DLM=For-Official-Use-Only]; Exhibit 4-6331 - CTH.3027.0004.9343_R - RE- Proposed PAYG process [DLM=For-Official-Use-Only]; Exhibit 4-6322 - CTH.3715.0001.4283_R - FW- Proposed PAYG process [DLM=For-Official-Use-Only]; Exhibit 4-6376 - CTH.3023.0021.7101_R - FW- Proposed PAYG process [DLM=For-Official-Use-Only].
11 Exhibit 4-6322 - CTH.3715.0001.4283_R - FW- Proposed PAYG process [DLM=For-Official-Use-Only]; Exhibit 4-6331 - CTH.3027.0004.9343_R - RE- Proposed PAYG process [DLM=For-Official-Use-Only].
12 Exhibit 1-1204 - CTH.2000.0002.3645_R - Final Report - Pilot v0 2; Exhibit 4-5654 - CTH.3023.0002.0503 - GM feedback.
13 Exhibit 1-1204 - CTH.2000.0002.3645_R - Final Report - Pilot v0 2.
14 Exhibit 4-6461 - CTH.3027.0001.9662_R - Final Report - Pilot v0.2 [p 4-5].
15 Exhibit 1-1186 - CTH.3000.0005.2193_R - RE- PAYG Pilot Plan [DLM=For-Official-Use-Only]; Transcript, Jason Ryman, 8 November 2022 [p 743-744]; Exhibit 1-1188 - CTH.3000.0006.3124 - PAYG Pilot - Combined Report 12 June 2015 v0 3.
16 Exhibit 1-1186 - CTH.3000.0005.2193_R - RE- PAYG Pilot Plan [DLM=For-Official-Use-Only]; Transcript, Jason Ryman, 8 November 2022 [p 743-744]; Exhibit 1-1188 - CTH.3000.0006.3124 - PAYG Pilot - Combined Report 12 June 2015 v0 3.
17 Exhibit 4-5622 - CTH.3030.0010.1327 - PAYG High Level Assumptions V1 0; Transcript, Jason Ryman, 22 February 2023 [p 3559 - 3698].
18 Exhibit 4-5654 - CTH.3023.0002.0503 - GM feedback.
19 Exhibit 4-5653 - CTH.3023.0002.0501_R - Urgent - Secretary Brief - PAYG Brief [DLM=For-Official-Use-Only].
20 Exhibit 4-5653 - CTH.3023.0002.0501_R - Urgent - Secretary Brief - PAYG Brief [DLM=For-Official-Use-Only]; Exhibit 4-5654 - CTH.3023.0002.0503 - GM feedback; Exhibit 4-5656 - CTH.3023.0002.0509 - Secretary Brief - PAYG Pilot v0 7; Transcript, Scott Britton, 23 February 2023 [p 3726].
21 Exhibit 4-5653 - CTH.3023.0002.0501_R - Urgent - Secretary Brief - PAYG Brief [DLM=For-Official-Use-Only].
22 Exhibit 4-5658 - CTH.3023.0002.8902_R - FW- Checked with BI briefs 29-7 - still with GM - (MA) - Urgent - Secretary Brief - PAYG Brief [DLM=For-Official-Use-Only].
23 Exhibit 4-5658 - CTH.3023.0002.8902_R - FW- Checked with BI briefs 29-7 - still with GM - (MA) - Urgent - Secretary Brief - PAYG Brief [DLM=For-Official-Use-Only].
24 Which Mr Ryman had earlier adopted in any event in his email to Mr Lange on 6 May 2015.
25 Transcript, Jason Ryman, 8 November 2022 [p 742-743]; Transcript, Scott Britton, 8 November 2022 [p 693: lines 32-40].
26 Exhibit 4-5657 - CTH.3023.0002.0512 - Attachment A - PAYG Intervention Letter.
27 Exhibit 1-1104 - CTH.3001.0022.2183 - 1. OCI_Customer Contact Letter_FINAL v0 1 [p 747].
28 Transcript, Jason Ryman, 8 November 2022 [p 748: lines 1-25].
29 Transcript, Scott Britton, 23 February 2023 [p 3727].
30 Transcript, Scott Britton, 23 February 2023 [p 3698: lines 42-46; p 3728: lines 35-39].
31 Transcript, Scott Britton, 23 February 2023 [p 3724: lines 6-8]; Transcript, Scott Britton, 8 November 2022 [p 681: lines 31-33].
32 Transcript, Scott Britton, 23 February 2023 [p 3728-3729].
33 Exhibit 1-0843 - CTH.9999.0001.0033_R - [Consolidated] NTG-0001 [Clean], [p 54].
34 Exhibit 9887 - CTH.3002.0007.6024_R, RE: PAYG [DLM=For-Official-Use-Only].

35 Exhibit 4-6558 - CTH.3000.0004.6867_R - RE- PAYG Info [DLM=Sensitive]; Exhibit 8992 - CTH.3000.0028.4730_R - RE- Additional context re NEIDM and EIM [DLM=For-Official-Use-Only].
36 Exhibit 2-2022 - PMC.001.0002.017_R - PMC-001-0002-017_Redacted.
37 Exhibit 4-7089 - CTH.3002.0009.4465 - PAYG CT Manual Compliance Intervention v03, p 12-13 [p 12-13].
38 For example, if a recipient provided an update to a match period, the PAYG income data would still be apportioned evenly across the period advised by the recipient. See: Exhibit 4-7089 - CTH.3002.0009.4465 - PAYG CT Manual Compliance Intervention v03 [p 14-16].
39 Exhibit 4-7089 - CTH.3002.0009.4465 - PAYG CT Manual Compliance Intervention v03 [p 17-18].
40 Exhibit 4-7089 - CTH.3002.0009.4465 - PAYG CT Manual Compliance Intervention v03 [p 19-20].
41 Exhibit 4-7089 - CTH.3002.0009.4465 - PAYG CT Manual Compliance Intervention v03 [p 21].
42 Exhibit 9367 - CTH.9999.0001.0148_R, [Final] Services Australia - Response to NTG-0146.pdf [para 2.7].
43 Such limitations can be found in the various iterations of DHS's operational blueprint entitled "Acceptable documents for verifying income when investigating debts."
44 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement - Signed, [para 22]; Transcript, Colleen Taylor, 13 December 2022 [p 1730: lines 4-38].
45 See Chapter 1 - Legal and Historical Context.
46 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement - Signed [para 5 - 11].
47 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement - Signed [para 12].
48 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement - Signed [para 14].
49 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement - Signed [paras 24 - 25].
50 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement - Signed [paras 25-26]; Transcript, Colleen Taylor, 13 December 2022 [p 1731: line 41 – p 1732: line 2].
51 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement - Signed [para 28]; Transcript, Colleen Taylor, 13 December 2022[p 1731: line 41 – p 1732: line 2; p 1735: lines 22-36].
52 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement – Signed [para 30, 33]; Transcript, Colleen Taylor, 13 December 2022 [p 1727: line 28 – p 1729: line 45].
53 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement - Signed [para 31].
54 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement - Signed [para 31].
55 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement - Signed [para 32].
56 Exhibit 2-2529 - CTH.3001.0035.3159_R - In-Confidence emails from Jan 2016 re concerns.
57 Transcript, Colleen Taylor, 13 December 2022 [p 1738: lines 27-37].
58 Exhibit 2-2529 - CTH.3001.0035.3159_R - In-Confidence emails from Jan 2016 re concerns.
59 Exhibit 2-2529 - CTH.3001.0035.3159_R - In-Confidence emails from Jan 2016 re concerns.
60 Exhibit 2-2529 - CTH.3001.0035.3159_R - In-Confidence emails from Jan 2016 re concerns.
61 For the duration of the Manual Program, just under 105,000 compliance interventions were commenced over the 12 months from 1 July 2015 to 30 June 2016. In the first six months of the operation of the OCI, from July 2016 to December 2016, just over 226,000 compliance interventions were commenced, most of which occurred in the months October to December inclusive (see: Exhibit 9367 - CTH.9999.0001.0148 - [Final] Services Australia - Response to NTG-0146.pdf [para 2.7]).
62 Exhibit 2-2616 - RBD.9999.0001.0220 - MYEFO_2015-16_Final [p 210].
63 Exhibit 2-2616 - RBD.9999.0001.0220 - MYEFO_2015-16_Final [p 210].
64 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 10].
65 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 10].
66 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 34].
67 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 11].
68 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 192].
69 Transcript, Karen Harfield, 15 December 2022 [p 1891: lines 11-26].
70 Transcript, Karen Harfield, 15 December 2022 [p 1891: lines 11-26].
71 Transcript, Karen Harfield, 15 December 2022 [p 1897: lines 4-7, p 1898: lines 10-45].
72 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 69].
73 Exhibit 9927 - CTH.0030.0006.0121 - EIM - UAT v1.0 (NM and GM signed).
74 Exhibit 9927 - CTH.0030.0006.0121 - EIM - UAT v1.0 (NM and GM signed).
75 Exhibit 2-2730 - CTH.3023.0004.6161_R - FW- DMR - 67972 - EIM - Independent System Integration Testing

(SIT) - Final Sign-Off Report -- Release Recommendation = Negative [SEC=UNOFFICIAL]; Exhibit 2-2731 - CTH.3023.0004.6162_R - Test Summary Report EIM - DMR 67972 - System Integration Testing.

76 Exhibit 2-2731 - CTH.3023.0004.6162_R - Test Summary Report EIM - DMR 67972 - System Integration Testing [p 2, p 4].

77 Exhibit 2-2731 - CTH.3023.0004.6162_R - Test Summary Report EIM - DMR 67972 - System Integration Testing.

78 Exhibit 2-2731 - CTH.3023.0004.6162_R - Test Summary Report EIM - DMR 67972 - System Integration Testing.

79 Exhibit 2-2732 - CTH.3023.0019.8459_R - FW- EIM SIT conditional sign off [DLM=For-Official-Use-Only].

80 Employment Income Matching.

81 Exhibit 2-2732 - CTH.3023.0019.8459_R - FW- EIM SIT conditional sign off [DLM=For-Official-Use-Only].

82 Exhibit 2-2734 - CTH.3023.0019.8741_R - RE- EIM SIT conditional sign off [DLM=For-Official-Use-Only]; Exhibit 9930 - CTH.3023.0004.6233 - Test Summary Report SIWP_EIM 11 June 2016 Release_v1.0.docx.

83 Exhibit 2-2734 - CTH.3023.0019.8741_R - RE- EIM SIT conditional sign off [DLM=For-Official-Use-Only]; Exhibit 9930 - CTH.3023.0004.6233 - Test Summary Report SIWP_EIM 11 June 2016 Release_v1.0.docx.

84 Exhibit 2-2734 - CTH.3023.0019.8741_R - RE- EIM SIT conditional sign off [DLM=For-Official-Use-Only].

85 Exhibit 2-2734 - CTH.3023.0019.8741_R - RE- EIM SIT conditional sign off [DLM=For-Official-Use-Only].

86 Presumably, in this context, an abbreviation for “Project Manager.”

87 Acting General Manager.

88 Exhibit 9943 - CTH.3072.0012.4980 - PN2015 5075 EIM PAYG July 2016 v0.7.xlsm.

89 Exhibit 9965 - CTH.2002.0002.1995 - SIWP ICT Program Board Meeting - Friday 15th July 2016 [DLM=For-Official-Use-Only]; Exhibit 9966 - CTH.2002.0002.2019 - 05 ICT Programme Update 20160715.docx

90 Exhibit 9927 - CTH.0030.0006.0121 - EIM - UAT v1.0 (NM and GM signed).

91 Exhibit 9927 - CTH.0030.0006.0121 - EIM - UAT v1.0 (NM and GM signed).

92 Exhibit 9927 - CTH.0030.0006.0121 - EIM - UAT v1.0 (NM and GM signed).

93 Exhibit 2-1318 - CTH.1000.0007.0113 - Online Compliance System - ICT Chronology (002); Exhibit 9949 - CTH.3715.0002.0064 - FW: UAT testers [DLM=For-Official-Use-Only].

94 Exhibit 1-1181 - CTH.3001.0032.7823_R - Re- Urgent [DLM=For-Official-Use-Only].

95 Exhibit 1-0848 - CTH.9999.0001.0013 - [FINAL] RRC - Services Australia - Response to NTG-0009 (25 October 2022) [para 25.3].

96 Exhibit 1-1181 - CTH.3001.0032.7823_R - Re- Urgent [DLM=For-Official-Use-Only].

97 Exhibit 2-2695 - CTH.3000.0016.2584_R - EIM PN2015 5075 Out of session Meeting Minutes 24062016 v1.0.

98 Exhibit 2-2695 - CTH.3000.0016.2584_R - EIM PN2015 5075 Out of session Meeting Minutes 24062016 v1.0.

99 Exhibit 2-2695 - CTH.3000.0016.2584_R - EIM PN2015 5075 Out of session Meeting Minutes 24062016 v1.0.

100 Exhibit 2-2695 - CTH.3000.0016.2584_R - EIM PN2015 5075 Out of session Meeting Minutes 24062016 v1.0.

101 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 71].

102 Exhibit 9931 - CTH.3000.0016.8394 - OCI – Our future is here.

103 Exhibit 9950 - CTH.3715.0002.7111 - PN2015 5075 EIM PAYG October 2016 v0 8 GM cleared.xlsm.

104 Exhibit 4-6581 - CTH.3502.0001.0718 - Attachment D - BVT Plan Version 10.

105 Exhibit 1-0848 - CTH.9999.0001.0013 - [FINAL] RRC - Services Australia - Response to NTG-0009 (25 October 2022) [para 23.10]; Exhibit 4-6581 - CTH.3502.0001.0718 - Attachment D - BVT Plan Version 10 [p 8].

106 Exhibit 1-0848 - CTH.9999.0001.0013 - [FINAL] RRC - Services Australia - Response to NTG-0009 (25 October 2022) [para 23.11]; Exhibit 4-6581 - CTH.3502.0001.0718 - Attachment D - BVT Plan Version 10 [p .0728-.0729].

107 Some documents before the Commission refer to BVT being “renamed” to SIP (see, for example, Exhibit 9950 - CTH.3715.0002.7111 - PN2015 5075 EIM PAYG October 2016 v0 8 GM cleared.xlsm. Others describe this as an “expan[sion] in scope” and a “transition” (see Exhibit 1-0848 - CTH.9999.0001.0013 - [FINAL] RRC - Services Australia - Response to NTG-0009 (25 October 2022), para 23.15). There is reference in one draft brief to “the second phase of SIP,” which commenced on 19 September 2016 and in which 2,500 further reviews were initiated (see: Exhibit 4-6468 - CTH.3024.0006.5611 - OCI Brief for DEP Sec OCI SIP_V0 17).

108 Exhibit 9951 - CTH.3715.0002.4220 - Post SIP EIM OCI Implementation Plan v0.6.docx [p 3].

109 Exhibit 9952 - CTH.3023.0006.1593 - FW: Delivery Plan for Online Compliance Interventions – Removal of System Switch: Signed Brief [DLM=For-Official-Use-Only]; Exhibit 9953 - CTH.3023.0006.1594 - 06102016150317-0001.pdf.

110 Exhibit 9944 - CTH.3091.0060.6735 - Employment Income Matching Project BVT Plan.pdf; Exhibit 1-0902 - CTH.3715.0002.3697_R - 110816 SIP Reporting Dashboard + Issues + Reference Guide.pdf.

111 Exhibit 9932 - CTH.2002.0002.6730 - FW: BVT - Testing Outcomes 01/08 + Weekly Report - Week 2 [DLM=For-Official-Use-Only]; Exhibit 9933 - CTH.2002.0002.6731 - Week 2 – BVT Reporting Dashboard.pdf; Exhibit 9934 - CTH.2002.0002.8244 - FW: BVT – Testing Outcomes 05/08 + Week 3 Report [DLM=Sensitive]; Exhibit 9935 - CTH.2002.0002.8245 - Week 3 BVT Reporting Dashboard.pdf; Exhibit 9945 - CTH.3018.0019.4582 - SIP Weekly Report Package - Week 6 [DLM=Sensitive]; Exhibit 9946 - CTH.3018.0019.4583 - Week 4 -

SIP Reporting Dashboard.pdf; Exhibit 1-0895 - CTH.3715.0002.4133 - Week 5 - SIP Reporting Dashboard; Exhibit 9947 - CTH.3018.0020.1284 - SIP Weekly Report Package – Week 6 [DLM=Sensitive]; Exhibit 9948 - CTH.3018.0020.1288 - Week 6 – SIP Reporting Dashboard.pdf; Exhibit 9936 - CTH.3000.0019.0356 - SIP Weekly Report Package – Week 7 [DLM=Sensitive]; Exhibit 9937 - CTH.3000.0019.0368 - Week 7 – SIP Reporting Dashboard.pdf; Exhibit 9938 - CTH.2002.0003.3359 - FW: SIP Weekly Report Package - Week 8 [DLM=Sensitive]; Exhibit 9954 - CTH.3018.0021.3043 - SIP Weekly Report Package - Week 10 [DLM-Sensitive]; Exhibit 9955 - CTH.3018.0021.3051 - 230916 SIP1 Reporting Dashboard + Issues.pdf.

112 Exhibit 1-0856 - CTH.3715.0002.6783_R - 290916 SIP Reporting Dashboard + Issues.

113 Exhibit 1-0856 - CTH.3715.0002.6783_R - 290916 SIP Reporting Dashboard + Issues.

114 Exhibit 1-0856 - CTH.3715.0002.6783_R - 290916 SIP Reporting Dashboard + Issues.

115 Exhibit 4-8342 - RBD.9999.0001.0505 - Professor Peter Whiteford – Report to the Robodebt Royal Commission [paras 6.24-6.31].

116 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 75].

117 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 186].

118 Exhibit 1-1175 - SBR.9999.0001.0002_R - NTG - 0038 Response Statement (executed) [para 90].

119 Exhibit 1-1175 - SBR.9999.0001.0002_R - NTG - 0038 Response Statement (executed) [para 90].

120 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 75].

121 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 76].

122 Exhibit 1-1176 - CTH.3001.0025.8402_R - ICT Fixes supporting the Online Compliance Intervention Platform [DLM=For-Official-Use-Only.

123 Exhibit 1-1177 - CTH.3001.0026.0028_R - RE- ICT Fixes supporting the Online Compliance Intervention Platform [DLM=For-Official-Use-Only].

124 Ongoing monitoring and assessment of the programs was conducted through Programme Status Reports, which were cleared by the deputy secretary, Ms Golightly, and provided to the Portfolio Project Office (see Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield (46617405.1) [para 66-67]). The Portfolio Project Office formed part of governance structures within DHS which generally managed and coordinated programmes and projects across DHS, including delivery of Budget measures and service transformation initiatives, and conducting status reviews to provide assurance that projects were "staying on track" (see: Department of Human Services, *2015-16 Annual Report* (Report, 22 September 2016) [p 103].

125 Exhibit 9939 - CTH.2002.0003.3060 - RE: ACTION: Request for Participation, Aged Care and Integrity Group August 2016 Status Reports and Closure Report Updates [DLM=For-Official-Use-Only]; Exhibit 9940 - CTH.2002.0003.3064 - 153266 - PN2016.6005 - MG comments.pdf.

126 Exhibit 9959 - CTH.2002.0003.3145_R - FW: URGENT – ACTION: Request for Participation, Aged Care and Integrity Group August 2016 Status Reports and Closure Report Updates [DLM=For-Official-Use-Only].

127 Exhibit 2-2696 - CTH.3023.0005.8673_R - FW- Findings resulting from analysis of remaining 7 assessment scenarios [DLM=For-Official-Use-Only].

128 Exhibit 2-2696 - CTH.3023.0005.8673_R - FW- Findings resulting from analysis of remaining 7 assessment scenarios [DLM=For-Official-Use-Only].

129 Exhibit 2-2697 - CTH.3023.0005.8679_R - FW- URGENT- ASAP For clearance please - Draft OCI Deputy Secretary brief [DLM=For-Official-Use-Only].

130 Exhibit 2-2698 - CTH.3023.0005.8683 - OCI Brief for DEP Sec OCI SIP_V0 14 (clean).

131 Transcript, Tenille Collins, 3 March 2023 [p 4333: lines 39-44].

132 Exhibit 4-6379 - TCO.9999.0001.0008_R2 - Clean PDF - Statement of T Collins NTG-0166 amended 22 February 2023, [para 118(c)]; Exhibit 4-6467 - CTH.3024.0006.5609_R - RE- Combined OCI brief [DLM=For-Official-Use-Only]; Exhibit 4-6468 - CTH.3024.0006.5611 - OCI Brief for DEP Sec OCI SIP_V0 17.

133 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 78].

134 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 77].

135 Transcript, Tenille Collins, 3 March 2023 [p 4334: lines 22-25].

136 Exhibit 1-1136 - JRY.9999.0001.0002_R - NTG-0019 - Statement of Jason Ryman 27.10.22 [paras 56 - 57].

137 Exhibit 1-1136 - JRY.9999.0001.0002_R - NTG-0019 - Statement of Jason Ryman 27.10.22 [para 57].

138 Exhibit 2-2699 - CTH.3034.0028.7077_R - Re- OCI Intervention Initiation plan [DLM=For-Official-Use-Only].

139 Exhibit 2-2699 - CTH.3034.0028.7077_R - Re- OCI Intervention Initiation plan [DLM=For-Official-Use-Only].

140 Exhibit 2-2699 - CTH.3034.0028.7077_R - Re- OCI Intervention Initiation plan [DLM=For-Official-Use-Only].

141 Transcript, Tenille Collins, 3 March 2023 [p 4333: line 46 – p 4334: line 4].
142 Transcript, Tenille Collins, 3 March 2023 [p 4333: line 46 – p 4334: line 4].
143 Transcript, Tenille Collins, 3 March 2023 [p 4334: lines 8-11].
144 Transcript, Tenille Collins, 3 March 2023 [p 4334: lines 11-18].
145 Transcript, Tenille Collins, 3 March 2023 [p 4334: lines 18-20]; Exhibit 4-6379 - TCO.9999.0001.0008_R2 - Clean PDF - Statement of T Collins NTG-0166 amended 22 February 2023 [para 118(c)].
146 Exhibit 4-6379 - TCO.9999.0001.0008_R2 - Clean PDF - Statement of T Collins NTG-0166 amended 22 February 2023, [para 118(c)]; Exhibit 4-6471 - CTH.3024.0007.4792_R - RE- ASAP 19 September 2016 Combined OCI brief [DLM=For-Official-Use-Only]; Exhibit 9968 - CTH.3024.0007.1927 - FW: ASAP 19 September 2016 Combined OCI brief [DLM=For-Official-Use-Only]; Exhibit 9969 - CTH.3024.0007.1930 - OCI Brief for DEP Sec OCI SIP_V0 19.docx.
147 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 79].
148 Exhibit 9953 - CTH.3023.0006.1594 - 06102016150317-0001.pdf.
149 These were described in the brief in the following terms: “positive adjustment prior to match period;” “arrears at the end of the debt period;” “previously verified earnings not considered when earnings apportioned;” and “work item incorrectly tagged as verify earnings GP work item.”
150 Exhibit 9952 - CTH.3023.0006.1593 - FW: Delivery Plan for Online Compliance Interventions – Removal of System Switch: Signed Brief [DLM=For-Official-Use-Only]; Exhibit 9953 - CTH.3023.0006.1594 - 06102016150317-0001.pdf.
151 Exhibit 9952 - CTH.3023.0006.1593 - FW: Delivery Plan for Online Compliance Interventions – Removal of System Switch: Signed Brief [DLM=For-Official-Use-Only]; Exhibit 9953 - CTH.3023.0006.1594 - 06102016150317-0001.pdf.
152 In fact, this issue was still the subject of debate, and legal advice, in the context of Authorised Review Officer reviews as late as August 2019 (see: Exhibit 9956 - CTH.3091.0246.8395 - RE: ARO reviews of EIM intervention debts – offsetting and date of effect provisions [DLM=Sensitive]).
153 Exhibit 9953 - CTH.3023.0006.1594 - 06102016150317-0001.pdf.
154 Exhibit 9952 - CTH.3023.0006.1593 - FW: Delivery Plan for Online Compliance Interventions – Removal of System Switch: Signed Brief [DLM=For-Official-Use-Only].
155 Exhibit 2-2700 - CTH.3024.0006.9323_R - FW- September Debt and Compliance Report [DLM=For-Official-Use-Only].
156 Exhibit 1-1180 - CTH.3001.0029.6372_R - img-Y21121325-0001.
157 Exhibit 4-5565; Exhibit 2-2297 - CTH.3001.0029.8524_R - FW- PRINTED FW- URGENT - compliance and debt report [DLM=For-Official-Use-Only].
158 Exhibit 4-5565; Exhibit 2-2297 - CTH.3001.0029.8524_R - FW- PRINTED FW- URGENT - compliance and debt report [DLM=For-Official-Use-Only]. It is unclear what Mr Britton meant by “60 per cent built into assumptions.” The significance of the figure of 60 per cent may relate to that number representing the non-response rate that was demonstrated in the initial three month Pilot.
159 Exhibit 4-5565; Exhibit 2-2297 - CTH.3001.0029.8524_R - FW- PRINTED FW- URGENT - compliance and debt report [DLM=For-Official-Use-Only].
160 Exhibit 2-2727 - CTH.2002.0006.0204_R - Escalation Template - Customers incorrectly impacted by OCI Dep Sec Clea.
161 Exhibit 2-2702 - CTH.3034.0030.3842_R - RE- URGENT Re- FOR INFORMATION- OCI issue impacting Employment Income Matching Budget measures. [DLM=For-Official-Use-Only].
162 Exhibit 9960 - CTH.3034.0031.8582 - Fwd: Escalation brief: Rejection of customer payments [DLM=Sensitive]; Exhibit 9961 - CTH.3034.0031.8583 - escalation brief 071216.docx.
163 Exhibit 9962 - CTH.3004.0002.4891 - Fwd: Escalation Brief – Employment Income Matching Service Not available [DLM=For-Official-Use-Only] [yet to be published on RRC website]; Exhibit 9963 - CTH.3004.0002.4895 - Escalation Brief – Employment Income Matching Service Not available 1.0……docx.
164 Exhibit 9967 - CTH.3034.0032.3454_R - Debt reminder lettres are not currently being issued for people who have not repaid their online compliance intervention debt.
165 Exhibit 1-1175 - SBR.9999.0001.0002_R - NTG - 0038 Response Statement (executed) [para 90].
166 Exhibit 1-1175 - SBR.9999.0001.0002_R - NTG - 0038 Response Statement (executed) [para 93].
167 Exhibit 1-1175 - SBR.9999.0001.0002_R - NTG - 0038 Response Statement (executed) [para 94].
168 Exhibit 1-1175 - SBR.9999.0001.0002_R - NTG - 0038 Response Statement (executed) [para 94].
169 Exhibit 1-1175 - SBR.9999.0001.0002_R - NTG - 0038 Response Statement (executed) [para 101].
170 Exhibit 1-1136 - JRY.9999.0001.0002_R - NTG-0019 - Statement of Jason Ryman 27.10.22 [para 62].
171 Exhibit 1-1136 - JRY.9999.0001.0002_R - NTG-0019 - Statement of Jason Ryman 27.10.22 [para 62].
172 Exhibit 1-1136 - JRY.9999.0001.0002_R - NTG-0019 - Statement of Jason Ryman 27.10.22 [para 62].

173 Exhibit 4-6379 - TCO.9999.0001.0008_R2 - Clean PDF - Statement of T Collins NTG-0166 amended 22 February 2023 [para 567].
174 Exhibit 4-6379 - TCO.9999.0001.0008_R2 - Clean PDF - Statement of T Collins NTG-0166 amended 22 February 2023 [para 567].
175 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 198].
176 Transcript, Tenille Collins, 3 March 2023 [p 4334: lines 6-8].
177 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 199].
178 Exhibit 1-1175 - SBR.9999.0001.0002_R - NTG - 0038 Response Statement (executed) [para 22].
179 Exhibit 1-1175 - SBR.9999.0001.0002_R - NTG - 0038 Response Statement (executed) [para 102].
180 Exhibit 3-4623 - CTH.2009.0006.2319_R2 - MB16-000051 Minister Signed.pdf; Exhibit 3-4624 - CTH.2004.0005.7122_R2 - 26022016161751-0001.pdf.
181 Transcript, Alan Tudge, 1 February 2023 [p 2883: line 32 – p 2884: line 1; p 2884: lines 11-26].
182 Exhibit 3-4623 - CTH.2009.0006.2319_R2 - MB16-000051 Minister Signed.pdf; Exhibit 3-4624 - CTH.2004.0005.7122_R2 - 26022016161751-0001.pdf.
183 Exhibit 3-4622 - ATU.9999.0001.0048_R - The Hon Alan Tudge MP - Statement of Hon Alan Tudge MP (20 January 2023 - Replacement) [REDACTED], [p 32]; Transcript, Alan Tudge, 1 February 2023 [p 2884: lines 28-33].
184 Exhibit 3-4623 - CTH.2009.0006.2319_R2 - MB16-000051 Minister Signed.pdf; Exhibit 3-4622 - ATU.9999.0001.0048_R - The Hon Alan Tudge MP - Statement of Hon Alan Tudge MP (20 January 2023 - Replacement) [REDACTED] [p 32].
185 Exhibit 3-4622 - ATU.9999.0001.0048_R - The Hon Alan Tudge MP - Statement of Hon Alan Tudge MP (20 January 2023 - Replacement) [REDACTED], [p 32]; Exhibit 3-4632 - CTH.3001.0034.8666_R2 - MS16-000418.pdf.
186 Exhibit 3-4622 - ATU.9999.0001.0048_R - The Hon Alan Tudge MP - Statement of Hon Alan Tudge MP (20 January 2023 - Replacement) [REDACTED], [p 33].
187 Exhibit 3-4622 - ATU.9999.0001.0048_R - The Hon Alan Tudge MP - Statement of Hon Alan Tudge MP (20 January 2023 - Replacement) [REDACTED], [p 32]; Transcript, Alan Tudge, 1 February 2023 [p 2884: lines 35-38].
188 Exhibit 3-4631 - CTH.3001.0034.8636_R2 - MS16-000226 notation; Exhibit 3-4632 - CTH.3001.0034.8666_R2 - MS16-000418.
189 Transcript, Alan Tudge, 1 February 2023 [p 2886: lines 11-44]; Exhibit 3-4628 - CTH.3000.0012.7824 - 030316 Early Edition Top Stories; Exhibit 3-4627 - CTH.3061.0005.3510_R - FW- Urgent [DLM=For-Official-Use-Only]; Exhibit 3-4629 - CTH.3001.0017.1156_R - 2016-03-11 Minister for Human Services - Media Release - Welfare compliance measures ahead of schedule; Exhibit 3-4630 - RBD.9999.0001.0374 - CTH.3001.0016.1236 – page .1248.pdf; Exhibit 9971 - CTH.3001.0016.4634 - FW: Debt and Compliance info [DLM=For-Official=Use-Only]; Exhibit 3-4637 - CTH.0009.0001.0144_R - MB16-000483 MO.
190 Exhibit 3-4628 - CTH.3000.0012.7824 - 030316 Early Edition Top Stories; Exhibit 3-4629 - CTH.3001.0017.1156_R - 2016-03-11 Minister for Human Services - Media Release - Welfare compliance measures ahead of schedule; Exhibit 3-4630 - RBD.9999.0001.0374 - CTH.3001.0016.1236 – [page .1248].
191 Exhibit 3-4626, RBD.9999.0001.0372_R – ATU.9999.0001.0018 – pages .007 to .008.pdf.
192 Exhibit 3-4627 - CTH.3061.0005.3510_R - FW- Urgent [DLM=For-Official-Use-Only].
193 Exhibit 9971 - CTH.3001.0016.4634 - FW: Debt and Compliance info [DLM=For-Official=Use-Only].
194 Exhibit 9985 - CTH.3108.0001.4037 - MB16-000141 – Forecast of significant business – May to July - Version 2 [DLM=For-Official-Use-Only]; Exhibit 9986 - CTH.3108.0001.4038 - MB16-000141 - Forecast of significant business - May to July - Version 2 [DLM=For-Official-Use-Only]; Exhibit 9987 - CTH.3108.0001.4039_R - Updated Forecast of Significant Business or Service Delivery Events from May 2016.docx.
195 Exhibit 9987 - CTH.3108.0001.4039_R - Updated Forecast of Significant Business or Service Delivery Events from May 2016.docx.
196 Exhibit 3-4628 - CTH.3000.0012.7824 - 030316 Early Edition Top Stories.
197 Exhibit 3-4629 - CTH.3001.0017.1156_R - 2016-03-11 Minister for Human Services - Media Release - Welfare compliance measures ahead of schedule.
198 Exhibit 3-4630 - RBD.9999.0001.0374 - CTH.3001.0016.1236 – page .1248.pdf.
199 Exhibit 3-4622 - ATU.9999.0001.0048_R - The Hon Alan Tudge MP - Statement of Hon Alan Tudge MP (20 January 2023 - Replacement) [REDACTED] [p 33]; Exhibit 2-2889 - ACS.9999.0001.0046 - 2016 Coalition Election Policy - Better Management of the Social Welfare System.
200 Exhibit 3-4636 - RBD.9999.0001.0371 - CTH.2000.0001.1558 - pages .1594 to .1596 and page.1606 [p 1].
201 Exhibit 2-2889 - ACS.9999.0001.0046 - 2016 Coalition Election Policy - Better Management of the Social Welfare System.
202 Exhibit 3-4636 - RBD.9999.0001.0371 - CTH.2000.0001.1558 - pages .1594 to .1596 and page.1606 [p 1].
203 Exhibit 3-4622 - ATU.9999.0001.0048_R - The Hon Alan Tudge MP - Statement of Hon Alan Tudge MP (20

January 2023 - Replacement) [REDACTED] [p 33].

204 Transcript, Alan Tudge, 1 February 2023 [p 2883: line 32 – p 2884: line 1; p 2884: lines 11-26; p 2893: line 12 – p 2894: line 31; p 2894: lines 35-45].

205 Transcript, Alan Tudge, 1 February 2023 [p 2896: lines 7-28; p 2897: lines 11-23].

206 Transcript, Alan Tudge, 1 February 2023 [p 2895: lines 1-13].

207 Exhibit 3-4636 - RBD.9999.0001.0371 - CTH.2000.0001.1558 - pages .1594 to .1596 and page.1606 [p 1].

208 Exhibit 3-4637 - CTH.0009.0001.0144_R – MB16-000483 MO.

209 Exhibit 3-4638 - CTH.3001.0030.3987_R – 2016-11-23 New technology helps raise $4.5 million in welfare debts a day_FINAL_docx.

210 Exhibit 3-4639 - CTH.3001.0030.6443 – Transcript.docx.

211 Exhibit 3-4640 - CTH.3001.0030.7077_R - FW- ---PRINTED---..... brief from DSS [DLM=For-Official-Use-Only]; Exhibit 3-3804 - CTH.3001.0030.7078_R - img-Z06123324-0001.

212 Transcript, Alan Tudge, 1 February 2023 [p 2915: line 27 – p 2916: line 23; p 2917: line 19 – p 2918: line 33].

213 Exhibit 2-3137 - ACS.9999.0001.0309 - Acoss criticises government's appalling jail threats to welfare recipients _ Centrelink _ The Guardian.

214 Exhibit 3-4622 - ATU.9999.0001.0048_R - The Hon Alan Tudge MP - Statement of Hon Alan Tudge MP (20 January 2023 - Replacement) [REDACTED] [p 53]; Transcript, Alan Tudge, 1 February 2023 [p 2909: lines 25-47].

215 Exhibit 3-4622 - ATU.9999.0001.0048_R - The Hon Alan Tudge MP - Statement of Hon Alan Tudge MP (20 January 2023 - Replacement) [REDACTED] [p 53].

216 Transcript, Dr Cassandra Goldie, 16 December 2022 [p 2027: lines 5-15]; Transcript, Charmaine Crowe, 16 December 2022 [p 2027: lines 38-39].

217 Exhibit 3-4554 - CTH.9999.0001.0107_R - Response to NTG-0144 [para 88].

218 Transcript, Alan Tudge, 1 February 2023 [p 2910: lines 1-27; p 2911: line 24 – p 2912: line 11].

219 Transcript, Dr Cassandra Goldie, 16 December 2022 [p 2027: lines 5-15, lines 28-36].

220 Transcript, Dr Cassandra Goldie, 16 December 2022 [p 2027: lines 28-36].

221 Transcript, Alan Tudge, 1 February 2023 [p 2910: lines 1-27; p 2911: line 24 – p 2912: line 11]; Exhibit 3-4554 - CTH.9999.0001.0107_R - Response to NTG-0144 [para 88].

222 Transcript, Alan Tudge, 1 February 2023 [p 2910: lines 1-14].

223 Transcript, Alan Tudge, 1 February 2023 [p 2910: lines 24-27].

224 Exhibit 3-4693 - CTH.3001.0033.1063 - 2017.01.11 - Transcript - Radio National Breakfast - Interview with Minister for Human Services Alan Tudge.

225 Transcript, Alan Tudge, 1 February 2023 [p 2910: lines 24-34].

226 Transcript, Alan Tudge, 1 February 2023 [p 2913: line 45 – p 2914: line 24].

227 Transcript, Alan Tudge, 1 February 2023 [p 2914: lines 26-40].

228 Mr Wilkie appeared to be operating under a misapprehension that the new IT system was called "Welfare Payment Infrastructure Transportation" [sic], rather than OCI.

229 Exhibit 3-4641 - CTH.3001.0030.6877_R - BREAKING NEWS ALERT- Guilty until proven innocent - Centrelink gone rogue - Andrew Wilkie media call [SEC=UNCLASSIFIED].

230 Exhibit 3-4648 - CTH.3004.0002.4939_R - MB16-000533.

231 This statement was not correct. Evidence before the Commission demonstrates that the outcome of that exercise was that debts calculated using averaging of the ATO PAYG data resulted in debts that were, on average, 13 per cent higher than those calculated using actual income data.

232 Exhibit 3-4314 - CTH.3108.0003.3673_R - FW- For OK- The Guardian (ChristopherKnaus) - incorrect debtnotices[SEC=UNCLASSIFIED].

233 Exhibit 2-2699 - CTH.3034.0028.7077_R - Re- OCI Intervention Initiation plan [DLM=For-Official-Use-Only]; Exhibit 4-5565; Exhibit 2-2297 - CTH.3001.0029.8524_R - FW- PRINTED FW- URGENT - compliance and debt report [DLM=For-Official-Use-Only]; Exhibit 2-2726 - CTH.2002.0006.0207_R - FW- PRINTED OCI escalation brief [DLM=Sensitive]; Exhibit 9964 - CTH.2002.0006.0208 - Escalation Template - Customers incorrectly impacted by OCI V2.DOCX; Exhibit 2-2702 - CTH.3034.0030.3842_R - RE- URGENT Re- FOR INFORMATION- OCI issue impacting Employment Income Matching Budget measures [DLM=For-Official-Use-Only].

234 Exhibit 9988 - CTH.3001.0031.5316 - Re: For urgent clearance – The Guardian (Christopher Knaus) – incorrect debt notices [DLM=For-Official-Use-Only]; Exhibit 10021 - DPS.0001.0033.0046 – Re: For OK- The Guardian (Christopher Knaus) – incorrect debt notices [SEC=UNCLASSIFIED].

235 Exhibit 2-1296 - CTH.1000.0006.8741_R - Section 8 Questions under IOIs 2016-400007 and 2016-600004 [SEC=UNCLASSIFIED].

236 Exhibit 2-1297 - CTH.3001.0031.8290_R - Fwd- BREAKING NEWS ALERT- Calls for Ombudsman to investigate Centrelink debt recovery activity [SEC=UNCLASSIFIED].

237 Exhibit 2-3013 - ACS.9999.0001.0177_R - 161221 Letter to Alan Tudge final. Mr Tudge was on leave at this point in time, and did not receive this correspondence until sometime in January 2017.

238 Exhibit 3-4649 - CTH.3001.0038.4984_R - TUDGE, Alan 21 December 2016.
239 Exhibit 3-4652 - CTH.3007.0027.3923_R - Fwd- BREAKING NEWS ALERT- The Guardian [SEC=UNCLASSIFIED].
240 Exhibit 3-4653 - CTH.3001.0032.0480_R - ATODataMatchin rF.281216.
241 Exhibit 4-7125 - LMA.9999.0001.0011_R - 20230228 - NTG-0006 MacLeod First Statement with Annexure and Document IDs (AGS review) (Redaction Applied) [para 40]; Exhibit 2-2841 - ACS.9999.0001.0308_R - Witness statement of Dr Cassandra Goldie (signed 14 December 2022) [para 40]; Exhibit 3-4554 - CTH.9999.0001.0107_R - Response to NTG-0144 [para 89-90]; Transcript, Rachelle Miller, 31 January 2023 [p 2789: lines 30-33]; Exhibit 2-1297 - CTH.3001.0031.8290_R - Fwd- BREAKING NEWS ALERT- Calls for Ombudsman to investigate Centrelink debt recovery activity [SEC=UNCLASSIFIED]; Exhibit 3-4511 - CTH.3000.0023.5809_R - Afternoon Media Summary - Wednesday 21 December 2016 [SEC=UNCLASSIFIED]; Exhibit 3-3401 - CTH.3051.0014.9234 - TripleJ Hack 20.12.16; Exhibit 3-4514 - CTH.3000.0023.5029 - Early Edition Top Stories - Tuesday 20 December 2016.
242 Exhibit 3-4655 - CTH.3000.0023.6660 - Top Stories - Tuesday 3 January 2017; Exhibit 3-4656 - CTH.3000.0023.6773 - Top Stories - Wednesday 4 January 2017; Exhibit 3-4658 - CTH.3000.0023.7200_R - Top Stories - Friday 6 January 2017.

Chapter 6: 2017, part A - A crescendo of criticism

1 A watershed moment

The beginning of 2017 had all the hallmarks of becoming a watershed moment for the Robodebt Scheme (the Scheme). In the first few months of the year, the chorus of criticism was deafening. The usual checks and balances on government power were swinging into action, and it seemed the Scheme would be subjected to scrutiny and evaluation by bodies external to the Department of Human Services (DHS). The unfairness, probable illegality and cruelty of the Scheme were publicly laid bare. All signs pointed towards the possible abandonment or, at the very least, drastic revision of the Scheme as it was operating at the time.

Given the circumstances, one of the most remarkable aspects of the Scheme's saga is how it continued, albeit in modified form, after the early months of 2017.

It was a period of great industry within DHS. Many witnesses who gave evidence before the Commission described it as a period involving long hours, high workloads and intense pressure and stress.

Despite this industriousness, by mid-2017 remarkably little progress had been made towards the identification of any issues of substance: the fundamental problems with the Scheme remained; and there was no legal advice which actually supported its fundamental premise. However, the intense public criticism from earlier in the year had quietened. A comprehensive report on the Scheme, and some of its failings, had been prepared and paid for, but was never received. The government continued to illegally raise debts against some of society's most vulnerable.

2 The acting Minister for Human Services – Mr Porter

Criticisms of the OCI system in the media continued into the new year.[1] While Mr Tudge was on leave over the Christmas and New Year period, Christian Porter, Minister for Social Services, assumed additional responsibilities as the acting Minister for Human Services.

Throughout the period in which he acted as the Minister for Human Services, Mr Porter made various requests of DHS for fact checks of media articles[2] and information on the Scheme,[3] in addition to the talking points provided to him by DHS.[4]

Mr Porter's evidence was that, initially, he accepted the departmental position on the issues including as they were represented in the talking points.[5] At some point, he began to view the information he was being given with a degree of circumspection, which then turned to scepticism.[6]

On 3 January 2017, Mr Porter was interviewed on ABC Radio National in relation to the OCI program. His responses were largely based on the talking points that had been provided by DHS.[7] He told the interviewer that the debt recovery scheme was "working exceptionally well."[8] He also made the following statements:

- I think this [the Scheme] is about as reasonable a process as you could possibly derive…
- Ultimately, if a real discrepancy does exist then eventually we raise a debt, and that happens much later than this initial letter, and even then, there are many ways in which you can dispute that debt, if you think that a mistake has been made…
- It really is an incredibly reasonable process…
- Only in 2.2 per cent of instances [do people need to provide things like payslips]…
- 169,000 letters and the complaint rate is running at 0.16 per cent. So that's only 276 complaints from those 169,000 letters. That process has raised $300 million back to the taxpayer.[9]

Mr Porter was also asked, "How important is this debt recovery to the budget bottom line?" and replied:

> It's very significant. Four billion dollars over four years is evidently a very significant amount of money. That is helping us get back into surplus.[10]

The Commission accepts that Mr Porter was simply repeating information from the talking points given to him by DHS staff. As it transpired, that information was wrong. The rate of complaint was most certainly not as low as 0.16 per cent of reviews. The Commission heard evidence that, in fact, the information with which Mr Porter was provided did not include complaints specifically relating to OCI that were held in DHS's central complaints repository,[11] and that even if it had, there were systemic problems with the recording of OCI complaints in that repository in any event.[12]

Mr Porter's comments, based on the talking points provided to him, suggested a high degree of confidence in the program generally and in particular the reasonableness of it, which was reiterated. They also gave the impression that recipients seldom had to provide information, and that the rate of complaint and internal review of debts generated under the Scheme was very low, suggesting that such debts were unobjectionable and, in turn, accurate.

On 9 January 2017, Mr Porter said on ABC Radio that "debts raised under the automated system were 'fairly and legitimately calculated'."[13] He also noted that, in circumstances where a person did not respond to the initial letter, "it will be the case that the ATO estimate will be the preferred reporting and there will be an averaging out process."[14]

By the time Mr Porter made the statement about debts being "fairly and legitimately calculated," it is likely that he was starting to appreciate that this position lacked credibility; that income averaging was liable to produce inaccurate results as to the existence and quantum of debts.

By around 10 January 2017, at the conclusion of his period acting as the Minister for Human Services, Mr Porter said he "was extraordinarily frustrated with the level of information and detail being provided," and that "there was a greater number of queries and inquiries that were being generated by me and my staff in my office."[15]

The statements Mr Porter made in media interviews about the fairness of the process, and the statistics he cited, were wrong. One has to recognise, however, that he had been plunged in a maelstrom of media enquiries and public complaint about the Scheme, and there was not much he could do but rely on what DHS staff told him about the program. His performance in the short period he was Acting Minister for Human Services cannot fairly be criticised.

That is not true, however, of Mr Porter's response in his role as Minister for Social Services. He was responsible under the AAO for the lawful administration of the Social Security Act and the Administration Act. The responsibility for ensuring that DHS officers lawfully exercised their DSS-delegated powers of overpayment identification and debt recovery under the legislation lay with him.

On 28 December 2016, the first day of Mr Porter's acting position as Minister for Human Services, his office requested "talking points" on the OCI program and, later in the day, a briefing from DHS about the program.[16] The request for the briefing said that the Minister wanted it to cover "averaging out of income provided to ATO by CLK [Centrelink] impacting on people who only earned income seasonally (e.g. students) – it appears CLK is averaging income over 26 fortnights and then raising debts."[17]

This was an obvious question to ask, as was accepted by Mr Porter in his evidence before the Commission.[18] Inaccurate results produced by income averaging, with respect to both the existence and quantum of debts being raised by the OCI program, had been squarely raised as an issue in the media at the time. Mr Porter was trying to "get an understanding of some of the basic fundamental mechanics of the program."[19]

On 9 January 2017, Mr Porter asked, during a meeting with Mr Britton, a question to the effect of whether Centrelink could be given more frequent data on a person's income.[20] He evidently appreciated that the use of yearly data to calculate a person's income was likely to give rise to inaccuracies, and that the provision of more frequent data would produce more accurate results. His office had already raised the query with DHS about its effect where the income of seasonal workers was concerned.

Mr Porter may not completely have understood what the OCI process was, but he did know it involved income averaging. It did not take a genius to see that averaging a person's annual income to arrive at a fortnightly figure was likely to produce inaccurate results unless the person was on a consistent income. Mr Porter, from his inquiries, clearly appreciated that. It was not a big step from there to ask whether the Social Security Act allowed this. Mr Porter, as Minister for Social Services, should have made that inquiry.

In an ABC interview of 31 May 2020, Mr Porter said in respect of the Scheme: "We received advice at the time that the program was put together that it was lawful. Many governments have used ATO averaging… ."[21] That suggested that at the inception of the Scheme, the government had obtained legal advice that the use of averaging in the way proposed was lawful; which it had not.

Mr Porter explained that statement as follows:

> I'm referring to two things. Certainly, that recollection of a meeting during that period where I sought an assurance and got an affirmation about the underpinnings, and also the knowledge and experience that I had by that stage that, to have gone through the NPP process, this would have been scrutinised as to the issue of whether it required legislative change or not. But I certainly - I firmly had in my mind that I had put this question to people and that they had responded affirmatively.[22]

As to the first part of that explanation, Mr Porter said that in the course of a meeting with persons from DHS, he raised "almost incidentally" the fact that he "was operating under the assumption that the departments had at some point been advised that there was sound legislative underpinning for the system as it was operating."[23] A participant in the meeting confirmed the correctness of his assumption by answering, "yes."[24] Giving evidence before the Commission, Mr Porter said he was unsure whether that person was from DHS or DSS.[25]

As to the second part, Mr Porter did not in fact know whether the intention to use income averaging formed any part of the detail of the NPP or whether the process had scrutinised whether legislative change was needed.[26]

Mr Porter could not rationally have been satisfied of the legality of the Scheme on the basis of his general knowledge of the NPP process, when he did not have actual knowledge of the content of the NPP, and had no idea whether it had said anything about the practice of income averaging. A simple "yes" to his question about whether there was advice was not enough to meet his obligation to ensure that the program was operating lawfully under the Social Security Act, particularly where he had already identified shortcomings in the information provided to him by DHS.

As Minister for Social Services, Mr Porter should at least have directed his department to produce to him any legal advice it possessed in respect of the legislative basis of the Scheme. If he had done so promptly when he became aware of the problems associated with the Scheme in late December 2016 or early January 2017, he would have discovered that the only legal advice DSS possessed (the 2014 DSS legal advice)[27] advised that the income averaging proposal might not be consistent with the legislative framework because it was necessary to consider the amount of income received in each fortnight.

If he had made his inquiry after 24 January, he would have been provided with the 2017 DSS legal advice,[28] obtained by DSS more than 18 months after the Scheme commenced operating. He would have found it was qualified by being expressed to be limited to the use of income averaging as "a last resort" and identified no legislative provision which actually authorised income averaging. In either event, the proper and obvious next step would have been to obtain external legal advice as to the legislative underpinning for the Scheme as it was operating, with the probable result that its unlawfulness would have been identified and the Scheme ended.

3 Mr Tudge returns

Mr Tudge took leave over the Christmas period in 2016-17; however, he cut his leave short and returned to work in early January 2017.[29]

By the time of his return, the *Budget Savings (Omnibus) Act 2016* (Cth) had been passed. One of the effects of that Act was to remove the six-year limitation period on the recovery of social security debts. Another was that it enabled the department, in particular circumstances, to issue Departure Prohibition Orders, to prevent people with outstanding debts from going overseas.

Mr Tudge's evidence was that in early 2017, he was "very much focused on the implementation of the Scheme."[30] His "intense focus in January and February"[31] was on a number of issues that had been raised in the media, and issues that he himself subsequently discovered "weren't being done well."

During this time, Mr Tudge made numerous requests to DHS and his advisors for information about the Scheme and associated DHS processes,[32] and he was provided with a steady stream of information in response.[33]

Not all of the information provided by DHS to their minister and his advisors during this time was accurate, or reflective of the actual state of affairs.

Mr Tudge was provided with "OCI Talking Points" that had also been provided to Mr Porter and the department's media spokesperson, Hank Jongen.[34] Those talking points stated that OCI did not change how income was assessed or how debts were calculated. That was false. The talking points stated that the letter sent to recipients "has a number they can call if they would rather speak with someone." At that point in time, that was false, and was contradicted by the copies of the letters that had been sent to the minister just three hours earlier.[35] The talking points stated that:

> … if a person fails to respond to the initial request and the reminder to confirm or update the information, a debt will be raised using data from the ATO as provided to them by the employer. This is not new and is consistent with procedures that have been in place for many years.

That was false.

Mr Tudge also had a number of meetings with officers from DHS in which he made requests for detailed information about the Scheme,[36] and discussed income averaging with Kathryn Campbell (secretary, DHS) and Malisa Golightly (deputy secretary, DHS).[37] Mr Tudge's evidence was that he was frequently told in those meetings, by either Ms Campbell or Ms Golightly, that income averaging had been occurring for some time, and although he couldn't remember a specific conversation, recalled coming to an understanding that it had been "part of the welfare compliance architecture for a very long time."[38]

Mr Tudge asked for information about the proportion of debts that had been raised in circumstances where a recipient had not responded to the department's letter.[39] This was a logical and obvious request to make. In what was most likely a response to this request, this information was included in a departmental "Key Facts" document,[40] which was attached to an email indicating that "Karen will bring printed copies to meeting with Minister."[41]

The Key Facts set out the proportion of OCI recipients who had a debt, but had not had contact with DHS. This information was based on a random sample and indicated that:[42]

- 57 per cent of recipients who were currently in receipt of a Centrelink payment had had a debt raised with no contact with DHS, and
- 79 per cent of recipients who were not currently in receipt of a Centrelink payment had had a debt raised with no contact with DHS.

In circumstances where Mr Tudge was intently focused on the details of the program, had made a specific request for this information, and had met with DHS officers who attended the meeting with printed copies of the information he had requested, it can be inferred that he was informed of these percentages.

Mr Tudge in his evidence set out a number of problems that he had identified with the system during early 2017.[43] These included deficiencies in the usability of the online portal, the inability to enter net income amounts into the system, a lack of clarity in the correspondence sent to recipients, a "too-readily applied" 10 per cent penalty fee, and the fact that a number of recipients had not received correspondence from DHS to initiate the review. All of those were problems related to the actual, practical operation of the processes under the Scheme or, as Mr Tudge characterised it, the "implementation" of the Scheme.[44]

In January 2017, Mr Tudge exchanged messages with the prime minister, the Malcolm Turnbull, through the WhatsApp messaging service. Consistent with his identification of the system's problems, Mr Tudge's messages demonstrated that his planned approach to dealing with the criticisms of the compliance program was to introduce changes to address those operational defects. The proposed changes that Mr Tudge described to Mr Turnbull included those relating to the volume of correspondence, use of registered mail, and the online platform.[45]

Mr Tudge indicated an intention to project a message that "the system is working, but we will continue to make improvements,"[46] and he subsequently informed Mr Turnbull that there was "a complete plan as to how to make the system more defensible."[47] He agreed with Mr Turnbull that it was "important to have this settled down by the time we get back to parliament," and that was "the key deadline that [he had] given."[48] He expressed optimism that his "…positioning this week hopefully allows us to do more "refinements" fast without losing too much face."[49]

In March 2017, Mr Tudge and Mr Porter sent a letter to Mr Turnbull about the progress of the online compliance system, the action taken to address the issues that had been raised in the media, and discuss how the online compliance program could be managed from that point forward.[50] The letter set out the changes that had been made to the system to date, including changes to the initial letters, the suspension of the use of external debt collection agencies, and the removal of a requirement for recipients to have a myGov or Centrelink Online account to access an online review.

Many of the process refinements Mr Tudge instituted reflected his drive to improve the system and its usability. But it is apparent from his communication with Mr Turnbull that a large part of Mr Tudge's motivation for focusing on those refinements was to allow him, as minister, and the government, to "save face" and to minimise public embarrassment; not surprisingly, given his full-throated public endorsement of the system the previous year.

4 The Human Services response

Much of the focus within DHS was similar to that of the minister. Efforts were made to iteratively address individual issues as they emerged. The purported solutions focused on the process and implementation of specific aspects of the operation of the compliance program, rather than involving any strategic consideration of the program as a whole or its fundamental conceptual underpinnings.

Through the early months of 2017, these changes were made to the online compliance process, largely at Mr Tudge's instigation: a contact telephone number was included in the initial letters sent to recipients; initial letters were sent by registered mail; improvements were made to the online interface; the circumstances in which manual intervention would occur during a review were expanded; the system was able to accept bank statements and net income; debt recovery action was paused while a debt was under review; and the scope of the application of the 10 per cent penalty fee was revised.[51]

It is obvious from the evidence before the Commission that the early months of 2017 were a frenetically busy and stressful period for many members of DHS staff. It was described as "a very difficult period for many staff including SES level staff," where many staff were "in "coping" mode to deal with the volume and complexity of work under intense scrutiny."[52] The culture within the Compliance Branch was described as "particularly intense."[53]

Ms Golightly was the deputy secretary responsible for DHS's response during this time. She was in frequent, direct contact with Mr Tudge and Ms Campbell about the response to issues being raised with the OCI program.[54]

In early January 2017, Ms Harfield had a conversation with Ms Golightly about the problems with the OCI system, AAT appeals, increasing customer dissatisfaction and unfavourable media attention.[55] Ms Harfield suggested that, given those factors, "it would be a suitable time to consider declaring a major incident response to re-evaluate if the original measure assumptions were still valid."[56] According to Ms Harfield, Ms Golightly's "style" was to gather information about many individual issues, brief the secretary or minister, and then return with a set of proposed actions.[57] Ms Harfield was trying to convince her instead to look at the OCI problems at a broader strategic level.[58] That might involve, for example, bringing a group of specialists together to solve those problems.[59]

The suggestion was not well-received.[60] Ms Harfield said that an angry Ms Golightly "made it clear that what she expected of me was to do as I was told…she would tell me what needed to be done."[61] After this, she did not revisit the topic. Her interactions with Ms Golightly were about specific tasks and they never had a more general, strategic conversation about the compliance program.[62] In March 2017, Ms Harfield was moved to a new division.[63]

Ms Harfield's description of the focus on specific tasks and issues, to the exclusion of more fundamental problems, is emblematic of the departmental response in early 2017 to the expressions of criticism and dissatisfaction with the OCI program. Some defects of the program were being regularly raised, by different sources, some with specialist expertise. The criticism that the system was raising inaccurate debts and that the use of income averaging in the debt calculation was often the cause of the inaccuracy, featured frequently. Despite the apparent obviousness of some of the problems, the approach in response centred around iterative and reactive remediation of defects in implementation, while dealing with the Scheme's fundamental flaws was avoided. Examples of this are outlined further later.

5 The Employment Income Confirmation program

In February 2017, the OCI program became the Employment Income Confirmation (EIC) program.[64] Mr Tudge described this change to the Scheme as a "re-naming."[65] At this point, one thing was clear: the compliance program could no longer operate under the name of "Online Compliance Intervention," which even by this stage had become synonymous with incompetence and failure.

All OCI reviews that had been initiated, but in respect of which recipients had not contacted DHS or commenced an online process, were cancelled.[66]

Initiations under the EIC began on 11 February 2017.[67] To test the changes that had been made to the program, DHS prepared a staged implementation strategy which provided for compliance reviews to be gradually increased and rolled out to recipients with more complex circumstances throughout early 2017.[68]

DHS undertook "Business Verification Testing" (BVT) during this period in relation to a sample of 100 EIC reviews.[69] The BVT did not reveal any systemic issues with the operation of the EIC platform.[70] On 30 May 2017, the BVT closure report was signed off and interventions under the EIC commenced in earnest.[71]

Notwithstanding the changes between the OCI and the EIC programs, many of the fundamental features remained the same. From February 2017, under EIC, the system was modified to remove the automatic application of averaged ATO data to finalise reviews.[72] This did not, however, represent the demise of the widespread use of averaging under the Scheme.[73] Instead, the process of applying averaged ATO data to raise a debt was modified by requiring it to be undertaken manually.[74]

From February until August 2017, the application of averaged ATO data was suspended for reviews in which a recipient had received an initial letter but had not commenced or finalised the review process.[75] During that period, DHS introduced an internal policy requiring compliance offices to make two "genuine" attempts to contact a recipient by telephone where the recipient had not responded to an initial letter.[76] From August 2017, where these attempts to contact were unsuccessful, the compliance officer would finalise the review using the averaged ATO income information.[77]

For all of the fervour with which DHS had insisted that averaging had always been used, and its steadfast refusal to directly acknowledge the problems with its use, it speaks volumes that one of the main actions taken during a period of intense criticism and scrutiny was to suspend (for a period) the use of averaging in the absence of contact by a recipient, and to remove the automation of its use in the compliance process.

Despite all of the changes that had been, and continued to be, made, problems with the review process continued. As it turned out, by September 2017, it was clear that the changes that had been made to the process had resulted in the vast majority (in the order of 97 per cent) of EIC reviews needing some level of staff assistance in order to be completed.[78]

6 The end of the Online Compliance Intervention program

The rebranding to EIC represented the symbolic end of the first automated, online iteration of the Scheme.

During the operation of the OCI program, DHS consistently and staunchly denied accusations of an "error rate" in the initial letters that were issued to recipients. The department had released information that, of the initial letters sent to recipients between July to December 2016, approximately 80 per cent had ultimately resulted in a debt following finalisation of the review.[79] This resulted in public criticism in which this figure was characterised as a "20 per cent error rate."[80]

According to DHS, the criticism was "misleading and a misrepresentation of the process." Departmental talking points and public statements were keen to point out that the initial letter was "not a debt letter," that all the 20 per cent figure meant was that 20 per cent of people had been able to satisfactorily explain the discrepancy presented to them in the initial letter, and that the system was designed to work in this way.[81]

Two aspects of that defence warrant comment.

Firstly, it was incorrect to describe that figure as an error rate, but not for the reasons given by the department. It was because what that figure represented was a subset of a more significant "error rate," which was the rate at which the system was calculating inaccurate debts. That is something that is difficult to quantify, because, on the records before the Commission, it is apparent that the department was not actually measuring and recording that data.[82]

Secondly, even if the term "error rate" is characterised as the percentage of initial letters sent that did not result in a debt being raised, it was higher than 20 per cent in any event. Under OCI, the percentage of recipients who did not ultimately end up with a debt raised against them after being issued with the initial letter was approximately 36 per cent.[83]

In February 2017, the percentage proportion of debts that had been raised under the OCI program using averaging was calculated by the Department to be 76 per cent.[84]

7 The Minister's knowledge of the Scheme

Mr Tudge was clear in his evidence before the Commission that he had a "laser-like focus" during January and February 2017 on issues concerning the implementation of the OCI program, including a focus on "trying to understand and improve it."[85]

The evidence before the Commission is consistent with Mr Tudge's recollection. As outlined above, there are numerous examples of Mr Tudge's requests and DHS's responses, such that in early 2017 Mr Tudge had the following knowledge of the Scheme.

By January 2017, Mr Tudge was aware that the OCI program was issuing inaccurate debt notices, including in circumstances where a process of averaging of income was used to calculate a debt.[86]

Mr Tudge was aware that the OCI system applied a process of income averaging in circumstances where a recipient did not respond to DHS's request for information,[87] and where a recipient was unable to provide evidence of their earnings to the satisfaction of DHS.[88] He knew that, in those circumstances, a debt raised against the recipient would not be an accurate debt based on what they had actually earned,[89] and that it was "highly likely" to be inaccurate.[90]

Mr Tudge had specifically requested information about the percentage of debts that had been determined in the absence of contact with DHS.[91] He knew, or ought to have known from the information he received,[92] that a significant percentage of recipients (approximately 60 per cent of current recipients and 80 per cent of former recipients) had had their debts raised using income averaging, and were therefore likely to have inaccurate debts.

Mr Tudge had asked numerous questions about the use of averaging, both in requests for information to DHS, and in meetings in which one or both of Ms Campbell and Ms Golightly were present, and it seems he was given to understand that averaging had been used for many years. Longstanding practice is not an answer to a definitive source of authority to use income averaging. However, the information with which he was provided, and the level of assurance he was receiving from DHS, is relevant to his understanding.

Mr Tudge had undertaken an analysis of the detail as between the pre-Robodebt process, the interim process and the OCI process[93] and had particular reference to the process map provided to him in January 2017.[94] He was aware of the features of the historical process that existed prior to the Scheme (that is, prior to 1 July 2015) set out in those documents.[95] He therefore knew that the historical use of income averaging by DHS was subject to qualifications, including that:

- it was used only in reviews of cases involving the highest levels of income discrepancy.
- it was only used in circumstances where compliance officers had made inquiries with either one or both of a recipient and any employers to obtain information, so its use was confined to circumstances where the onus of obtaining or providing information in relation to income did not lie entirely with a recipient.
- prior to the implementation of the SIWP measure on 1 July 2015, there had never been a time where income averaging had been used in circumstances where the onus lay entirely on the recipient.
- it was only used in circumstances where a compliance officer would manually assess the outcome of an intervention, so that it could be assumed experience and judgment would be applied.

Though it predated his time as minister, Mr Tudge was aware that since the commencement of the Manual Program on 1 July 2015, DHS had ceased to use its compulsory powers to request information and instead placed the onus on the recipient to establish actual fortnightly income by providing information about their earnings.[96] He did not know the basis (including the legal basis) upon which DHS purported to "require" that information from recipients (which was none).[97]

As at January 2017, Mr Tudge was aware that the OCI process could not be implemented, or continue to be implemented, on the scale which had been approved by government under the measures, without retaining these features:[98]

- the onus being on a recipient to establish actual fortnightly income by providing information about what they had earned, and DHS no longer using its compulsory powers to request that information, and
- the provision of information by a recipient and, in the absence of the provision of that information, the use of income averaging to calculate a debt.

It was with this state of knowledge and awareness of the OCI program that Mr Tudge took the approach that he did over the following weeks and months of 2017.

8 Mr Tudge's approach generally

Mr Tudge stated that his concern, "within [his] authority as Human Services Minister," was to ensure that the system could be easily understood and was as reasonable as possible for a person using the system.[99] He gave examples including the use of bank statements, and contact with compliance officers for persons with a vulnerability indicator.[100] His authority, he said, "was to fix and address the problems which I saw to make it fair and reasonable from that implementation perspective;"[101] his "very sharp focus" was "to fix the implementation and the operations of the system."[102]

Mr Tudge considered his role was to implement the measures approved by Cabinet[103] and announced by the government.[104] He understood that obligation as applying to his department and also to himself as the responsible minister.[105] He considered he did not have the authority to overturn decisions made by Cabinet to approve and implement the measures,[106] including the Scheme's fundamental features - the reversal of the onus onto a recipient and the use of income averaging – which he regarded as themselves Cabinet decisions.[107]

However, that claim was made in circumstances where Mr Tudge did not know precisely what the proposals underpinning the Scheme that had been taken to and approved by Cabinet were,[108] or whether the documentation Cabinet considered identified the use of income averaging under the measure.[109]

At the end of Mr Tudge's tenure as Minister for Human Services, these fundamental features – reversal of onus and income averaging - remained a part of the Scheme, although he knew there were problems with them. He knew that the Scheme could not continue to operate without them. He was willing to rectify aspects of the Scheme which did not interfere with these features.

Mr Tudge instituted a number of process refinements, and the Commission accepts that he was, in part, motivated to improve the implementation of the system and its usability. One of those was the removal of some level of automation in the system, by requiring a manual step prior to the calculation of a debt using averaging. But it was also for the purpose of attempting to repair the public perception of the Scheme, and to avoid transparent and open scrutiny of those aspects of the Scheme that were fundamental to its operation.

Mr Tudge was not open to considering any significant alteration, or cessation, of processes underlying those fundamental features. The Commission accepts he believed he was bound by the Cabinet decision to implement them, but that did not mean he could not have investigated the problems with them and raised any concerns with the appropriate senior minister.

9 Missed opportunities

The Scheme received early and ongoing criticism – in the media, from advocacy organisations, within academia and from DHS employees and whistle-blowers. It would be impossible to catalogue each example of such criticism of the Scheme because of its volume, particularly in the press. DHS's own "comprehensive register of media coverage"[110] on the Scheme for the period October 2016 - June 2017 spanned many hundreds of entries.[111] DHS was well aware of these criticisms.

Each example of criticism, as well as its cumulative impact, presented DHS with further opportunities to investigate the concerns raised and react to them, particularly insofar as accuracy and illegality were raised. Those opportunities were not taken up by DHS. Some particularly pertinent examples of this follow.

9.1 Australian Council of Social Service

During a time in which the compliance program was drawing intense criticism, and DHS and its minister were attempting to remedy and improve aspects of that program, including its usability by recipients, one of the most obvious sources of feedback and constructive criticism was community bodies with expertise in social security policy. One such body was the Australian Council of Social Service (ACOSS).

As has been detailed earlier, Dr Cassandra Goldie AO, the CEO of ACOSS, had written to Mr Tudge in December 2016 about the compliance program,[112] and had raised a number of concerns including inaccurate debt assessments due to the use of income averaging, and the reversal of the onus to the recipient to "disprove" a debt. Dr Goldie had also referred to the "consistent and alarming level of distress" the process was causing social security recipients.

Representatives of ACOSS met with Mr Tudge on 18 January 2017 and repeated the concerns expressed in their December correspondence.[113] The following day, 19 January 2017, Dr Goldie again wrote to Mr Tudge reiterating those concerns[114] and calling for an immediate end to the compliance program and for a stakeholder roundtable to be convened to "design a humane and fair approach to debt recovery." Dr Goldie said:

> During our meeting, we highlighted to you the unique power that the Commonwealth Government has over people's lives whether as recipients of social security or as taxpayers. As a result, it is essential that the Commonwealth adhere to the highest of standards with respect to the raising of debts against people…

Ms Campbell was also aware of ACOSS's warning that the Scheme raised inaccurate debts, and its calls for the Scheme to be terminated. On 20 January 2017, Ms Campbell received a daily media update which referred to a media interview involving Dr Goldie, as follows:

> Interview with Australian Council of Social Services CEO Cassandra Goldie. Goldie met with Human Services Minister Alan Tudge about the Centrelink "robo-debt scheme" yesterday. She initially wrote to the Minister amidst disturbing assessments of alleged debts which aren't owed. She says changes announced in the last week do not address their concerns, and has urged him to abandon the automation of debt collection. She says a human should be involved in debt assessment, and there needs to be a humane approach to how debt is recovered.[115]

Ms Campbell requested a transcript of the media interview, saying:

> Can someone get me the transcript of the Spears / Goldie interview. I thought she said at the end that she was ok with automation as long as it was always beneficial to the recipient. If so, it will be a good line for us to use in the future – we have to make sure it is in accordance with the law, not just beneficial to the recipient.[116]

After receiving the transcript, Ms Campbell concluded that she "must have misheard."[117]

Significantly, Ms Campbell's focus on the interview was not the substantive problems raised with respect to the Scheme, but rather about the possibility of obtaining a "good line for us to use in the future." Her reference in her response to having "to make sure it is in accordance with the law" seems to have been

solely concerned with its use for rhetorical purposes, not any intention to that effect; because there is no evidence that Ms Campbell did anything to ensure the Scheme's lawfulness.

Mr Tudge wrote to Dr Goldie in a letter which was undated but which ACOSS received in the first week of February 2017.[118] The final version of this correspondence had been the subject of some amendment, both by the minister himself and at a departmental level.[119] It contained an assertion which, by this stage, had become a familiar refrain from the department:

> While the online compliance system uses more technology for part of the standard compliance review process**, it does not change how income is assessed or how debts are calculated**. [Emphasis added]

The statement's inaccuracy was obvious to those with experience of the social security system.

In Dr Goldie's evidence before the Commission, she explained that, at the time she received the minister's response in February 2017, she understood that the statement was not correct.[120] It was also non-responsive to the significant issues that she had raised.

ACOSS had, by this point, written two detailed letters and had met with the minister himself, expressing its specific concerns with the Scheme. The correspondence had identified a number of issues which rendered DHS's statement demonstrably false. Where specific and particular examples of problems with changes to both income assessment, and debt calculation, were raised, it was clearly no answer to respond by doggedly insisting that there had been no change.

Despite this, DHS continued to insert this statement into correspondence and departmental documents almost compulsively, as though with repetition it might become true. Some of the DHS officers using it could not have given it any critical consideration, because they did not seem to realise its falsity.

Mr Tudge again wrote to Dr Goldie in a letter which was undated, but was received by ACOSS on 13 March 2017.[121] The letter sought to provide an update "on the performance of the Online Compliance system and some of the recent refinements that the government has made to it." The updates that were described in that letter included the addition of a DHS telephone number in the letters to recipients, upgrades to the online compliance system functionality, and the pausing of debt enforcement action where a recipient had requested a review of that debt.

While some of these changes represented incremental improvements to the usability of the program, neither the February nor the March letter addressed the issues that Dr Goldie had raised which related to the fundamental underpinnings of the Scheme. The letters did not deal with debt inaccuracy, or the underlying debt calculation methods that Dr Goldie had called into question, or give any substantive response to the detailed concerns she had expressed about placing the onus on recipients. Instead, the correspondence focused on peripheral issues and how flaws in the implementation and operation of the Scheme were being addressed, rather than the problems concerning its more fundamental features.

On 29 May 2017, Dr Goldie wrote once more to Mr Tudge.[122] She acknowledged the refinements that had been made but again raised specific concerns relating to the fundamental features underpinning the Scheme, saying:

> …We acknowledge the refinements that have been made to the Online Compliance Intervention program, including the stay on debt recovery where an alleged debt is under review. This is an important reform. **However, the program continues to issue inaccurate debt notices, place the onus of proof onto current and former income support recipients and detect and calculate debts without human involvement**…
>
> [emphasis added]

Mr Tudge replied by way of another undated letter which ACOSS received on 23 June 2017.[123] Soon after, on 16 August 2017, Dr Goldie and Charmaine Crowe (ACOSS senior adviser) met with Mr Tudge, Ms Campbell and others.[124] The concerns with respect to the fundamental features of the Scheme, that had now been raised by ACOSS in at least five instances of direct communication, were not addressed in either the June correspondence or at the meeting.[125]

ACOSS is a peak industry body with specialist knowledge in the administration of the social security system. In December 2016, Dr Goldie's letter to Mr Tudge represented one of the earliest and most detailed warnings to both the minister and his department about problems associated with the Scheme, including those relating to the Scheme's fundamental underpinnings. This included an identification of issues with respect to inaccuracy of debts, often due to the use of income averaging, and the reversal of the onus of proof of a debt onto social security recipients.

Dr Goldie's letter identified many of those issues with striking accuracy, particularly given that, at the time it was written, there was very little information about the Scheme available publicly, and what was available often contained vague or opaque explanations. But perhaps the accuracy with which ACOSS was able to identify those issues reflected the fact that the identified flaws were glaringly obvious to anyone with experience in the social security system.

Importantly, ACOSS had informed Mr Tudge, and through him, his department, that the operation of the Scheme was causing distress to those who were subject to it.

ACOSS was not a lone voice in delivering its message. Similar concerns, which are discussed in more detail throughout this chapter, were being raised through other sources, including the department's own staff, members of Parliament and the media.[126]

Mr Tudge took some steps to address the problems that Dr Goldie had raised,[127] and responded to those parts of her correspondence that dealt with those implementation issues but he did nothing about the fundamental concerns: reversal of the onus and income averaging.

9.2 Human Services employees

On 10 January 2017, it was brought to Mr Tudge's attention that a "long-time Centrelink worker who was working in income reviews and eligibility assessments" had spoken to a journalist about problems with the income compliance system.[128] The Centrelink worker described warnings from her colleagues to DHS officers that "computer-based data matching would lead to incorrect debts being issued and a lot of problems." Less than 15 minutes later, Mr Tudge had dictated written comments to be provided to the journalist in response. None of these comments addressed the issue of incorrect debts.

Michael Tull (assistant national secretary, CPSU) wrote to Mr Tudge on 13 January 2017.[129] He described DHS staff as being under "extraordinary pressure and stress from the volume of queries and complaints that are arising from the program." He said:

> Previously, there was human intervention prior to the letters being issued, which meant that staff could **prevent letters that were manifestly incorrect from being sent. This is no longer the case**.
>
> [emphasis added]

Also on 13 January 2017 an article was published in The Guardian newspaper called "Internal Centrelink records reveal flaws behind debt recovery system."[130] The article described flaws in the OCI system including "letters to old addresses, wildly wrong earnings figures, duplicated employers and inaccurate averaged yearly income." It referred to "a series of staff logs" and displayed screenshots of the automated system.

On the same date Mr Turnbull sent a message to Mr Tudge drawing his attention to the media coverage.[131] Mr Tudge replied to Mr Turnbull, saying:

> …My assessment is that apart from abc and guardian, this is now no longer a story of any significant size. We have staff leaking to abc – Dhs is very highly unionised – which we have to manage. I gave our position to abc yesterday re latest allegations of theirs…

On 19 January 2017 Lisa Newman (deputy national president, CPSU) wrote to Ms Campbell, relaying concerns raised by staff that "debts are being issued where there is no proof that a debt exists."[132] The correspondence from the CPSU was based on member complaints to it as well as a whistle-blower letter

which had been publicised in the media and drawn to the attention of CPSU representatives.[133] It also stated that "The staff we have spoken to indicate the directions they are being given and the potential harm it is causing to customers is resulting in high levels of personal distress."

A response was drafted that said "Unfortunately the information that you have been provided is incorrect,"[134] but it does not appear that it was sent, and there is no evidence that it reached Ms Campbell's desk.[135]

On the same day Mr Tudge sent an email to Ms Campbell, requesting that she "call to discuss" the whistle-blower's allegations.[136]

A summary of the communication from the whistle-blower[137] explained that debts raised under the Scheme were frequently inaccurate for a number of reasons. It stated:

> I am a compliance officer with Centrelink. I'm writing because I along with so many of my co-workers have tried to stop the wrong that is being done to thousands of our customers on a daily basis and I can no longer live with what we are doing. I spoke confidentially to my wife and she has urged me to speak out about what is actually happening inside Centrelink, before it is covered up. Both myself and my wife understand this could mean that I lose my position….
>
> We are struggling daily with our consciences and pushing back against our leaders every single day … I see these reviews every working day and I am horrified at what I am being directed to do. I am risking my job sending this information in the desperate hope that exposing such as corrupt and unjust system might just make a difference.[138]

The summary described the raising of debts that were "incorrect" and outlined the five main system errors that caused the debts to be incorrect, which were:

- doubling up of income due to errors in the correct identification of employers or income types,
- the inclusion of non-assessable income which should be excluded from the assessment,
- incorrect calculation of the amount of payments made to recipients,
- the application of a recovery fee in circumstances where it should not be applied, and
- directions to compliance officers which had the effect of inhibiting their ability to correct errors.[139]

In particular, it was said, "Centrelink officers are not allowed to check the results of the automated system against evidence previously provided by the person or their employer…."[140]

A short time later, Ms Campbell circulated a "para" as a basis for a communication to be issued to DHS employees, which read:

> The Online Compliance Intervention is a new way of approaching overpayment identification. It takes advantage of data from the ATO and when a mismatch between that data and the data reported to Centrelink is identified, the Centrelink Payment recipients [sic] is asked to clarify the information. In the past, staff did this work for the recipient. This was very time consuming and meant that a relatively small number of overpayments could be addressed. Some of our staff believe that intensive one-on-one management of recipients is always required. As with other online initiatives in Centrelink, this intensive support is still available for those recipients who need it and complex cases. Many recipients prefer to manage through an online system, in their own time, rather than dealing with a staff member. Also, some staff do not welcome technology driven change because they are concerned for the future of their jobs. We will continue to work with staff to explain how the system operates and the role they play.[141]

That paragraph did not respond substantively to the accuracy concerns raised in the whistle-blower letter, but rather dismissed them at a high level as the self-focused, out of date preoccupations of a staff member concerned about their employment.

In response to the whistle-blower's allegations, a media statement was published on the DHS website.[142] That response had been developed with the input of Ms Campbell, Ms Golightly and Mr Tudge.[143] The media statement asserted that the claims made in the whistle-blower document about the OCI program did not "accurately represent how the system work[ed]" and that each of the five main allegations of

system error outlined in the document was "incorrect." It also said that "The system is designed to identify anomalies and these are sent to a staff member for review."

Again, the media statement did not address the substance of the concerns expressed by the whistle-blower – that is, that debts being raised under the Scheme were themselves "incorrect."

Also on 19 January, Mr Tudge visited frontline Centrelink officers as part of his consultation process.[144] A DHS officer made notes of his meeting with staff on that date, and the suggestions that were made to him about improving the system.[145] The notes stated on two occasions that the minister had made no commitment to any changes additional to those that were already being pursued.[146] Ms Golightly emailed those notes to Ms Campbell, with the assurance, "We will start work on reviewing each of the suggestions – some we already have answers to!." [147]

A few days later, Mr Tudge emailed staff in his ministerial office. Among the instructions given to them was "A push on the ideas that came out of the Centrelink visit."[148] Mr Tudge seems to have been more motivated than his departmental officers to consider suggestions from staff, and commit to changes beyond those "already being pursued." Mr Tudge emphasised in his email his support for recipients being able to access the online portal "without having to sign up for MyGov," a change that was in fact implemented in early 2017.

On 25 January 2017 Mr Tudge's chief of staff telephoned the CPSU regarding its 13 January 2017 letter to Mr Tudge.[149] He advised the CPSU that their letter had "raised some important issues around staffing and…[they] should raise those issues with the department." There was no response to the problem of incorrect debts. The CPSU had, in fact, already raised similar issues about staff distress in their letter to Ms Campbell on 19 January.

Also on 25 January 2017, Ms Campbell sent an email to staff referring to misrepresentations in the media and assuring them that there had been no change to the way DHS assessed income or calculated and recovered debt.[150] The use of that representation was both false and non-responsive to the substance of the concerns that were raised. Its use in correspondence to DHS staff, including compliance officers, many of whom would know more about the processes for assessing income and calculating debts than the senior executive officers of the department ever would, was an invitation for correction. That is precisely what occurred.

"You are being misled"

Colleen Taylor, an experienced DHS compliance officer, saw the departmental media release and read the email from Ms Campbell on 25 January 2017.[151] It was almost a year to the day that Ms Taylor had emailed the Compliance Helpdesk and her managers about problems with the Manual Program (detailed earlier). She had continued to raise concerns with the Scheme, both verbally and by email, since that time.[152]

Ms Taylor said that she was "shocked" when she read Ms Campbell's email.[153] In particular, she was "very concerned that she [Ms Campbell] had said that there had been no changes in how we assessed income or calculated and recovered debt, when I knew that was not correct."[154] Ms Taylor considered the new approach to be "dramatically different," and that what Ms Campbell had said was "quite wrong."[155] Clearly of a charitable disposition, Ms Taylor concluded that Ms Campbell "obviously did not know what was happening in the implementation of the Scheme,"[156] so her reaction was:

> I wanted to tell her how dreadful the changes were and the effect they were having, because someone was obviously telling her that nothing had really changed, which was not true.[157]

On 7 February 2017, Ms Taylor sent an email directly to Ms Campbell,[158] copying in Hank Jongen, the departmental media spokesperson. She referred to Ms Campbell's statement that there had "been no changes to how we assess income or calculate and recover debt"[159] and did her best to enlighten her:

> Please allow me, as a loyal employee of many years standing who has only ever raised concerns in-house, to respond to you directly as **your statement tells me that you are being misled** and I want to ensure my words reach you…
>
> There has been a very dramatic change within the last 18 months to the way in which compliance assesses income and calculates and recovers debt…
>
> [emphasis added]

Ms Taylor's correspondence to Ms Campbell raised specific concerns about the accuracy and legality of debts raised pursuant to the Scheme, and about the reversal of the onus of proof on to a recipient, including that:[160]

- DHS was raising "debts… that were never incurred and debts raised for amounts higher than warranted"
- Prior to the Scheme, a process of averaging was "very rarely… used because we know the PAYG Payment Summary data is corrupt for our purposes"
- DHS was engaging in a process considered by Centrelink workers to be "a fraud perpetrated by us on our customers" and "we should not be the ones stealing from our customers" and
- there were numerous circumstances in which a recipient, who did not have the skills of a compliance officer or compulsory powers to obtain information, would be unable, or unaware of a need, to provide information that would be required to accurately calculate a debt.

Like the whistle-blower, Ms Taylor raised the issue of deficiencies in the system's ability to detect information already present on a recipient's record. She cited the example of an employment separation certificate as something that should be checked at the start of the review process, and that had been disregarded under the review process in place at the time she had identified an issue (during the Manual program).[161]

Ms Campbell's evidence was that she did not read "the full extent of Ms Taylor's documents." Instead, she had "referred them to the relevant line area."[162] This is consistent with documents before the Commission which demonstrate that, approximately four minutes after receiving Ms Taylor's email, Ms Campbell forwarded it to DHS officers including Ms Golightly, stating "Can I have some analysis undertaken on this urgently. I expect it will already be with the CPSU."[163]

A short time later, a telephone conference was arranged between Ms Taylor and two members of the senior executive service of DHS. Ms Taylor described feeling "very pleased," because she thought that "someone was listening and my concerns would be considered."[164] During the phone call, Ms Taylor recalled talking about the concerns she had raised in her response to the secretary and also some additional matters, including problems with averaging.[165] At the end of that call, Ms Taylor remarked to her team leader, "I don't think she listened to a thing I said."[166]

A departmental Minute was prepared which contained, among other things, a summary of the telephone conversation with Ms Taylor.[167] It stated:

> It was clear during this phone conversation, that Ms Taylor did not understand the processing capabilities of the online compliance system…

What was, in fact, clear was that there were a number of senior departmental officers who did not understand the online compliance system or its effects. To compound that problem, when people like Ms Taylor raised legitimate concerns, which in substance reflected the reality of what was occurring to those subject to the system, they were, effectively, ignored.

A document attached to the departmental Minute also referred to Ms Taylor's concern that there were circumstances in which compliance officers had been instructed to undertake reviews "without reference to the customer's record which could explain the discrepancy."[168] It sought to dismiss that concern by saying that Ms Taylor had taken "out of context" Helpdesk advice to staff in January 2016 that "they should not be interrogating customer records and looking at periods not relevant to the review."[169]

That was wrong; the advice given was that while there was nothing to stop staff looking at the record relevant to the review, there was no expectation that they would do so; the policy was to apply the match data if the recipient did not make contact.[170] And staff involved in the preparation of the departmental Minute had located a similarly restrictive instruction to all staff in relation to OCI, published in a newsletter in November 2016, which said:

> …It is important that staff do not investigate the record looking for documents to alter the outcome of an intervention, as the outcome should be based on the updates provided by the customer…If the customer makes the decision to accept the match data without making changes, then the match data is to be applied in its entirety.
>
> The same process applies for Staff Assisted customers; the intervention is done on behalf of a customer using their own responses. Staff should not look for evidence on a customer's record unless the customer advises that they provided documentation previously…[171]

Ms Taylor was clearly correct in what she had said about the instructions to staff. The comment that the advice to staff had "been represented out of context" was removed in the final version of the document that went to the secretary.[172]

Ms Taylor received a brief response from Ms Golightly on 14 March 2017.[173] That response advised "The Secretary has asked that I respond on her behalf." It did not respond substantively to the concerns raised by Ms Taylor but simply stated:

> I can assure you that your suggestions are being considered and will be taken into account in our continuous improvement processes.

On receiving Ms Golightly's letter, Ms Taylor, who was given to hoping the best of people but was also a realist "wasn't overly confident that things would change."[174]

Ms Taylor retired from the public service in July 2017. In her statement, Ms Taylor said:

> Before Robodebt was introduced I loved my job. I felt I had expertise in my area and I felt I was making a contribution as a public servant. Having tried my hardest to get something done at the highest levels of the Department to change the scheme, I felt I had no option other than to leave my position and retire from the public service.[175]

In oral evidence, when asked what her reason was for retiring, Ms Taylor said:

> **I just – I was just spent, I think. I just – it was just the, I guess, callous indifference, that you just thought, is that what people do to each other? And it was just so sad…**[176]
>
> [emphasis added]

Response to staff concerns

Mr Tudge was asked, in his oral evidence, about the issue of staff being unable to check a recipient's record for relevant information in order to check the accuracy of a debt, specifically in the context of employment separation certificates,[177] which the whistle-blower had raised. According to Mr Tudge, that restriction no longer occurred:

> From that point onwards, there – there was a compliance officer. So the debts were paused, as I said, until the end of August. And at the end of August, there was a compliance officer there to do that checking, precisely dealing with the matter which she raises.[178]

The fact that it was recognised as necessary to introduce a manual check demonstrates that the response in the media statement, which dismissed the whistle-blower's claims as "incorrect," and made no mention of any known issues with the system, or any steps being taken to address them, was specious. The manual check was also tacit confirmation of the validity of some of the staff concerns that had been raised with the system.

Both the secretary of DHS, and its minister, had specifically been made aware of the concerns of the departmental whistle-blower. Ms Campbell knew of Ms Taylor's email. The CPSU had informed them that the program was causing stress and distress for staff, and that debts were being issued that were incorrect. Numerous sources, inside and outside the department, had raised problems with debt inaccuracy, which was a consistent theme of the criticisms of the Scheme at the time, and required close scrutiny.[179]

In contrast with the attention he gave process changes, Mr Tudge refrained from asking what authorised the department to raise inaccurate debts, and did not respond to the substance of the allegation of debt inaccuracy, instead participating in a response to staff that asserted that the specific system concerns that had been raised were "incorrect." Mr Tudge's conduct in his response to staff concerns was another example of his selectively responding to implementation issues with the Scheme, while avoiding fundamental concerns, including that of debt accuracy.

Ms Campbell failed to engage with the concerns that both the whistle-blower and Ms Taylor had raised. Her response to staff concerns, including those about income averaging and debt accuracy, was not to seek external assurance or even make inquiries about the matter with her chief counsel or other departmental lawyers. Instead, it was to issue the staff communication on 25 January 2017 which contained the representation that there had "been no change to how we assess income or calculate and recover debts," which she knew to be false. When Ms Taylor expressly brought the falsity of that statement to her attention on 7 February 2017, Ms Campbell took no steps to correct it. Ms Campbell accepted that the persons to whom she had delegated the review of Ms Taylor's complaints had not followed up and addressed them in any systematic way. The responsibility was hers, but she took no further action.[180]

10 The 10 per cent penalty fee

In her December correspondence to Mr Tudge, Dr Goldie had raised a concern about the "routine" imposition of a 10 per cent "recovery" fee.[181] That was a reference to the application, by the department, of a penalty fee, euphemistically called a "recovery fee," in circumstances where a compliance review resulted in a debt. Economic Justice Australia had also met with DHS in January 2017 and had raised concerns including with respect to averaging and the 10 per cent penalty.[182]

The Social Security Act provided for the addition of an amount, by way of penalty, to a debt which arose in certain circumstances because a person had either not provided, or had provided false or misleading, information about their income.[183] The penalty did not apply where the person had a reasonable excuse for either refusing or failing to provide the information. The amount of the penalty under OCI was 10 per cent of the amount of the debt.

Eventually, it would come to light through the *Amato* proceeding that the underlying debts to which the penalty fee had been applied were invalid (due to the use of income averaging), and that none of the necessary preconditions for the application of the penalty were present. However, even before that eventuated, there were still problems with the application of the fee.

Crucially, the provision in the legislation which provided for the application of the penalty fee stated that it arose in circumstances where a person had been "required, under a provision of the social security law, to provide information in relation to the person's income…."[184] Legal advice in January 2015 had pointed out to DHS that the initial letter sent to recipients at the start of the process was "not a coercive notice under social security law;" instead it was a request to a recipient to provide information voluntarily.[185] It follows that the initial letters sent out under the review process provided no legal foundation for the application of the 10 per cent penalty fee provision, and no basis upon which to charge the penalty.

In averaging cases, the only conceivable argument for the penalty's application required a conclusion that there must have been a failure to report correctly in each fortnight represented by the supposed overpayment of benefit, on the basis of an assumption that the averaged amount represented the recipient's correct income for every single fortnight of the supposed overpayment which constituted the debt. That would be a very large assumption indeed, particularly given that the charging of a penalty required the serious conclusion that the recipient had breached the Social Security Act.

All of these problems apparently went unnoticed, despite a number of legal advices which dealt with the issue of the 10 per cent penalty fee.

10.1 Changes to the application of the penalty fee

The way in which the penalty was administered under OCI was that, when the recipient went online to complete their review, there was a question on one of the screens that asked "Were there any personal factors that affected your ability to correctly declare your income during the above periods?."[186] If the recipient answered, "Yes," then the penalty fee would not be applied. If they answered "No," it would be applied. Where a person did not respond, it would also be applied.[187] Legal advice had been obtained from DSS in relation to the issue in July 2016.[188]

In early 2017, as part of the changes that were being made to the OCI process, Mr Porter and Mr Tudge had conveyed to the department that they wanted to change the online screens so that they defaulted to answering "Yes" to the personal factors question outlined above (even in circumstances where a person did not respond), and a 10 per cent penalty fee would not be applied.[189] The ministers were also involved in the re-wording of a number of the letters for the OCI process. One change that had been requested by Mr Porter was the removal of information about the 10 per cent penalty fee from the initial letter.[190]

By the time of the Ombudsman's report in April 2017, those changes had occurred. The Ombudsman recommended that, in certain circumstances, DHS should manually reassess those debts already raised under OCI where the "recovery" fee had been applied automatically.[191] Those circumstances included where a recipient contacted DHS (or a debt collector) to raise a concern, seek information, or seek a reassessment in relation to an OCI debt which included a penalty fee. DHS had had no small hand in the drafting of the wording of that recommendation, its having been the subject of significant revision by DHS, and substantial acceptance of those changes by the Ombudsman.[192]

DHS's letter in response to the Ombudsman's recommendation stated that the "recovery" fee had been automatically applied in "limited circumstances," namely where a recipient had not contacted the department or where "the recipient did not tell the department they had a reasonable excuse for inaccurate reporting."[193]

There were obvious problems with that response. Firstly, the "limited circumstances" in which the fee had been applied represented approximately 74 per cent of the completed reviews under OCI from July 2016 to January 2017.[194] Secondly, it implied that the raising of a debt had necessarily arisen as a result of "inaccurate reporting" by recipients, in circumstances where the department was well aware that there were significant system issues causing errors in debt calculations, and they had not undertaken any comparison of what the recipient had, in fact, reported, as contained on their departmental record. Thirdly, the circumstances in which a recipient "did not tell" the department they had a reasonable excuse included those where a recipient may have:

- understandably, not been aware of or understood the nature or context of, or the complex underlying statutory provisions relating to, a "reasonable excuse" and its relationship to the application of a penalty
- not made a connection between the impenetrably vague language of the online question about "personal factors" affecting their ability to declare their income, and its import with respect to the automatic application of a penalty fee, or
- not even seen the question on the online screen because they had not received the initial letter.

In any event, DHS advised the Ombudsman that it had commenced contacting people who had had the fee applied, and would write to all recipients who had an OCI debt, to remind them of their review rights, "including the application of the recovery fee."[195]

11 The use of the media

A particularly mean-spirited aspect of the government's defence of the Scheme in 2017 was the employment of the media in a form of counter-attack against criticism, which included singling out recipients who complained.

11.1 Media strategy

In January 2017, Mr Tudge's media adviser, Rachelle Miller, developed a media strategy with respect to the OCI program. This strategy included the use of a "counter narrative" in "more friendly media," which focused on themes of "cracking down" on welfare cheats, restoring integrity to the welfare system and using "cutting-edge" technology to ensure that the welfare system was sustainable.[196]

The strategy involved:[197]

- placing media stories about "legitimate" debts that were being detected by the OCI system, including "real life 'case studies'"
- placing media stories about convicted "welfare fraudsters" and
- as possible.

Mr Tudge was advised of some of Ms Miller's suggestions for that strategy by an email on 9 January 2017, which said "There is a strong defence here and a story of a system that is doing what it is supposed to do, if we aim it at the right media."[198]

On 18 January 2017, Bevan Hannan (acting national manager, Customer and Media Engagement, DHS) sent an email to senior DHS officers including Ms Campbell, Ms Golightly, Ms Harfield and Mr Withnell (general manager, Business Integrity).[199] He outlined the "likely approach from the Minister's office over the next week" with respect to media, attributing the thinking behind it to the Minister's media advisor.

That approach included an observation that "News Corp isn't interested in the line being run by left-leaning media – but is keen on the alternative view. As such, the focus will be on working with News to achieve this." Elements being considered for this "narrative" included statistics on the success of current compliance activity, correction of customer cases "where we are certain of the facts," de-identified "cameos" demonstrating the types of debts being recovered, and highlighting the percentage of "valid" debts within cases featured in the media.

Consistent with this approach, requests for information soon followed from the minister's office, including for:

- "information on media cases that we know have been misrepresented when reported"[200]
- "case studies of situations uncovered, through the new system, where people have owed legitimate debts, preferably large debts where there is a clear case of under reporting"[201]
- full lists and details of cases that had been featured in the media[202] and
- the "top 20 $ value potential overpayments identified through the OCI system."[203]

Mr Tudge personally involved himself in responding to media,[204] manifesting his acceptance of those of Ms Miller's suggestions that were ultimately adopted, and of a strategy involving a "strong defence," and the "story of a system that is doing what it is supposed to do."[205]

Mr Tudge submitted to the Commission that, in effect, he did not adopt a strategy in order to respond to criticism in the media; instead, his "focus was on addressing the implementation issues with the Scheme, rather than engaging in a strategy of deflection."[206] His evidence was that part of the role of a minister included working with the media to communicate the government's message, and that it was an important and expected part of that role, which he took seriously.[207]

Certainly Mr Tudge's communications with Mr Turnbull included telling the prime minister that:

- "My messaging will be that the system is working but we will continue to make improvements, as we have since we first came to office"[208]
- he had been monitoring media coverage that morning (13 January 2017). Later that day, he said that he had a "complete plan as to how to make the system more defensible" and "My plan is to signal more of these "refinements" on Monday"[209] and
- "My positioning this week hopefully allows us to do more "refinements" fast without losing too much face."[210]

While it is accepted Mr Tudge did have an implementation focus, his media strategy did not stop at conveying the refinements he had made. He also employed it to deflect criticism of the Scheme and quell negative public comment. He was personally involved in its execution. He received and reviewed the details of case studies reported in the media,[211] and edited and analysed details of some of those case studies and statistics that were derived from them.[212] In one instance, with respect to a response to the case studies that had been developed by his ministerial staff, Mr Tudge commented, "These lines are not robust enough."[213] Mr Tudge also approved information about the case studies to be sent to a journalist at The Australian newspaper.[214]

Mr Tudge's assistant advisor undertook part of the analysis of the case studies that were sent to the minister's office in late January 2017.[215] In an email sent on 20 January, she indicated that she had discussed the matter with Mr Tudge that afternoon, and that he had requested further data analysis. In her email, which was subsequently forwarded to Mr Tudge, she noted that the spreadsheet of cases provided by DHS contained original debt amounts raised against recipients, and observed:

> In a number of cases this has been substantially revised down – this could present a bit of a risk about the quality and accuracy of the original data-matching system.

A journalist at The Australian newspaper, Simon Benson, was provided with the information that had been approved by Mr Tudge.[216] On 26 January 2016, The Australian published an article by Mr Benson entitled "Debt scare backfires on Labor."[217] The article described the recent criticism of the compliance program by the opposition as "an embarrassing blunder," and characterised the people who had spoken publicly about their experiences with Centrelink debts as "so-called victims."

The same day, Mr Tudge was interviewed on radio 2GB, where the article was discussed, and the following exchange occurred:

> WARREN MOORE: …Well you must be quite happy that Simon Benson has written this piece in The Australian today.
>
> ALAN TUDGE: Well, it's a very significant story that he's written, and what it shows is that Labor has been deliberately putting up cases to the media alleging that people have been so-called victims of the online compliance system, when in many cases, in fact, they do owe significant amounts of money.
>
> Now, we're recovering that money where there has been a clear overpayment, and that's good for the taxpayer and it's also good for the welfare system, because it means it's going to be a more sustainable system in the long run…[218]

The minister also made the decision for his office to publicly release the personal details of one particular person to the media, following an opinion piece she wrote, critical of her treatment by Centrelink, which was published in various newspapers.[219]

The opinion piece related to that person's experience with Centrelink concerning a debt that was not raised under the Scheme. However, its relevance to the Commission's investigations was that it occurred in the context of a media strategy to discourage public criticism of the Scheme. It was a response, from both DHS and the minister's office, to a person who had described their negative experience with a Centrelink debt. The information released related to a particular named individual, rather than being an anonymised case study or part of an aggregate of data about a number of case studies and it was released by both the minister's office and DHS.

Mr Tudge said that, in hindsight, he considered that the information should have come from the department to "correct the record," and not from his office.[220]

This particular release had an observable impact on the willingness of people to publicly speak out about their experiences in the media. Ms Miller commented that, as a result of the release of this personal information, "there were less people speaking out in the media, which was the intention."[221] It had the effect of shutting down most of the personal stories appearing in the media which were critical of the Scheme.[222] Ms Crowe, from ACOSS, described the release of the information as "a shocking abuse of the government's power at the time."[223] She was worried that it would "silence people who were affected by Robodebt" and agreed with the proposition that the release of the information in fact had "a chilling effect" on people who wanted to complain about DHS.[224]

There may well have been other reasons for the drop in Robodebt stories at the time, but it is reasonable to infer, particularly given the observations of Ms Miller, a media professional, and Ms Crowe, who dealt regularly with recipients subject to the Scheme, that it was largely due to the release of information by the minister's office in response to complaints.

It can be accepted that a minister may often be called upon to defend government policy in the media, including unpopular policy. However, this strategy went further than that. Mr Tudge submitted that the use of case studies, and the release of information relating to a particular person, was intended to "correct the record" in the media. Correcting errors in reporting may be a legitimate exercise. But this was not done openly. Instead, the minister's office fed information to the press, and in the case of the 26 January article in The Australian, Mr Tudge the same day exclaimed over the "significant story" on radio without disclosing that his office had been the source of it.

If "correcting the record" were the only purpose for the collation and release of this information, then it would have been equally important for the minister's office to do the same in respect of at least some of the cases where DHS or the system had made mistakes. Instead, in instances where debts had been discovered to be incorrect, recipients were dealt with by contact with DHS.[225] The effect of the strategy employed by the minister and his office, of publicly correcting the record by emphasising "legitimate debts,"[226] "preferably large debts"[227] and "top 20 $ value potential overpayments"[228] without doing the same with respect to instances where mistakes were also occurring, and debts were either inaccurate or non-existent, was that it was apt to create a general perception that debts under the Scheme were owed and the system was working.

Mr Tudge's engagement in this media strategy, and use of the media in this way, had the effect of discouraging criticism of the Scheme, and inhibiting open dialogue and analysis of the flaws of the Scheme. It also had the effect of undermining the credibility of complaints and concerns about flaws in the Scheme.

As a minister, Mr Tudge was invested with a significant amount of public power. Mr Tudge's use of information about social security recipients in the media to distract from and discourage commentary about the Scheme's problems represented an abuse of that power. It was all the more reprehensible in view of the power imbalance between the minister and the cohort of people upon whom it would reasonably be expected to have the most impact, many of whom were vulnerable and dependent on the department, and its minister, for their livelihood.

11.2 Department media

On 28 and 29 December 2016, Ms Golightly emailed Ms Harfield about the articles about the OCI program that were proliferating in the media at the time.[229] She apologised to Ms Harfield for "bother[ing her] over the break," but indicated that the issue was in the mainstream media and "we will need to get it shut down as quickly as possible." Ms Golightly indicated that she was "keeping up the pressure on media to get the details" and that the media interest had "the potential to derail the good work we are doing and we need to get it dealt with."

On 2 January 2017 Ms Golightly sought "options and advice" on a proposed media strategy to deal with the media reporting on the OCI program.[230]

Mr Hannan subsequently signed off on a "Communication Plan" for the OCI program, and commenced development of a "script…from the standard words" and talking points "drawn from the ones sent to the minister."[231] Mr Hannan was of the view that such a plan should have been considered at a far earlier time and, by January 2017, the department "had missed the opportunity for a well-executed launch and the situation was beyond rescue from communications."[232]

Part of DHS's engagement with the media involved its spokesperson, Hank Jongen. Mr Jongen's role included releasing "official statements" to the media and participating in broadcast interviews to represent the department.[233] Mr Jongen's evidence was that, with respect to the Scheme, he engaged with the media "in accordance with direction provided by DHS in line with approved statements," and that he would be provided with "media statements" or "talking points."[234] Mr Jongen explained that it was the "business owner" (in this case, Ms Golightly) who was responsible for media content; his role was to deliver that message.[235]

Ms Golightly demonstrated a desire to keep control of the media narrative and the dissemination of information for that purpose. On 4 January 2017, in response to a query about information required for a media appearance by Mr Porter, Ms Golightly replied "Thanks for the offer of assistance, however it is my team that should be handling this and will do so."[236] She frequently amended proposed media responses, including ensuring "standard words" were added.[237]

In January and February 2017, Ms Campbell replied to media summaries, dismissing the reporting as "fabrication"[238] and "distort[ion]"[239] and criticised the reporting for leaving recipients' stories "unchallenged."[240] On 4 May 2017 Ms Campbell responded to a media update saying "good to see no questions on OCI today. Maybe it's easing…."[241] A further specific example of Ms Campbell's approach to the use of media follows, with respect to the income support recipients who had been subject to the Scheme

DHS's approach to the media, particularly during the period of intense publicity in the early months of 2017, was to respond to criticism by systematically repeating the same narrative, underpinned by a set of talking points and standard lines. There was no critical evaluation of this messaging, or its accuracy, because the "gatekeepers" of its content were more concerned with "getting it [the media criticism] shut down as quickly as possible," and "correcting the record" with standard platitudes that failed to engage with the substance of any criticisms.

12 Suicides associated with the Scheme

The Commission is aware that a number of people who had alleged debts raised against them under the Scheme have died by suicide. While each of those deaths may have prompted an internal review of the particular case,[242] they did not galvanise either DHS or DSS into a substantive or systemic review of the problem of illegal, inaccurate or unfair debt-raising.

Further detail about some of these cases, and the serious human impacts arising from the Scheme, are contained in the chapter on Effects of Robodebt on individuals. The following section is concerned with the response of DHS and the minister's office to two suicides which occurred in early 2017.

On 16 February 2017 at 8:35 pm, Ms Campbell asked for "our response on the customer case for the Saturday paper."[243] Ms Campbell was referring to a request from a journalist from The Saturday Paper, who had inquired with DHS about information relating to Rhys Cauzzo. At 9:17 pm and 9:19 pm Ms Golightly emailed Ms Campbell in response to her request.[244] Both emails included the information that Mr Cauzzo's debt was not raised by way of the OCI iteration of the Scheme.[245]

On 18 February 2017 emails were circulated by DHS, including to Ms Campbell and to the minister's staff, seeking a correction to the article published on Mr Cauzzo's death in The Saturday Paper; in particular making the key point that the debt raised against Mr Cauzzo "was not tied to the OCI system."[246]

On 18 February 2017 at 11:03 pm, Ms Golightly wrote to Ms Campbell in respect of the death of Mr Cauzzo:

> Hi Kathryn - The Saturday Paper updated story has not used most of the info we sent them today - they do include that it was a manual process right at the end but this is after the whole body of the report which still implies it was all to do with OCI. Clearly they are not interested in the facts or in printing what we provide to them. As per Cathy's email earlier this evening, we will work on a narrative around the processes re debt collectors and vulnerable people for use in other forums or if this story gets picked up. I am envisioning something which says that we followed the normal processes in the case - the same processes that apply for any debts raised across any Centrelink programme and which have been in place for many years. We will check that this is an accurate statement of course.[247]

Ms Campbell's response was sent on 20 February 2017 at 8:50 am stating:

> Thanks Malisa.
>
> Jonathan, Annette and Cathy
>
> From now on, I want to be more direct with media outlets when a recipient or representative makes claims which are inconsistent with our records. After getting legal advice, I want to say that the information is inconsistent with our records or some other form of words. This may require a discussion with the MO.
>
> Happy to discuss further. Kathryn[248]

The exchange demonstrates that Ms Campbell and Ms Golightly were, first and foremost, preoccupied with distancing Mr Cauzzo's death from the OCI program and to "work on a narrative." Ms Golightly had proposed words to the effect that standard processes had been observed, noting as an addendum that they would check those words for accuracy, having already "envisaged" the message she wanted to deliver. In her oral evidence, Ms Campbell explained that the approach was because "staff were feeling that they were under siege" but acknowledged that, with respect to Mr Cauzzo's death, it did not matter "what, if anything, had… contributed. This was a tragic circumstance."[249]

DHS's emphasis on whether the debt was the product of its earlier, manual system, or its current, automated system (both of which involved averaging) is symptomatic of its senior executive officers' emphasis on controlling the narrative surrounding the Scheme rather than dealing with the actual concerns being expressed in many quarters about the accuracy, fairness and legality of debts raised under it.

Mr Tudge was also made aware of Mr Cauzzo's death, and that the media report had indicated that letters relating to a social security debt were a factor relevant to his suicide.[250] He requested an investigation into the circumstances of Mr Cauzzo's case.[251] The intent behind Mr Tudge's request was described by a departmental liaison officer as being able to write to Mr Cauzzo's mother and convey that he "[was] confident that the Department ha[d] done everything correctly."[252]

Mr Tudge was provided with a brief on the outcome of that investigation in April 2017.[253] The brief stated that DHS had identified one system issue relating to an incorrect date on a letter and that all of DHS's interactions with Mr Cauzzo "were appropriate and undertaken within the parameters of departmental processes."

Consistent with the intent behind Mr Tudge's request, the investigation was conducted, and conclusions were drawn, on the basis of a superficial examination of procedural and operational compliance by DHS. The investigation should have identified that a "vulnerability indicator" ought to have been recorded on Mr Cauzzo's Centrelink record, given that (as the investigation report attached to the brief recorded) in September 2015 DHS was made aware he suffered from anxiety and depression and had reported suicidal ideation. A vulnerability indicator would have triggered the additional responsibilities in dealing with Mr Cauzzo, including exercising caution when considering compliance action and taking any vulnerabilities into consideration with respect to possible non-compliance.[254]

Mr Tudge's letter to Mr Cauzzo's mother, Jennifer Miller, said:

> While the review identified some minor errors of an administrative nature, it concluded that both the Department's and its agent's interactions with your son were handled appropriately, professionally and sensitively.[255]

Those conclusions were wrong and the letter misleading. The error was not minor, and Mr Cauzzo's case was not handled appropriately or sensitively.

Mr Tudge was made aware of a second suicide relating to a discrepancy letter issued under the compliance program, which by this time was known as EIC, in July 2017. (The individual involved will be referred to as "Ms A.")

Mr Tudge's chief of staff, Andrew Asten, received an email in relation to Ms A's suicide on 14 July 2017, and requested a further update to be given later that day.[256] He recalled telephoning Mr Tudge and "effectively relay[ing] the contents of the original escalation email to him."[257]

Documents provided in response to a specific request by the Commission reveal no record of any further communication to or from the minister about this case.

DHS's summary of the circumstances of the case indicated that Ms A did not, in fact, owe a debt.[258] Her employment had ended prior to the period in which she commenced receipt of welfare payments. This information was available on DHS file when the discrepancy letter was sent, in the form of an employment separation certificate which gave the correct end date for her employment. Under the compliance review system that was in place prior to the Scheme, it is most likely that no discrepancy letter would have been sent to Ms A at all, because, under that system, before proceeding, compliance officers would check a recipient's record to determine if there were information that could explain a discrepancy.[259]

Mr Tudge conceded in oral evidence that while it was not possible to say that the Scheme was the cause of the suicide, it was equally not possible to say that it was not.[260]

In fact, it seems highly probable that it was. An email setting out DHS history of the case provides the following information:[261]

- Ms A had provided medical evidence to DHS that she suffered from depression and other mental ill-health; as DHS knew, she had suffered from workplace bullying and was seeing a psychologist; she had previously contacted DHS to discuss financial hardship.

- In mid-June 2017, a compliance officer had spoken to Ms A about contacting her employer for additional documents; she was sent a reminder letter; within a week of it her sister contacted DHS and advised that Ms A had died shortly after receiving it.
- Ms A's sister suggested that given she had gone through an unfair dismissal process, the prospect of having to speak to her previous employer could have been overwhelming and brought back memories of her experiences, with an impact on her continuing mental health problems.

As previously outlined in more detail, the media statement issued, with Mr Tudge's input, in response to the whistle-blower's document had asserted that the system errors it outlined were "incorrect," and made the claim, "The system is designed to identify anomalies and these are sent to a staff member for review."[262]

In Ms A's case, in July 2017 the system could not, and did not, identify any "anomaly" and an initial letter was automatically generated in circumstances where it should not have been. The deficiencies in the automated system were twofold:[263]

- the system was unable to identify a crucial piece of information that was already contained on Ms A's Centrelink record, namely the end date of her employment contained on an employment separation certificate, and
- in the absence of the ability to identify that information, the system had erroneously used the incorrect end date of employment contained within the ATO PAYG data to generate the initial letter to her commencing the review process.

Mr Tudge had said in his evidence that after Ms Taylor's email, a process had been introduced where a compliance officer would check the information on a recipient's file. In the context of being asked about the July 2017 case, where Ms A was required to respond to a discrepancy letter, he explained that this was a check at a different stage in the compliance review process; the compliance officer would review the materials during the debt raising process.[264] The best stage of the process in which to insert a compliance officer was, Mr Tudge said, after the discrepancy was identified but prior to the raising of a debt.[265]

Mr Tudge was asked by Senior Counsel Assisting why it would not be best to insert a compliance officer at the start of the process, to review material and prevent unnecessary initial discrepancy letters from being issued at all.[266] The following exchange occurred:

> THE HON ALAN TUDGE: Well, I can only reflect on why the Cabinet made that decision in 2015.
>
> MR GREGGERY: Mr Tudge, this was not a Cabinet decision in 2015; this was your fix in 2017.
>
> THE HON ALAN TUDGE: With – with due respect, Mr Greggery, those – the essential issues which you raised then were Cabinet decisions of 2015, because it was putting the onus back on to the recipient, which enabled a lot more reviews to be undertaken. And my reading of the Cabinet minutes is that there was a desire to undertake more reviews, because there was an identification that there was as much as 3.5 per cent of the welfare expenditure, being $100 billion per year, was an overpayment. And yet up until that point, only a tiny fraction was reviewed.
>
> And in order to be able to do more reviews, the structure of the system had to change, and the Cabinet made that decision, to change two key elements of the structure. One key element was to put more responsibility on to the recipient to collect that income information, and the second key structural element then was to create an online interface for the recipient to upload that information, both of which, those two things, enabled the additional compliance checks to be done. Without those two things, you could not do those additional compliance checks.[267]

There is no evidence that Mr Tudge was sufficiently concerned about the circumstances of Ms A's suicide to request any further information, brief, or investigation after his initial briefing from Mr Asten, so he may not have had sufficient details to connect what had happened in this case with the system deficiency identified by the whistle-blower earlier in the year. However, he seems previously to have recognised the problems that could arise at the initial letter stage; he had made inquiries about involving a compliance officer prior to an initial letter being issued. On 23 March 2017 Mr Tudge signed two ministerial briefs[268]

produced in response to his office's request "that the Department… produce costings to demonstrate the impact of every initial letter, and every finalisation with a debt outcome letter, being checked by a compliance officer prior to being sent to welfare recipients." Those figures were provided to him. Although departmental processes were changed to allow for additional manual steps later in a review process (as outlined in the changes to the Scheme under EIC, described above), no action was taken to have the initial letters checked.

By July 2017, Mr Tudge knew that at least two people had died by suicide, and that their family members had identified the impact of the Scheme as a factor in their deaths. Nonetheless, Mr Tudge failed to undertake a comprehensive review into the Scheme, including its fundamental features, or to consider whether its impacts were so harmful to vulnerable recipients that it should cease.

13 The issue of lawfulness

Early 2017, as has already been mentioned, saw a flurry in departmental activity. Because it was the holiday season, many officers were on leave, and others acted in their positions.

Between 23 December 2016 and 16 January 2017, Jonathan Hutson (deputy secretary, DHS) was on leave, and Sue Kruse acted in his place.[269]

Between 3 January and 15 January 2017, Annette Musolino (chief counsel, DHS) was on leave. Between 3 January and 8 January 2017, Paul Menzies-McVey acted as chief counsel, and between 9 January and 15 January 2017, Lisa Carmody acted as chief counsel.[270]

During December 2016 and January 2017, Mark Gladman acted as general counsel, Programme Advice and Privacy, DHS. That role was usually occupied by Maris Stipnieks.[271]

Between 22 December 2016 and 9 January 2017, Ms Campbell was on leave. During that time, Barry Jackson acted as DHS secretary.[272]

During the first week of January 2017, the Office of Legal Services Coordination (OLSC) raised with Mr Menzies-McVey whether the Scheme gave rise to a significant issue in the provision of legal services which was required to be reported to the OLSC or the Attorney-General. Communications between the OLSC and Mr Menzies-McVey, and Ms Musolino, on her return from leave, continued throughout January 2017, with no report being made. The details of those interactions are set out in the chapter on Lawyers and Legal Services.

13.1 Mr Jackson's period as acting secretary of Human Services

Mr Jackson was aware that towards the end of December 2016 and into January 2017, DHS was the subject of substantial adverse media publicity in relation to the Scheme.[273] That adverse publicity included media reporting and commentary about the use of income averaging in the Scheme, including with respect to the accuracy and lawfulness of debts raised under it.[274]

DHS officers were also required to respond to enquiries from the acting minister responsible, Mr Porter[275] (and subsequently Mr Tudge upon his return from leave),[276] about the Scheme and the use of averaging. Mr Jackson stated that his first "actual awareness of the problems associated with [the] Robodebt Scheme was on 23 December 2016, when there was the first significant media coverage."[277] He said "that level of media coverage obviously required my attention as Acting Secretary."[278] This is consistent with Ms Campbell's evidence that when she returned from leave on 10 January 2017 the Scheme was receiving media attention warranting daily meetings and phone calls until early February 2017.[279]

13.2 "A weapon of math destruction"

One example of a media article which raised the use of income averaging in the Scheme, including with respect to the accuracy and lawfulness of debts, was an article by Peter Martin published in the Sydney Morning Herald on 7 January 2017, entitled "How Centrelink unleashed a weapon of math destruction."[280] The prime minister, Mr Turnbull, had drawn the article to Mr Tudge's attention,[281] and he in turn sent a link to his chief of staff saying "PM sent me this one and has the clearest critique. Please forward this to Malisa."[282] The chief of staff did so; however, the article had already come to Ms Golightly's attention, she having forwarded it to Mr Withnell that same day.[283]

The article described the "automated Centrelink debt recovery system." It contained a quote from a "former Centrelink worker with 30 years' experience" about the historical process that had been in place.

That worker provided a description of the compliance review process that had been in place prior to the introduction of the Scheme.

The article then made the following crucial point:

> What's important in this description is the humans charged with applying the law **didn't issue debt notices unless they had evidence that a debt existed. To do so without evidence would be to break the law**.
>
> [emphasis added]

The article described the use of income averaging by the Centrelink system which "produces consistently false estimates of debts by dividing by 26 the annual wages employers report paying in order to overestimate income received during the smaller number of fortnights claimants get benefits."

In response to Mr Turnbull, Mr Tudge asserted (erroneously) that the description of the averaging methodology over 26 fortnights was "not correct," but that Mr Martin had identified the "key methodological change" of the reversal of the onus onto a recipient. There was a brief discussion of the article between the two, the focus of which was the apparent age of some of the debts and the difficulties for recipients obtaining records after that length of time. Neither Mr Tudge nor Mr Turnbull demonstrated an awareness of an issue with legality in that correspondence.

On 8 January 2017 Mr Tudge sent an email to Ms Campbell, Mr Jackson, and Ms Golightly and others. He outlined his requests for information for a meeting the next day with DHS employees and said "Please look at the Peter Martin column in FAIRFAX which PM has read."

Later that day Mr Withnell prepared what he described as "a brief overview of the Peter Martin article."[284] With respect to the paragraph of the article which dealt with legality (set out above), the document said:

> Important that humans who issued debt only did so with evidence a debt existed to do otherwise would break the law.- the difference in income between ATO and DHS records already suggest a debt. The system only raises a debt after the customer has verified or updated the data (therefore making it accepted data) unless they fail to respond in which case the individual is technically breaking the law and would leave DHS legally entitled to take a relevant course of action (should check with Legals).

Mr Withnell, it seems, was one of the many who were not very clear on the authority by which DHS was requiring responses under the Scheme; the correct answer being that there was none.

The next day, on 9 January 2017, DHS officers including Mr Jackson and Ms Golightly met with Mr Tudge. There is no record to indicate whether the Peter Martin article was specifically discussed. Mr Jackson recalled that the focus of the meeting was on the OCI "client facing portal,"[285] the nature of the letters being sent to recipients and the overall experience of recipients.[286] A list of requests from the minister, including data requests and directions for improvements to the operation of the system, was compiled and emailed to the meeting participants later that day.[287]

To Mr Jackson's recall the legal basis for the Scheme was not discussed during that meeting. DHS officers including Ms Golightly had said that the Scheme had been operating this way for a long period of time.[288] Mr Jackson's request for advice was not raised (that is detailed in the following section),[289] and Mr Tudge was not advised of it at any stage.[290]

13.3 Mr Jackson's request for legal advice

In that context of media coverage and ministerial inquiries, Mr Jackson had received repeated assurances from DHS officials, especially Ms Golightly, that income averaging was a longstanding practice.[291] Despite this, Mr Jackson sought to satisfy himself that there was a proper legal basis for income averaging, by requesting legal advice about it.[292] At the time of Mr Jackson's request, on 6 January 2017, DHS had not obtained internal or external advice about the lawfulness of income averaging as used in the Scheme.[293] Mr Jackson's expectation, given the significance of the issue, was that the advice would be from an external source, such as the Australian Government Solicitor (AGS).[294]

On the same date, this request for advice was communicated by Ms Kruse to Mr Menzies-McVey for his consideration. It appears that Mr Menzies-McVey became aware of Mr Jackson's request for advice after his 6 January 2017 conversation with the OLSC representatives. In submissions, Mr Menzies-McVey indicated he was not aware that the request for advice originally came from Mr Jackson.

By email dated 6 January 2017, Mr Menzies-McVey asked that Mark Gladman prepare advice in response to Mr Jackson's request.[295] He stated:

> Sue Kruse would like us to develop, as a top priority next week, a paper on the department's current practice of averaging income for the purposes of calculating payments under the social security law. This paper should look at the legislative basis for this practice for each payment, and identify the circumstances where it is permissible for the department to assume (in the absence of other evidence) that income over a period has been earned pro rata over the period. If, in some or all cases, the department should use its information gathering powers to obtain detailed information about when income has been earned (i.e. by compelling detailed information from an employer), rather than relying upon averaging, this should be identified. Any guidance in the Guide should also be identified.

The following day, on 7 January 2017, Mr Menzies-McVey re-sent his instructions to Mr Gladman saying "If you need to rope Glyn [Fiveash] in to assist, that's fine – let me know."[296] Mr Menzies- McVey forwarded that correspondence to Mr Fiveash, stating "Glyn See below for info. Mark might need a bit of help."[297]

Mr Gladman carried out this task with the assistance of John Barnett (deputy general counsel, DHS) and Matthew Daly (lawyer, Legal Services Division)[298] and provided the resulting draft advice to Ms Carmody, who ultimately provided a version of it to Ms Kruse.

Mr Fiveash held the position of deputy general counsel, DHS. His evidence was that he could not recall helping Mr Gladman;[299] however, on 11 January 2017, Mr Fiveash provided an advice to Tracy Tozer (acting director, WPIT Programme) on the issue (the Fiveash advice).[300]

The Fiveash advice concluded:

> The Department cannot apply an income amount received over a larger period (e.g. 12 months), in any way against a customer other than in the matter in which the person received it in those individual fortnights; i.e. the annual amount cannot simply be divided by and applied as the person's income over 26 payment fortnights. Rather, the annual amount needs to be apportioned between the relevant fortnights in the period at the rate at which it was actually earned, derived or received.

Unlike other internal advices, this advice actually addressed the statutory definition of "income" and, though brief, it encapsulated the fatal flaw at the heart of income averaging as used in the Scheme: that DHS could not (legally or justly) assess a recipient's entitlement to payment on one basis and then seek on a different basis to recover the payments made.

The Fiveash advice was sent to Ms Musolino on 23 January 2017,[301] but there is no evidence that she brought it to Ms Campbell's attention.

The evidence shows that a number of critical events took place by and on 10 January 2017 in relation to the proposal to seek external legal advice. These are:

- First, Mr Gladman had formed the view that the arguments in favour of averaging were "weak" and that AGS should be retained to provide an independent advice on the topic.[302] Mr Barnett and Mr Daly came to conclusions to the same effect.[303]
- Second, a draft of the advice responding to Mr Jackson's request had been prepared (the draft advice) and was in circulation within DHS.[304] That advice explicitly recommended that external advice be sought.[305] Ms Carmody accepted in her evidence that the arguments in the draft advice in support of averaging were "unconvincing."[306] Further work was done on the draft advice, including the preparation of a more developed version on 11 January 2017.[307] The draft circulated the following day still contained the recommendation that external legal advice be sought.[308] Versions of the draft advice continued to be circulated for some days, including a version which was provided by Ms Carmody to Ms Kruse in hard copy on 13 January 2017.[309]

- Third, Mr Gladman spoke to Ms Carmody, conveying his view as to the weakness of the arguments in favour of averaging in the context of preparing the draft advice and as to the need, as he saw it, for AGS advice to be obtained.[310] He stated in the covering email to Ms Carmody providing a version of the draft advice for her consideration, "As discussed… I've left in the suggestion about seeking external advice."[311] Those words confirm that the matter had been a specific topic of conversation between the two. Mr Gladman's evidence is that when he informed Ms Carmody of his recommendation to seek AGS advice, Ms Carmody said "I will go and speak to [Ms Kruse] about it."[312]
- Fourth, Ms Carmody spoke with AGS lawyer, Leo Hardiman, who confirmed that he had the "capacity and experience" to provide "urgent legal advice on the process that… DHS is using to identify potential overpayment of social security payments."[313]
- Fifth, Mr Gladman was circulating draft instructions to AGS within DHS.[314] While it may have been that further work was required to develop settled comprehensive instructions to AGS, DHS was in a position on 10 January 2017 to retain AGS and iteratively develop more detailed instructions later.[315]

Accordingly, it is clear that by 10 January 2017 there was an internal view held by a number of lawyers at DHS that the arguments in favour of averaging were weak and unconvincing, and that external advice should be sought on that question. Steps had been taken to obtain that advice, including confirming that there was an AGS solicitor available to give it, and drafting the questions to be answered by the external advice. All of that was consistent with Mr Jackson's request.

Two further significant events took place on 10 January 2017. The first was Ms Campbell's returning from leave. On or about that date, Mr Jackson said, he provided Ms Campbell with a verbal briefing, in which he informed her of his request for legal advice about averaging.[316] In a statement, Mr Jackson said:

> I provided verbal advice to Ms Campbell that I had raised the issue of legislative authority with respect to Averaging with Ms Golightly who had advised me that she was progressing my request.

Ms Campbell did not recall a substantive handover[317] but did recall speaking to Mr Jackson[318] and accepted that she had been communicating with Ms Golightly while on leave, following the adverse media reporting on the Scheme.[319] Ms Campbell denied knowledge of Mr Jackson's request for advice.[320] Her evidence was that she was:

> …unaware that a request for legal advice in the terms described by Mr Gladman had been made and [was] unaware that any such advice, draft or otherwise, had been prepared.[321]

The second significant event that occurred on 10 January 2017 was the Ombudsman's formally notifying DHS by way of correspondence to Ms Campbell that it would undertake an Own Motion Investigation into the Centrelink automated debt raising and recovery system (including the issue of adherence to legislative requirements).[322] The Ombudsman's investigation would obviously and necessarily require the provision of information by DHS to the Ombudsman, with heightened scrutiny of the Scheme and DHS's conduct in respect of it.

13.4 The legal advice work ceases

As matters eventuated, the draft advice was not finalised and AGS was not retained to provide advice on the lawfulness of income averaging. From around 13 January 2017, it appears that work on these matters ceased. The reason for this is the subject of some controversy.

Both Mr Jackson and Ms Musolino gave evidence to the effect that, following 9 January 2017 (that is, Mr Jackson's final day as acting secretary), Mr Jackson's request for advice could only have been withdrawn by Ms Campbell.[323] Ms Campbell denied making any such instruction.

In submissions made on behalf of Ms Campbell it was asserted that "a far more plausible inference" than any direction by Ms Campbell to withdraw the request for advice was that she assumed that Ms Golightly had the matter under control and would report to her if necessary. Another possibility was said to be that Mr Jackson's request "fell through the cracks" as the officers who had been acting in roles over the Christmas break and were responsible for obtaining the AGS advice failed to properly brief the substantive officeholders when they returned to their positions. The Commission does not accept these submissions.

On the basis of Mr Jackson's evidence, the Commission is satisfied that Ms Campbell was made aware of Mr Jackson's request for advice and its progress.

It is clear that from 6 January 2017, the process of responding to Mr Jackson's request for advice gained significant momentum within DHS. The cessation of this process coincided with, firstly, Ms Campbell's return from leave, secondly, Ms Campbell's briefing with Mr Jackson and, thirdly, Ms Campbell's being notified of the commencement of the Ombudsman's investigation. A much more likely explanation for the demise of Mr Jackson's request than inaction by Ms Golightly or the process falling 'through the cracks' is that Ms Campbell instructed that the steps towards obtaining an opinion from AGS and finalising the draft cease.

Significantly, in providing a late iteration of the draft advice to Ms Kruse on 13 January 2017, Ms Carmody said: "I realise to some extent circumstances have moved beyond this."[324] Ms Carmody's description of a change in circumstances suggests something more than inaction, lending support to the conclusion that there was some positive instruction that the process of finalising the draft advice cease.

The Commission finds that Ms Campbell instructed DHS officers to cease the process of responding to Mr Jackson's request for advice, motivated by a concern that the unlawfulness of the Scheme might be exposed to the Ombudsman in the course of its investigation.

13.5 Ms Musolino returns from leave

Ms Musolino returned from leave on 16 January 2017,[325] six days after DHS had first been in a position to retain AGS. By that stage, the draft advice had not been finalised and AGS had not yet been retained, despite Mr Menzies-McVey and Ms Kruse having assigned the matter "top priority." The draft advice had been emailed to Ms Musolino's chief counsel positional email address on 11 January 2017,[326] so she would likely have seen it either on screen when reviewing the contents of her inbox on her return from leave, or because it was printed for her and brought to her attention in that context.

The latter seems likely. Subsequently, when Ms Carmody asked Ms Musolino whether a request for legal advices included work she (Ms Carmody) had done in the week of 9 to 13 January 2017, Ms Musolino replied that she thought she had everything printed for that week.[327]

On 16 January 2017 there was a hand over meeting between Ms Musolino and Ms Carmody.[328] Although Ms Carmody does not have a specific memory of the handover meeting,[329] her evidence was:

- that Ms Musolino was provided with a hard copy folder of all relevant documents from the week which she expects would have included the draft advice and draft instructions to AGS[330]
- that her expectation was that she informed Ms Musolino that the arguments in support of averaging were unconvincing and that a view had been formed within the Legal Services Division that there was a need to get AGS advice[331] and
- that she "…broadly recalls discussing with Ms Musolino that this matter consumed most of the week, that we had been asked a range of questions and prepared a range of advice and draft advice in response and that the extent to which we had existing relevant legal advice was not yet resolved."[332]

Given: the substantial adverse media publicity about the Scheme, including with respect to income averaging; that the acting secretary had requested legal advice about averaging; that the request had been assigned "top priority" by Ms Kruse and Mr Menzies-McVey; and the negative views about the lawfulness of averaging that had been formed by the Legal Services Division; it is implausible that Ms Carmody did not fully brief Ms Musolino about:

- Mr Jackson's request,
- the draft advice that had been prepared and the substance of it,
- the draft instructions to AGS that had been prepared,
- the fact that an appropriate AGS lawyer had been contacted and confirmed that he was available to advise on averaging, and
- the fact that lawyers within the Legal Services Division of DHS had formed the view that the legal arguments in favour of averaging could be described with words such as "weak," "unconvincing."

Ms Musolino, having reviewed the draft advice and the markedly tentative arguments it offered in support of averaging, and/or having received the information provided to her orally by Ms Carmody, must also have appreciated that the legal arguments in favour of averaging were weak and unconvincing.

13.6 "Scare the horses"

On 21 January 2017, Ms Golightly sent Ms Musolino and Mr Hutson an email which in turn forwarded an email from the DHS media unit, detailing various media reporting about DHS.[333] The reporting included an article in *The Guardian* about consideration being given to a class action concerning the Scheme. Ms Golightly foreshadowed the prospect of inquiries from the minister, and possibly prime minister, and stated:

> …Given we haven't changed the way we to the data matching or the way we assess or calculate the debts – ie we are doing it the same way we have done it for many years – does this form the kernel of any immediate legal advice we may need to give? (This has been our position to date when other mentions of legal issues have come up in the press)…
>
> Not sure we need formal external legal advice just yet – unless you have a different view? Just want to be ready with something **but not scare the horses**. We don't want to give the impression we are concerned when we are not. [emphasis added][334]

There is no sensible reason why Ms Golightly would not want external legal advice if she genuinely wanted a definitive legal view on that question; but instead it appears from her email that what she wanted was internal legal advice, from the Legal Division of DHS, confirming the lawfulness of income averaging.

Mr Hutson responded to Ms Golightly's email with a query as to whether AGS advice ought to be obtained for "reassurance."[335] Ms Musolino chose her words carefully in responding to Mr Hutson's query,[336] saying, "*If* the department wants assurance on the legal issues, I recommend we get the end to end review," identifying legal issues that might be considered in such a review as including "Is it lawful to 'average' absent any other income information?."

What Ms Musolino failed to acknowledge in her email was what must have been clear to her by that time; that the Legal Services Division had only managed to develop "weak" and "unconvincing" legal arguments in support of income averaging, that the legal position of DHS with respect to it was therefore uncertain and involved substantial legal risk, and that the only prudent and sensible course for it to adopt was to seek independent legal advice.

The Commission infers that she did not do so because she knew that DHS executives, particularly Ms Campbell and Ms Golightly, did not want to be told they should seek independent advice because of the likelihood of its confirming that income averaging was unlawful and the professional consequences that they would face in that event. If she did give written advice pointing out the weakness and legal risk of

DHS's position on averaging and recommending independent advice be sought, they would have difficulty in explaining why they did not get it.

On 23 January 2017, Ms Musolino sent a group email to various lawyers within the Legal Services Division requesting that they provide any legal advices that they, or their teams, had provided that were relevant to the Scheme.[337] Among those who responded was Mr Fiveash. In an email he sent to Ms Musolino the same day, he attached the Fiveash advice.[338]

The Commission rejects Ms Musolino's evidence that she relied on Mr Stipnieks to collate the responses to her 23 January 2017 email, and therefore did not read the Fiveash advice.[339] Mr Stipnieks has no recollection of being asked to collate, or collating, the advices in the manner described by Ms Musolino, and Ms Musolino does not point to any other documentary evidence to support her oral evidence. Having made the request, it is likely that Ms Musolino read the email from Mr Fiveash and the attached advice. This could only have reinforced in her mind the weakness and legal risk of the DHS position on averaging, and the need for her to clearly advise DHS executives in writing to that effect. However, at no stage did she do so.

14 Social Services in early January

Catherine Halbert (group manager, DSS) said she first became aware of media criticism of the OCI program shortly before Christmas 2016 and worked with Emma Kate McGuirk (group manager, DSS) to gather information to brief the secretary, Finn Pratt.[340] Ms Halbert said "these briefings were verbal" because of the close proximity of Serena Wilson's (deputy secretary, DSS) and Finn Pratt's (secretary, DSS) offices.[341] The briefings concerned DSS's involvement in the conception of the Scheme.[342]

Prompted by Mr Porter's media interviews in early January 2017, Ms McGuirk said, she sought information from persons in DHS and DSS relating to the OCI program.[343]

On 5 January 2017 Ian Joyce sent Ms McGuirk an email trail including the 2014 DSS policy advice prepared by David Mason (acting director, Rates and Means Testing Policy Branch, DSS) and the description of the proposal in respect of which the advice was provided.[344] Mr Mason had asserted that the use of averaging in the way proposed did not 'accord with legislation, which specifies that employment income is assessed fortnightly'. Mr Mason also identified a number of policy flaws associated with the proposal.

It included Mr Mason's observation to Mr Joyce on 21 December 2016:

> It is not clear in what form this measure was ultimately implemented. It seems like when a discrepancy is uncovered that the customer is contacted and given the opportunity to clarify and provide fortnightly income amounts. It is not clear, however:
>
> 1. how granular the ATO income details are – is if for a specific period or just for a FY
>
> 2. following from 1, how accurate the parameters for identifying a discrepancy are
>
> 3. If the customer doesn't respond or does not have the information about their fortnightly earnings (for what may be a period a fair way in the past), is a debt raised on the basis of averaging?
>
> 4. What a Tribunal's view of debts being raised based on averaging would be – under Social Security Law, a fortnightly income test applies.[345]

The email from Mr Joyce to Ms McGuirk also included Mr Joyce's observation to Andrew Whitecross (acting group manager, DSS) on 21 December 2016:

> I will also send you a further e-mail that was sent to you that confirms that legals had provided advice that the DHS proposal at the time was not supported by the social security law.[346]

In evidence, Ms McGuirk admitted the flaws identified by Mr Mason in the 2014 DSS policy advice were of "some substance."[347] The concepts the subject of the 2014 DSS policy advice were not foreign to Ms McGuirk. She was aware that the fortnightly income test was "central" to the calculation of entitlement.[348]

1 Exhibit 3-4655 - CTH.3000.0023.6660 - Top Stories - Tuesday 3 January 2017; Exhibit 3-4656 - CTH.3000.0023.6773 - Top Stories - Wednesday 4 January 2017; Exhibit 3-4658 - CTH.3000.0023.7200_R - Top Stories - Friday 6 January 2017.
2 See, e.g.,: Exhibit 3-4897 - CTH.3001.0032.0395_R - Fwd- Request from Minister Porter's Office [DLM=For-Official-Use-Only]; Exhibit 3-4906 - CTH.3001.0032.1009_R - MEDIA ENQUIRY- The Guardian, fact check on data-matching software being used by DHS [DLM=For-Official-Use-Only].
3 See, e.g., Exhibit 3-4899 - CTH.0009.0001.0196_R - MB17-000003 MO; Exhibit 3-4903 - AGD.0004.0001.0834_R - FW- Debt letters - examples [SEC=UNCLASSIFIED].
4 Exhibit 3-4661 - CTH.3001.0032.6581_R - Fwd- UPDATE- FINAL- OCI Talking Points [SEC=UNCLASSIFIED]; Exhibit 3-4662 - CTH.3001.0032.6582 - 2017-01-07 - OCI Ministerial TPs - draft 1.
5 Transcript, Christian Porter, 2 February 2023 [p 3066: lines 29-34].
6 Transcript, Christian Porter, 2 February 2023 [p 3066: line 36].
7 Transcript, Christian Porter, 2 February 2023 [p 3067: lines 36-37; p 3068: line 36 – p 3069: line 15].
8 Exhibit 3-4828 - CPO.9999.0001.0009 - Summary of media statements or media releases in relation to Robodebt scheme (CP001).
9 Exhibit 3-4828 - CPO.9999.0001.0009 - Summary of media statements or media releases in relation to Robodebt scheme (CP001).
10 Exhibit 3-4828 - CPO.9999.0001.0009 - Summary of media statements or media releases in relation to Robodebt scheme (CP001).
11 Exhibit 3-3360 - CTH.2007.0004.3282_R – FW: Additional TPs for Minister Porter [DLM=For-Official-Use-Only]; Transcript, Christopher Birrer, 23 January 2023 [p 2197: line 3 – p 2198: line 34].
12 Transcript, Christopher Birrer, 23 January 2023 [p 2193: line 7 – p 2194: line 20].
13 Exhibit 3-4920 - CPO.9999.0001.0015 - Christopher Knaus, 'Centrelink crisis- people targeted with inaccurate debts may be able to sue' (The Guardian) (CP009); Exhibit 3-4828 - CPO.9999.0001.0009 - Summary of media statements or media releases in relation to Robodebt scheme (CP001).
14 Exhibit 3-4920 - CPO.9999.0001.0015 - Christopher Knaus, 'Centrelink crisis- people targeted with inaccurate debts may be able to sue' (The Guardian) (CP009); Exhibit 3-4828 - CPO.9999.0001.0009 - Summary of media statements or media releases in relation to Robodebt scheme (CP001).
15 Transcript, Christian Porter, 2 February 2023 [p 3066: lines 36-43].
16 Exhibit 3-4894 - CTH.3001.0032.0078_R - URGENT- talking points on Earned Income Intervention for Minister Porter [DLM=For-Official-Use-Only]; Exhibit 3-4895 - CTH.3001.0032.0079 - 2016-12-28 Online compliance tool_ Talking Points_Minister Porter; Exhibit 3-4892 - DSS.5054.0001.1387_R - FW- Media bits and pieces [SEC=UNCLASSIFIED] .
17 Exhibit 3-4892 - DSS.5054.0001.1387_R - FW- Media bits and pieces [SEC=UNCLASSIFIED] .
18 Transcript, Christian Porter, 2 February 2023 [p 3068: lines 1-7].
19 Transcript, Christian Porter, 2 February 2023 [p 3065 lines 1-3].
20 Exhibit 1-0261 - ATO.001.571.7124_R - Email from Michael Brown (ATO) to Media Unit (ATO) and Tyson Fawcett (ATO) re Media Enquiry on DHS data matching from the Australian.
21 Exhibit 3-4828 - CPO.9999.0001.0009 - Summary of media statements or media releases in relation to Robodebt scheme (CP001).
22 Transcript, Christian Porter, 2 February 2023 [p 3086: lines 10-20].
23 Exhibit 3-4826 - CPO.9999.0001.0026_R - 2022 11 18 - First Response for Hon C Christian Porter to NTG-0035 [para 74]; Exhibit 3-4827 - CPO.9999.0001.0003_R - 20221223 Porter statement PII markup 22006293_ Redacted [para 38, 61].
24 Exhibit 3-4826 - CPO.9999.0001.0026_R - 2022 11 18 - First Response for Hon C Christian Porter to NTG-0035 [para 74]; Exhibit 3-4827 - CPO.9999.0001.0003_R - 20221223 Porter statement PII markup 22006293_ Redacted [para 38, 61].
25 Transcript, Christian Porter, 2 February 2023 [p 3087: line 43].
26 Transcript, Christian Porter, 2 February 2023 [p 3093: lines 16-37].
27 Exhibit 1-0002 - DSS.5006.0003.1833_R, FW: Legal Advice - Data matching- notifications and debt raising [DLM=Sensitive:Legal].
28 Exhibit 1-3; Exhibit 1-0003; Exhibit 1-0090 - DSS.5006.0001.2713_R - [D17 226681] Legal to Emmakate - advice re using smoothed tax data as last resort to raise debt Advice please; Exhibit 1-0084 - DSS.8001.0001.1736_R - FW- Advice please [DLM=Sensitive-Legal].
29 Exhibit 3-4622 - ATU.9999.0001.0048_R - The Hon Alan Tudge MP - Statement of Hon Alan Tudge MP (20 January 2023 - Replacement) [REDACTED] [para 92].
30 Transcript, Alan Tudge, 1 February 2023 [p 2898: lines 30-33].
31 Transcript, Alan Tudge, 1 February 2023 [p 2898: lines 30-33].

32 Exhibit 3-4660 - CTH.3001.0032.6218_R - Questions; Exhibit 3-4664 - CTH.3001.0032.6216_R - Phone call from Minister Tudge; Exhibit 3-4317 - CTH.3051.0015.0646_R - RE- DRAFT Op Ed - Centrelink automated debt recover ysystem[SEC=UNCLASSIFIED]; Exhibit 3-4669 - CTH.3007.0027.3920_R - Fwd- MB17-000023 - Online compliance and debt letters [DLM=For-Official-Use-Only]; Exhibit 3-4672 - CTH.3001.0032.8131_R - Questions arising from Minister meeting on OCI [DLM=For-Official-Use-Only]; Exhibit 3-4673 - CTH.3001.0032.8374_R - Further request from Minister.

33 Exhibit 2-1759 - CTH.3001.0032.6454_R - MB17-000023 - Online compliance and debt letters [DLM=For-Official-Use-Only]; Exhibit 2-1760 - CTH.3001.0032.6455_R - MB17-000023 - Current online compliance intervention process and debt le...; Exhibit 2-1761 - CTH.3001.0032.6456 - Attachment A - Review Initiation Letter; Exhibit 2-1762 - CTH.3001.0032.6461 - Attachment B - Review Reminder Letter; Exhibit 2-1763 - CTH.3001.0032.6464 - Attachment C - Review finalisation letter; Exhibit 2-1764 - CTH.3001.0032.6466 - Attachment D - Account Payable Letter; Exhibit 2-1765 - CTH.3001.0032.6468 - Attachment E - Debt Reminder Letter; Exhibit 2-1766 - CTH.3001.0032.6470 - Attachment F - Rate Notice; Exhibit 3-4661 - CTH.3001.0032.6581_R - Fwd- UPDATE- FINAL- OCI Talking Points [SEC=UNCLASSIFIED]; Exhibit 3-4662 - CTH.3001.0032.6582 - 2017-01-07 - OCI Ministerial TPs - draft 1; Exhibit 3-4663 - CTH.3001.0032.6615_R - Fwd- Old Interim and online processes [DLM=For-Official-Use-Only]; Exhibit 3-4665 - CTH.3001.0032.6616 - Process Map -Old Interim and OCI; Exhibit 3-4666 - CTH.3001.0032.6617 - Attachment A - Process Map Supporting Point; Exhibit 3-4667 - CTH.3001.0032.6619 - Debt Recovery Process v1; Exhibit 3-4674 - CTH.3001.0032.8926_R - Key Facts # 2 - OCI - January 2017 [DLM=For-Official-Use-Only]; Exhibit 3-4675 - CTH.3001.0032.8927 - Key Facts # 2 - OCI - January 2017; Exhibit 3-4676 - CTH.3001.0033.2184_R - Information for 1pm meeting with the Minister [DLM=For-Official-Use-Only]; Exhibit 3-4677 - CTH.3001.0033.2187 - Key facts - OCI - 12 January 2017; Exhibit 3-4683 - CTH.0009.0001.0372_R - MB17-000079 MO; Exhibit 2-2010A - CTH.4000.0069.8100_R - MB17-000172 Minister signed].

34 Exhibit 3-4661 - CTH.3001.0032.6581_R - Fwd- UPDATE- FINAL- OCI Talking Points [SEC=UNCLASSIFIED]; Exhibit 3-4662 - CTH.3001.0032.6582 - 2017-01-07 - OCI Ministerial TPs - draft 1.

35 Exhibit 2-1759 - CTH.3001.0032.6454_R - MB17-000023 - Online compliance and debt letters [DLM=For-Official-Use-Only]; Exhibit 2-1760 - CTH.3001.0032.6455_R - MB17-000023 - Current online compliance intervention process and debt le...; Exhibit 2-1761 - CTH.3001.0032.6456 - Attachment A - Review Initiation Letter.

36 Exhibit 3-4672 - CTH.3001.0032.8131_R - Questions arising from Minister meeting on OCI [DLM=For-Official-Use-Only]; Exhibit 3-4673 - CTH.3001.0032.8374_R - Further request from Minister; Exhibit 3-4676 - CTH.3001.0033.2184_R - Information for 1pm meeting with the Minister [DLM=For-Official-Use-Only]; Exhibit 3-4679 - CTH.3023.0006.7525_R2 - RE: Questions arising from Minister meeting on OCI [DLM=For-Official-Use-Only].

37 Exhibit 3-4664 - CTH.3001.0032.6216_R - Phone call from Minister Tudge; Exhibit 3-4684 - CTH.3001.0035.2383_R - Averaging info [DLM=For-Official-Use-Only]; Transcript, Alan Tudge, 1 February 2023 [p 2928: line 15 – p 2929: line 17].

38 Transcript, Alan Tudge, 1 February 2023 [p 2925: line 18 – p 2929: line 17].

39 Exhibit 3-4670 - CTH.0035.0003.0228_R - Re- MB17-000023 - Online compliance and debt letters [DLM=For-Official-Use-Only]; Exhibit 3-4672 - CTH.3001.0032.8131_R - Questions arising from Minister meeting on OCI [DLM=For-Official-Use-Only].

40 Exhibit 3-4675 - CTH.3001.0032.8927 - Key Facts # 2 - OCI - January 2017.

41 Exhibit 3-4674 - CTH.3001.0032.8926_R - Key Facts # 2 - OCI - January 2017 [DLM=For-Official-Use-Only].

42 There is a typographical error in this document. There is a heading “Proportion of OCI customers with a debt and no contact.” Under that heading, there is a table, which contains a column headed “Percentage of debts raised with no contact by the customer.” However, in the paragraph above the table, it describes the data as being based upon a random sample, and states “the following percentage of people had an interaction with the Department (either online or by telephone) prior to the OCI debt notice being issued.” In circumstances where this information is responsive to the Minister’s request for the percentage of people who had a debt and had not had contact with the Department, and where the heading and column heading in the table indicate that that is the nature of the information, it is obvious that the reference to contact with the Department is an error, and that the table in fact contains the percentage of people who had a debt and had not had contact with the Department.

43 Exhibit 3-4622 - ATU.9999.0001.0048_R - The Hon Alan Tudge MP - Statement of Hon Alan Tudge MP (20 January 2023 - Replacement) [REDACTED] [p 21-22].

44 Transcript, Alan Tudge, 1 February 2023 [p 2898: lines 30-33].

45 Exhibit 4-6724 - MTU.9999.0001.0001_R - SIGNED - Statement of The Hon Malcolm Bligh Turnbull AC - 20.02.2023 [p 9].

46 Exhibit 4-6724 - MTU.9999.0001.0001_R - SIGNED - Statement of The Hon Malcolm Bligh Turnbull AC - 20.02.2023 [p 9].

47 Exhibit 4-6724 - MTU.9999.0001.0001_R - SIGNED - Statement of The Hon Malcolm Bligh Turnbull AC - 20.02.2023 [p 10].
48 Exhibit 4-6724 - MTU.9999.0001.0001_R - SIGNED - Statement of The Hon Malcolm Bligh Turnbull AC - 20.02.2023 [p 10].
49 Exhibit 4-6724 - MTU.9999.0001.0001_R - SIGNED - Statement of The Hon Malcolm Bligh Turnbull AC - 20.02.2023 [p 10].
50 Exhibit 3-3671 - DSS.5003.0001.0945_R - MC17-004721 Letter to the Prime Minister.
51 Exhibit 3-4744 - CTH.3044.0003.7539 - 4.3 Ombudsman Report-Centrelinks automated debt raising and recovery system April 2017 [p 35-38].
52 Exhibit 4-6379 - TCO.9999.0001.0008_R2 - Clean PDF - Statement of T Collins NTG-0166 amended 22 February 2023 [para 564].
53 Exhibit 1-1136 - JRY.9999.0001.0002_R - NTG-0019 - Statement of Jason Ryman 27.10.22 [para 62].
54 Transcript, Alan Tudge, 1 February 2023 [p 2921: lines 30-43; p 2922: lines 29-37; p 2923: lines 39-46]. See also, for example: Exhibit 3-4671 - CTH.3001.0032.7133_R - Fwd- MB17-000023 - Online compliance and debt letters [DLM=For-Official-Use-Only]; Exhibit 3-4661 - CTH.3001.0032.6581_R - Fwd- UPDATE- FINAL- OCI Talking Points [SEC=UNCLASSIFIED]; Exhibit 3-4663 - CTH.3001.0032.6615_R - Fwd- Old Interim and online processes [DLM=For-Official-Use-Only]; Exhibit 3-4664 - CTH.3001.0032.6216_R - Phone call from Minister Tudge; Exhibit 3-4673 - CTH.3001.0032.8374_R - Further request from Minister.
55 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 190].
56 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 190].
57 Transcript, Karen Harfield, 15 December 2023 [p 1914: lines 28-30].
58 Transcript, Karen Harfield, 15 December 2023 [p 1914: lines 16-32].
59 Transcript, Karen Harfield, 15 December 2022 [p 1912: lines 39-46].
60 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 191].
61 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 191].
62 Transcript, Karen Harfield, 15 December 2022 [p 1915: lines 27-40].
63 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 205].
64 Exhibit 10012 - CTH.3000.0031.5113 - Employment Income Confirmation Case Selection Strategy v0 5.docx [p 5].
65 Exhibit 3-4622 - ATU.9999.0001.0048_R - The Hon Alan Tudge MP - Statement of Hon Alan Tudge MP (20 January 2023 - Replacement) [REDACTED][para 98].
66 Exhibit 3-4751 - CTH.3005.0004.0143_R - MS17-000277- Minister signed brief.
67 Exhibit 8935 - CTH.9999.0001.0145 - [Final] Services Australia - Response to NTG-0096 [p 7: para 2.1].
68 Exhibit 10012 - CTH.3000.0031.5113 - Employment Income Confirmation Case Selection Strategy v0 5.docx.
69 Exhibit 10012 - CTH.3000.0031.5113 - Employment Income Confirmation Case Selection Strategy v0 5.docx [p 5]; Exhibit 10017 – CTH.3027.0017.8707 – CMPDecision170526-2-1_Final BVT Closure Report_EIC Feb Release V1.0, 30 May 2017.
70 Exhibit 10017 – CTH.3027.0017.8707 – CMPDecision170526-2-1_Final BVT Closure Report_EIC Feb Release V1.0 [p 3].
71 Exhibit 8935 - CTH.9999.0001.0145 - [Final] Services Australia - Response to NTG-0096 [p 7: para 2.1].
72 Exhibit 3-4801 - CTH.0009.0001.2661_R - MS17-000740 MSB [para 1]; Exhibit 8935 - CTH.9999.0001.0145 - [Final] Services Australia - Response to NTG-0096 [para 3.47].
73 The EIC program ran from February 2017 to September 2018. Though the time periods are not directly correlative, the percentage of debts that were calculated using averaged ATO data was 79.4% for the 2016-17 financial year, 52.4% for the 2017-18 financial year, and 66.7% for the 2018-19 financial year (see: Exhibit 3-4806 - CTH.9999.0001.0060 - [Final] Services Australia - Response to NTG-0103, para 1.7).
74 Exhibit 3-4801 - CTH.0009.0001.2661_R - MS17-000740 MSB [p 1: para 1].
75 Exhibit 3-4801 – CTH.0009.0001.2661_R – MS17-000740 MSB [p 1-2: para 2]
76 See Exhibit 10014 - CTH.3500.0003.3804 - 29 - 110-13090010 as at 29092017 - 03102017.docx [p 3]; Exhibit 8935– CTH.9999.0001.0145 – [Final] Services Australia - Response to NTG-0096 [p 17: para 3.47].
77 See Exhibit 10014 - CTH.3500.0003.3804 - 29 - 110-13090010 as at 29092017 - 03102017.docx [p 3]; Exhibit 8935 - CTH.9999.0001.0145 - [Final] Services Australia - Response to NTG-0096 [para 3.48]; Exhibit 3-4801 - CTH.0009.0001.2661_R - MS17-000740 MSB [para 3].
78 Exhibit 3-4802 - CTH.0009.0001.0829_R – MB17-000635 MSB.

79 Exhibit 3-4463 - CTH.3001.0039.5424 – 2017-03-21 – OCI master talking points + DS cleared.docx.
80 Exhibit 3-4463 - CTH.3001.0039.5424 – 2017-03-21 – OCI master talking points + DS cleared.docx.
81 Exhibit 3-4463 - CTH.3001.0039.5424 – 2017-03-21 – OCI master talking points + DS cleared.docx.
82 Exhibit 8590 - CSI.0001.0001.1174_R – Data Pack comments from DHS [SEC=UNCLASSIFIED].
83 Exhibit 1-0848 - CTH.9999.0001.0013 – [FINAL] RRC – Services Australia – Response to NTG-0009 (25 October 2022).pdf.
84 Exhibit 4-7287 - CTH.3030.0025.7062_R – FW: Ombudsman – Response to Questions [DLM=For-Official-Use-Only]. That is comparable with the figure Services Australia gave the Commission, of 79.4 per cent of debts raised on the basis of averaging in the 2016-17 financial year (see: Exhibit 3-4806 - CTH.9999.0001.0060 - [Final] Services Australia - Response to NTG-0103, [para 1.7]).
85 Transcript, Alan Tudge, 1 February 2023 [p 2942: lines 23-27]; 2 February 2023 [p 3007: lines 41-46; p 3017: lines 15-17; p 3026 lines 1-4].
86 Transcript, Alan Tudge, 1 February 2023 [p 2920: line 22 – p 2921: line 8; p 2929: lines 34-43].
87 Transcript, Alan Tudge, 1 February 2023 [p 2927: lines 22-42].
88 Transcript, Alan Tudge, 1 February 2023 [p 2929: lines 24-32].
89 Transcript, Alan Tudge, 1 February 2023 [p 2929: lines 24-32].
90 Transcript, Alan Tudge, 1 February 2023 [p 2956: lines 4-11].
91 Exhibit 3-4670 - CTH.0035.0003.0228_R - Re- MB17-000023 - Online compliance and debt letters [DLM=For-Official-Use-Only]; Exhibit 3-4672 - CTH.3001.0032.8131_R - Questions arising from Minister meeting on OCI [DLM=For-Official-Use-Only].
92 Exhibit 3-4674 - CTH.3001.0032.8926_R - Key Facts # 2 - OCI - January 2017 [DLM=For-Official-Use-Only]; Exhibit 3-4675 - CTH.3001.0032.8927 - Key Facts # 2 - OCI - January 2017.
93 Transcript, Alan Tudge, 1 February 2023 [p 2927: lines 15-16].
94 Exhibit 3-4622 - ATU.9999.0001.0048_R - The Hon Alan Tudge MP - Statement of Hon Alan Tudge MP (20 January 2023 - Replacement) [REDACTED], [para 50]; Exhibit 3-4665 - CTH.3001.0032.6616 - Process Map -Old Interim and OCI.
95 Transcript, Alan Tudge, 1 February 2023 [p 2956: lines 31-47]; Exhibit 3-4663 - CTH.3001.0032.6615_R - Fwd-Old Interim and online processes [DLM=For-Official-Use-Only]; Exhibit 3-4665 - CTH.3001.0032.6616 - Process Map -Old Interim and OCI; Exhibit 3-4666 - CTH.3001.0032.6617 - Attachment A - Process Map Supporting Point.
96 Transcript, Alan Tudge, 1 February 2023 [p 2930: line 38 – p 2931: line 2; p 2931: lines 21-25].
97 Transcript, Alan Tudge, 1 February 2023 [p 2930: line 45 p 2931: line 17]; 2 February 2023 [p 3022: lines 12-22].
98 Transcript, Alan Tudge, 1 February 2023 [p 2933: lines 4-9; p 2956: lines 13-28; p 2990: lines 13-27].
99 Transcript, Alan Tudge, 1 February 2023 [p 2974: lines 34-41].
100 Transcript, Alan Tudge, 1 February 2023 [p 2974: lines 34-41].
101 Transcript, Alan Tudge, 1 February 2023 [p 2974: lines 34-41].
102 Transcript, Alan Tudge, 1 February 2023 [p 2975: lines 6-7].
103 Transcript, Alan Tudge, 1 February 2023 [p 2896: lines 17-28; p 2897: lines 11-23].
104 Transcript, Alan Tudge, 1 February 2023 [p 2896: lines 7-28].
105 Transcript, Alan Tudge, 1 February 2023 [p 2897: lines 11-14].
106 Transcript, Alan Tudge, 1 February 2023 [p 2975: lines 21-31].
107 Transcript, Alan Tudge, 1 February 2023 [p 2975: lines 1-7; p 2932: line 41 – p 2933: line 9; p 2990: lines 8-27].
108 Transcript, Alan Tudge, 2 February 2023 [p 3023: lines 14-27].
109 Transcript, Alan Tudge, 2 February 2023 [p 3023: lines 14-27].
110 Exhibit 2-1458 - CTH.3001.0032.7206_R - Re- FOR REVIEW- OCI media coverage to date with customer cases [DLM=ForOfficial-Use-Only].
111 Exhibit 2-1478 - CTH.3001.0047.3547_R - FOR REVIEW- OCI media coverage to date with customer cases - Wednesday 21 June 2017 [DLM=For-Official-UseOnly]; Exhibit 2-1479 - CTH.3001.0047.3548 - Media coverage analysis - OCI - 16 June - 21 June 2017.
112 Exhibit 2-3013 - ACS.9999.0001.0177_R - 161221 Letter to Alan Tudge final.
113 Transcript, Cassandra Goldie, 16 December 2022 [p 2038: lines 1-13].
114 Exhibit 3-4732 - CTH.3005.0004.6431_R – 20170118L Minister Tudge.
115 Exhibit 2-1789 - CTH.3001.0033.7774_R - RE- PRINTED - RE- Top Stories - Friday 20 January 2017 [SEC=UNCLASSIFIED].
116 Exhibit 2-1789 - CTH.3001.0033.7774_R - RE- PRINTED - RE- Top Stories - Friday 20 January 2017 [SEC=UNCLASSIFIED].
117 Exhibit 2-1789 - CTH.3001.0033.7774_R - RE- PRINTED - RE- Top Stories - Friday 20 January 2017 [SEC=UNCLASSIFIED].

118 Exhibit 4-7058; Exhibit 2-2872 - ACS.9999.0001.0029_R - MC17-001263 - Cassandra Goldie; Exhibit 9989 - CTH.3075.0002.5290 - FW: MC17-001263 – Goldie response [DLM=For-Official-Use-Only]; Exhibit 9990 - CTH.3075.0002.5291 - MC16-009579 Final.docx; Exhibit 9991 - CTH.3075.0002.5295 - MC17-001263 MO words.docx; Exhibit 9992 - CTH.3075.0002.5299 - MC17-001263 MO words updated (tracked).docx; Exhibit 9993 - CTH.3075.0002.5300 - MC17-001263 MO words updated (Sue Kruse updates tracked).docx.

119 Exhibit 3-4733 - CTH.3108.0003.8749_R - Dr Goldie letter; Exhibit 9989 - CTH.3075.0002.5290 - FW: MC17-001263 – Goldie response [DLM=For-Official-Use-Only]; Exhibit 9990 - CTH.3075.0002.5291 - MC16-009579 Final.docx; Exhibit 9991 - CTH.3075.0002.5295 - MC17-001263 MO words.docx; Exhibit 9992 - CTH.3075.0002.5299 - MC17-001263 MO words updated (tracked).docx; Exhibit 9993 - CTH.3075.0002.5300 - MC17-001263 MO words updated (Sue Kruse updates tracked).docx.

120 Transcript, Cassandra Goldie, 16 December 2022 [p 2041: lines 1-19].

121 Exhibit 2-2964 - ACS.9999.0001.0122_R - 2017.03.13 Letter from Minister Tudge re CL debt.

122 Exhibit 3-4734 - CTH.3001.0045.6164_R - 20170529L Minister Tudge Centrelink recommendations.

123 Exhibit 2-1639 - CTH.3001.0047.2281_R - MB17-000417 Minister Signed brief and letter.

124 Exhibit 3-4735 - CTH.3005.0006.1617_R - MB17-000572 Ag Dep Sec signed brief with attachments for progression to the Minister.

125 Transcript, Charmaine Crowe, 16 December 2022 [p 2044: lines 20-31].

126 Transcript, Cassandra Goldie, 16 December 2022 [p 2042: lines 12-15]; Exhibit 3-4641 - CTH.3001.0030.6877_R – BREAKING NEWS ALERT: Guilty until proven innocent – Centrelink gone rogue – Andrew Wilkie media call [SEC=UNCLASSIFIED]; Exhibit 3-4649 - CTH.3001.0038.4984_R – TUDGE, Alan 21 December 2016.pdf; Exhibit 3-4653 - CTH.3001.0032.0480_R – ATODataMatchin.RF.281216.pdf; Exhibit 3-4654 - SUB.0000.0001.0082_R – question-2021-07-01-8334411265-filesubquestion.pdf.

127 Exhibit 3-4622 - ATU.9999.0001.0048_R - The Hon Alan Tudge MP - Statement of Hon Alan Tudge MP (20 January 2023 - Replacement) [REDACTED] [p 46].

128 Exhibit 3-4324 - CTH.3051.0015.1406_R - RE- Centrelink insider comments [SEC=UNCLASSIFIED].

129 Exhibit 3-4681 - CTH.3004.0002.5216_R - Correspondence to Minister Tudge from CPSU Acting National Secretary 13.

130 Exhibit 3-4680 - CTH.3000.0024.0863 - Guardian_Internal Centrelink records reveal flaws behind debt recovery s.

131 Exhibit 4-6724 - MTU.9999.0001.0001_R - SIGNED - Statement of The Hon Malcolm Bligh Turnbull AC - 20.02.2023, [p 10].

132 Exhibit 2-1794 - CTH.3001.0034.1319_R- Response to the CPSU re online compliance measures [DLM=ForOfficial-Use-Only].

133 Exhibit 2-1794 - CTH.3001.0034.1319_R, Response to the CPSU re online compliance measures[DLM=ForOfficial-Use-Only].

134 Exhibit 2-1794 - CTH.3001.0034.1319_R, Response to the CPSU re online compliance measures[DLM=ForOfficial-Use-Only].

135 Transcript, Melissa Donnelly and Lisa Newman, 12 December 2022 [p 1636: line 20 – p 1637: line 34]. Neither the Royal Commission nor the CPSU have a record of a response.

136 Exhibit 3-4736 - CTH.3004.0002.5438_R - Please call to discuss; Exhibit 3-4737 - CTH.3004.0002.5439 - Whistleblower Document Plain English Summary.

137 The summary appears to have been prepared by GetUp! who provided it to a journalist. See: Exhibit 4-7008 - CTH.3005.0002.2317_R – Fwd: GetUp releases “explosive” new Centrelink whistleblower document; Exhibit 4-7009 - CTH.3005.0002.2319 – Whistleblower Document Plain English Summary.pdf; Exhibit 4-7010 - CTH.3005.0002.2323 – Centrelink Whistleblower Document.pdf.

138 Exhibit 3-4737 - CTH.3004.0002.5439 - Whistleblower Document Plain English Summary.

139 Exhibit 3-4737 - CTH.3004.0002.5439 - Whistleblower Document Plain English Summary.

140 Exhibit 3-4737 - CTH.3004.0002.5439 - Whistleblower Document Plain English Summary. The document that was sent to Mr Tudge was a summary of the whistle-blower document. The whistle-blower document itself (Exhibit 2-1993 - CTH.3001.0033.6563 - Centrelink Whistleblower Document) specifically mentioned notices from employers confirming termination or non-employment as an example of documents that “the online OCI process does not check.”

141 Exhibit 2-1786 - CTH.3001.0033.6820_R - Para [DLM=For-Official-Use-Only]; Exhibit 2-1787 - CTH.3001.0033.6821 - The Online Compliance Intervention is a new way of approaching overpayment identification.

142 Exhibit 3-4554 - CTH.9999.0001.0107_R - Response to NTG-0144 [paras 114-116]; Exhibit 3-4384 - CTH.3001.0033.6866_R - FW- UPDATED- UPDATE- For review [SEC=UNCLASSIFIED]; Exhibit 2-2536 - RCW.0005.0002.0006 - Media Hub January 19 2017.

143 Exhibit 3-4554 - CTH.9999.0001.0107_R - Response to NTG-0144, para 114-116; Exhibit 3-4384 - CTH.3001.0033.6866_R - FW- UPDATED- UPDATE- For review [SEC=UNCLASSIFIED].
144 Transcript, Alan Tudge, 1 February 2023 [p 2942: lines 29-34].
145 Exhibit 2-1788 - CTH.3001.0033.7511_R, Fwd: Minister visit [DLM=Sensitive].
146 Exhibit 2-1788 - CTH.3001.0033.7511_R, Fwd: Minister visit [DLM=Sensitive].
147 Exhibit 2-1788 - CTH.3001.0033.7511_R, Fwd: Minister visit [DLM=Sensitive].
148 Exhibit 3-4699 - CTH.3051.0015.6301_R - RE- Process for constit inquires - IMPORTANT [SEC=UNCLASSIFIED].
149 Exhibit 2-2464 - CPU.9999.0001.0013_R - Annexure J - Email re message from Alan Tudge.
150 Exhibit 2-2531 - CTH.3000.0024.8495_R - A message from the Secretary- Online Compliance System [DLM=For-Official-Use-Only].
151 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement - Signed, [para 61-62]; Transcript, Colleen Taylor, 3 December 2022 [p 1742: line 25 – p 1743: line 12]; Exhibit 2-2535 - RCW.0005.0002.0003 - Media Hub January 16 2017; Exhibit 2-2536 - RCW.0005.0002.0006 - Media Hub January 19 2017; Exhibit 2-2537 - RCW.0005.0002.0004 - Media Hub January 25 2017.
152 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement – Signed [paras 49-50]; Exhibit 2-2530 - CTH.3001.0035.2921_R - FW- An update from the National Manager - A REPLY for consideration [DLM=Sensitive].
153 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement – Signed [para 62].
154 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement – Signed [para 62].
155 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement – Signed [para 62].
156 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement – Signed [para 66].
157 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement – Signed [para 66].
158 Exhibit 2-2532 - CTH.2009.0007.5968_R - Respectful correction to Message from the Secretary 25 Jan 2017 [DLM=Sensitive]; Exhibit 2-2533 - CTH.2009.0007.5969_R - Response to the Secretary; Exhibit 2-2534 - CTH.2009.0007.5975_R - PAYG Rapid Response Prompts; Exhibit 2-2529 - CTH.3001.0035.3159_R - In-Confidence emails from Jan 2016 re concerns.
159 Exhibit 2-2533 - CTH.2009.0007.5969_R - Response to the Secretary.
160 Exhibit 2-2533 - CTH.2009.0007.5969_R - Response to the Secretary.
161 Exhibit 2-2529 - CTH.3001.0035.3159_R - In-Confidence emails from Jan 2016 re concerns [p 6-7].
162 Transcript, Kathryn Campbell, 7 March 2023 [p 4599: lines 10-15].
163 Exhibit 1-1265 - CTH.3001.0035.2826_R - FW- Respectful correction to Message from the Secretary 25 Jan 2017 [DLM=Sensitive].
164 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement – Signed [para 81].
165 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement – Signed [para 81]; Transcript, Colleen Taylor, 13 December 2022 [p 1751: lines 19-44].
166 Transcript, Colleen Taylor, 13 December 2022 [p 1752: lines 19-26].
167 Exhibit 1-1263 - CTH.0033.0001.0516_R - Sec Minute EC17-000241 GM signed.
168 Exhibit 1-1264 - CTH.0033.0001.0518 - Attachment B detailed response to Ms Taylor concerns v4 clean.
169 Exhibit 1-1264 - CTH.0033.0001.0518 - Attachment B detailed response to Ms Taylor concerns v4 clean.
170 Exhibit 2-2529 - CTH.3001.0035.3159_R - In-Confidence emails from Jan 2016 re concerns.
171 Exhibit 2-2742 - CTH.3027.0008.0693_R - New Information to Include - Update to draft response to staff member Colleen Taylor [DLM=For-Official-Use-Only]; Exhibit 2-2743 - CTH.3027.0008.0696 - 15112016-OCI 066 OCI Investigating the Customer Record.
172 Exhibit 9973 - CTH.3001.0038.7214 - FW: For Urgent Approval: EC17-000241 Ms taylor [DLM=Sensitive]; Exhibit 9974 - CTH.3001.0038.7215 - sec-minute EC17-000241 final.docx; Exhibit 9975 - CTH.3001.0038.7217 - Attachment A proposed response to Ms Taylor final.docx; Exhibit 9976 - CTH.3001.0038.7218 - Attachment B detailed response to Ms Taylor concerns v6 clean.docx.
173 Exhibit 4-7063 - CTH.4750.0029.0042_R - EC17-000241 - letter to Colleen Taylor - MG signed.
174 Transcript, Colleen Taylor, 13 December 2022 [p 1752: line 35 - p 1753: line 16].
175 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement – Signed [para 96].
176 Transcript, Colleen Taylor, 13 December 2022 [p 1753: lines 36-44].
177 Transcript, Alan Tudge, 1 February 2023 [p 2940: line 14 – p 2945: line 44].
178 Transcript, Alan Tudge, 1 February 2023 [p 2940: line 14 – p 2945: lines 1-5, 33-44].
179 Transcript, Cassandra Goldie, 16 December 2022 [p 2042: lines 12-15]; Exhibit 3-4641 - CTH.3001.0030.6877_R - BREAKING NEWS ALERT- Guilty until proven innocent - Centrelink gone rogue - Andrew Wilkie media call [SEC=UNCLASSIFIED]; Exhibit 3-4649 - CTH.3001.0038.4984_R - TUDGE, Alan 21 December 2016; Exhibit 3-4653 - CTH.3001.0032.0480_R - ATODataMatchin rF.281216; Exhibit 3-4654 - SUB.0000.0001.0082_R - question-2021-07-01-8334411265-filesubquestion.
180 Transcript, Kathryn Campbell, 7 March 2023 [p 4600: lines 35-40].

181 Exhibit 2-3013 - ACS.9999.0001.0177_R – 161221 Letter to AlanTudgefinal.pdf. Mr Tudge was on leave at this point in time, and did not receive this correspondence until sometime in January 2017.
182 Transcript, Genevieve Bolton, 11 November 2022 [p 1000: line 32 – 39].
183 Social Security Act 1991 (Cth), s 1228B.
184 Social Security Act 1991 (Cth), s 1228B(1).
185 Exhibit 2-2205 – CTH.3002.0007.1631_R – Lex 17990 – Online mandating – data matching etc – advice.doc.
186 Exhibit 3-4744 – CTH.3044.0003.7539 – 4.3 Ombudsman Report-Centrelinks automated debt raising and recovery system April 2017.pdf [p 82 of 110].
187 Exhibit 3-4744 – CTH.3044.0003.7539 – 4.3 Ombudsman Report-Centrelinks automated debt raising and recovery system April 2017.pdf [p 1-2 of 110].
188 Exhibit 1-0132 – CTH.3007.0020.0538_R – ADVICE: Issue relating to Recovery Fee and PAYG Online Intervention [DLM=Sensitive:Legal].
189 Exhibit 1-0133 – CTH.3007.0004.4801_R – URGENT _ Joint legal advice with DSS re OCI Letters [DLM=Sensitive:Legal].
190 Exhibit 3-4827 - CPO.9999.0001.0003_R - 20221223 Porter statement PII markup 22006293_Redacted [para 26]; Exhibit 3-4235 – CTH.3001.0033.4604_R – FW: DSS legal advice re 10% fee reference in letters [DLM=Sensitive:Legal].
191 Exhibit 3-4744 – CTH.3044.0003.7539 – 4.3 Ombudsman Report-Centrelinks automated debt raising and recovery system April 2017.pdf [p 26-27 of 110].
192 Exhibit 2-1430 – CTH.3005.0003.7982 – Mark up of sections re Debt Recovery fee (003).pdf.
193 Exhibit 3-4744 – CTH.3044.0003.7539 – 4.3 Ombudsman Report-Centrelinks automated debt raising and recovery system April 2017.pdf [p 47 of 110].
194 Exhibit 4-7798 – CTH.3004.0010.5743_R – Attachment A – s8 request – IMP OF RECOMMENDATIONS OF OWN MOTION REPORT (002).docx [p .5745].
195 Exhibit 3-4744 – CTH.3044.0003.7539 – 4.3 Ombudsman Report-Centrelinks automated debt raising and recovery system April 2017.pdf [p 47 of 110].
196 Exhibit 3-4305 - RMI.9999.0001.0002 - 230118 Hearing Block 3 - Response by Rachelle Miller to NTG-0147 [p 7].
197 Exhibit 3-4305 - RMI.9999.0001.0002 - 230118 Hearing Block 3 - Response by Rachelle Miller to NTG-0147 [p 7-8].
198 Exhibit 3-4323 - CTH.3051.0015.0811_R - Re- Media Summary - Debt Letters [SEC=UNCLASSIFIED].
199 Exhibit 3-4332 - CTH.3001.0033.5463_R - Minister tweet Update Media plan [SEC=UNCLASSIFIED].
200 Exhibit 2-1462 - CTH.3001.0033.2571_R - NEW URGENT TASK OCI media coverage to date with customer cases [DLM=For-Official-Use-Only].
201 Exhibit 3-4698 - CTH.3001.0033.3675_R - URGENT ADVISER INFORMATION REQUEST- OCI Case studies - Due 2pm [DLM=For-Official-Use-Only].
202 Exhibit 3-4333 - CTH.3001.0033.2620_R - RE- URGENT- Case study to air on ABC 7.30 tonight [DLM=Sensitive-Personal]; Exhibit 3-4716 - CTH.3001.0034.1975_R - INFORMATION- MS17-000076 Information Request OCI Cases [DLM=Sensitive-Personal].
203 Exhibit 2-2721 - CTH.3027.0005.5256_R - FW- MB17-000066 - Adviser Information Request - Top 20 $ value potential identified through OCI [DLM=For-Official-Use-Only]; Exhibit 3-4717 - CTH.3007.0004.6224_R - Sufficiently anonymised [DLM=Sensitive-Personal].
204 Exhibit 3-4324 - CTH.3051.0015.1406_R - RE- Centrelink insider comments [SEC=UNCLASSIFIED].
205 Exhibit 3-4325 - CTH.3108.0003.5563_R - oped; Exhibit 3-4326 - CTH.3108.0003.5564 - 170106 Opinion Piece - Centrelink automated debt recovery system - AA edit; Exhibit 3-4329 - CTH.3051.0015.2331_R - RE- Possible statement [SEC=UNCLASSIFIED].
206 Exhibit 3-4622 - ATU.9999.0001.0048_R - The Hon Alan Tudge MP - Statement of Hon Alan Tudge MP (20 January 2023 - Replacement) [REDACTED] [para 67].
207 Transcript, Alan Tudge, 1 February 2023 [p 2889: line 43 – p 2890: line 8].
208 Exhibit 4-6724 - MTU.9999.0001.0001_R - SIGNED - Statement of The Hon Malcolm Bligh Turnbull AC - 20.02.2023 [p 9].
209 Exhibit 4-6724 - MTU.9999.0001.0001_R - SIGNED - Statement of The Hon Malcolm Bligh Turnbull AC - 20.02.2023 [p 10].
210 Exhibit 4-6724 - MTU.9999.0001.0001_R - SIGNED - Statement of The Hon Malcolm Bligh Turnbull AC - 20.02.2023 [p 10].

211 Exhibit 3-4337 - CTH.3051.0015.2785_R - Briefing document- ABC reporting inaccuracies [SEC=UNCLASSIFIED]; Exhibit 3-4338 - CTH.3051.0015.2786_R - 170114 Online Compliance system - ABC reporting inaccuracies; Exhibit 3-4341 - CTH.3051.0015.4042_R - Brief of case studies that have run in the media [SEC=UNCLASSIFIED]; Exhibit 3-4342 - CTH.3051.0015.4043_R - Details of Customers that have appeared in the media; Exhibit 3-4343 - CTH.3108.0003.6695_R - FW-Wilkie [redacted]_700801971V as at 16Jan[DLM=For-Official-Use-Only]; Exhibit 3-4344 - CTH.3108.0003.6696_R - [Redacted]_700801971V as at 16 Jan.

212 Exhibit 3-4346 - CTH.3058.0012.7183_R - 38 media cases [DLM=For-Official-Use-Only]; Exhibit 3-4347 - CTH.3051.0015.5625_R - Latest case studies in the media - stats [SEC=UNCLASSIFIED]; Exhibit 3-4348 - CTH.3051.0015.5628_R - 170117 - Legitimate OCI debts Case studies; Exhibit 3-4349 - CTH.3051.0015.5629_R - MS17-000066 GM Cleared; Exhibit 3-4350 - CTH.3051.0015.5877_R - 170123 OCI - Collated information; Exhibit 3-4351 - CTH.3051.0015.5878_R - 170123 OCI - Collated information; Exhibit 3-4356 - CTH.3051.0015.6295_R - Re- Updated materials for media [SEC=UNCLASSIFIED]; Exhibit 3-4357 - CTH.3051.0015.6466_R - RE- Updated materials for media [SEC=UNCLASSIFIED]; Exhibit 3-4358 - CTH.3051.0015.6503_R - FW- Final info document [SEC=UNCLASSIFIED]; Exhibit 3-4359 - CTH.3051.0015.6504_R - 170123 OCI - Collated information - FINAL; Exhibit 3-4360 - CTH.3108.0003.7571_R - 170123 OCI - Collated information - FINAL; Exhibit 3-4361 - CTH.3108.0003.7572_R - 170123 OCI - Collated information - FINAL; Exhibit 3-4362 - CTH.3051.0015.6537_R - FW- Fact check- case study [DLM=Sensitive-Personal]; Exhibit 3-4363 - CTH.3051.0015.6592_R - FINAL information document [SEC=UNCLASSIFIED]; Exhibit 3-4364 - CTH.3051.0015.6593_R - 170124 OCI - Collated information FINAL.

213 Exhibit 3-4350 - CTH.3051.0015.5877_R - 170123 OCI - Collated information; Exhibit 3-4351 - CTH.3051.0015.5878_R - 170123 OCI - Collated information.

214 Exhibit 3-4352 - CTH.3051.0015.6199_R - Updated materials for media [SEC=UNCLASSIFIED]; Exhibit 3-4353 - CTH.3051.0015.6262_R - 170123 OCI - Collated information - AA update; Exhibit 3-4356 - CTH.3051.0015.6295_R - Re- Updated materials for media [SEC=UNCLASSIFIED]; Exhibit 3-4357 - CTH.3051.0015.6466_R - RE- Updated materials for media [SEC=UNCLASSIFIED]; Exhibit 3-4358 - CTH.3051.0015.6503_R - FW- Final info document [SEC=UNCLASSIFIED]; Exhibit 3-4359 - CTH.3051.0015.6504_R - 170123 OCI - Collated information - FINAL; Exhibit 3-4360 - CTH.3108.0003.7571_R - 170123 OCI - Collated information - FINAL; Exhibit 3-4361 - CTH.3108.0003.7572_R - 170123 OCI - Collated information - FINAL; Exhibit 3-4363 - CTH.3051.0015.6592_R - FINAL information document [SEC=UNCLASSIFIED]; Exhibit 3-4364 - CTH.3051.0015.6593_R - 170124 OCI - Collated information FINAL; Exhibit 3-4369 - CTH.3104.0029.3610_R - OCI Case Studies sent to Simon Benson [SEC=UNCLASSIFIED]; Exhibit 3-4370 - CTH.3104.0029.3618_R - Benson - OCI - package.

215 Exhibit 3-4347 - CTH.3051.0015.5625_R - Latest case studies in the media - stats [SEC=UNCLASSIFIED]; Exhibit 3-4348 - CTH.3051.0015.5628_R - 170117 - Legitimate OCI debts Case studies; Exhibit 3-4349 - CTH.3051.0015.5629_R - MS17-000066 GM Cleared.

216 Exhibit 3-4369 - CTH.3104.0029.3610_R - OCI Case Studies sent to Simon Benson [SEC=UNCLASSIFIED]; Exhibit 3-4370 - CTH.3104.0029.3618_R - Benson - OCI – package.

217 Exhibit 3-4371 - CTH.3007.0005.6573 - Simon Benson - Australian - 260117.

218 Exhibit 10022 - DPS.0001.0034.7221 - Minister for Human Services – Key Transcript – Interview with Warren Moore 2GB.

219 Transcript, Alan Tudge, 1 February 2023 [p 2964: lines 1-38].

220 Transcript, Alan Tudge, 1 February 2023 [p 2964: lines 26-40].

221 Transcript, Rachelle Miller, 31 January 2023 [p 2800: lines 14-43].

222 Transcript, Rachelle Miller, 31 January 2023 [p 2803: lines 4-12].

223 Transcript, Charmaine Crowe, 16 December 2022 [p 2042: lines 17-32].

224 Transcript, Charmaine Crowe, 16 December 2022 [p 2042: lines 25-47].

225 Transcript, Alan Tudge, 1 February 2023 [p 2954: lines 9-47; p 2958: lines 10-16]; Exhibit 3-4699 - CTH.3051.0015.6301_R - RE- Process for constit inquires - IMPORTANT [SEC=UNCLASSIFIED]; Exhibit 3-4700 - CTH.3001.0034.0967_R - Re- Further context, as discussed [DLM=For-Official-Use-Only].

226 Exhibit 3-4323 - CTH.3051.0015.0811_R - Re- Media Summary - Debt Letters [SEC=UNCLASSIFIED]; Exhibit 3-4698 - CTH.3001.0033.3675_R - URGENT ADVISER INFORMATION REQUEST- OCI Case studies - Due 2pm [DLM=For-Official-Use-Only].

227 Exhibit 3-4698 - CTH.3001.0033.3675_R - URGENT ADVISER INFORMATION REQUEST- OCI Case studies - Due 2pm [DLM=For-Official-Use-Only].

228 Exhibit 2-2721 - CTH.3027.0005.5256_R - FW- MB17-000066 - Adviser Information Request - Top 20 $ value potential identified through OCI [DLM=For-Official-Use-Only]. This document also shows that the Minister's office requested that this information "be anonymised versions, suitable and cleared for immediate public release."

229 Exhibit 9977 - CTH.3001.0032.0139 – Re: Top Stories – Wednesday, 28 December 2016 [SEC=UNCLASSIFIED].

230 Exhibit 3-4596 - CTH.3837.0001.0022_R - FW- Request from Minister Porter's Office[DLM=For-Official-Use-Only].
231 Exhibit 3-4597 - CTH.3837.0001.0042_R - FOR REVIEW- Communication plan [SEC=UNCLASSIFIED].
232 Exhibit 3-4554 - CTH.9999.0001.0107_R - Response to NTG-0144 [paras 176-177].
233 Exhibit 3-4412 - HJO.9999.0001.0001_R - 20221114 Statement HankJongenSIGNED – Copy [para 37].
234 Exhibit 3-4412 - HJO.9999.0001.0001_R - 20221114 Statement HankJongenSIGNED – Copy [para 52].
235 Exhibit 3-4412 - HJO.9999.0001.0001_R - 20221114 Statement HankJongenSIGNED – Copy [para 34].
236 Exhibit 4-5938B - SKR.001.001.0309 - RE- Urgent request- Minister Porter 7.30 interview DHS debt case studies [DLM=Sensitive].
237 Exhibit 3-4572 - CTH.3001.0034.1552_R - Re- Urgent Approval- Media response for Minister re advance payment-debt - Letter from Julian Hill MP [DLM=For-Official-Use-Only]; Exhibit 3-4462 - CTH.3001.0039.5422_R - RE- PRINTED For clearance - latest OCI master TPs [DLM=For-Official-Use-Only]; Exhibit 3-4449 - CTH.3001.0032.6190_R - Fwd- FOR APPROVAL- Updated media statement [SEC=UNCLASSIFIED].
238 Exhibit 2-1795 - CTH.3001.0034.2201_R - RE- JS - Noted - PRINTED - RE- MO APPROVAL- media statement [SEC=UNCLASSIFIED].
239 Exhibit 2-1862 - CTH.3004.0002.5883_R - Fwd- FOR INFO- Minister's Office - today's media and communication interactions [SEC=UNCLASSIFIED].
240 Exhibit 2-1897 - CTH.3008.0016.7472_R - FW- BREAKING NEWS ALERT- news.com_.au (Online) reports Centrelinks intimidating phase two in debt crackdown [SEC=UNCLASSIFIED].
241 Exhibit 2-1847 - CTH.3001.0043.4160_R - RE- INFO- Minister's office today's media and communication interactions [DLM=For-Official-Use-Only].
242 Transcript, Kathryn Campbell, 7 March 2023, [p 4600: lines 10-20].
243 Exhibit 2-1813 - CTH.3001.0036.5346_R - RE- INFO- Minister's office today's media and communication interactions [DLM=For-Official-Use-Only].
244 Exhibit 2-1814 - CTH.3001.0036.5353_R - Response to media enquiry from The Saturday Paper re Mr Cauzzo [DLM=Sensitive]; Exhibit 9448 - CTH.3001.0036.5355, FW: RE: URGENT: HEAD'S UP: Enquiry from The Saturday Paper featuring customer case. [DLM=Sensitive:Personal], 16 February 2017.
245 Exhibit 2-1814 - CTH.3001.0036.5353_R - Response to media enquiry from The Saturday Paper re Mr Cauzzo [DLM=Sensitive]; Exhibit 9448 - CTH.3001.0036.5355, FW: RE: URGENT: HEAD'S UP: Enquiry from The Saturday Paper featuring customer case. [DLM=Sensitive:Personal], 16 February 2017.
246 Exhibit 2-1817 - CTH.3001.0036.6957_R - Re- FOR OK - On the record for The Saturday Paper in response to today's article [DLM=Sensitive].
247 Exhibit 4-6984 - CTH.3001.0036.7272_R - RE- BREAKING NEWS ALERT- Updated article in The Saturday Paper 'Centrelink's debt collection 'pushed him over the edge'' [SEC=UNCLASSIFIED].
248 Exhibit 4-6984 - CTH.3001.0036.7272_R - RE- BREAKING NEWS ALERT- Updated article in The Saturday Paper 'Centrelink's debt collection 'pushed him over the edge'' [SEC=UNCLASSIFIED]
249 Transcript, Kathryn Campbell, 7 March 2023, [p 4600: lines 20-25].
250 Exhibit 3-4407 - CTH.3051.0016.4527_R - FW- URGENT- HEAD'S UP- Enquiry from The Saturday Paperfeaturingcustomercase. [DLM=Sensitive-Personal]; Exhibit 4-5146 - CTH.3051.0016.4582_R - 20170218 Centrelink's debt collection 'pushed him over the edge' - full article - re Civil Litigation - GBH - Health - Medical and Politics 201702182051.
251 Exhibit 3-4721 - CTH.3796.0001.0001_R - FW- Re Letter for Ms Jennifer Miller - MC17-005127 - Minister has requested brief and redraft [DLM=Sensitive].
252 Exhibit 3-4721 - CTH.3796.0001.0001_R - FW- Re Letter for Ms Jennifer Miller - MC17-005127 - Minister has requested brief and redraft [DLM=Sensitive].
253 Exhibit 3-4722 - CTH.3009.0008.0589_R - MB17-000300 Letter at the end of the brief was signed by the Minister.
254 Exhibit 10036 - CTH.3043.0054.6794 - 001-10050000_20150806.pdf.
255 Exhibit 3-4722 - CTH.3009.0008.0589_R - MB17-000300 Letter at the end of the brief was signed by the Minister.
256 Exhibit 3-4723 - CTH.3001.0048.8449_R - RE- URG - MO request - Extremely sensitive- a DHS recipient took their own life, allegedly in response to an Employment Income Confirmation Letter [DLM=Sensitive].
257 Transcript, Andrew Asten, 27 February 2023 [p 3956: line 25 – p 3957: line 15].
258 Exhibit 3-4724 - CTH.3001.0049.0924_R - RE- Phone Call outcome for sensitive case [DLM=Sensitive-Personal].
259 Exhibit 3-4753 - CTH.0009.0001.2043_R - MS17-000506 MSB [p .2057]; Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement – Signed [para 19].
260 Transcript, Alan Tudge, 1 February 2023 [p 3000: lines 1-23].
261 Exhibit 3-4725 - CTH.3004.0005.4685_R - Detailed History of sensitive case [DLM=Sensitive-Personal].

262 Exhibit 3-4554 - CTH.9999.0001.0107_R - Response to NTG-0144 [paras 114-116]; Exhibit 3-4384 - CTH.3001.0033.6866_R - FW- UPDATED- UPDATE- For review [SEC=UNCLASSIFIED].
263 Exhibit 3-4724 - CTH.3001.0049.0924_R - RE- Phone Call outcome for sensitive case [DLM=Sensitive-Personal].
264 Transcript, Alan Tudge, 1 February 2023 [p 2989: lines 23-41].
265 Transcript, Alan Tudge, 1 February 2023 [p 2989: line 43 – p 2990: line 1].
266 Transcript, Alan Tudge, 1 February 2023 [p 2990: lines 3-6].
267 Transcript, Alan Tudge, 1 February 2023 [p 2990: lines 8-27].
268 Exhibit 3-4749 - CTH.3005.0003.7891_R - MS17-000266 Minister signed brief; Exhibit 3-4750 - CTH.3005.0003.7472_R - MB17-000252 - Minister signed brief.
269 Exhibit 4-5810 - SKR.9999.0001.0001_R - 20230219 NTG-0193 - Statement Sue Kruse (47169792.6) [p4: para 31–32].
270 Exhibit 3-4208 - AMU.9999.0001.0003_R - 20221031 NTG-0012 - Response (Annette Musolino)(46258465.1) [p9: para 11].
271 Exhibit 4-5807 - MGL.9999.0001.0002_2 - 20230130 Statement M Gladman (final) - signed - updated document IDs_Redacted [p 2: para 14; p 8: para 44].
272 Exhibit 4-6850 - BAJ.9999.0001.0001_R - NTG-0218 - Barry Jackson - DocID update(47338496.1) [p3: para 18].
273 Exhibit 1-1237 - KCA.9999.0001.0002_R - 2022.10.13 - NTG-0013 Kathryn Campbell - Response, [para 35]; Exhibit 4-6850 - BAJ.9999.0001.0001_R - NTG-0218 - Barry Jackson - DocID update(47338496.1), [para 20]; Exhibit 4-5304 - AGD.0003.0001.5028_R - RE- Centrelink debt-recovery [SEC=UNCLASSIFIED]; Transcript, Annette Musolino, 30 January 2023 [p 2675: lines 35-40].
274 Exhibit 4-5304 - AGD.0003.0001.5028_R - RE- Centrelink debt-recovery [SEC=UNCLASSIFIED]; Transcript, Annette Musolino, 30 January 2023 [p 2675 – p 2676].
275 See, for example, Exhibit 4-5815 - SKR.0001.0001.0020_R - Fwd- Request from Minister Porter's Office [DLM=For-Official-Use-Only]; Exhibit 4-6851 - CTH.4750.0028.0433_R - Minister Porter [DLM=For-Official-Use-Only]; Exhibit 4-6850 - BAJ.9999.0001.0001_R - NTG-0218 - Barry Jackson - DocID update(47338496.1) [p 5: para 23 – p 6: para 34].
276 Exhibit 3-4660 - CTH.3001.0032.6218_R - Questions; Exhibit 3-4664 - CTH.3001.0032.6216_R - Phone call from Minister Tudge; Exhibit 3-4317 - CTH.3051.0015.0646_R - RE- DRAFT Op Ed - Centrelink automated debt recover ysystem[SEC=UNCLASSIFIED]; Exhibit 3-4669 - CTH.3007.0027.3920_R - Fwd- MB17-000023 - Online compliance and debt letters [DLM=For-Official-Use-Only]; Exhibit 3-4672 - CTH.3001.0032.8131_R - Questions arising from Minister meeting on OCI [DLM=For-Official-Use-Only]; Exhibit 3-4673 - CTH.3001.0032.8374_R - Further request from Minister.
277 Exhibit 4-6850 - BAJ.9999.0001.0001_R - NTG-0218 - Barry Jackson - DocID update(47338496.1) [p 3: para 20].
278 Exhibit 4-6850 - BAJ.9999.0001.0001_R - NTG-0218 - Barry Jackson - DocID update(47338496.1) [p 3: para 20].
279 Exhibit 1-1237 - KCA.9999.0001.0002_R - 2022.10.13 - NTG-0013 Kathryn Campbell – Response [p 2: para 12].
280 Exhibit 3-4321 - RBD.9999.0001.0369 - Sydney Morning Herald Article How Centrelink unleashed a weapon of math destruction (see hyperlink in document in previous tab).
281 Exhibit 4-6724 - MTU.9999.0001.0001_R - SIGNED - Statement of The Hon Malcolm Bligh Turnbull AC - 20.02.2023 [p 8].
282 Exhibit 3-4320 - CTH.3001.0032.6643_R - Fwd- How Centrelink unleashed a weapon of math destruction.
283 Exhibit 9972 - CTH.3001.0032.6417 - Fwd: BREAKING NEWS: Peter Martin in The Age: How Centrelink unleashed a weapon of math destruction [SEC=UNCLASSIFIED].
284 Exhibit 9035 - CTH.3001.0032.7224_R, Peter Martin artcile. [DLM=Sensitive]; Exhibit 9036 - CTH.3001.0032.7225, Peter Martin article.docx.
285 That is, the screens seen by a recipient when using the OCI system.
286 Exhibit 4-6850 - BAJ.9999.0001.0001_R - NTG-0218 - Barry Jackson - DocID update(47338496.1) [p 4: para 21(d)].
287 Exhibit 3-4672 - CTH.3001.0032.8131_R - Questions arising from Minister meeting on OCI [DLM=For-Official-Use-Only].
288 Exhibit 4-6850 - BAJ.9999.0001.0001_R - NTG-0218 - Barry Jackson - DocID update(47338496.1) [p 4: para 21(d)].
289 Exhibit 4-6850 - BAJ.9999.0001.0001_R - NTG-0218 - Barry Jackson - DocID update(47338496.1) [p 4: para 21(d)].
290 Transcript, Alan Tudge, 1 February 2023 [p 3029: line 42 – p 3030: line 43].
291 Exhibit 4-6850 - BAJ.9999.0001.0001_R - NTG-0218 - Barry Jackson - DocID update(47338496.1) [p 5: para 23 – p 6: para 34].
292 Exhibit 4-6850 - BAJ.9999.0001.0001_R - NTG-0218 - Barry Jackson - DocID update(47338496.1) [p 7: para 39].
293 Exhibit 2-1744 - CTH.3007.0004.3585_R - Possible Legal issues - for discussion with Malisa [DLM=Sensitive-Legal].

294 Exhibit 4-6850 - BAJ.9999.0001.0001_R - NTG-0218 - Barry Jackson - DocID update(47338496.1) [p 7: para 39].
295 Exhibit 4-5827 - CTH.3111.0017.9684_R - Social security law - averaging provisions [DLM=Sensitive-Legal].
296 Exhibit 8433 - GFI.0001.0002.0001_R - FW- Social security law - averaging provisions [DLM=Sensitive-Legal].
297 Exhibit 8433 - GFI.0001.0002.0001_R - FW- Social security law - averaging provisions [DLM=Sensitive-Legal].
298 Transcript, Mark Gladman, 27 February 2023 [p 3869: lines 10-30]; Exhibit 4-5855 - MGL.0001.0001.0011_R - Draft [DLM=Sensitive-Legal]; Exhibit 4-5856 - MGL.0001.0001.0012 - Annualisation of Income Review Process.
299 Exhibit 8717 - GFI.9999.0001.0023_R - 2023.04.04 NTG-0238 Statement G Fiveash [para 15].
300 Exhibit 4-5107 - CTH.3007.0004.3602_R - FW- debts [DLM=For-Official-Use-Only].
301 Exhibit 4-5106A - CTH.3007.0004.3601_R - RE- URGENT Online Compliance Intervention - Debt system [DLM=Sensitive-Legal].
302 Transcript, Mark Gladman, 27 February 2023 [p 3869 – p 3872].
303 So much can be inferred from: Exhibit 3-4229; Exhibit 4-8081 - CTH.3038.0002.6650_R - Social Security - Calculating Ordinary Income [DLM=Sensitive-Legal]; Exhibit 3-4230; Exhibit 4-8082 - CTH.3038.0002.6640_R - Draft Instructions [DLM=Sensitive-Legal]; Exhibit 3-4231 - CTH.3038.0002.6641 - AGS Instruction; Exhibit 3-4232; Exhibit 4-8084 - CTH.3038.0002.6646_R - FW- AGS Instruction [DLM=Sensitive-Legal]; Exhibit 3-4233 - CTH.3038.0002.6647 - AGS Instruction v2.
304 Exhibit 4-5844 - CTH.3113.0004.7075_R - draft advice - calculating income for income support payments [DLM=Sensitive-Legal]; Exhibit 4-5845 - CTH.3113.0004.7076 - calculating of income for income support payments.
305 Exhibit 4-5844 - CTH.3113.0004.7075_R - draft advice - calculating income for income support payments [DLM=Sensitive-Legal]; Exhibit 4-5845 - CTH.3113.0004.7076 - calculating of income for income support payments. See paragraph 4 stating 'Given the complexity of the legislation, and the significance of this issue for the department, it may be prudent to obtain external legal advice on this matter.'
306 Transcript, Lisa Carmody, 27 February 2023 [p 3898].
307 Exhibit 4-8089 - JBL.0001.0001.0455_R - RE- calculating of income for income support payments [DLM=Sensitive-Legal]; Exhibit 4-8090 - JBL.0001.0001.0456 - calculating of income for income support payments.
308 Again, see paragraph [4] stating 'Given the complexity of the legislation, and the significance of this issue for the department, it may be prudent to obtain external legal advice on this matter.'
309 Exhibit 4-5902 - CTH.3754.0001.0001_R - Lisa Carmody Scanned Email.
310 Transcript, Mark Gladman, 27 February 2023 [p 3869 – p 3872].
311 Exhibit 5844 – CTH.3113.0004.7075_R, draft advice - calculating income for income support payments [DLM=Sensitive:Legal].
312 Transcript, Mark Gladman, 27 February 2023 [p 3875: lines 5-10].
313 Exhibit 4-5848 - CTH.3881.0001.0009_R - RE- urgent advice - calculating income for income support payments [DLM=Sensitive-Legal].
314 Exhibit 4-5850 - CTH.3881.0001.0025_R - AGS Instructions - backgound [DLM=Sensitive-Legal]; Exhibit 4-5851 - CTH.3881.0001.0026 - AGS Instruction (002).
315 Transcript, Mark Gladman, 27 February 2023 [p 3877 – p 3891].
316 Exhibit 4-6850 - BAJ.9999.0001.0001_R - NTG-0218 - Barry Jackson - DocID update(47338496.1), [para 18; para 40-42]; Transcript, Barry Jackson, 7 March 2023 [p 4518: lines 25-45].
317 Transcript, Kathryn Campbell, 7 March 2023 [p 4609: lines 25-40].
318 Transcript, Kathryn Campbell, 7 March 2023 [p 4610: line 5].
319 Transcript, Kathryn Campbell, 7 March 2023 [p 4609: line 45 – p 4610: line 20].
320 Transcript, Kathryn Campbell, 7 March 2023 [p 4610 – p 4611].
321 Exhibit 7059, Statement of Kathryn Campbell, 3 March 2023 [para 5]; Transcript, Kathryn Campbell, 7 March 2023 [p 4610-4611].
322 Exhibit 4-6861 - CTH.4750.0028.0208_R - RE- Ombudsman [DLM=For-Official-Use-Only]; Exhibit 4-6979 - CTH.3001.0033.1195_R - EC17-000064 Letter.
323 So much was accepted by Ms Musolino: Transcript, Annette Musolino, 1 March 2023 [p 4138: lines 1-5]. See also Transcript, Barry Jackson, 7 March 2023 [p 4519: lines 5-15].
324 Exhibit 4-5902 - CTH.3754.0001.0001_R - Lisa Carmody Scanned Email.
325 Exhibit 3-4208 - AMU.9999.0001.0003_R - 20221031 NTG-0012 - Response (Annette Musolino)(46258465.1) [p 27: para 46].
326 Exhibit 4-5889 - CTH.3113.0004.7296_R - updated draft - calculating of income for income support payments [DLM=Sensitive-Legal]; Exhibit 4-5890 - CTH.3113.0004.7297 - calculating of income for income support payments.
327 Exhibit 4-5936 - CTH.3007.0004.3604_R - RE- URGENT Online Compliance Intervention - Debt system [DLM=Sensitive-Legal].

328 Exhibit 4-5813 - CTH.3135.0001.0002_R - Lisa and Annette handover [SEC=UNOFFICIAL].
329 Transcript, Lisa Carmody, 27 February 2023 [p 3901: lines 0-5]; Exhibit 4-5812 - LCA.9999.0001.0002_R - [FINAL] Services Australia - Response to NTG-0192 (Lisa Carmody) [para 50].
330 Transcript, Lisa Carmody, 27 February 2023 [p 3900: line 35 – p 3901: line 40]. Ms Musolino does not accept so much but does not deny it, she simply does not recall it: Transcript, Annette Musolino, 1 March 2023 [p 4134: line 40 – p 4135: line 5].
331 Transcript, Lisa Carmody, 27 February 2023 [p 3901].
332 Exhibit 4-5812 - LCA.9999.0001.0002_R - [FINAL] Services Australia - Response to NTG-0192 (Lisa Carmody) [para 50].
333 Exhibit 2-1744 - CTH.3007.0004.3585_R - Possible Legal issues - for discussion with Malisa [DLM=Sensitive-Legal].
334 Exhibit 2-1744 - CTH.3007.0004.3585_R - Possible Legal issues - for discussion with Malisa [DLM=Sensitive-Legal].
335 Exhibit 2-1738 - CTH.3001.0034.0729_R - FW- Weekend Top Stories - Saturday 21 January 2017 [DLM=Sensitive-Legal].
336 Exhibit 2-1744 - CTH.3007.0004.3585_R - Possible Legal issues - for discussion with Malisa [DLM=Sensitive-Legal].
337 Exhibit 4-5934 - CTH.3007.0004.3599_R - URGENT Online Compliance Intervention - Debt system [DLM=Sensitive-Legal].
338 Exhibit 4-5106A - CTH.3007.0004.3601_R - RE- URGENT Online Compliance Intervention - Debt system [DLM=Sensitive-Legal]; Exhibit 4-5107 - CTH.3007.0004.3602_R - FW- debts [DLM=For-Official-Use-Only].
339 Ms Musolino's evidence is found at Transcript, Annette Musolino, 1 March 2023 [p 4145 - 4147]. That evidence was specifically rejected by Mr Stipnieks in his statement of 9 March 2023: Exhibit 8520 - MAS.9999.0001.0003_R - 20230309 Supplementary statement M Stipnieks 22006293(47392112.1) (004) [para 10-22].
340 Exhibit 2-2072 - DSS.9999.0001.0025_R - 20221125 NTG-0092 Statement (Part 2) (Halbert, C) 22006293(46543944.1) [para 20].
341 Exhibit 2-2072 - DSS.9999.0001.0025_R - 20221125 NTG-0092 Statement (Part 2) (Halbert, C) 22006293(46543944.1) [para 20].
342 Ex 2072 - DSS.9999.0001.0025, Statement of Catherine Halbert 25 November 2022, para 20.
343 Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4248: lines 34-38].
344 Exhibit 4-6374 - DSS.5075.0001.0127_R - FW E-mail regarding DHS compliance proposal - November 2014.
345 Exhibit 4-6374 - DSS.5075.0001.0127_R - FW E-mail regarding DHS compliance proposal - November 2014.
346 Exhibit 4-6374 - DSS.5075.0001.0127_R - FW E-mail regarding DHS compliance proposal - November 2014.
347 Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4246: line 39 – p 4247: line 8].
348 Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4247: line 18].

Chapter 7: 2017, part B – Inquiries and Investigations

1 Complaints management at Human Services

The Department of Human Services (DHS) received a significant number of complaints about the Robodebt scheme (the Scheme), particularly in late 2016 and early 2017. The volume of Robodebt-related complaints imposed stress on DHS's complaint management systems.

During the life of the Scheme, DHS had the capacity to receive complaints in a number of ways: face-to-face, by phone, email, post, fax, online or though social media. With the exception of "escalated complaints" (those received by the minister's office and the Ombudsman), complaints were handled through a Customer Feedback Tool and had "input from relevant business areas."[1]

Complaints recorded through the Customer Feedback Tool were categorised as either Level 1 – a complaint that could be managed at the first point of contact, or Level 2 – a complaint that required referral upwards: "escalation".[2] Once escalated to Level 2, complaints were dealt with based on their particular features. There was no option to escalate a complaint on the basis of a recipient's being vulnerable or high risk, although it was said to be possible to capture such information within the "complaint notes."[3]

From late 2016, there was an increase in complaints concerning the Scheme.[4] Complaints identified as relating to the Scheme had been referred to the Customer Compliance Division (CCD). In October 2016, an option was added to the Customer Feedback and Complaints Line (a platform where complaints were received by DHS) which allowed callers the option to go directly to the CCD phone line. In November 2016, a business process was established to identify and track Robodebt complaints. This process involved the identification of Robodebt complaints as a Potential Systemic Issue.[5]

In evidence, Christopher Birrer (Services Australia), agreed that there was no certainty that the Customer Feedback Tool had captured all complaints related to Robodebt, as the categorisation involved a "human step" and was, in consequence, open to error.[6]

Mr Birrer described in his evidence how, during the Scheme, complaints were largely managed within the Integrity and Information Group which, among other things, sought to ensure that the public messaging was aligned with the "underlying narrative… that they were seeking to maintain." Outside that group, there was said to be "limited visibility."[7] He spoke of the lack of "an appropriate feedback loop" in identifying "underlying issues" that were being communicated through complaints. Despite the lack of visibility inherent in the complaint system, Mr Birrer noted that "you would have to have your head in the sand" to not have had some awareness of the concerns being expressed about the integrity of the Scheme.[8]

Since January 2021, Services Australia said that it has implemented training and awareness for the purposes of raising the standard of its complaint management system, and has also taken steps to improve the quality of its information and data.[9]

According to Mr Birrer, the current complaints processes were "designed to comply with industry best practice, including the Ombudsman's 'Better Practices Complaint Handling Guide'." He outlined how complaints are now managed through the Multicultural and Tailored Services (MATS) Branch, which holds membership of the Society of Consumer Affairs Professionals, a peak body for Australian and New Zealand complaint professionals. Mr Birrer explained that, within MATS, there are specialist teams to provide personalised support to the agency's most vulnerable and disadvantaged customers.[10]

2 The Commonwealth Ombudsman's inquiry

The investigation by the Commonwealth Ombudsman in early 2017 into the Scheme was a significant event. The scrutiny of the Scheme by an independent body, invested with investigatory and reporting powers, gave rise to the potential for its flaws and illegalities to be brought to light and for serious consideration to be given to the viability of the Scheme's continuation.

The manner in which the Ombudsman's office conducted the 2017 investigation, and consideration of the scope of the Ombudsman's role and powers more generally, is examined in further detail in the chapter – The Commonwealth Ombudsman. What is examined in this part of the report is the chronology of how two government departments acted to deceive the Ombudsman's office, avoid effective scrutiny of the Scheme and, in doing so, thwart one of the best opportunities that existed to bring the Scheme to an end.

2.1 An investigation commences

From October 2016, the Office of the Commonwealth Ombudsman had received high numbers of complaints about the Scheme, and had tracked these as an "issue of interest" in its complaints system.[11] By December 2016, the Ombudsman's office was aware of media reports about Centrelink's automated debt letters.[12]

In late December 2016, the Ombudsman's office contacted DHS and sought information about the Scheme. It sought any advice obtained by DHS "about the legality of averaging income for social security overpayment calculations."[13]

There was further contact between the Ombudsman and DHS, culminating in a meeting between Ombudsman and DHS officers on 6 January 2017.[14] At this meeting, DHS briefed the Ombudsman representatives on the Scheme, and presented a walkthrough of the system.[15]

On 10 January 2017, the Ombudsman decided to conduct an "own motion" investigation into the Scheme.[16] The Ombudsman wrote to Ms Campbell, Mr Pratt, Mr Tudge and Mr Porter advising them of the investigation.[17] The scope of the investigation included, among other things, the Scheme's "adherence to relevant legislative requirements" and the "accuracy of debts being raised via the platform."

As set out below, DHS and DSS officers engaged in behaviour designed to mislead and impede the Ombudsman in the exercise of his functions. This, coupled with deficiencies in the Ombudsman's own processes, had the consequence of diluting the effectiveness of the investigation. The illegality of the Scheme was not brought to light. The Scheme continued for years after the Ombudsman's work was done.

2.2 Social Services initial response

In January 2017, the DSS staff assigned responsibility for its response to the Ombudsman's investigation were Robert Hurman (director, Payment Integrity and Debt Strategy Section)[18] and Ms McGuirk (branch manager, Work and Payments Study Branch).[19] Mr Knox acted for Mr Hurman while he was on leave between 16 and 27 January 2017.[20]

Russell de Burgh (branch manager, Pensions and Integrity Branch) was also involved in the Ombudsman's response.[21] He reported to Ms Halbert, who in turn reported to Ms Wilson.

2.3 Initial response to investigation

On 10 January 2017 a meeting was arranged for 16 January 2017 between employees of DSS and employees of the Ombudsman, in relation to the investigation.[22]

Prior to that meeting, on 12 January 2017, Mr Hurman, Ms McGuirk and Ms Halbert had been sent the 2014 DSS legal advice by Alan Grinsell-Jones (branch manager, Legal Services Branch Executive, DSS).[23] That advice, dated 9 December 2014, by Simon Jordan and second counselled by Ann Pulford (principle legal officer, Social Security and Families) asserted that the use of income averaging to determine social security entitlement was unlawful.[24] The 2014 DSS legal advice was directed at the question of whether a "debt amount derived from annual smoothing or smoothing over a defined period of time is legally defensible." Significantly, the instructions upon which the advice was premised also described an early iteration of the proposal that would become the Scheme.

Upon receipt of the 2014 DSS legal advice, Ms McGuirk appreciated that the proposal that was the subject of the advice (i.e. the proposal that became the Scheme) did "not fit within the legislative requirements for raising debts."[25] Similarly, in evidence, Mr Hurman said that he understood the advice and its implications.[26]

2.4 Preparation for the meeting on 15 January

A meeting had been scheduled for 16 January 2017 between DSS and Ombudsman representatives. In preparation for that meeting, DSS and DHS officers participated in a teleconference on 15 January 2017. Invitees to that teleconference included Ms Golightly, Paul McBride (group manager), Murray Kimber (branch manager), Ms Wilson and Ms Halbert.[27]

In advance of the teleconference, Ms McGuirk sent an email to Ms Halbert, Ms Wilson, Mr Kimber and Mr McBride[28] attaching the 2014 DSS legal advice and the 2014 DSS policy advice.[29] Ms McGuirk also sent those officers sample correspondence sent to recipients under the Scheme (that she had received three days earlier).[30]

In evidence, Mr Kimber could not recall attending the teleconference.[31] However, prior to the meeting, he sent the email to Ms McGuirk, Ms Halbert, Ms Wilson and Mr McBride in which he recounted what he recalled of the meeting on 27 February 2015 involving himself and Mr McBride from DSS, and Mr Withnell and Scott Britton (national manager, Compliance Risk Branch) from DHS to discuss the proposal that led to the Scheme.[32] According to his emailed account, the DHS representatives identified these components of their proposal:

a. DHS would target identified discrepancies based on analysis of the [PAYG] file obtained from the [ATO] compared with the reported earnings data that DHS holds…

b. Where a significant discrepancy is detected this information will be presented to the recipient. This would not be a debt notice but rather the recipient would be afforded the opportunity to explain, correct, update or challenge the information…

c. Any subsequent debt raised would take into account the information provided by the recipient.

Significantly, Mr Kimber recalled that DHS had also advised that there would be no change to "how income [was] assessed or overpayments calculated" as part of the proposal. Attached to Mr Kimber's email was correspondence dated 4 March 2015 enclosing draft DHS New Policy Proposals (NPP) for the 2015-16 Social Services portfolio Budget submission process (including a draft of the NPP that would later inform Cabinet's decision to authorise spending for the Scheme).[33]

Ms Halbert said she understood Mr Kimber's email to convey that, during the 27 February 2015 meeting, DHS had indicated that the use of averaging to determine social security entitlement would not be a feature of the proposal. [34]

2.5 The "last resort" email

Prior to the 15 January 2017 teleconference, Ms Harfield sent an email to Ms Golightly, copied to Mr Britton and Ms Wilson.[35] In that email, Ms Harfield provided a "simple explanation for DSS reference explaining that the methodology to assess employment income has not changed." The explanation was as follows:

> In respect of the current on-line compliance system there has been no change to the methodology used for the assessment of employment income. It remains the same and has been used for many many years An individual is required to report their employment income fortnightly and it is applied to the period worked. The averaging of employment income over the period worked is only used as a last resort if other information is unavailable…

Contrary to Ms Harfield's assertion, under the Scheme averaging was not being used "as a last resort" and there had been a change to the methodology. Averaging was being used where a recipient did not respond or did not provide the required information, and DHS was not making the inquiries of employers and banks it had previously made.

In evidence, Ms Harfield admitted that the representations in her 15 January 2017 email were inaccurate, but said that they were consistent with her understanding of the Scheme at the time.[36] The Commission accepts that Ms Harfield had never worked as a compliance officer and that her explanation of the program was, to a significant degree, based upon information other DHS officers had provided.

In an email dated 4 January 2017,[37] the director, Compliance Risk Branch, DHS had told Ms Harfield that the "concept of averaging income in the absence of detailed information" had been around since at least the 1980s. He provided Ms Harfield with the "operational blueprint" for the Scheme, which explained that it was possible to "use any evidence available to raise a debt, including an annual figure" in circumstances where "every possible means of obtaining the actual income information has been attempted."

By email dated 13 January 2017, Ms Harfield had also been advised by the director of the Compliance Risk Branch, DSS, that there had been "no change to the methodology for the assessment of employment income;"[38] averaging was only used "as a last resort if other information is unavailable." Mr Withnell had also communicated this concept of "last resort" to Ms Harfield in an email dated 12 January 2017.[39]

Ms Harfield's email appears to have been sent in response to a request for information by Ms Wilson about 20 minutes before the meeting; but since it was only sent about a minute before the meeting's scheduled start time, Ms Wilson may only have seen it after the meeting.[40] Ms Wilson said Ms Harfield's email gave her 'assurance that there had been no fundamental change to the way PAYG income was assessed."[41]

2.6 The 15 January 2017 meeting

The 15 January 2017 teleconference was attended by Ms McGuirk, Ms Wilson, Ms Halbert, Mr Kimber and Mr McBride from DSS and Ms Golightly, Ms Harfield and Mr Britton from DHS.[42]

At the teleconference, DHS officers disclosed to DSS officers that, under the Scheme, averaging was being used to determine social security entitlement.[43] Ms McGuirk's handwritten notes of the meeting disclose representations made by DHS officers that averaging was not being used "all the time", only where there was "no other option."[44]

Ms Wilson's evidence was that the 15 January 2017 meeting was the first time she had become aware that averaging to determine social security entitlement was a feature of the Scheme. She recalled being "surprised" "puzzled" and "taken aback."[45]

In evidence, Ms Wilson said that at the time of the 15 January 2017 meeting she recalled the various occasions in early 2015 when DSS had given DHS advice that income averaging, used in the way intended in the proposal which became the Robodebt Scheme, was unlawful.[46] She admitted having "actual knowledge", at that time, "that the law did not allow income averaging,"[47] and conceded that the concept of last resort "didn't matter to the question of legality."[48]

Mr McBride had no independent recollection of the meeting.[49] That averaging was being used under the Scheme "came as a complete surprise" to him.[50] He perceived that during the development of the Scheme, DSS had been misled by DHS in their description of the proposal.[51] The 15 January 2017 meeting, Mr McBride said, "crystallised in [DSS's] mind that [DHS] were doing something unlawful."[52]

Ms Halbert "vaguely" recalled the 15 January 2017 teleconference.[53] She also recalled being "surprised"[54] and "angered"[55] to learn that DHS was using income averaging to calculate social security entitlement. She appreciated at that time that the practice was unlawful.[56]

Ms McGuirk could not recall any discussion about the 2014 DSS legal advice during the meeting.[57] However, it is plain that by 12 January 2017 Ms McGuirk knew of the advice and its conclusion that income averaging was unlawful. She was not aware of any other legal advice from DSS to the effect that income averaging was lawful.[58] Prior to the meeting on 15 January 2017, Ms McGuirk said, she understood DHS were using averaging to identify a potential discrepancy, but thought that DHS had not changed the way it assessed income for the purpose of raising a debt.[59] Income averaging being used "as a last resort" was, she claimed, a new concept to her.[60]

2.7 Social Services knowledge of averaging prior to 15 January 2017

The Commission does not accept the evidence of Ms McGuirk, Mr McBride and Ms Wilson that they were unaware that averaging was being used under the Scheme prior to January 2017.

Ms McGuirk

In 2015, prior to the Scheme's implementation, Ms McGuirk gave advice to DHS in relation to the Scheme's "business process design." She did so in her capacity as the then director, Income Support Means Test, DSS, and after she had participated in a walk-through of the processes.[61]

Ms McGuirk's advice was provided in response to an email dated 24 April 2015 from Danny Scott, (Business Integrity, DHS).[62] In his email, Mr Scott summarised the proposed DHS business design process for the Scheme. A "key point" in the process was said to be:

> Applying the matched information to the customer record means that the total gross income (advised on the PAYG summary) will be evenly distributed across all fortnights in the employment period (advised on the PAYG summary), and then standard fortnightly attribution of income will be applied. It is important to note that the matched information will only be used for retrospective earnings related to debt calculations and not for the assessment of income in relation to ongoing rates of payment...

In a response dated 1 May 2015, Ms McGuirk advised:[63]

> … as long as the customer is given the opportunity to correctly declare against each fortnight and apportionment is the last resort, we support what you are doing…

In evidence, Ms McGuirk could not recall providing the 1 May 2015 advice.[64] However, she accepted that at the time she knew that DHS proposed to use averaging to determine social security entitlement.[65] Specifically, she had knowledge about "the use of averaging as a last resort in terms of what was proposed."[66] Ms McGuirk emphasised that her advice to Mr Scott was "programme management advice" and was not an expression of any legal opinion.[67]

In submissions made on behalf of Ms McGuirk, it was said that in providing her advice, she was "focussed on the calculation of a rate for a social security payment, not the raising and calculation of a debt." Her advice was said to have been "directed at a limited issue" and did not disclose "some broader understanding of how income averaging was being used to raise a debt nor the legitimacy of doing so."

The Commission does not accept these arguments. Mr Scott's instructions articulated, in clear terms, a process that involved the use of averaging to raise debts. Ms McGuirk's advice made explicit reference to (and expressed approval of) the use of "apportionment" to this end. Contrary to her submissions, Ms McGuirk's advice does disclose an historical understanding of the (then) proposed use of averaging to raise debts under the Scheme.

Incidentally, on 15 January 2017, Mr Britton had unsuccessfully (because he misspelled the email address)[68] attempted to email a copy of Ms McGuirk's own 1 May 2015 advice to her. Ms McGuirk could not explain what prompted Mr Britton to try sending the advice.[69]

Ms Wilson and Mr McBride

In early 2016, both Mr McBride and Ms Wilson were involved in the preparation of a brief to Mr Porter, then Minister for Social Services. That brief, signed by Mr Porter on 6 April 2016,[70] was provided in response to his request for information about "DHS Compliance Activity." Attached to the brief was a document titled "Information on current compliance processes" that DHS had provided.[71] The DHS document disclosed that, under the Scheme:

- recipients would initially be presented with "information obtained from the ATO" and "an assessment of their correct welfare entitlement based on this information,"
- recipients would then "have an opportunity to update the information prior to it being applied to their Centrelink record," and
- DHS would rely upon ATO data as the 'trusted source' and as "the primary evidence rather than just a trigger."

Both Ms Wilson[72] and Mr McBride[73] had been sent and had reviewed this material from DHS in the process of preparing the brief.

In the Commission's view, the language used in the DHS document contemplated the use of averaging to determine social security entitlement under the Scheme. Indeed, the way that the measure was described by DHS was analogous to how it had been defined in the Executive Minute; that is, the proposal that had attracted significant concern on DSS's part. It is difficult to reconcile Ms Wilson's and Mr Bride's exposure to this information in early 2016 with their evidence that they were "surprised" to learn in January 2017 that DHS was using averaging to determine social security entitlement.[74]

Ms Wilson's handwritten annotations on the DHS document and Mr McBride's agreement to include that material in the brief is evidence of their close review of its contents. From the language employed by DHS, it should have been, and mostly likely was, clear to both Ms Wilson and Mr McBride that DHS was using averaging to calculate overpayment of entitlement. Given the seniority of Ms Wilson and Mr McBride and their previous involvement in the development of the measure, any argument that the language used by DHS did not disclose the true nature of the Scheme is untenable.

On 9 March 2016, a DSS Payments Forum meeting was held. The listed attendees at the forum included Ms Wilson, Mr McBride, Mr de Burgh, Mr Kimber and Ms McGuirk.[75] Mr Britton gave a presentation at the forum concerning the Digital Compliance Intervention Project (i.e. the project that would later become the OCI phase of the Scheme). Although Mr Britton did not recall making explicit reference to averaging in his presentation,[76] the visual slides he used in his presentation described a process of "online assessment" in which recipients were notified of discrepancies between ATO information and declared earnings to DHS. Recipients were warned that a failure to complete an online assessment would result in the ATO information being "applied to [the recipient's] Centrelink record."[77]

In evidence, Ms Wilson accepted that she had attended the Forum (because she was also presenting) but could not recall whether she was present for Mr Britton's presentation.[78] Mr McBride and Ms McGuirk did not recall attending the Forum.[79] Mr McBride accepted that Mr Britton's presentation "should have raised concerns."[80] He described it as "a missed opportunity to be more forensic as to how [the Scheme] was operating."[81] Ms McGuirk accepted that it could be inferred from the presentation slides that income averaging was involved "in the creation of debt."[82]

The Commission is satisfied that Mr McBride, Ms Wilson and Ms McGuirk attended the Forum and that they were present during Mr Britton's presentation, in which he used slides disclosing the use of averaging to determine social security entitlement under the Scheme.

On those occasions, Ms Wilson, Mr McBride and Ms McGuirk were exposed to information that should have disclosed to them that income averaging was a feature of the Scheme. The Commission does not accept that the three individuals, Ms McGuirk, Ms Wilson and Mr McBride, had no awareness or suspicion that under the Scheme averaging was being used to determine social security entitlement prior to the 15 January 2017 meeting. Contrary to their evidence, being told by DHS that income averaging was a feature of the Scheme on 15 January 2017 did not take Ms McGuirk, Ms Wilson and Mr McBride by surprise.

That conclusion is reinforced by the way these DSS officers behaved in the aftermath of the 15 January 2017 teleconference. The natural reaction to learning that DHS had been raising debts through a practice DSS had advised was unlawful would be to raise the alarm with their secretary and the minister. But nothing of the kind occurred. Instead, as explained in detail below, Ms Wilson and Ms McGuirk engaged in behaviour designed to mislead the Ombudsman.

Mr McBride's failure to act

Following Mr McBride's participation in the meeting on 15 January 2017, he took no step to ensure that the behaviour of DHS and the unlawfulness of the Scheme was raised with either Mr Pratt or Mr Porter.

Mr McBride explained in evidence that it was not his responsibility to take such steps.[83] In submissions, Mr McBride emphasised that Ms Wilson was present at the 15 January 2017 meeting. He said that, due to her position of seniority, it was reasonable to infer that Ms Wilson 'would take the necessary steps to deal with the issue of unlawfulness." He drew an inference that further advice received by DSS (the 2017 DSS legal advice discussed in detail below) "was a result of senior members in his team, particularly Ms Wilson, having taken steps to question and then satisfy themselves of the DHS position."

Though, in evidence, Mr McBride said he became aware 'through public discussion' that there was "subsequent legal advice," there is no evidence that he was ever provided with the 2017 DSS legal advice. Even if it were accepted that he had become aware of the existence of the advice, that would not be sufficient basis for a finding that Mr McBride properly satisfied himself that what DHS had done had been properly addressed. Nor was it sufficient for Mr McBride to rely upon Ms Wilson's doing something about it.

Mr McBride was a senior public servant with knowledge and experience in social security policy. Through his involvement in the preparation of the NPP in 2015, he was acutely aware that the use of averaging to determine social security entitlement was unlawful. By the time of the 15 January 2017 meeting, Mr McBride knew that income averaging was being used under the Scheme. Given his senior position within DSS, Mr McBride had the capacity to act to ensure that the unlawful use of averaging by DHS was being properly addressed. He could have taken steps to ensure that the matter was squarely raised with Mr Pratt or Mr Porter. Instead, Mr McBride did nothing.

2.8 The 16 January 2017 meeting with the Ombudsman

On 16 January 2017, the scheduled meeting occurred between officers of DSS, DHS and the Ombudsman's office. Attendees from DSS included Ms Wilson, Ms Halbert and Ms McGuirk. By the time of the 16 January 2017 meeting with the Ombudsman representatives, all DSS officers in attendance had knowledge that the Scheme involved the use of averaging to determine social security entitlement. Additionally, they had knowledge of the 2014 DSS legal advice that, in clear terms, said that the use of averaging in this way was unlawful.

At the 16 January 2017 meeting, DSS failed to disclose to the Ombudsman the 2014 DSS legal advice or that there were any doubts as to the legality of the Scheme.[84] This was in circumstances where DSS had been made aware that the scope of the Ombudsman's investigation included, among other things, the Scheme's "adherence to relevant legislative requirements." This was, in and of itself, misleading behaviour by Ms Wilson, Ms Halbert and Ms McGuirk.

Ms McGuirk took notes at the meeting, which attributed particular statements to Ms Wilson regarding the Scheme,[85] to the effect that the Scheme did not represent any "changes to approach for assessing debt." Ms Wilson said she was provided with a script by DHS, upon which she relied in discussing the Scheme with the Ombudsman's representatives. She said that she had no reason to question the information she had been provided.[86]

Ms Wilson's representation to the Ombudsman representatives that there had been "no change" to the assessment of debt under the Scheme was misleading. It did nothing to inform the Ombudsman of the true nature of the Scheme or that there was doubt as to its lawfulness. To the contrary, it had the effect of suggesting to the Ombudsman's representatives that, because there had no change to the way entitlement was calculated, the Scheme was lawful.

Following the meeting with the representatives of the Ombudsman's office, Ms Wilson and Ms McGuirk had a further conversation with Mr Britton about the OCI program.[87] From notes prepared by Ms McGuirk at that discussion, it appears that Mr Britton explained that the government "didn't want burden on employers" and that if recipients failed to contact DHS after being notified of a discrepancy, DHS would apply ATO data.[88]

2.9 2017 DSS legal advice

DSS subsequently sought further advice from Ms Pulford (an author of the 2014 DSS legal advice). Ms Wilson "considered it was necessary to obtain legal advice in relation to using income averaging of [sic] a 'last resort'." She asked Ms McGuirk to obtain it[89] and the latter telephoned Ms Pulford to provide instruction.[90]

In evidence, Ms Pulford explained that it was "not as common" for a group manager (in Ms McGuirk's position) to telephone a principal legal officer such as herself directly to seek legal advice. Ms Pulford said:[91]

> I do recall that Ms McGuirk indicated that there was a Departmental business need to have some means of legally justifying taking action of this nature in these circumstances. Ms McGuirk sought my assistance as part of the legal branch to provide this justification.

Ms McGuirk's evidence was that she could not recall the conversation with Ms Pulford.[92]

Later on 16 January 2017, Ms Pulford sent an email to another lawyer in the public law branch[93] saying, "I've had a conversation with Emmakate on the basis we can make an argument to support the position discussed. I'm happy to talk you through it tomorrow."[94] In her oral evidence, Ms Pulford said:[95]

> …I felt pressure from Ms McGuirk to provide an answer that justified taking action in circumstances which the broad general advice in 2014 would not have supported on its face. I now cannot recall whether that was done in full awareness of the Robodebt Scheme being in full flight or not.

On 16 January 2017, DSS created an Action Register, which set out tasks for the Payments Policy Group managed by Ms Halbert.[96] The first task concerned the Ombudsman's investigation, of which it was noted,

"The Main part of the scope concerning DSS relates to adherence to legislative requirements."[97] The task of dealing with the Ombudsman was allocated to Ms McGuirk and Mr Knox, who was replaced by Mr Hurman at the beginning of February.[98] The register entry shows DSS was aware of the Ombudsman's focus on issues of lawfulness.

On 18 January 2017, DSS officers participated in a walk-through of the Scheme with some DHS officers.[99] Ms Wilson, Ms Halbert and Ms McGuirk attended from DHS, while Ms Golightly, Mr Britton, Ms Harfield were among the DHS attendees. Ms McGuirk said she could not recall whether the 2014 DSS legal advice was discussed at the walk through.[100]

On the same day, Ms McGuirk sent an email to Ms Pulford, formally seeking the advice.[101] She said:

> As discussed, am looking for advice please regarding a "last resort" method of debt identification for income support recipients. The SSAct details a fortnightly income test, which is applied for standard debt raising. However, in circumstances where there is available information about employment income and it appears an overpayment has been made but no available information from the recipient / ex- recipient about the period over which the income was earned, is it lawful to use an averaging method (as a "last resort") to determine the debt?

On 24 January 2017 Ms Pulford sent her advice (the 2017 DSS legal advice) to Ms McGuirk.[102]
It was heavily qualified:

> You've asked about whether using income averaging as a last resort to determine a social security debt was lawful, in circumstances where no other information about the person's circumstances are available. We are providing this advice on a general basis, without details as to what information source is being used and for what period. We would appreciate your treating this advice on this general basis.
>
> With this proviso in mind, the answer is yes. The Secretary must be guided in their decision-making by the range of information they are able to obtain, and whether this casts sufficient doubt about the correctness of the rate of social security payment to justify taking action.

Ms McGuirk thanked Ms Pulford for her "considered response"[103] and sent the 2017 DSS legal advice to Ms Halbert,[104] Mr Knox[105] and Mr Hurman.[106] Ms Halbert forwarded the 2017 DSS legal advice to Ms Wilson shortly after receiving it.[107]

Fundamentally, the 2017 DSS legal advice was not only inconsistent with the 2014 DSS legal advice; it was wrong. Averaged ATO PAYG data did not, as Ms Pulford argued, "justify the Secretary lawfully taking action" to raise a debt. This was so regardless of whether averaging was used "as a last resort." In her advice, Ms Pulford relied upon ss 8, 79 and 80 of the S*ocial Security (Administration) Act 1999* (Cth) (SSA Act), none of which provided a basis for the use of averaging to determine social security entitlement.

Ms Pulford gave evidence in relation to the 2017 DSS legal advice. She accepted that, save for the words "as a last resort", she was in effect being asked the same question as was the subject of the 2014 DSS legal advice.[108] She conceded that the qualifications in the first paragraph of the advice made it impossible to identify a practical application for her advice[109] (although she appeared to resile from that position in subsequent evidence, saying "a practical application could be teased out").[110] Further, Ms Pulford accepted that the concept of casting "sufficient doubt" was a different thing from proving a debt,[111] and that "casting doubt about something by incomplete information [did] not permit a decision-maker to affirmatively establish a debt."[112]

The Commission is satisfied that Ms McGuirk sought this advice in circumstances where she was aware of the 2014 DSS legal advice and its conclusion that, in effect, the use of income averaging as the sole basis to determine social security entitlement was unlawful (whether it was done as a "last resort" or otherwise). Submissions made on behalf of Ms McGuirk that she was genuinely uncertain as to the legal position expressed in the 2014 DSS legal advice are not accepted. The Commission makes no finding that Ms McGuirk, as it was framed in submissions made by her solicitors, "dictated to Ms Pulford what the advice needed to say." However, in the Commission's view, Ms McGuirk's request for advice from Ms Pulford was not motivated by any genuine interest to resolve the legal question framed in her 18 January 2017 instructions. It is more likely than not that the impetus for DSS's seeking the further advice from Ms Pulford was the Ombudsman's investigation and a perceived need to justify the continuation of the Scheme.

Given Ms Pulford's experience in social security law, it should have been, and most likely was, obvious to her that the 2017 DSS legal advice was incorrect. She was aware that the distinction drawn by Ms McGuirk (and others within DSS) between averaging as "a last resort" and averaging in other circumstances was entirely artificial and had no bearing on the question of whether the practice was lawful. The Commission is satisfied that Ms Pulford's advice was influenced by pressure placed upon her by Ms McGuirk.

Subsequently, DSS used the 2017 DSS legal advice to support representations to the Ombudsman that the Scheme was lawful.

2.10 Deception of the Ombudsman by Social Services

The Ombudsman requests legal advice on averaging

In an email on 19 February 2017, Louise MacLeod (acting senior assistant Ombudsman) sought information from DSS about the legal basis for the use of averaging to determine social security entitlement.[113] She requested from DSS "any legal advice it has received about averaging income for social security overpayment calculations."

On 21 February 2017, Mr Hurman sent correspondence to Ms Pulford forwarding the Ombudsman's request and attaching the 2017 DSS legal advice.[114] Mr Hurman sought Ms Pulford's approval to provide the 2017 DSS legal advice to the Ombudsman and asked whether there was "nothing more recent/better suited or anything else [Ms Pulford] thought should be done." In response, Ms Pulford referred to (and attached) the 2014 DSS legal advice. She informed Mr Hurman that the 2014 DSS legal advice also seemed to be "within scope" of the Ombudsman's request.[115]

Initially, Mr Hurman and Mr De Burgh took a different view, but when Ms Pulford reiterated[116] that both the 2014 and 2017 DSS legal advices fell within the scope of the Ombudsman's request, which should not be "read down,"[117] they agreed.[118] Mr Hurman asked Ms Pulford to provide an explanation that could be provided to the Ombudsman as to why the 2014 and 2017 DSS legal advices "appear different but don't contradict each other."

The explanation that Ms Pulford provided was framed in the following way:[119]

> The 2014 advice relates to the process of rate calculation under the social security law, and indicates the method of generating an accurate debt amount on the basis of full information. By contrast, the 2017 advice identifies circumstances in which the Secretary would be obliged by the social security law to take action to adjust a rate of social security payment, despite not having full information to generate an accurate debt amount. The advices are consistent but address different levels of available information to ground administrative decision making by the Secretary.

Contrary to the representations made by Ms Pulford, the 2014 and 2017 DSS legal advices were inconsistent. The distinction drawn between the use of averaging to calculate entitlement "on the basis of full information" and the use of averaging as a last resort was entirely artificial. As a matter of fact, the use of averaging as the sole basis to determine social security entitlement was unlawful. This was so whether it was done as a last resort or otherwise. The 2014 DSS legal advice had (correctly) made no distinction of the kind drawn by Ms Pulford in her 22 February 2017 email.

Interference in the response to the Ombudsman

On 22 February 2017 Mr Hurman sent the Ombudsman's request to Ms Halbert, copied to Mr de Burgh.[120] Ms Halbert forwarded the request to Ms Wilson.[121]

On 23 February 2017, Mr Hurman emailed Mr De Burgh a draft response to the Ombudsman. The draft response referred to, and attached, both the 2014 DSS legal advice and the 2017 DSS legal advice.[122] Reproduced in the draft response was the explanation provided by Ms Pulford the previous day.[123] That response was not sent.

At 3:35 pm on 23 February 2017 an email was sent by Ms Halbert's executive assistant to Ms Wilson enclosing a version of the 2017 DSS legal advice.[124] That version had been reformatted to, relevantly, remove Ms McGuirk's instructions to Ms Pulford in seeking that advice. At 4:10 pm, Ms Wilson replied to the email, stating, "Thanks – fine to go."[125]

At 4:21 pm, the DSS response was sent to the Ombudsman.[126] The response included a covering statement:

> Please find attached information containing legal advice from earlier this year, that is within scope of your request. This advice identifies circumstances in which the Secretary would be obliged by the social security law to take action to adjust a rate of social security payment, despite not having full information to generate an accurate debt amount.

Attached to the response was the reformatted version 2017 DSS legal advice.[127] The 2014 DSS legal advice was not attached.

In evidence, both Mr Hurman and Mr de Burgh said they could not recall why the 2014 DSS advice was not initially provided to the Ombudsman.[128] Mr de Burgh had no recollection of any change of mind from the position that he and Mr Hurman reached on 22 February 2017.[129] He speculated that someone in a more senior role had overridden the decision to provide both advices.[130] He acknowledged that "it was more complete for the Ombudsman to have both advices" and that providing the 2014 DSS advice had the potential to mislead the Ombudsman.[131]

In evidence, Ms Wilson could not recall who decided to withhold the 2014 DSS legal advice from the Ombudsman. It was possible, Ms Wilson said, that either she or Ms Halbert made the decision.[132] Ms Wilson denied that withholding the 2014 DSS legal advice had the capacity to mislead the Ombudsman.[133]

In an email dated 28 February 2017 from Ms Pulford to Mr Hurman (addressed in detail below), Ms Pulford expressed her understanding to Mr Hurman that "it was decided (at deputy secretary level) not to provide the [2014 DSS legal advice] to the Ombudsman."

In submissions made on behalf of Ms Wilson, it was said that because the evidence did not disclose the basis for Ms Pulford's understanding, her 28 February 2017 email should not be relied upon.

The Commission does not accept that. Ms Pulford's email, as a contemporary observation, adds significant weight to the evidence that it was Ms Wilson who decided to withhold the 2014 DSS legal advice. Ms Wilson's settling of the reformatted version of the 2017 DSS legal advice discloses her direct involvement late in the process of DSS responding to the Ombudsman. It is not the case, as Ms Wilson's representatives asserted, that Ms Wilson deciding to withhold the 2014 DSS legal advice in this instance was inconsistent with her later agreeing to provide the advice to the Ombudsman. That occurred only after the Ombudsman had expressly asked for it (as set out below).

The Commission is satisfied that it was Ms Wilson who, on 23 February 2017, decided to withhold the 2014 DSS legal advice from the Ombudsman.

DSS's withholding of the 2014 DSS legal advice from the Ombudsman constituted a failure to comply with the Ombudsman's 19 February 2017 request for information. The information that the Ombudsman had requested from DSS was clear. What was sought was "any legal advice… about averaging income for social security overpayment calculations." That request was not limited by any concept of "last resort" (as suggested by Mr Hurman in his 21 February 2017 email to Ms Pulford), nor was it limited to "the Department's current view" (as asserted by Mr de Burgh in evidence). Its omission had the capacity to mislead the Ombudsman, who, without it, might have been under the misapprehension that the only advice that DSS had obtained in relation to income averaging was the 2017 DSS legal advice.

In the Commission's view, Ms Wilson's conduct in instructing that the 2014 DSS legal advice be withheld from the Ombudsman was not motivated by doubt as to whether the opinion fell within the scope of the Ombudsman's request for information. Rather, it was motivated by a concern that the Ombudsman might be made aware that averaging was being used to determine social security entitlement under the Scheme

in circumstances where DSS had obtained advice that the practice was unlawful. Ms Wilson's behaviour in this regard was an attempt to conceal critical information from the Ombudsman.

The Ombudsman seeks further advice

By the time of DSS's response to the Ombudsman's 19 February 2017 request for information, DHS had independently provided the Ombudsman with an Executive Minute signed by the Hon Scott Morrison MP on 20 February 2015. In relation to the PAYG proposal that ultimately evolved into the Scheme, the Executive Minute said: "DSS has also advised that legislative change would be needed to implement this initiative."[134]

On 24 February 2017, Ms MacLeod sent a further information request to DSS,[135] referring to the Executive Minute and the notion of legislative change. She requested firstly, "the advice from DSS about the legislative change that would be needed" and secondly, "any other notes, documents or emails that relate to this advice."

Janean Richards, chief legal counsel, DSS, asked Mr Grinsell-Jones to locate advices relevant to the Ombudsman's request. She said that Ms Halbert and her team were "looking for advice that bridges/ explains why our approach has changed, from the view that legislative change was as required, to the view that it wasn't."[136]

Mr Grinsell-Jones (and possibly Mr de Burgh and Mr Hurman) had a discussion with Ms Pulford on 28 February 2017,[137] following which she emailed them with this "bridging" advice:[138] she referred to the 2014 DSS legal advice and explained that, in 2015, DHS "was advised by DSS's policy area in the context of subsequent discussions that legislative change would be needed to support the proposal" (i.e. the proposal that led to the implementation of the Scheme). Ms Pulford continued:

> Since then, DSS policy has become more comfortable with DHS's approach of using smoothed income, giving [sic] it is being applied as a mechanism of last resort when no more accurate income information is available. This appears to represent a change in DSS's position, although it doesn't represent a change in the legal position.

The basis for Ms Pulford's assertion that "DSS policy [had] become more comfortable" with DHS's use of averaging to determine social security entitlement is unclear.

In any event, that was not the response DSS provided to the Ombudsman's 24 February 2017 request for advice.[139] The response (the DSS explanation), emailed on 1 March 2017, was in the following terms:

> In late 2014, the Department of Social Services (DSS) considered an early version of a proposal that has since developed to become the Online Compliance Initiative (OCI), which is the subject of the Ombudsman investigation.
>
> As we do for many proposals, DSS considered the need for legislative change to implement the proposal. This is referred to in the Department of Human Services (DHS) Ministerial Brief provided by the Ombudsman's office. DSS had some concerns at that time about whether the proposal was consistent with legislative arrangements. Specifically, DSS considered implications for the use of annual ATO income data for the purposes of calculating fortnightly payment entitlements (and, as such, potential debts). At that time, DSS sought internal legal advice about the legality of using this income data to determine entitlement. The advice received (attached) in December 2014, indicated that this approach would not be supported by the legislation. This was communicated to DHS and that appears to be reflected in the advice from DHS to their Minister. It is understood that DSS also indicated to DHS that legal changes would be necessary to allow the measure, as DSS understood it at that time, to be implemented.
>
> Following this, DHS took DSS' concerns into account and made adjustments to the process. By early 2015, DSS gained a better understanding of how the revised process would satisfy the legislative requirements. In particular, DSS understood that the intended implementation model provided recipients with the opportunity to correct any information presented to them based on ATO data matching, particularly apportioning of income data obtained from the ATO. As such, DSS no longer considered that legislation would be required to implement the measure and advice regarding specific legislative changes was not sought.

> A key difference between the measure, as DSS originally understood it, and the approach that was ultimately implemented, is that averaged income is only used for the purposes of calculating entitlement (and, therefore, debt) where no other information is available and attempts have been made to seek information from the individual. This was not what DSS understood to be the proposal when the Department originally raised concerns over the legislative basis for the measure. This is evident in the 2014 legal advice.

Attached to the 1 March 2017 correspondence was a document that combined the 2014 and 2017 DSS legal advices (discussed further below).[140]

The DSS explanation was drafted by Mr Hurman,[141] amended by Ms Halbert[142] and Ms Lumley[143] and settled by Mr de Burgh,[144] Ms Halbert[145] and, ultimately, Ms Wilson.[146]

In a statement, Ms Wilson said that she spoke to Mr Pratt "to let him know that the Ombudsman may raise the issue of the different advices."[147] There is no evidence of Ms Wilson's advising Mr Pratt that the Scheme had been implemented in a way that was inconsistent with the 2014 DSS legal advice.

Concealment of information from the Ombudsman

The DSS explanation was dishonest. The assertion to the Ombudsman that, in developing the measure, "DHS took DSS's concerns into account and made adjustments to the process" was plainly false. Contrary to the representations made in the DSS explanation, the Scheme (and the proposal that led to its implementation) at all times involved, firstly, providing recipients "with the opportunity to correct any information presented to them based on ATO data matching" and, secondly, the use of averaging "for the purposes of calculating entitlement… where no other information is available and attempts have been made to seek information from the individual."

At no time (including after DSS's 20 January 2015 advice to DHS) was there any "adjustment" or "revised process" in how income averaging was proposed to be used, or in how it was used. There is no evidence of any representation made by DHS to DSS in 2015 to this effect. It is entirely inconsistent with the claims of some of the DSS witnesses that they were not aware that income averaging was being used at all until 2017. There is no evidence that DSS ever adopted a position that legislative change was no longer required to implement the measure.

The assertion that the proposal upon which the DSS 2014 legal advice was premised did not contemplate the use of income averaging 'where no other information is available and attempts have been made to seek information from the individual' was also false, as would have been revealed had the instructions that led to the DSS 2014 legal advice been provided. They described a proposed process for the recovery of debts which involved, firstly, a recipient's being notified of discrepancies between ATO data and earnings declared to DHS and, secondly, the recipient's being provided with an opportunity 'to provide evidence to explain the discrepancy' prior to a debt' being raised on the basis of 'income smoothing'. That opportunity to provide information did not change in any iteration of the Scheme.

The omission of the instructions concealed the terms upon which the advices were sought. It was not possible for the Ombudsman to ascertain that, in fact, there was no material difference between the process described in Mr Jones's 31 October 2014 instructions to Ms Pulford and the process later implemented under the Scheme. In evidence, Mr de Burgh admitted that "to only give the answer and not the question" would result in an "incomplete understanding of the application of the advice." [148]

"Other notes, documents or emails"

The Ombudsman's 24 February 2017 request for advice was not confined to the 2014 DSS legal advice. It extended to "any other notes, documents or emails that relate to this advice." Material of this kind was never provided to the Ombudsman. Indeed, there is no evidence that such material was ever sought. But this was not the result of ignorance. In the course of preparing the response, Ms Halbert had expressed to Mr de Burgh and others an awareness of "written advice" by DSS in relation to the Executive Minute

(presumably a reference to advice provided by DSS to DHS on 20 January 2015).[149] This document was not disclosed to the Ombudsman.

In evidence, Mr de Burgh could not explain why this additional material was not provided.[150] He accepted that his knowledge of the existence of the documents and the fact that no step was taken to locate or provide them to the Ombudsman suggested a deliberate choice by those considering the response to the Ombudsman.[151] However, in submissions, it was suggested on behalf of Mr de Burgh that, among other things, there was some "misunderstanding" about the scope of the Ombudsman's request.

In evidence, Ms Halbert accepted that DSS had the opportunity to provide the other material requested by the Ombudsman.[152] She said "there was no reason why we wouldn't have provided that."[153] But Ms Halbert offered little in terms of a coherent explanation for DSS's behaviour. She admitted that DSS may not have considered the matter[154] but later speculated that any decision to not provide the documents may have been informed by the Ombudsman's office "[having] access to those documents anyway."[155] She thought it possible that DSS had engaged in "a conversation with the Ombudsman's office about their access to other [documents][156] and things."[157]

In submissions made on behalf of Ms Halbert, it was asserted that had the Ombudsman required further clarification, "it ought to have raised it with [Ms Halbert] if her team had not provided everything that was requested." Ms Halbert was "aware the Ombudsman's office had viewed numerous documents from DHS and must have been told about the comments provided from 2014-15." The Commission does not accept these submissions. DSS was obliged to provide all of the information that the Ombudsman had requested. Whether the Ombudsman "had viewed" other documents from DHS was irrelevant to the necessity for DSS to discharge that obligation.

Summary

DSS attempted to and did conceal critical information from the Ombudsman and represented that the Scheme was lawful.

In submissions made on behalf of Ms Wilson, it was asserted that she had "minimal" involvement in dealing with the Ombudsman's requests. The Commission rejects this submission. On 1 March 2022, a draft version of the response (attaching the combined 2014 and 2017 DSS legal advice document) was provided to Ms Wilson for her settling.[158] Ms Wilson said that she was "happy" with the draft but instructed that amendments be made. Specifically, she asked that a reference to "smoothing" be changed "apportioning."[159] The Commission is satisfied that Ms Wilson read the draft response, reviewed the attachment and understood the contents of this material.

Ms Halbert explained that she relied upon information provided to her about the contents of the draft response to the Ombudsman's further request.[160] She did not feel any sense of obligation to justify the legality of the Scheme to the Ombudsman.[161] In submissions made on Ms Halbert's behalf, it was asserted that, at the time, she held a belief that the 2014 DSS legal advice 'related to an early policy proposal that had not yet been fully developed' and that the 2017 DSS legal advice related to 'a refined proposal that was being implemented'. The Commission does not accept this submission. For the reasons set out above, it was clear that both advices were directed at substantially the same process.

In submissions made on Mr de Burgh's behalf, it was said that he held a belief "in good faith and on reasonable grounds" that the Scheme was lawful. It was submitted that Mr de Burgh had relied upon the conclusions drawn by the 2017 DSS legal advice and Ms Pulford's representations to him that the 2014 and 2017 DSS legal advices were "consistent." It was also emphasised on behalf of Mr de Burgh that he had not been involved in the implementation of the Scheme and that the response to the Ombudsman had been prepared by other DSS officers who were involved.

The Commission does not accept these submissions. It was not necessary for Mr de Burgh to have been involved in the conception and implementation of the Scheme to understand that there had been no adjustment or revision of the kind described in the 1 March 2017 response. The instructions that led to the

2014 DSS legal advice set out, in clear terms, the nature of the proposal as it existed in October of 2014.

The DSS explanation on 1 March 2017 made these false representations to the Ombudsman:

- that in response to concerns expressed by DSS to DHS in 2015, there had been some revision or adjustment to how income averaging was proposed to be used under the Scheme,
- that as a result of the asserted revision or adjustment, DSS had adopted a position that legislative change was no longer required to implement the measure, and
- that the 2014 DSS legal advice was premised on a proposal that was different to the Scheme that was later implemented.

Ms Halbert, Ms Wilson and Mr De Burgh were all involved in preparing the DSS explanation and knew these representations to be false. They were aware of its contents and had knowledge of the 2014 DSS legal advice and its contents (including the instructions upon which the advice was premised). DSS's withholding of the instructions upon which the DSS 2014 legal advice was premised was a deliberate decision by Ms Wilson, Mr de Burgh and Ms Halbert designed to conceal the falsity of the representations made to the Ombudsman.

Ms Halbert, Ms Wilson or Mr De Burgh did nothing to provide any information in response to the Ombudsman's request for "any other notes, documents or emails" that related to the need for legislative change referred to in the Executive Minute. Its omission was calculated to conceal the warnings DSS had given DHS in early 2015 about the need for legislative change if income averaging were to form part of the proposal which began the Scheme.

The Commission is satisfied that the behaviour of Mr de Burgh, Ms Wilson and Ms Halbert in making the false representations and concealing critical information was designed to, and did, mislead the Ombudsman in the exercise of his functions.

2.11 Human Services' chief counsel is made aware of the deception of the Ombudsman and takes no action

At 5:16 pm on 1 March 2017 Mr de Burgh sent a copy of the DSS response to the Ombudsman to Mr Stipnieks of DHS, copied to Ms Halbert and Mr Hurman, and said "Thanks for the conversation earlier today. Here is the information that we will forward to the Ombudsman. Happy to discuss further."[162] Mr de Burgh's email replied to an earlier email from Mr Stipnieks at 1:36 pm that afternoon which had no content, only the title "Issue re brief."[163] Mr Stipnieks replied and copied in Ms Musolino and Michael Robinson (national manager, Ombudsman and Information Release Branch, DHS). Mr Stipnieks suggested there was little utility to organising a meeting between DSS, DHS and the Ombudsman's office in view of the detailed response by DSS to the Ombudsman.[164]

On 1 March 2017, Mr Stipnieks forwarded to Ms Musolino an email from Mr De Burgh setting out the DSS explanation, with the combined 2014 and 2017 DSS legal advices attached, advising that it was the information DSS proposed to forward to the Ombudsman.[165] By that email, Ms Musolino became aware that in 2014 DSS had obtained internal legal advice to the effect that income averaging was unlawful. Mr De Burgh's email explicitly acknowledged that further legal advice on that issue was not sought before 2017, asserting that this was because in 2015 DSS had come to "better understand" the proposal that became the Scheme. As an experienced lawyer it would have been obvious to Ms Musolino that this assertion was dubious, an attempted rationalisation for the commencement and continuation of the Scheme contrary to the 2014 legal advice.

Ms Musolino must also have suspected that the 2017 legal advice referred to in Mr De Burgh's email was sought and obtained by those involved in the development and implementation of the Scheme to gain legal cover as a result of the adverse media publicity about the Scheme and the Ombudsman inquiry. The

2017 legal advice[166] supported income averaging "as a last resort," which Ms Musolino knew was not how income averaging was being used in the Scheme; she knew that it had effectively become a methodology that was being used by "default."[167] Further, the 2017 legal advice used language suggesting that it was highly qualified and legal reasoning which Ms Musolino, an experienced lawyer, must have known was highly questionable.

Mr De Burgh's email could only have reinforced in Ms Musolino's mind what she had already learned on her return from leave on 16 January 2017; that the legal arguments in support of income averaging were weak and unconvincing and involved substantial legal risk. Despite this, Ms Musolino took no steps to provide legal advice to DHS executives as to the extent of that risk and the need to obtain independent external advice. She did not do so because she knew that such advice was unwanted by them.

As chief counsel of DHS, Ms Musolino was responsible for the accuracy and completeness of information provided to the Ombudsman on matters of a legal nature.[168] The Ombudsman requested legal advices about income averaging for the 2017 investigation into the Scheme by his office.[169] Ms Musolino was aware that the Ombudsman had done so.[170] Ms Carmody's draft advice and the Fiveash advice were within the scope of the Ombudsman's request, as Ms Musolino knew. However, she took no steps to ensure that those advices were produced to the Ombudsman.

On 6 March 2017, various persons within DSS were reminded of Mr Porter's response to the suggestion that debts were raised erroneously by the Scheme; a suggestion that was described as "misinformation in the media." On that date Ms Halbert received a copy of the joint letter from Mr Porter and Mr Tudge to the Prime Minister dated 3 March 2017,[171] which responded to an email from his office to Ms Wilson and Ms Golightly on Friday, 20 January 2017 requesting an update on the Scheme. The letter, a copy of which was forwarded to Mr de Burgh and Mr Hurman, said in part:

> Steps taken to address misinformation in the media
>
> The OCI has been the subject of concerted campaigns by the Labor Party, the Greens, GetUp! and other parties. These campaigns have primarily been in regard to debt raising, which some parties alleged is entirely automated or not subject to review or appeal as well as claims that debts have been raised erroneously.
>
> We have undertaken efforts to address the misinformation communicated as part of these campaigns, across both mainstream media and through social media.

2.12 The Ombudsman seeks comment from Mr Pratt

On 10 March 2017, Ms MacLeod sent a copy of the draft report of the Ombudsman to Mr Pratt, DSS secretary, with a letter inviting comments from DSS by 27 March 2017.[172]

The letter, signed by the acting Ombudsman, Mr Glenn, noted that the report made one recommendation relevant to DSS, which related to its responsibility for the *Guide to Social Security Law.*[173] Mr Glenn proposed to recommend that DSS include clear guidelines about the process for obtaining employment income evidence in the *Guide to Social Security Law,* "to assist customers to gather evidence to effectively use the OCI."[174]

DSS officers prepared various drafts of a response to the Ombudsman on behalf of Mr Pratt.[175]

On 29 March 2017, the Ombudsman's office sent the final draft of the report to DSS and requested a formal response from Mr Pratt on or before 5 April 2017.[176]

After a number of further drafts,[177] Mr Pratt signed the letter to the Ombudsman on 4 April 2017.[178] On 6 April 2017 a revised letter (also dated 4 April 2017) was sent to the Ombudsman which omitted paragraphs in the earlier letter that raised issues about the terminology used in the final draft report.[179] That letter contained the following paragraph:[180]

> The Department is satisfied the system is operating in line with legislative requirements and there have been no changes to the way in which DHS assesses Pay As You Go employment income. The Department notes your office has consulted extensively with DHS and the revised versions of the report include improvements which acknowledge that the system is accurately identifying and raising debts based on the information available to DHS.

The letter became an appendix to the final report, "Centrelink's automated debt raising and recovery system",[181] which was published in April 2017.

Mr Pratt was aware that the Scheme was the subject of significant public interest and media interest, particularly in late 2016, continuing into 2017;[182] he remembered seeing media reports about it around this time.[183] Mr Pratt recalled that the media he focused on related to the operational arrangements for dealing with recipients for potential debts; for example, the absence of DHS telephone contact numbers on the initial letters, and complaints about recipients not receiving those letters.[184] Remarkably, he did not recall media reports on income averaging.[185]

Mr Pratt was also aware that the controversy had triggered significant interest from the ministers associated with the portfolio, including the Minister for Social Services.[186] In either late 2016 or early 2017, Mr Porter telephoned Mr Pratt about the media interest, and Mr Pratt arranged for the acting secretary of DHS to advise him, because the issues raised in the media "related to DHS service delivery actions."[187]

The media reactions in respect of the Scheme in late 2016 and early 2017 were described by a DHS media manager as "arriv[ing] … like a cyclone."[188] The coverage attracted the interest of Mr Porter (who, as Acting Minister for Human Services, was advised by DHS about the issue), and caused Mr Tudge to return early from a period of leave. Mr Pratt's evidence was that, even though he was largely unaware of the content of the media publicity (save to the extent it mentioned operational issues), he was at least aware that there was media interest sufficient to attract both the interest of Mr Porter and an Ombudsman investigation.

Mr Pratt said he did not take any steps to satisfy himself that the Scheme was "operating in line with legislative requirements." All the briefings he received prior to signing the letter to the Ombudsman made similar assertions, but he did not see any legal advice to that effect.[189] In relation to the assertion that there had been no change to the way DHS assessed PAYG income, Mr Pratt said he assumed that it was a change to the volume of interventions which involved automation, in contrast to the labour-intensive process prior to July 2015,[190] but he did not ask how the system worked.[191]

It can be readily accepted that as secretary of DSS Mr Pratt was entitled to rely on the expertise of DSS staff in developing draft correspondence for him to sign. However, that does not absolve Mr Pratt of any responsibility to make inquiry before making a public, positive assertion about the lawfulness of an entire Scheme. His Department held legal advice about the Scheme which demonstrated it was unlawful. Mr Pratt was not aware of that advice, but he did not take any steps to inquire about that prior to asserting the legality of the Scheme. He failed to make inquiries to satisfy himself that the representation made with respect to the legality of the Scheme in the letter he signed was correct.

The effect of Mr Pratt's letter to the Ombudsman was significant. The Ombudsman placed substantial weight on Mr Pratt's assurance that DSS was satisfied that the Scheme was operating in line with legislative requirements.[192] Both DHS and DSS continued to cite the Ombudsman's report, including Mr Pratt's statement as to the Scheme's meeting legislative requirements, to defend the Scheme. This is outlined in further detail in the chapter – The Commonwealth Ombudsman.

2.13 Human Services conduct in the Ombudsman investigation

While DSS was engaged in conduct designed to avoid providing the Ombudsman with the 2014 DSS legal advice, DHS was also avoiding giving responses to inconvenient requests for information from the Ombudsman and taking an approach designed to obtain validation of the DHS narrative about the Scheme.

The Ombudsman's investigation had necessitated a series of meetings and correspondence with DHS over the early months of 2017. The Ombudsman's office made numerous requests for information to facilitate its investigation, and there are a number of examples that demonstrate that DHS did not engage with the Ombudsman's office with the frankness and candour that would ordinarily be expected of a Government department. Some of those examples represent concerning behaviour by certain DHS staff, who demonstrated an alarming readiness to mislead the Ombudsman and conceal information that was detrimental to the narrative DHS was determined to sell.

The exchange of drafts of the Ombudsman's report, and DHS' revisions to them, was also concerning. Early in the process, having been provided with a draft outline by the Ombudsman, a DHS officer made the extraordinary statement that "the department has been given a great opportunity to effectively co-write the report with the Ombudsman's office."[193]

It may be accepted that in many circumstances it will be either acceptable or necessary for departments under investigation to provide comments or feedback on drafts of an Ombudsman's report, for purposes such as fulfilling the requirements of procedural fairness, or to improve the efficiency or effectiveness of an investigation. However, in this instance the levels of DHS's amendment and control of the drafting of the report, including its extensive tracked changes to the Ombudsman's drafts, went well beyond any fairness requirements or process efficiencies. DHS took numerous opportunities to alter and adapt the report's language and conclusions, and the report that was ultimately produced reflected DHS's best efforts to further the narrative that it was presenting to the public.

The conduct of DHS throughout the Ombudsman investigation, including specific examples of the conduct outlined above, is examined in further detail in the chapter – The Commonwealth Ombudsman.

2.14 The subsequent use of the Ombudsman's report to defend the Scheme

Given the conduct of both DHS and DSS in their interactions with the Ombudsman during the 2017 investigation, the use that was subsequently made of the 2017 Ombudsman report is particularly galling. Both DHS and DSS and their officers had used various means to influence the report so that it was consistent with their respective positions. The report was then used as an example of an independent review, to support the advocacy of those who sought to defend the Scheme.

In the report, the Ombudsman did not deal with the issue of the legality of the Scheme.[194] The closest that the report came to expressing a position on that issue was the comment that the "business rules in the OCI that support the debt calculation are comprehensive and accurately capture the legislative and policy requirements."[195] This was, in fact, an indication that the rate calculators used to inform the technical specifications underpinning the ICT build of the platform had not changed.[196] However, that was not explained in the report, and that statement, with its lack of clarity, readily lent itself to being misused and misinterpreted as endorsing the legality of the Scheme.

The situation was not assisted by the annexure to the report of Mr Pratt's letter saying, "The Department is satisfied the system is operating in line with legislative requirements…",[197] signed by him despite having taken no steps to confirm its content and not having seen any legal advice to that effect.[198]

The Ombudsman's report also dealt with the issue of the accuracy of debts generated by the Scheme in a way that allowed it to be misused. The report stated:[199]

> …We examined the accuracy of debts raised under the OCI…
>
> We are satisfied that if the customer can collect their employment income information and enter it properly into the system, or provide it to DHS to enter, the OCI can accurately calculate the debt. After examination of the business rules underpinning the system, we are satisfied the debts raised by OCI are accurate, based on the information which is available to DHS at the time the decision is made.
>
> However, if the information available to DHS is incomplete the debt amount may be affected.

The way in which this was phrased downplayed the significance of the qualification it contained. There were widespread problems with debt accuracy. The qualification that the system required particular inputs in order to perform accurate calculations was systematically not being met under the Scheme. That was implicit from the "key issues" identified elsewhere in the report,[200] and would have been apparent to persons who knew that qualifications was not being met. However, the lack of an express acknowledgement of this in the report left open the opportunity, which was taken up on many occasions, for the report to be used to defend against criticism with respect to debt inaccuracy.

2.15 Use of the report by the minister

One of the first to seize the opportunity to use the Ombudsman's report to deflect criticism was Mr Tudge. He issued a media release at the time the report was published, using parts of it to defend the Scheme. The media release said that the Ombudsman had found that "the system calculates debts accurately, is reasonable and appropriate in asking recipients to explain discrepancies in data, and the method of data matching has not changed from the approach used by successive governments."[201]

The representation that the Ombudsman had found that the system accurately calculated debts was subject to the qualification that debts raised were accurate based on the information available to DHS at a time a decision was made, which was also set out in the media release. Mr Tudge understood the Ombudsman's statement to mean that if recipients provided information, the system produced an accurate result.[202]

However, Mr Tudge knew that the Scheme was issuing inaccurate debt notices, including in circumstances where a process of averaging of income was used to calculate a debt.[203] He also knew that a significant proportion of recipients had not entered information into the system, and that those debts were likely to be inaccurate.[204]

He was, therefore, aware that the qualification to the Ombudsman's statement with respect to the system's ability to accurately calculate debts, namely, that it depended upon a recipient's input of information, had not been met for the majority of debts that had been raised under the Scheme, and that those debts were highly likely to be inaccurate.

In circumstances where the Ombudsman's comments with respect to the accuracy of debts and debt calculations were only applicable to a minority of debts being generated under the Scheme, the report provided an incomplete and unsatisfactory answer to concerns raised about debt inaccuracy. Mr Tudge's use of the Ombudsman's report as a purported response to those concerns represented a continuation of his approach to avoid engaging with problems that were raised with respect to fundamental features of the Scheme, instead focussing on improvements relating to implementation of the Scheme.

The media release also represented that the Ombudsman had effectively found that "the method of data matching has not changed from the approach used by successive governments."

This comment by the Ombudsman was confined, in both its language and its context, to the process by which data that had been received from the ATO was compared to data held by Centrelink, in order to identify discrepancies and select recipients to be subject to the review process.[205] It was also apparent from the Ombudsman's report that what had changed was the Scheme process itself.[206]

Mr Tudge knew, or ought to have known from inquiries with DHS and from a careful reading of the Ombudsman's report that the Ombudsman's reference to data matching was a specific reference to a process that occurred prior to the initiation of a compliance review under the Scheme. He should have known, therefore, that the Ombudsman's reference to the method of data-matching having "not changed" for many years said nothing about the compliance review processes that occurred under the Scheme.

Mr Tudge, either himself or through his office, continued to use the Ombudsman's report as a defence against concerns that had been raised,[207] although he knew that the parts of the report relied on were subject to qualifications rendered the Ombudsman's comments inapplicable with respect to a significant proportion of debts that had been raised under the Scheme.

Despite being aware that the Ombudsman's report did not, in fact, provide an answer to concerns raised relating to fundamental features of the Scheme, Mr Tudge took advantage of the language used in the report to deflect criticism of the Scheme and in doing so, avoided engaging with the substance of those concerns.

2.16 Use of the report by Human Services

DHS's use of the report echoed that of its minister, although it went even further in terms of the representations it was willing to make about the purported breadth and application of the Ombudsman's findings. DHS used the Ombudsman's comments with respect to the data matching process remaining unchanged to make the claim that the Ombudsman had found that debts were being raised consistently with previous processes of departmental investigation.[208]

That was untrue, in two respects:

- the investigation processes adopted under the OCI phase were, in fact, different, which was apparent from the Ombudsman's description of the previous processes carried out prior to the Scheme.[209]
- what the Ombudsman had found was that the initial identification of a discrepancy through data matching was unchanged, but that "under the OCI the way DHS investigates ATO data discrepancies has changed."[210]

DHS also represented that the Ombudsman had found that the online compliance system "meets all legislative requirements."[211] The report provided no basis for any assurance that calculating social security debts using income averaging was lawful.[212] It did not deal with that question or articulate any legal basis that could support such an assurance. To the extent it was sought to be relied upon by DHS as providing comfort as to the legality of the Scheme, that reliance was, on the most charitable view, misconceived.

3 Other inquiries

Two further inquiries indicative of heightened scrutiny of the Scheme took place in late 2016 and early 2017: a report conducted by the Australian National Audit Office (ANAO) and an inquiry by a Senate Committee.

Parliamentary privilege limits the uses to which evidence of those matters may be put. For present purposes, it suffices to say that those inquiries did not have the effect of bringing the Scheme to an end. The work done by the ANAO asked a different question from that posed by this Commission and could not have been expected to do so. The Senate Inquiry, however, touched on many matters similar to those dealt with by this Commission and recommended a form of termination of the Scheme. No such action was taken by DHS and DSS. Both inquiries will be dealt with briefly below.

First, the ANAO conducted an audit which included the Robodebt Budget measure. It released its report on *Management of Selected Fraud Prevention and Compliance Budget Measures* (ANAO Report)[213] on 28 February 2017. The objective of the ANAO Report was to assess DHS's and DSS's "management of selected fraud prevention and compliance Budget measures" by reference to three key questions:

- have sound processes and practices been establishes to support the design and implementation of specific Budget-funded compliance measures?
- is there effective monitoring of the implementation and achievement of the measures?
- have expected savings and other benefits from the measures been achieved?

The focus of the ANAO Report was the realisation of expected savings. In respect of employment income matching, the ANAO Report found that though the activity levels achieved exceeded the projected targets, "the NPP substantially underestimated the costs of delivery; as a consequence, the implementation … was not as cost-effective as the proposals put to government."[214]

As already observed, the ANAO Report asked a different question from this Commission, so the deficiencies which are of present focus were not likely to be revealed by that process. There is no criticism of the work done by the ANAO. It is relevant only as a matter of history and to identify a further departmental engagement with investigative processes in late 2016 and early 2017. Versions of the draft report were provided to DHS and DSS for comment on 22 December 2016 and again to DHS on 10 February 2017. The ANAO report annexes correspondence from the secretaries of both departments send during that period.

Second, the Senate Inquiry on the *Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative* (Senate Inquiry),[215] had within its terms of reference the impacts of automated debt collection, the error rates in issuing debt notices, the adequacy of departmental management of the OCI and "advice and related information available to [DHS] in relation to potential risks associated with the OCI." The report was published 21 June 2017 after nine public hearings between March and May of that year.

The first recommendation of the Senate Inquiry was that the OCI iteration of the Scheme be put on hold until "all procedural fairness flaws are addressed," and until the other recommendations made by the committee were implemented. The recommendation went on to state that if those issues were addressed, the Scheme should only be continued (in its new form) after the implementation of the ATO's Single Touch Payroll system (which would not require the use of averaging) was implemented in 2018.[216]

The Senate Inquiry also recommended that all those who had debts determined by way of income averaging should have those debts re-assessed manually by compliance officers, "using accurate income data sourced from employers." That reassessment, the Committee continued, was to include the full range of unpaid, partially paid and fully paid debts incurred by recipients, including those outsourced to debt collectors.

The Government response "reject[ed] the central conclusions and recommendations" of the Senate Report.

4 External consultants

4.1 Digital Transformation Agency

In his communications with Mr Tudge in early January, Mr Turnbull suggested that if there were problems with the development of the online program, the Digital Transformation Agency (DTA) could be of assistance.[217]

A few days later, on 22 January 2017 Mr Tudge sent an email to his chief of staff and advisors, setting out some instructions with respect to the Scheme's problems.[218] One of those instructions was to continue the "ongoing push on the implementation table, particularly the portal." He instructed his advisor to ensure that the DTA was "working almost daily with DHS on this. The DTA is very good at having things consumer oriented. This is important for other reasons also…." The last part may have been a reference to Mr Turnbull's suggestion.

By 31 January 2017, DHS had asked DTA to review progress on improvements to the online compliance program, with "a focus on recommendations to quickly improve the user experience."[219] After meeting with DHS, the DTA provided recommendations, to be implemented within a four-week period.[220]

Four days later, on 3 February 2017, the DTA emailed Ms Campbell, copying in others, about the engagement.[221] The DTA advised of "concerns" in relation to its engagement, which centred around the fact that, rather than the proposed four week period, the DTA had been told that deadline for improvements was in fact in four days' time. The DTA advised "it is not possible to make improvements that we would have any confidence in within a four day time period"; so, it concluded, "therefore, the DTA's involvement in this work should not be portrayed as an endorsement of any proposed changes to the user experience at this stage."[222]

By 8 February 2017, DHS had provided the DTA with a presentation entitled "Employment Income Confirmation v1.8."[223] An internal DTA email stated "this is going to depress you (see attachment). Apparently going live this week."[224] A further internal email commented on the perceived limitations of the program, stating "very 'crude' application."[225] Very limited feedback was provided on the presentation from the DTA to DHS.[226] Despite efforts by the DTA, no further correspondence relevant to this exchange could be identified.

After February 2017, the DTA does not appear to have had any further involvement with DHS that was specifically directed at the iterations of the Scheme.[227]

4.2 Data61

On 25 January 2017, Mr Tudge requested that Ms Campbell commission data research and development consultants, Data61 (an arm of the CSIRO), to "undertake an assessment of the data-matching functionality to determine if further refinements can be made."[228] Ms Campbell confirmed that Data61 was commencing work that day.[229]

By 1 February 2017, both the CSIRO and DHS had executed a consulting services agreement by which Data61 was to deliver "general advice on optimal algorithms to be used for the outcomes intended by DHS."[230] The start date was 30 January 2017 and the delivery date 2 February 2017. That work was to "analyse the Centrelink automated debt recovery system" and the process was to "review the quality of certain algorithms used by the Department in its operations.[231] The scope of that work included, in effect, an analysis of the accuracy of the debts calculated by the system.

Two key written work products were prepared by Data61 – a report[232] and a series of presentation slides. The slide deck contained 43 slides.[233] The evidence of Data61 is that only slides 25-29 of it were drafted by Data61, with the remainder being drafted by the department.[234]

The evidence before the Commission suggests that Data61's final report was of limited utility because, as it transpired, there was an inadvertent error in the data provided to Data61, and upon which it based its analysis.[235] No criticism is made of Data61 or the department in that regard; it appears to have arisen as a result of a system anomaly that was not discovered until after the work had been completed, on or around 21 March 2017.[236]

However, it seems that although Data61 was subsequently engaged to do other work in 2017 and 2018, it was not engaged to revisit the work done in early February 2017 in relation to the accuracy of the debts raised under the Scheme.[237]

On 2 March 2017, DHS provided "comments" on a draft of the report prepared by Data61, including the following:[238]

> We do have concerns with some of the terminology being used particularly in the recommendations. For example **the "overall accuracy of the ATO data" is not core to the department's implementation as the point of the measure is for the customer to check their data.** The use of the term **"error-rate" is not terminology that the department uses and perhaps the meaning is meant to be "likelihood of debt being reduced" or a similar term more in line with the measure.** [emphasis added]

It is a remarkable proposition that "the "overall accuracy of the ATO data" was not core to the department's implementation" of the Robodebt Scheme. That proposition suggests both Departmental knowledge of its inaccuracy, and not just a disregard, but a positive acceptance, of it.

Internal correspondence at Data61 the following day stated, in respect of those comments received from DHS, "Well, they *want* us to change it, but what they want is fundamentally at odds with what we found... If we change it to what they want it basically nullifies our time there."[239]

It is important to reiterate that the inadvertent error in the underlying data provided to Data61 means that this Commission is unable to rely upon the report's conclusions with respect to the accuracy of debts. However, what this interaction between DHS and Data61 demonstrates is that, prior to the discovery of the error, the department's reaction was not to deal seriously with those concerns, but instead to ask Data61 to change its drafting and to revise the "terminology" used. This is another example of DHS seeking to control the narrative surrounding the Scheme and to shield the department from criticism of it.

4.3 The engagement of PricewaterhouseCoopers

On 31 January 2017, Ms Campbell contacted Mr Terry Weber, Partner at PricewaterhouseCoopers (PwC). Mr Weber's recollection is that Ms Campbell informed him that she had concerns about the delivery of targets under the Scheme, and she wanted a review of the processes by an external organisation.[240] Over the following fortnight, employees of PwC and DHS negotiated the terms of the engagement with PwC.[241]

On 9 February 2017, Ms Golightly and Mr McNamara met with Ms Campbell about the engagement with PwC. The agenda for that meeting attached an 8 February 2017 version of the engagement letter between PwC and DHS.[242] Ms Campbell initialled the agenda, stating "Agreed to proceed." That engagement letter contemplated that PwC would prepare a final report.

PwC's engagement formally commenced on 15 February 2017. The terms of that engagement, and a description of the services to be provided, were reflected in the final version of a letter of engagement dated 13 February 2017,[243] and an official order dated 14 February 2017.[244]

The engagement letter indicated that DHS required "an independent review of the compliance and fraud activities of…DHS, culminating in identification of areas for improvement, together with a high-level implementation plan."[245] The letter set out four 'phases' of work to be undertaken in the engagement.

The final phase, "Phase 4 -Implementation roadmap and report" envisaged the provision of a "high-level implementation plan or roadmap" which would "capture [PwC's] key recommendations around productivity initiatives, and synthesise all preceding analysis in a final report." PwC's final report was intended to "synthesise the key steps and findings of all preceding stages of work and analysis, including an "artefact of key project steps and findings", "an evidence base and 'case for change'", an "analysis of options" and "final recommendations and implementation roadmap."

The official order indicated that one part of the work required by the engagement, described as a "deliverable," was a "[r]eport that identifies and analyses options for improvement and considers the implementation of current budget measures." The report was to be provided at the end of the final "phase" of the work.

The scope of PwC's engagement encompassed the compliance and debt management activities undertaken by DHS with respect to a number of Budget measures.[246] The OCI program (or its subsequent iteration, the Employment Income Confirmation program), and the measures underpinning it, formed a large component of that scope.

PwC estimated their total fees for the engagement at $853,859 (excluding GST), and proposed to invoice DHS for half this amount at the end of "Phase 2", and the remaining half upon completion of the engagement.[247]

PwC commences work with DHS

PwC commenced the engagement by gathering information from DHS. PwC staff met with a number of DHS officers, across various divisions of the Department. They requested, and were provided with, documentation relevant to their engagement. From that information, PwC began developing spreadsheets, project plans, and process maps.

As part of this stage of the process, the engagement letter had specifically contemplated that one issue that might require review as part of "policies and compliance" would be "the legal basis for the rules and policies implemented as part of the department's compliance activities."[248] It appears that there was some analysis done by PwC on this issue,[249] but, consistently with the agreed scope of the engagement, that analysis was done at a reasonably high level.

The issue of income averaging, as had been raised in the media, apparently came to the attention of PwC, but like many others, it was apparently informed by DHS "time and time again that the process is the same as completed manually."[250] The issue of averaging seems to have been characterised by PwC, in passing, as a feature of compliance reviews that had garnered increased attention,[251] but neither debt accuracy nor income averaging were included within the scope of work for which it was engaged.[252]

By mid-March, PwC had developed a number of "hypotheses," which essentially represented the broad issues that it had identified as relevant to the scope of its work. The themes that were emerging, apparent from the hypotheses, included deficiencies in the experiences of recipients with the compliance program, flaws in the business rules and case selection processes in the system, a lack of clear governance and oversight of the program, and the risk of the program's not raising the expected levels of debt within the timeframes that had been set in the Budget measure.[253]

On 10 March 2017, PwC staff met with DHS officers to provide an update on the progress of their work, including a discussion of the emerging hypotheses.[254] In that meeting, DHS officers indicated that the work so far had "hit the mark", and there was "no problem with what has been outlined." PwC perceived that the meeting had gone well, and that DHS officers had been pleased with PwC's progress, and the level of detail of the work so far.[255]

A further meeting between PwC and DHS was scheduled for 14 March 2017. PwC was informed that the "main topic" for discussion would be the actions that could be undertaken by DHS to "limit the outlays and increase the money they recover."[256] PwC perceived that "they [DHS] are expecting a significant shortfall relative to the savings targets they signed up for. Feels like they are desperate to stem the bleeding."[257]

By 27 March 2017, PwC was nearing the end of what it called the "current state assessment phase", and moving on to "reporting and analysis."[258] A draft outline of the report had been developed,[259] and PwC had discussed the final report with DHS officers.[260] An email summarising that discussion included the following:[261]

> …the report should be clear on whether the current design/approach is fit-for-purpose. There are quite a few in the department that think they can still use the approach by making some updates. If we think this is not the case (which I think we do) we will need to be clear…
>
> …previous reports have focussed too much on high-level recommendations; they expect us to put some meet on the bones and clearly outline what the 'better state' should look like…
>
> While the focus on recommendations has been good, I feel we will have to strengthen our assessment of the current state and substantiate why it is/isn't fit for purpose going forward. [Emphasis theirs]

PwC had also asked DHS "whether they would like the final report to be in PowerPoint or Word." DHS had indicated that its view, "noting the Secretary's preference," was that Word should be used.[262]

The "current state assessment"

A series of meetings between PwC and DHS executives was scheduled for early April, for the purpose of discussion of PwC's recommendations and "proposed roadmap."[263] Those discussions focussed on two main documents:[264] firstly, a summary of PwC's "insights" drawn from their assessment of the current state of the compliance program;[265] and secondly, an overview of PwC's proposed strategic priorities and recommendations.[266]

The content of the "current state assessment" document was significant, because it was to form the basis of the content of the final report, and provide a "guideline" for the relevant part of the report to which it related, which part would "go into more detail."[267] Mr van Hagen said that while he could not be sure, he expected that PwC would have indicated at the executive workshops that a written report was to be delivered.[268]

There was a number of issues of concern outlined in PwC's current state assessment document. The document indicated that, in order to deliver on the Budget measures, the current system would need to be "redesigned in order to address structural issues in relation not the validity and use of data, customer experience and scalability."[269]

In oral evidence before the Commission, Mr van Hagen was taken to this document. He accepted that what was meant by the concept of a "redesign" was a new system which encompassed various features identified by PwC.[270] This recommendation reflected a view that the EIC system was, effectively, not fit for the purpose of delivering the Budget projections and the analysis of the data it collected.[271] What PwC was intending to convey through this material was that while there were short term improvements that could be made, a new program had to be developed.[272]

On 7 April 2017, DHS officers including Ms Golightly and Mr McNamara met with PwC staff, including Mr van Hagen. Mr van Hagen recalled that the main discussion centred on a presentation to the minister's office (discussed further below), and that the report was also discussed briefly.[273] One of the PwC attendees took notes of the meeting, which recorded Mr McNamara as saying "CALL REPORT 'Strategy and PLAN'."[274]

As a result of that indication from DHS,[275] the naming convention for the versions of the draft report that was being developed by PwC, which had previously been saved as "DHS BPI Final Report",[276] changed to "DHS BPI Implementation Strategy."[277] A number of PwC staff began referring to the document as the "not-report", "non-report", and other variations on that theme.[278] One email said "Attached is the latest version of the DHS report (or not report, whatever you want to call [or not call] it)."[279]

A presentation for the minister

During the first week of April, PwC was requested by DHS to prepare a presentation to Mr Tudge.[280] At the meeting on 7 April 2017, Mr van Hagen recalled that the main discussion centred on this presentation.[281]

The following Monday, 10 April 2017, PwC prepared a table which "summarise[d] the narrative requested and discussed on Friday and or [sic] observations to date on whether supporting information is available.[282] In conjunction with the table, PwC also developed two versions of a PowerPoint presentation. One was described as "reflecting the requested narrative", and the other was a further version described as the "revised narrative."[283] The presentation for the minister was described as occurring "in parallel" to writing the report.[284]

An updated version was sent through later in the evening, which was described as "better aligned to the narrative requested by Malisa and strikes a better balance between outlining the possibilities and noting the constraints."[285]

The draft presentation was subject to several revisions, based on instructions from DHS, and in particular, Ms Golightly. Ms Golightly sent numerous, lengthy emails requesting changes to the presentation.[286]

PwC presented the PowerPoint to DHS and staff of the minister's office, including Ms Campbell, Ms Golightly and Mr Asten, on 19 April 2017.[287] The minister was not present on this occasion. Ms Golightly had discussed the presentation with, and provided a copy to, Ms Campbell prior to the presentation.[288] In addition to the presentation, the current state assessment[289] and strategic priorities and recommendations[290] documents were also presented.[291]

On 28 April 2017, PwC's first invoice was issued, and was paid by DHS.[292] The process maps that had been described in the official order and letter of engagement, due to be provided to DHS at the conclusion of "Phase 2" of the engagement, had been provided and were itemised on the invoice.

Also on 28 April 2017, Mr West emailed Mr Weber.[293] Mr West said:

> There's also a question about how the brief to the Secretary and Minister's office relates to the work we've done (i.e. the extent to which we're selling the message of Malisa in particular versus presenting our analysis and views)…
>
> We're also a bit concerned that they aren't actually going to do things that should *(sic),* to actually change the way the compliance program works, so we need to form a view as to how we'll handle that.

Mr West also expressed concern that "DHS seems to be looking at us to do a lot more than we're going to be funded for to start with."

Mr Weber replied that his belief was that the secretary was supporting the "scope change" for the moment "until we get the minister off our and her back", and that once PwC had done the presentation[294] to the minister, "we get back on scope of actually making it happen." Mr Weber indicated that the PwC budget would not be a problem, saying "we will be there for the next 3 years and will actually take on the outsource of the data analytics functions…Happy days."[295]

The presentation to the minister was originally scheduled to take place on 11 May 2017.[296] The minister was unable to attend on that date, but a meeting between PwC and DHS officers, including Ms Campbell, went ahead in his absence.[297] On 12 May 2017, PwC sent DHS the final PowerPoint for presentation to the minister.[298]

PwC presented the PowerPoint to the minister on 22 May 2017.[299] Ms Campbell was also present. The PowerPoint presentation that had been sent to the minister's office on 12 May 2017 was re-sent, unchanged, on 21 May 2017, under cover of a departmental brief.[300]

Work continues on report

In tandem with the work on the presentation to the minister, PwC had continued to develop the report. By early May 2017, the draft of the report was up to its twenty fifth version.[301] On 4 May, Mr van Hagen emailed the latest draft to Mr West, indicating that, "As discussed: if you're comfortable with the current version it would be good to share a hard-copy version with Jason to give them an idea of the scope of the report and recommendations…."[302]

Mr van Hagen accepted in his oral evidence that it was common practice for a draft of a final report to be provided to a client, so that they could identify any issues, including, for example, factual issues or information that may have been misunderstood in the development of the report.[303]

On 5 June 2017, DHS emailed PwC requesting that PwC send an invoice "for the remaining amount for the contract."[304] The next day, Mr Bowe informed Mr West that PwC was in the process of raising the final bill, and that the final report was "awaiting response from Terry."[305] Mr Bowe could not recall precisely what he meant by those words, but said that it was likely that he was referring to either waiting from a response from Mr Weber to his email of 30 May about the final report, or that he was waiting for confirmation from Mr Weber about whether the report was going to be provided to DHS.[306]

On 7 June 2017, PwC issued its final invoice to DHS. That invoice contained two itemised "Phase 4" deliverables, which were described as an "implementation roadmap" and an "implementation strategy."[307] DHS later paid the invoice.

The report that had been prepared by PwC was never formally received by DHS.

The total amount paid by DHS to PwC for the February to June 2017 engagement was $853,859 excluding GST.[308] The portion of that total attributable to the report cannot be ascertained with precision;[309] however, the evidence given by PwC representatives indicates that the best estimate is approximately $100,000.[310]

Commonalities between the report and the presentation

Although the documents that were specifically described as "deliverables" represented the most tangible output of the engagement, a significant amount of the work done by PwC was directed at developing a knowledge base and understanding of departmental systems, processes and data, which informed subsequent analysis. It was a necessary consequence of the nature of PwC's engagement that many documents (including the deliverables) were informed by the common body of work which underpinned them, and exhibited some similarities where they dealt with information or concepts derived from that shared foundation. It is unsurprising, therefore, that there is commonality, or overlap, of content as between a number of documents, including the presentation to the minister, and the report.[311]

However, it is clear, on both the face of the documents themselves, and the evidence given before the Commission, that the report that was prepared by PwC contained significantly more detail than the presentation given to the minister. So much is indicated by their respective formats; the presentation consisted of eight PowerPoint slides, including one slide for the title page. The report was a Word document which comprised almost 100 pages.

The distinction between the two was not just a matter of format. In effect, the document presented to the minister was a presentation, at a high level, of some of the main findings and recommendations that were outlined in detail in the draft report.

The report, in line with the description set out in the letter of engagement, was to "synthesise the key steps and findings of all preceding stages of work and analysis."[312] It was to include "an evidence base and a case for change," and, importantly, analyse and draw conclusions based upon "an independent review" of compliance and fraud activities at DHS.[313] This included a review of Budget measures, achievement of targets under those measures, and advice on the further implementation of those measures, but this was one aspect among others.

The presentation was designed to inform the secretary and minister about PwC's work, including PwC's understanding of the situation and proposed solutions to identified issues. But the "main focus" was whether DHS's then-current processes were capable of delivering the budgeted targets, and if not, how they could be improved.[314]

What the report said explicitly, that the presentation, on one view, implied,[315] was that the department's (then) current implementation approach for the Budget measures needed to be completely redesigned.

This was consistent with the view that PwC had formed, and presented to DHS, in the context of the findings of the "current state assessment" outlined above. What PwC was effectively conveying was that while there were short term improvements that could be made, a new program had to be developed.[316] The EIC system was effectively not fit for the purpose of delivering the Budget projections and the analysis of the data it collected.[317]

4.4 "This would have just poured a whole heap of petrol on it"

The report identified, in detail, problems with the system that were not, or at least not in the same level of detail, contained in the presentation.

There were criticisms of the underlying Budget assumptions and the manner in which savings had been calculated.[318] The report also highlighted inadequacies in the governance and decision-making with respect to the ongoing implementation and monitoring of the Budget measures, and noted that PwC had "faced significant issues in mapping the current state process due largely to the lack of end-to-end visibility."[319]

The report dealt with problems associated with some of the fundamental features of the compliance program, including the use of automation, and the way in which ATO data was used in the system. It indicated that the OCI process had operated indiscriminately on all identified discrepancies, with no apparent prioritisation, which had resulted in a large number of interventions with a lower likelihood of a debt's existing.[320] The shift to automation effected under OCI had resulted in "a loss of some of the strengths of the manual processes", and specifically the previous prioritisation of high likelihood, high value debts.[321]

Prior to the online process, the report pointed out, "human interaction provided a range of necessary checks and balances to ensure poor data did not adversely impact the process". The increase in scale, and the use of automation, had resulted in a loss of "quality control mechanisms of the manual process that perhaps had not been previously recognised or codified".[322] The impact of that loss of human intervention was difficult to quantify, but was "no doubt significant to the challenges faced by the system".[323] The report suggested measures to improve and monitor the quality of data inputs, and cited the example of "incorrect employment period dates," which were fixed in an ad hoc way, but for which the suitability of the modifications to the system had not been assessed or measured.[324]

The report stated that the automation of compliance interventions had been "critical" to the underlying assumptions of the measures with respect to both the volume of interventions proposed to be undertaken, and the resources required to support those interventions.[325] The changes that had been introduced under EIC in early 2017 had "drastically reduced" the volume of interventions that were automated, and this had had a significant impact on DHS's ability to deliver in line with the Budget measures.[326]

Consistent with the scope of PwC's engagement, the report did not directly engage with issues of debt accuracy, or the impact of income averaging in the debt calculation process. However, the report was critical (though, at times, in euphemistic terms) of DHS's use and management of data, including ATO data. There was "a lack of maturity in data capture and case selection and filtering, which presents a large opportunity for improvement."[327] DHS systems had limited ability to identify whether or not particular intervention targets were being achieved, and the information contained in DHS's regular reporting with respect to the measures was described as "simplistic."[328]

The number of interventions that were initiated, but resulted in no debt (which was publicly referred to as the "error rate", but vehemently defended by DHS as being part of the system functioning as intended), had increased from 20 per cent in 2016 to 24 per cent by March 2017.[329] For interventions that did result in a debt, the value of that debt might be less than it had cost to identify and recover it; however, that could not be confirmed, because the data necessary to establish that was not captured or measured by the system.[330]

The report noted that the underlying data used to identify discrepancies was collected by the ATO for purposes different to the purpose for which it was used by DHS.[331] As a consequence, "the quality of data is not at the preferred level", and there were limitations in using this data to identify discrepancies.[332]

Some of the report's conclusions with respect to these aspects of the system were made in a context of the inadequacies in DHS's use of the data to appropriately select and filter cases for compliance reviews, rather than a specific issue of debt accuracy in and of itself. However, it was still an unedifying reflection on both the system as it had operated under OCI, and the continuing problems with respect to data quality and management, despite the "fixes" that had been introduced under EIC.

Despite its delicate choice of language and focus on recommendations for short term improvements which could exist concurrently with a medium to long term redesign of the system, the report's identification of the compliance program's original design reflected extremely poorly on DHS. On one view, the report identified that the Scheme, as it had been designed and implemented, had failed. It had failed so badly that the only solution was to provide temporary, stop-gap solutions to allow it to limp along while a new program was being developed. It gave validity and credence to many of the public criticisms that had been made. DHS had requested an independent review of the Scheme. The report confirmed, in writing, that the Scheme as it existed was a failure.

In oral evidence, Mr McNamara accepted that had the report found its way into the public domain, it would have led to substantial adverse media publicity for DHS.[333] With respect to this issue, he said "Well, I think at the time we were the story in the news. This would have just poured a whole heap of petrol on it."[334]

Human Services and the PwC report

The Commission finds that, throughout PwC's engagement with DHS, from February 2017 until the first week of June 2017, PwC employees were of the understanding that the report that they prepared over the course of the engagement was the deliverable component of the engagement described as a "report." This was consistent with the evidence of each of Mr Weber, Mr Bowe, Mr van Hagen and Mr West.[335]

Moreover, throughout the engagement, there was a common understanding between DHS and PwC that PwC was preparing a report, which was separate from the presentation to the minister, and that report comprised the "report" deliverable component stated in the official order.

Mr Weber,[336] Mr Bowe[337] and Mr van Hagen[338] were each of the understanding, or belief, that DHS was aware that PwC was preparing a report that was separate from the presentation to the minister. In contrast, Mr West gave evidence to the effect that he could not recall DHS ever having knowledge that PwC was preparing the detailed report that it had been drafting.[339] However, Mr West later accepted, in submissions to the Commission, that even though it was not his specific recollection at the time of his giving oral evidence, it was likely that DHS was aware that PwC was preparing a draft report separate from the presentation, and in a more detailed format. That was a prudent and realistic concession.

The Commission rejects Mr West's oral evidence and accepts the evidence of each of Mr Weber, Mr Bowe and Mr van Hagen, and Mr West's updated position as stated in his submissions to the Commission.[340] That is based on the following evidence:

- PwC undertook a considerable body of work was undertaken by PwC to prepare a report, as evidenced by the various drafts of it, the deliberations within PwC as to its contents, the number of PwC employees and partners involved in working on it[341] and the value of the work.[342] It is implausible that employees of a firm such as PwC, which was highly experienced in providing consultancy services to the Commonwealth Government, including DHS,[343] acting under the supervision of its partners, would undertake such a considerable amount of work without there being a common understanding between PwC and DHS that the "report" was a separate document from the presentation to the minister and was to be in a form, and at a level of detail, at least similar to that of the drafts that were being prepared by PwC (even if its precise form was not entirely known to DHS).

- There were numerous meetings, workshops and consultation between PwC and DHS, and it is implausible that there would never have been a discussion, on at least some of those occasions, about the report, as distinct from the other work PwC was undertaking.
- The documentary evidence suggests there was a number of occasions where the report was discussed with DHS, including in circumstances where it was explicitly distinguished from the presentation to the minister. The internal PwC email dated 27 March 2017 referred to a discussion with DHS about the "final report" in which it was said that "[p]revious reports have focussed too much on high-level recommendations; they expect us to put some meat on the bones."[344] In a further internal PwC email on 28 March 2017, Mr van Hagen told Mr West about a conversation he had with Mr McNamara in which Mr McNamara had indicated that the secretary's preference was for the "final report" to be in "Word" rather than in "PowerPoint."[345]
- In a meeting on 7 April 2017,[346] Mr van Hagen, who attended the meeting, distinguished between the "main discussion", which centred around the presentation, and a discussion about the report, which was brief.[347] As was reflected in notes that were taken at the meeting, a representative of DHS told PwC that the "report" should be called a "strategy and plan."[348] This is consistent with members of PwC subsequently referring to the draft report as the "not-report", and variations on that theme,[349] and the subsequent change to the naming convention for the draft report from "DHS BPI Final Report"[350] to "DHS BPI Implementation Strategy."[351]
- If there were any confusion or ambiguity within DHS about whether the PowerPoint presentation was the "report" that PwC was preparing pursuant to the engagement, that must have become apparent in discussions between PwC and DHS that occurred after the presentation had been provided to DHS on or around 12 May 2017.
- On 4 May, Mr van Hagen emailed the latest draft to Mr West, saying, "As discussed: if you're comfortable with the current version it would be good to share a hard-copy version with Jason to give them an idea of the scope of the report and recommendations…."[352]
- On 16 May, Mr van Hagen set out a list of topics for Mr West to discuss with Mr McNamara the following day.[353] That list included "the "report", confirming that "he doesn't expect anything before the 2nd of June."[354] It also included, as a separate and distinct bullet point topic, "The Minister's presentation on Monday: no changes expected/logistics etc."

It is likely that a conversation occurred at some time in May in which DHS and PwC agreed that PwC would provide the "DHS Implementation Strategy document" to DHS around 2 June. Mr Bowe said as much in an email he sent to Mr Weber on 30 May 2017, attaching the most recent version of the report for Mr Weber's review.[355] Mr Bowe confirmed that his reference to the "DHS Implementation Strategy document" was a reference to the report,[356] which is also clear on the face of the email and its attachment.[357] Mr Bowe also stated that the report was "intended by DHS to be marked as "PROTECTED/Sensitive: Cabinet."

From the face of the email, it was clear that there had been agreement, at some earlier point in May, between PwC and DHS that an "implementation strategy document" would be provided to DHS around 2 June. Given Mr van Hagen's suggestion, in his 16 May email, that this precise topic (of the "report" and the date of 2 June) be discussed with DHS on 17 May, it is more probable than not that this discussion took place then, and the agreement was reached to provide the document to DHS (by 2 June).

At that point in time, the document that was discussed could not have been the presentation. This is because, firstly, DHS already had the final version of the presentation to the minister, having received it on 12 May, and secondly, both DHS and PwC were aware that the presentation to the minister had been rescheduled for 22 May, which would have made a nonsense of agreeing to provide the PowerPoint presentation document by 2 June. That is consistent with the 16 May email listing the minister's presentation, scheduled for "Monday" (that is, 22 May 2017), as a separate and distinct bullet point topic from that of the report.

Mr McNamara did not recall being shown a version of the report in hard copy, but said in oral evidence that he "[did] not dispute that [he] could have been shown something in hard copy."[358] Given the indication by PwC staff that they were going to do so, Mr van Hagen's evidence as to this being a common practice,[359] the subsequent email indicating agreement had been reached with DHS about the provision of the report by 2 June, and Mr McNamara's acceptance that it could have occurred, the Commission finds that it is more probable than not that Mr McNamara was shown a hard copy of a draft version of the report.

Why the report was never received by Human Services

The report that had been prepared by PwC, which had been the product of 34 previous drafts and spanned almost 100 pages, was never formally received by DHS.

All of the PwC witnesses indicated that, at some point in early June, they formed an understanding that DHS considered that the presentation that had been prepared for the minister would satisfy the "report" deliverable for the engagement, and that PwC could proceed to issue a final invoice for the completion of the work under the engagement.

What is significant for this Commission is that what this indication meant, in effect, was that DHS communicated to PwC that the draft report was not to be finalised and provided to DHS.

Mr Bowe was asked by Senior Counsel Assisting whether, in circumstances where the final report had been worked on for months, and was in the very last stages of drafting, it was unusual that it not be provided. Mr Bowe replied, "I haven't been involved in another project where that has occurred", and said "I'm sure it was odd to me at the time, yes."[360]

It is worth noting that Ms Campbell made the decision to engage PwC, initiated that engagement, and approved the engagement letter, which included specific reference to the production of a final report as a deliverable under that engagement. Ms Campbell was involved in monitoring the work of PwC, including in personally attending presentations and the presentation to the minister. A communication by DHS that the "report" deliverable component was no longer required, and that the presentation would instead suffice, either required, or amounted to, a variation of the official order.

The lack of contemporaneous records about how this aspect of the engagement came to an end is concerning. However, there is some evidence before the Commission as to what occurred. Mr Van Hagen gave evidence of a conversation with Mr West or Mr Bowe in which it was said that Mr Weber spoke to Ms Campbell and that "a report was not required."[361] Mr Bowe's evidence was that he was informed that DHS did not require the report, and that he believed that it was either Mr Weber or Mr West who told him.[362] He understood that the reason DHS did not require the report to be provided was because the Department was "keen to focus on the implementation of improvement initiatives and minimise media interest on the challenges of the previous system."[363] Mr Weber could not recall, but accepted that it was possible that the communication from DHS to PwC that a report was not required occurred between Ms Campbell and himself.[364]

The Commission finds that on or about 6 June 2017, Ms Campbell communicated to Mr Weber that the report was not to be finalised and provided to DHS. Despite the importance of that indication from DHS, it does not appear to have been documented at the time.

As detailed above, the report was far more extensive and critical of the Scheme's failings than the PowerPoint presentation; it revealed that it would not deliver the projected budget savings, that it was producing a significant percentage of inaccurate debts, and, crucially, that the online process had been a failure.

The Commission concludes that Ms Campbell made the decision that it should not be finalised and delivered to DHS. The rational inference is that although the report was contracted for and all but finalised, Ms Campbell formed the view that its detail as to the deficiencies of the Scheme was damaging and that it would be better for the department's reputation, and her own, if it were not produced.

5 Administrative Appeals Tribunal cases

5.1 Early reflections on the Administrative Appeals Tribunal cases

By 8 November 2016, lawyers at DHS had noted that the Administrative Appeals Tribunal (AAT) had "been more strident in its criticism [of PAYG debt cases] but this is limited to a few cases (which are unpublished)" and in particular that that "criticism… extends further to the debt raising processes associated with the PAYG program."[365] These observations were made by Ms Alice Linacre, General Counsel, FOI and Litigation Branch of DHS in the context of a report relating to the PAYG program and the response to it in the AAT. The effect of the report was that the AAT's commentary "continues largely in the same vein" as the similar report which was circulated on 11 October 2016 report but with "more critical comment."

Between November 2016 and January 2017, Mr Sparkes prepared a document which analysed AAT decisions in relation to the Scheme.[366] The document purported to provide a legal analysis of relevant AAT decisions and of administrative law principles affecting the use of income averaging in the Scheme.

The document suggested that two past decisions of the AAT provided relevant guidance.[367] However, at best, those decisions endorsed the use of income averaging in specific factual circumstances that involved:

- a social security payment type (age pension) where income averaging was permissible,[368] or
- the social security recipient agreed for the purposes of the tribunal's decision.[369]

The document referred to criticism in a decision of the AAT of the use of income averaging. It contained the following analysis in response to this criticism:

> The fundamental question that arises is whether the department is adhering to the principles of good administrative decision in the PAYG decision making: i.e. considering all legal requirements; considering all relevant matters; acting fairly (procedural fairness - hearing rule, bias rule and no-evidence rule); and taking into account any relevant policy.
>
> The legislative requirements would include the principles of administration set out in section 8 of the Social Security (Administration) Act 1999 including the delivery of services in a cost- effective manner and minimising abuses.
>
> …
>
> Providing the customer with the opportunity to put his case complies with procedural fairness and the debt raising process is consistent with government policy around the PA YG project and, we understand, endorsed by DSS. To pursue every possible evidentiary trail would frustrate the policy objective and would be administratively burdensome.
>
> The criticism levelled in the referenced decision is the comment of one lone tribunal member and is not repeated in the vast majority of decisions of the AAT1. It is also a criticism that lacks balance by failing to take into account all of the principles of good decision making, in particular the underlying public policy and the statutory imperatives to deliver services in a cost-effective manner and minimising abuses.
>
> Furthermore, it is noted that although the PAYG Program area has said that the PAYG Program is not under the provisions of the Data-Matching Program (Assistance and Tax) Act 1990 the process adopted would appear to be consistent with the requirements in that Act.

5.2 The 8 March 2017 decision, and decisions in 2016 and 2017

Indeed, there were a number of decisions of the AAT in 2016 and 2017 that set aside DHS decisions involving income averaging.[370] As made clear in the 8 November 2016 report referred to above, some of those decisions were critical of income averaging and some found that the specific debts in issue which were raised by way of averaging were unlawful.[371]

On 8 March 2017 in particular, the AAT made a significant decision relevant to Robodebts more generally.[372] The 8 March 2017 decision concluded that the "methodology" of income averaging itself was unlawful. That decision contained a careful and considered analysis of relevant legislation and legal principle and unqualified directions prohibiting DHS from recalculating the social security recipient's debt set aside in that case by the Tribunal with the use of income averaging.[373]

Relevantly, the 8 March 2017 decision concluded that income averaging was unlawful because it provided an insufficient evidentiary basis for the calculation. As was said at [54]-[56] of that decision:

> 54. [There is]… no provable overpayment or overpayment quantum on the facts before the Tribunal.
>
> 55. The reason it does not establish either an overpayment or its quantum is due both to the lack of sufficient strength of evidence and to simple mathematics.
>
> 56. The lack of strength of evidence flows from my characterisation of the overpayment 'methodology' (actually an administrative algorithm as I understand) — involving extrapolation of ATO employment income information over a period, divided to produce an average fortnightly, and then applied to YA payment periods to raise a debt — as, at best, raising no more than the sufficient doubt about the accuracy of past payments as to warrant the exercise of powers of enquiry held by Centrelink (or indirectly by this Tribunal: see paragraph 42 of these Reasons above). It is too uncertain, and too slight a basis to [raise a debt].

There was no appeal from the 8 March 2017 decision.[374] As Ms Bundy (national manager of Appeals)[375] accepted, so much is an admission of the correctness of the decision.[376] Similarly, Mr Brazel (acting national manager/ general counsel, FOI & Litigation) agreed that the internal advice on further administrative review of the 8 March 2017 decision accepted that it was unlawful to calculate social security entitlements using averaging and that he did not disagree with the position communicated in it.[377]

On 27 March 2017, Mr Brazel brought the 8 March 2017 decision to Ms Bundy's attention[378] in an email.[379] Ms Bundy gave evidence that she knew it "needed to be looked at and considered in the light of all the other focus on the program."[380] In the email Mr Brazel said:

> I will look into where this is at. It was brought to my attention on Friday, but I have not escalated.

Ms Bundy responded:

> We need to escalate this asap.

The 8 March 2017 decision was one of ten AAT decisions referred to in an email from Ms Bundy to Mr Brazel and Ms Musolino dated 19 April 2017 in which Ms Bundy said:[381]

> We are going to pull together the list of the 10 set aside decision relating to OCI. [**(AAT OCI Case Summaries document)**] We need to have a better feedback loop with these I think where we aren't appealing and how we are going to manage and then ensure feedback goes back down regarding decisions. If we aren't appealing then we are accepting the decision is correct which means there is either new evidence (that's ok) but if there has been something we should or shouldn't have done along the way from the ARO down we need to address.

In these circumstances, it may be inferred that it was obvious to Ms Bundy that the 8 March 2017 AAT decision and the others identified in the AAT OCI Case Summaries document were significant. One might expect that, consistently with her role as National Manager of the Appeals Branch, she would have read the 8 March 2017 decision and taken steps to understand its implications, including, if necessary, obtaining legal advice about whether it had significance for the lawfulness of debt decisions made under the Scheme. Ms

Bundy did not do those things.[382] The Commission regards this as another instance of DHS officers failing to critically reflect on serious challenges to the fundamental underpinnings of the Scheme. This was a function of the culture within DHS which did not allow for those officers to undertake any such reflection.

Later in the day on 19 April 2017, Ms Bundy provided Ms Musolino with the AAT OCI Case Summaries document which set out some key Robodebt decisions set aside by the AAT and in particular those that "… raise the issue around [DHS] relying on averaging without obtaining other information."[383] That AAT OCI Case Summaries document was updated over time and provided again to Ms Musolino, including on 18 May 2017.[384]

Accordingly, the Commission finds that Ms Musolino became aware of the 8 March 2017 decision by no later than 18 May 2017 when she received the further updated version of the AAT OCI Case Summaries document containing reference to it,[385] which stated that there were no grounds for appeal of that decision.[386]

The 8 March 2017 decision was significant, but so too was the AAT OCI Case Summaries document itself. It tracked AAT decisions adverse to the Scheme and was updated over time by DHS lawyers and circulated within that division. It made clear that decisions involving income averaging had been set aside by the AAT, including, that in some cases, the AAT held that income averaging was unlawful.[387]

That document was as close as DHS came to having any method of systematic review of AAT cases. Two things ought to be said about that. First, the AAT OCI Case Summaries document was entirely inadequate for the task of monitoring AAT decisions, but the existence of it makes clear that there was at least some awareness and concern about the AAT criticism of debts raised by way of the Scheme. Second, the inadequacy of that document is symptomatic of the failure by DHS to put systems in place which would enable monitoring of the legal issues arising in the AAT. Those failures will be dealt with in more detail in the chapter – The Administrative Appeals Tribunal.

None of the AAT decisions identified in the AAT OCI Case Summaries document or otherwise contained any statement of legal principle or references to legislation justifying the use of income averaging in the absence of other evidence to support conclusions reached with the use of income averaging. That would have been obvious had there been a systematic process in place to monitor such decisions.

It was Ms Musolino's responsibility to ensure that systems were put in place that would enable monitoring by the Legal Services Division of legal issues arising from AAT decisions so that DHS and DSS were properly advised about those issues. Ms Musolino accepts that she failed to do so.[388]

6 2017 AIAL conference

By 20 June 2017, Ms Musolino was aware that she would be unable to attend the 2017 Australian Institute of Administrative Law annual conference at which a paper was to be delivered on the Scheme.[389] As a consequence, Ms Musolino made a request for someone from the Legal Services Division to attend and "report back noting the sessions of particular interest to DHS."[390] By 10 July 2017, DHS had identified "potentially 8 lawyers going including 3 SES officers."[391] The attendance record indicates 9 attendees from DHS including three general counsel (Mr Stipnieks, Mr Ffrench and Mr Roser).[392] There were no attendees from DSS.

At the AIAL conference, on 20 July 2017, Peter Hanks KC presented a paper about the Scheme.[393] Mr Hanks is an eminent barrister with extensive expertise in administrative law.[394] Mr Hanks argued in his presentation and his paper, later published, that the manner in which income averaging was used to calculate debts in the Scheme was unlawful.[395] In both the paper and the presentation, Mr Hanks identified the "critical question" as whether DHS had DHS the "legal authority" to raise debts under the Scheme.[396]

That presentation, and the publication of the paper shortly after, ought to have been a further red flag for both DHS and DSS as to the legality of the Scheme. Little was done within DHS in response to it and there is no evidence that the conference or paper attracted any attention at all at DSS.

At DHS, Mr Stipnieks provided Ms Musolino with a summary of what Mr Hanks said in his presentation in a series of emails sent in real time during the delivery of the paper at the conference.[397] Ms Musolino provided Ms Campbell and Mr Hutson a summary of what Mr Hanks had said, based on Mr Stipnieks' summary, by email at 8:41 pm that evening.[398] Ms Musolino's email said that Mr Hanks' "…speech was extremely critical of the OCI program" and summarised the key points made, including that "Someone should look to test the matter in the Federal Court" and "Raising of debts using averaging is not consistent with the terms of the social security law."

Nonetheless, Ms Musolino said in her covering email to the secretary, "None of the criticisms are new, however noting that organisations such as ACOSS and Legal Aid were present, the comments may end up in a press release or in the media." While those propositions were factually true, those words emphasised the possibility of negative publicity over the substance of the criticisms and the suggestion that they did not amount to anything "new" suggested that there was no necessity for the secretary to act responsively to them. Those words tended to diminish the significance of the arguments made by Mr Hanks.

Ms Campbell annotated, by hand, a printed copy of the summary email on 24 July 2017 with the words "Noted Thanks K Campbell 24 July 2017."[399] Ms Campbell's office relayed to Ms Musolino by email that "the Secretary has noted this advice" sent at 5:36 pm on the same day. There is no evidence before the Commission that Ms Campbell read or even requested a copy of Mr Hanks' paper delivered at the AIAL conference or took any steps in response to the summary email apart from "not[ing]" it.

The summary email contained nothing by way of rebuttal of the legal arguments Mr Hanks KC had presented. Given the serious repercussions for the government, DHS and vulnerable welfare recipients if those arguments were right and given that they were raised by a highly-qualified academic and an experienced legal practitioner in the field, Ms Campbell should, at a minimum, have requested a brief on the arguments raised, if not further work from the Legal Service Division and independent advice assessing the merit of them. Ms Campbell did not ask to see the paper. As it turned out, the arguments Mr Hanks raised were substantially correct, as ultimately demonstrated by the Solicitor-General's advice and also foreshadowed by the Clayton Utz advice (described below) and the AGS draft advice in 2019.[400] Had that work been done, it would probably have exposed the unlawfulness of the Scheme.

In submissions made by her solicitors, it was said that Ms Campbell had not actively chosen not to take further action in light of Mr Hanks' criticisms; no such proposal was raised with her by the lawyers responsible for doing so. The Commission does not accept these submissions.

It is the apparent lack of interest by Ms Campbell in the arguments expressed by Mr Hanks that is of

concern. The obvious and appropriate response for a person in Ms Campbell's position would be alarm upon being told about Mr Hanks' arguments; arguments that a Scheme for which Ms Campbell was responsible was, in effect, unlawful. However, Ms Campbell made no request for advice, nor did she make any attempt to ensure that DHS was acting upon the criticisms.

Ms Campbell's conduct is inexplicable except on the basis that she had an expectation that Mr Hanks' arguments were properly made and that further work would have exposed the unlawfulness of the Scheme.

Ms Musolino read Mr Hanks' paper in or about August 2017.[401] There is no evidence before the Royal Commission that Ms Campbell read that paper or requested it. In any event, neither the presentation nor the publication of it resulted in DHS's doing anything to address Mr Hanks' criticisms. Ms Musolino took no steps to ensure that the merits of Mr Hanks' arguments articulated at the AIAL presentation and in his paper were properly investigated. She neither instructed members of the Legal Services Division of DHS to do any work to investigate the merits of Mr Hanks' arguments, nor did any further work in this respect herself.[402]

In evidence, Ms Musolino asserted that she had relied on Mr Stipnieks and others within the Legal Services Division of DHS, in order to justify her failure to properly advise the executives of DHS.[403] However, that evidence is not supported by that of Mr Stipnieks who understood that the matter was under consideration by his team but did not recall anything coming out of that[404] and denied ever forming a considered view as to whether or not income averaging was lawful.[405]

A number of current and former DHS lawyers gave evidence before the Commission. All acknowledged the significant legal issue that Mr Hanks' paper presented for DHS and the indisputable need for independent advice to be obtained.[406]

Mr Stipnieks' evidence was that he expected that Ms Musolino would have had a "frank" conversation with Ms Campbell about the issues that Mr Hanks raised.[407] He is right to have expected such an approach to the matter. However, no such conversation occurred. In the very least, the substance of the arguments raised by Mr Hanks ought to have been investigated and had that been done, the need to bring them to secretarial and ministerial attention would have been clear.

Ms Musolino's duty as general counsel of DHS was to ensure that appropriate and documented legal advice was provided to DHS executives, including Ms Campbell and Ms Golightly. That advice would have been that the arguments articulated by Mr Hanks raised serious questions as to the legality of the Scheme and that external legal advice ought to be sought by DHS. The only rational explanation for Ms Musolino's failure to give that advice is that she knew DHS executives, including Ms Campbell, did not want advice of that nature.

Mr Porter gave evidence that in his view the matter "ought to have been brought to at least Mr Tudge's Secretary [at the time of the presentation] or even to [his own] attention."[408] Mr Tudge's evidence was that consideration ought to have been given to raising the matter with him.[409] It seems that both ministers accept that the matter was not properly dealt with. That is a symptom of DHS's lack of engagement with the arguments raised and DSS's apparent ignorance that they had even been made.

7 Transition to secretary Leon at Human Services

Ms Campbell was the secretary of DHS from March 2011 to 17 September 2017 and the secretary of DSS from 18 September 2017 to July 2021.[410] Renee Leon was appointed secretary in September 2017 and commenced in that role in October 2018.[411]

Ms Leon gave evidence that she was aware about the culture at DHS before she commenced in that role. In particular she stated:

> I already knew something about the culture of the Department before I started, because one of my Deputy Secretaries at the Department of Employment had come to me in order to escape the culture in the Department of Human Services, which she described to me at the senior levels as very robust and challenging. And I understood that to mean from the description that she had of it that it was a culture in which there was a lot of aggression expressed at senior levels, where behaviour that I don't think is appropriate was modelled and encouraged, such as yelling at people or publicly shaming them in front of others and allowing discussions to occur between senior colleagues that were about attributing blame rather than working together to solve problems.

When Ms Leon started at DHS she was briefed on the Scheme. Ms Leon's evidence was that she was told two things: first, that averaging was a long-standing practice and second, that though there had been criticisms of the Scheme, they related to the roll out and customer experience, seemingly as distinct from its fundamental methodology.[412]

Ms Leon's appointment to the role as secretary of DHS represented the end of Ms Campbell's tenure in that role. Ms Campbell had been responsible for a department that had established, implemented and maintained an unlawful program. When exposed to information that brought to light the illegality of income averaging, she did nothing of substance. When presented with opportunities to obtain advice on the lawfulness of that practice, she failed to act.

1 Exhibit 3-3356 - CTH.9999.0001.0102 - [Final] Services Australia - Response to NTG-0128 – Revised at [4.1] to [4.2].
2 Exhibit 3-3356 - CTH.9999.0001.0102 - [Final] Services Australia - Response to NTG-0128 – Revised at [4.4].
3 Exhibit 3-3356 - CTH.9999.0001.0102 - [Final] Services Australia - Response to NTG-0128 – Revised at [6.2].
4 Exhibit 3-3406A - RBD.9999.0001.0362_B - CFT Data Analysis (Updated).pdf
5 Exhibit 3-3356 - CTH.9999.0001.0102 - [Final] Services Australia - Response to NTG-0128 – Revised at [4.10].
6 Transcript, Christopher Birrer, 23 January 2023 [page 2194: line 5-14].
7 Transcript, Christopher Birrer, 23 January 2023 [page 2185: line 23-34].
8 Transcript, Christopher Birrer, 23 January 2023 [page 2200: line 5-40].
9 Transcript, Christopher Birrer, 23 January 2023 [page 2194: line 22-32].
10 Exhibit 8494 - CTH.9999.0001.0167 - [Services Australia] Supplementary Response to NTG-0128 (Complaints).pdf at [2.2].
11 Exhibit 4-7125 - LMA.9999.0001.0011_R - 20230228 - NTG-0006 MacLeod First Statement with Annexure and Document IDs (AGS review) (Redaction Applied), [para 40-43].
12 Exhibit 4-7125 - LMA.9999.0001.0011_R - 20230228 - NTG-0006 MacLeod First Statement with Annexure and Document IDs (AGS review) (Redaction Applied) [para 44].
13 Exhibit 2-1296 - CTH.1000.0006.8741_R - Section 8 Questions under IOIs 2016-400007 and 2016-600004 [SEC=UNCLASSIFIED].
14 Exhibit 2-1299 - CTH.1000.0006.9025_R - Further s 8 questions under IOI-2016-400007 [SEC=UNCLASSIFIED]; Exhibit 2-1300 - CTH.1000.0006.9027_R - RE- Further s 8 questions under IOI-2016-400007 [SEC=UNCLASSIFIED].
15 Exhibit 4-7125 - LMA.9999.0001.0011_R - 20230228 - NTG-0006 MacLeod First Statement with Annexure and Document IDs (AGS review) (Redaction Applied), para 34; Exhibit 2-1303 - CTH.1000.0007.4557_R - scanned screen shots [SEC=UNCLASSIFIED]; Exhibit 2-1303 - CTH.1000.0007.4558_R - 21-03-2017_11-45-33.
16 Exhibit 4-7125 - LMA.9999.0001.0011_R - 20230228 - NTG-0006 MacLeod First Statement with Annexure and Document IDs (AGS review) (Redaction Applied) [para 38].
17 Exhibit 2-1305 - CTH.3001.0033.5489_R - IOI-2016-400007 - Ms Kathryn Campbell CSC; Exhibit 2-1306 - CTH.3502.0001.0948_R - a. EC17-000064 Att A; Exhibit 3-3603 - DSS.5113.0001.0054_R - IOI-2016-400007 - Mr Finn Prattt AO PSM; Exhibit 3-3604 - DSS.5113.0001.0055_R - IOI-2016-400007 - The Hon Christian Porter MP.
18 Exhibit 3-3596 - RHU.9999.0001.0003_R - NTG-0140 Hurman Updated Statement(46933793.1) [para 15].
19 Exhibit 1-0138 - EKM.9999.0001.0002_R - 20221021 NTG-0027 Statement of Emma Kate McGuirk (signed) 22006293(46180806.1) [para 7];. Transcript, Robert Hurman, 25 January 2023 [p 2400: lines 19-22]; Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4244: lines 13-26].
20 Exhibit 3-3596 - RHU.9999.0001.0003_R - NTG-0140 Hurman Updated Statement(46933793.1) [para 21].
21 Exhibit 3-3590 - RDB.9999.0001.0003_R - NTG-0053 Revised statement of Mr de Burgh [para 13].
22 Exhibit 3-3600 - DSS.5051.0001.0001_R - Meeting between DSS and CO relating to Centrelink Debt Recovery Investigation [SEC=UNCLASSIFIED].
23 Exhibit 1-0002 - DSS.5006.0003.1833_R - Email from Jordan Simon to Mark Jones copying Anne Pulford and preceding chain; Exhibit 3-3602 - DSS.5031.0001.0001_R - FW- Legal Advice - Data matching- notifications and debt raising [DLM=Sensitive-Legal].
24 Exhibit 3-3602 - DSS.5031.0001.0001_R - FW- Legal Advice - Data matching- notifications and debt raising [DLM=Sensitive-Legal].
25 Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4245: line 29].
26 Transcript, Robert Hurman, 25 January 2023 [p 2400: line 28 – p 2401: line 13, p 2409: lines 9-13].
27 Exhibit 4-6353 - DSS.5063.0001.0003_R - RE- Teleconference details [SEC=UNCLASSIFIED].
28 Exhibit 2-2105 - DSS.5023.0002.2163_R - Background to issue [DLM=Sensitive].
29 Exhibit 2-2106 - DSS.5023.0002.2164_R - 2.01701150954175E+16; Exhibit 1-0138 - EKM.9999.0001.0002_R - 20221021 NTG-0027 Statement of Emma Kate McGuirk (signed) 22006293(46180806.1), para 19.
30 Exhibit 4-6351 - DSS.5023.0002.2242_R - Sample Letters [DLM=For-Official-Use-Only]; Exhibit 4-6342 - DSS.5020.0001.0054 - Letter 1 - Initial Contact Letter (1).
31 Exhibit 2-2114 - MKI.9999.0001.0002_R - 20221111 NTG-0062 Response (Kimber, M)(46393028.1), para 101 - 103; Exhibit 2-2116 - MKI.9999.0001.0005_R - 20221118 NTG-0090 Response (Kimber, M)(46473783.1), para 8-9; Transcript, Murray Kimber, 8 December 2022 [p 1418: lines 30-37].
32 Exhibit 4-5575;Exhibit 2-2104 - DSS.5023.0002.2174_R - RE- Background to issue [DLM=Sensitive].
33 Exhibit 2-2103 - DSS.5023.0002.2176_R - FW- DHS NPPs for inclusion in the 2015-16 PB Sub [DLM=For-Official-Use-Only].
34 Transcript, Cath Halbert, 9 December 2022 [p 1464: lines 29-34].
35 Exhibit 1-1217; Exhibit 2-2808 - CTH.3001.0033.3350_R - FW Response to DSS - Employment Income Compliance Process [DLM=Sensitive].

36 Transcript, Karen Harfield, 15 December 2022 [p 1932 – p 1934].
37 Exhibit 2-2717 - CTH.3001.0032.1109_R - FW- Averaging Income [DLM=For-Official-Use-Only].
38 Exhibit 4-6475 - CTH.2002.0005.4474 _R - FW- Averaging Income [DLM=For-Official-Use-Only].
39 Exhibit 4-5661 (CTH.3002.0033.2103)
40 Exhibit 6353, DSS.5063.0001.0003_R.
41 Exhibit 1213 - SWI.9999.0001.0005_R, Statement of Serena Wilson 8 November 2022, para 43; Exhibit 5731 - SWI.9999.0001.0006_R, Statement of Serena Wilson, 21 February 2023, para 18.
42 Exhibit 1-0145 - DSS.5035.0001.0001 - Notes from 1501017 and 180117 meetings.
43 Exhibit 1-0145 - DSS.5035.0001.0001 - Notes from 1501017 and 180117 meetings.
44 Exhibit 1-0145 - DSS.5035.0001.0001 - Notes from 1501017 and 180117 meetings.
45 Transcript, Serena Wilson, 9 November 2022 [p 796: lines 35-37]; Transcript, Serena Wilson, 23 February 2023 [p 3669: lines 8-22]; Exhibit 4-5731 - SWI.9999.0001.0006_R - Robodebt Royal Commission - Further Supplementary Statement of Serena Judith Wilson - 21 Feb 23 [para 22].
46 Transcript P-3671 lines 9 to 19.
47 Transcript P-800 lines 35 to 46.
48 Transcript P-805 lines 20 to 23.
49 Transcript, Paul McBride, 9 March 2023 [p 4844: line 23].
50 Transcript, Paul McBride, 9 March 2023 [p 4849: lines 13-15].
51 Transcript, Paul McBride, 9 March 2023 [p 4844: line 19].
52 Transcript, Paul McBride, 9 March 2023 [p 4847: line 29].
53 Exhibit 2-2072 - DSS.9999.0001.0025_R - 20221125 NTG-0092 Statement (Part 2) (Halbert, C) 22006293(46543944.1) [para 23].
54 Transcript, Cath Halbert, 9 December 2022 [p 1454: lines 18-21]; Transcript, Cath Halbert, 9 December 2022 [p 1455: lines 30-32].
55 Transcript, Cath Halbert, 9 December 2022 [p 1454: line 47].
56 Transcript, Cath Halbert, 9 December 2022 [p 1457: lines 15-24].
57 Transcript, Emma-Kate McGuirk, 2 November 2022 [p 276: line 36]; Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4249: line 32 – p 4250: line 36].
58 Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4249: line 30].
59 Transcript, Emma-Kate McGuirk, 2 November 2022 [p 285: lines 1-4].
60 Transcript, Emma-Kate McGuirk, 2 November 2022 [p 284: lines 8-9]; Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4253: lines 11-26]; Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4265: lines 1-8].
61 Exhibit 4-6323 - EKM.9999.0001.0008_R - EMC.000262238; Exhibit 4-6324 - EKM.9999.0001.0007 - EMC.000163237; Exhibit 4-6326 - CTH.3715.0001.0401 - Online Compliance Interventions Meeting Minutes 20042015; Exhibit 4-6327 - CTH.3002.0008.0165_R - Online Compliance Intervention Meeting Draft Minutes-Action Items 20 Apr 2015 [DLM=For-Official-Use-Only]; Exhibit 4-6328 - CTH.3002.0008.0166 - Online Compliance Interventions Action Item Register 20042015; Exhibit 4-6329 - CTH.3715.0001.0636_R - PAYG Pilot Stakeholder Meeting_Minutes 21042015 v0 1; Exhibit 4-6330 - CTH.3023.0004.8451_R - PAYG Online Compliance Intervention Detailed Requirements Document - Signed.
62 Exhibit 4-5577 - CTH.3023.0021.7097_R - FW- Proposed PAYG process [DLM=For-Official-Use-Only]; Exhibit 4-6334 - CTH.3023.0004.6562_R - FW- Online Compliance- PAYG matching [DLM=For-Official-Use-Only]; Exhibit 4-6331 - CTH.3027.0004.9343_R - RE- Proposed PAYG process [DLM=For-Official-Use-Only]; Exhibit 4-6322 - CTH.3715.0001.4283_R - FW- Proposed PAYG process [DLM=For-Official-Use-Only]; Exhibit 4-6376 - CTH.3023.0021.7101_R - FW- Proposed PAYG process [DLM=For-Official-Use-Only].
63 Exhibit 4-6322 - CTH.3715.0001.4283_R - FW- Proposed PAYG process [DLM=For-Official-Use-Only]; Exhibit 4-6331 - CTH.3027.0004.9343_R - RE- Proposed PAYG process [DLM=For-Official-Use-Only].
64 Exhibit 4-6321 - EKM.9999.0001.0006_R - NTG-0212 - statement of Emma Kate McGuirk - 23 Feb 2023, para 20; Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4252: line 32].
65 Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4257: lines 9-13].
66 Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4257: lines 9-13].
67 Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4260: lines 12-14]..
68 Exhibit 4-6376 - CTH.3023.0021.7101_R - FW- Proposed PAYG process [DLM=For-Official-Use-Only]; Exhibit 4-6376A - EKM.9999.0001.0011_R - Undeliverable- Proposed PAYG process [DLM=For-Official-Use-Only].
69 Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4276: lines 34-38].
70 Exhibit 3-4854A - DSS.5001.0001.3994_R - MS16-000130 DHS Compliance Activity.
71 Exhibit 3-4854A - DSS.5001.0001.3994_R - MS16-000130 DHS Compliance Activity [p 1 of 10].
72 Exhibit 4-5697 - CTH.2004.0005.2164_R - FW- MS16-000130 - WIP version (2) (3) [SEC=UNCLASSIFIED]; Exhibit 4-5698 - CTH.2004.0005.2166_R - Covering email; Exhibit 4-5699 - CTH.2004.0005.2168_R - Min sub; Exhibit 4-5700 - CTH.2004.0005.2171 - Attachment A.

73 Exhibit 4-7942 - DSS.8500.0001.1186_R - FW- Information on DHS compliance - assurance for Minister Porter [DLM=For-Official-Use-Only]; Exhibit 4-7943 - DSS.8500.0001.1188 - DSS Response for Minister Porter; Exhibit 4-7937 - DSS.5105.0001.7121_R - RE- Follow up to MB15-000996 [SEC=UNCLASSIFIED]; Exhibit 4-7938 - DSS.5123.0001.0269_R - MS16-000130 - WIP version (2) (3) [SEC=UNCLASSIFIED]; Exhibit 4-7939 - DSS.5123.0001.0270_R - MS16-000130 - WIP version (2) (3).
74 Exhibit 8942; Exhibit 4-5639 - DSS.5023.0001.6194 - Minutes Payments Forum Meeting 31.
75 Exhibit 8945; Exhibit 4-5638 - CTH.3023.0003.5070_R - Digital Compliance Intervention_V1 2.
76 Transcript, Scott Britton, 23 February 2023 [P-3722: line 26 – P-3723: line2].
77 Exhibit 8945; Exhibit 4-5638 - CTH.3023.0003.5070_R - Digital Compliance Intervention_V1 2.
78 Transcript, Serena Wilson, 23 February 2023 [P-3656 line 25 – P-3657 line 13].
79 Transcript P- 4835 lines 20 – 22; Transcript P-4261 lines 22, and 45 to 46.
80 Transcript P-4836 lines 27-30.
81 Transcript P-4836 lines 30-34.
82 Transcript P-4262 lines 5 to 6 and line 17.
83 P-4849 lines 4 to 15.
84 Transcript, Serena Wilson, 9 November 2022 [p 813: line 38]; Transcript, Emma-Kate McGuirk, 2 November 2022 [p 281: lines 17-29]; Transcript, Emma-Kate McGuirk, 2 March 2023 [p 3676: lines 1-6].
85 Exhibit 1-0141 - DSS.5029.0001.0031 - Ombo meeting notes & Scott meeting notes, p .0032 (underlining in original); Transcript, Emma-Kate McGuirk, 2 November 2022 [p 278: lines 1-10, p 279: lines 4-15].
86 Transcript, Emma-Kate McGuirk, 2 March 2023 [p 3675: lines 34-46].
87 Exhibit 1-0141 - DSS.5029.0001.0031 - Ombo meeting notes & Scott meeting notes [p 4].
88 Exhibit 1-0141 - DSS.5029.0001.0031 - Ombo meeting notes & Scott meeting notes [p 4].
89 Exhibit 4-5731 - SWI.9999.0001.0006_R - Robodebt Royal Commission - Further Supplementary Statement of Serena Judith Wilson - 21 Feb 23 [para 23]; Exhibit 1-0138 - EKM.9999.0001.0002_R - 20221021 NTG-0027 Statement of Emma Kate McGuirk (signed) 22006293(46180806.1) [para 28].
90 Exhibit 1-0067 - APU.9999.0001.0001_R - 1002411563_1_20221021 Statement of Anne Pulford re NTG-028 [para 54-57].
91 Exhibit 1-0067 - APU.9999.0001.0001_R - 1002411563_1_20221021 Statement of Anne Pulford re NTG-028 [para 57].
92 Transcript, Emma-Kate McGuirk, 2 November 2022 [p 283: lines 18-20].
93 Transcript, Anne Pulford, 2 November 2022 [p 232: line 10].
94 Exhibit 1-0080 - DSS.8001.0001.0376_R - Smoothing income re debt calculation [DLM=Sensitive-Legal].
95 Transcript, Anne Pulford, 2 November 2022 [p 239: lines 41-44].
96 Exhibit 3-3611 - DSS.5113.0001.0206 - PaI input - Social Security Stream - Action Register week of 23 January ... (2).
97 Exhibit 3-3611 - DSS.5113.0001.0206 - PaI input - Social Security Stream - Action Register week of 23 January ... (2); Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4243: line 26 – p 4244: line 11].
98 Exhibit 3-3609 - DSS.5113.0001.0204_R - PaI input - Social Security Stream - Action Register [SEC=PROTECTED, DLM=Sensitive-Cabinet]; Exhibit 3-3611 - DSS.5113.0001.0206 - PaI input - Social Security Stream - Action Register week of 23 January ... (2); Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4243: line 39 – p 4244: line 18]. Mr Knox was Acting Director (EL 2), Payment Integrity and Debt Strategy Section, Payments Policy Branch, Social Security Division in place of Mr Hurman who was on leave (see Exhibit 1-0138 - EKM.9999.0001.0002_R - 20221021 NTG-0027 Statement of Emma Kate McGuirk (signed) 22006293(46180806.1) [para 38(b)]. His acting role involved coordination of meetings and collation of information (see Transcript, Serena Wilson, 23 February 2023 [p 3667: lines 32-45]).
99 Exhibit 4-6354 - CTH.3001.0033.4395_R - Walk through the New Online Compliance System [SEC=UNCLASSIFIED]; Exhibit 1-0138 - EKM.9999.0001.0002_R - 20221021 NTG-0027 Statement of Emma Kate McGuirk (signed) 22006293(46180806.1) [para 25-27]; Exhibit 1-0145 - DSS.5035.0001.0001 - Notes from 1501017 and 180117 meetings [p 3].
100 Transcript, Emma-Kate McGuirk, 2 November 2022 [p 282: lines 29-34].
101 Exhibit 1-0081 - DSS.8001.0001.1293_R - Advice please [DLM=Sensitive-Legal].
102 Exhibit 1-0084 - DSS.8001.0001.1736_R - FW- Advice please [DLM=Sensitive-Legal].
103 Exhibit 1-0146 - DSS.5035.0001.0004_R - RE- Advice please [DLM=Sensitive-Legal].
104 Exhibit 1-0143 - DSS.5031.0001.0096_R - FW- Advice please [DLM=Sensitive-Legal].
105 Exhibit 1-0144 - DSS.5031.0001.0100_R - FW- Advice please [DLM=Sensitive-Legal].
106 Exhibit 1-0140 - DSS.5018.0001.9396_R - FW- Advice please [DLM=Sensitive-Legal].
107 Exhibit 2-2108 - DSS.5031.0001.0106_R - FW- Advice please [DLM=Sensitive-Legal].
108 Transcript, Anne Pulford, 2 November 2022 [p 246: line 38].
109 Transcript, Anne Pulford, 2 November 2022 [p 247: line 4].

110 Transcript, Anne Pulford, 2 November 2022 [p 247: line 4].
111 Transcript, Anne Pulford, 2 November 2022 [p 247: line 24].
112 Transcript, Anne Pulford, 2 November 2022 [p 247: lines 28-31]. A point Ms Pulford restated in her oral evidence: Transcript, Anne Pulford, 2 November 2022 [p 251: lines 33-37].
113 Exhibit 3-3636 - DSS.5018.0002.4233_R - RE- URGENT ACTION- Due Wednesday, 22 February 2017- Request for meeting and-or documents [SEC=UNCLASSIFIED] [p 3-4].
114 Exhibit 3-3636 - DSS.5018.0002.4233_R - RE- URGENT ACTION- Due Wednesday, 22 February 2017- Request for meeting and-or documents [SEC=UNCLASSIFIED] [p 2].
115 Exhibit 3-3636 - DSS.5018.0002.4233_R - RE- URGENT ACTION- Due Wednesday, 22 February 2017- Request for meeting and-or documents [SEC=UNCLASSIFIED] [p 2].
116 Exhibit 3636, DSS.5018.0002.4233_R; Transcript P-2449 lines 4 to 6.
117 Exhibit 3637, DSS.5113.0001.0596_R; Exhibit 3613, DSS.5113.0001.0600_R; Exhibit 3638, DSS.5113.0001.0602_R.
118 Exhibit 82, DSS.8001.0001.3303_R.
119 Exhibit 1-0082 - DSS.8001.0001.3303_R - RE- URGENT ACTION- Due Wednesday, 22 February 2017- Request for meeting and-or documents [SEC=UNCLASSIFIED].
120 Exhibit 2-1372 - DSS.5023.0002.2781_R - FW URGENT ACTION Due Wednesday, 22 February 2017 Request for meeting andor documents [SEC=UNCLASSIFIED].
121 Exhibit 2-1372 - DSS.5023.0002.2781_R - FW URGENT ACTION Due Wednesday, 22 February 2017 Request for meeting andor documents [SEC=UNCLASSIFIED].
122 Exhibit 3-3639 - DSS.5113.0001.0588_R - FW- URGENT ACTION- Due Wednesday, 22 February 2017- Request for meeting and-or documents [SEC=UNCLASSIFIED].
123 Transcript, Robert Hurman, 25 January 2023 [p 2442: line 26 – p 2443: line 32].
124 Exhibit 2-1377 - DSS.5051.0001.0052_R - Ombudsman [SEC=UNCLASSIFIED]; Exhibit 2-1377 - DSS.5051.0001.0053 - 2.01702231441301E+16.
125 Exhibit 2-1379 - DSS.5051.0001.0072_R - RE Ombudsman [SEC=UNCLASSIFIED].
126 Exhibit 3-3642 - DSS.5051.0001.0068_R - Request for meeting and-or documents [SEC=UNCLASSIFIED]; Exhibit 2-1380 - DSS.5005.0001.0530_R - RE Request for meeting andor documents [SEC=UNCLASSIFIED].
127 Exhibit 3-3643 - DSS.5051.0001.0070 - Ombudsmans request for advice - 23 Feb 2017 - Cleared.
128 Transcript, Robert Hurman, 25 January 2023 [p 2432: line 45].
129 Transcript, Russell De Burgh, 25 January 2023 [p 2465: lines 41-44].
130 Transcript, Russell De Burgh, 25 January 2023 [p 2465: line 46 – p 2466: line 17].
131 Transcript, Russell De Burgh, 25 January 2023 [p 2466: lines 19-29].
132 Transcript, Serena Wilson, 23 February 2023 [p 3676: line 38 – p 3677: line 3].
133 Transcript, Serena Wilson, 23 February 2023 [p 3678: line 11].
134 Exhibit 3-3646 - DSS.5051.0001.0121_R - 0.6 Minister Brief#2.
135 Exhibit 3-3652 - DSS.5051.0001.0191_R - FW- Request for information-documents [SEC=UNCLASSIFIED].
136 136 Exhibit 1-0132 - CTH.3007.0020.0538_R - ADVICE- Issue relating to Recovery Fee and PAYG Online Intervention
137 Exhibit 1388, DSS.5051.0001.0146_R.
138 Exhibit 112, DSS.8001.0001.3405_R.
139 Exhibit 2-1395 - DSS.5005.0001.0534_R - Request for information-documents [SEC=UNCLASSIFIED].
140 Exhibit 4-5607; Exhibit 2-1396 - CTH.3023.0006.8897 - Combined 2014 and 2017 advice.
141 Exhibit 3647, DSS.5051.0001.0174_R; Exhibit 3648, DSS.5051.0001.0187; Exhibit 3646, DSS.5051.0001.0121_R.
142 Exhibit 1390, DSS.5026.0001.0004_R.
143 Exhibit 3657, DSS.5031.0001.0062_R; Exhibit 3658, DSS.5031.0001.0076.
144 Exhibit 2151A, DSS.5045.0001.0004_R.
145 Exhibit 1393, DSS.5023.0002.2547_R.
146 Exhibit 1393, DSS.5023.0002.2557; Exhibit 3663, DSS.5023.0002.2560_R; Exhibit 1395, DSS.5005.0001.0534_R.
147 Exhibit 1-1213 - SWI.9999.0001.0005_R - Supplementary statement for Serena Wilson (Final signed) [para 49].
148 Transcript P-2468 line 35 to P-2469 line 1.
149 Exhibit 2-1390 - DSS.5026.0001.0004_R - RE Request for informationdocuments [SEC=UNCLASSIFIED].
150 Transcript. Russel De Burgh, 25 January 2023 [p 2471: line 39].
151 Transcript. Russel De Burgh, 25 January 2023 [p 2473: line 32].
152 Transcript, Cath Halbert, 9 December 2022 [p 1469: line 9].
153 Transcript, Cath Halbert, 9 December 2022 [p 1469: lines 9-10].
154 Transcript, Cath Halbert, 9 December 2022 [p 1469: line 5].
155 Transcript, Cath Halbert, 9 December 2022 [p 1469: lines 26-27].
156 Transcript, Cath Halbert, 9 December 2022 [p 1469: lines 26-27]. The transcript records “comments” where “documents” should appear.

157 Transcript, Cath Halbert, 9 December 2022 [p 1470: lines 7-9].
158 DSS.5023.0002.2547 (Exhibit 1393); DSS.5023.0002.2550 (Exhibit 3662).
159 Exhibit 1-0132 - CTH.3007.0020.0538_R - ADVICE- Issue relating to Recovery Fee and PAYG Online Intervention
160 Transcript, Cath Halbert, 9 December 2022 [p 1452: lines 39-40].
161 Transcript, Cath Halbert, 9 December 2022 [p 1468: line 8].
162 Exhibit 3-3665 - DSS.5086.0001.1110_R - RE- Issue re brief [DLM=For-Official-Use-Only].
163 Exhibit 3-3668 - CTH.3827.0001.0909 - Combined 2014 and 2017 advice.
164 Exhibit 3-3665 - DSS.5086.0001.1110_R - RE- Issue re brief [DLM=For-Official-Use-Only].
165 Exhibit 4-5599; Exhibit 2-1402 - CTH.2004.0009.8539_R - FW- Issue re brief [DLM=For-Official-Use-Only].
166 Exhibit 1-0003; Exhibit 1-0090 - DSS.5006.0001.2713_R - [D17 226681] Legal to Emmakate - advice re using smoothed tax data as last resort to raise debt Advice please.
167 Transcript, Annette Musolino, 30 January 2023 [p 2670 – p 2671].
168 Transcript, Annette Musolino, 30 January 2023 [p 2621 – p 2622].
169 Exhibit 4-5615; Exhibit 2-1315 - CTH.1000.0006.9906_R - RE- Online compliance investigation - section 8 questions [SEC=UNCLASSIFIED].
170 By no later than 30 January 2017: Exhibit 2-1325 - CTH.3007.0004.4949_R - FW- Outline of OCI Own Motion investigation report (A444638) [DLM=For-Official-Use-Only].
171 Exhibit 3-3670 - DSS.5003.0001.0944_R - PR30039311_MC17-004721 (NFA) - Online Compliance Intervention system - PM Brief - Letter to PM OCI; Exhibit 3-3671 - DSS.5003.0001.0945_R - MC17-004721 Letter to the Prime Minister.
172 Exhibit 4-7961 - DSS.8500.0001.1198_R - FW- Ombudsman draft report - opportunity to comment [SEC=UNCLASSIFIED]; Exhibit 4-7962 - DSS.8500.0001.1200_R - Appendix A and B; Exhibit 4-7963 - DSS.8500.0001.1215_R - 20170310 - s 8(5) letter to DSS (A480911); Exhibit 4-7964 - DSS.8500.0001.1217_R - Report-Centrelink's automated debt raising and recovery-March 2017 (A447388).
173 This was a "set of online resources that [DSS]…maintained to assist decision-makers in [DHS]" and "the overarching authority…of translating both the Social Security Act and the Social Security Administration Act into a somewhat more accessible form" – See: Transcript, Serena Wilson, 9 November 2022 [p 760: lines 12-19].
174 Exhibit 4-7963 - DSS.8500.0001.1215_R - 20170310 - s 8(5) letter to DSS (A480911).
175 Exhibit 3-3682 - DSS.5113.0001.0218_R - FOR REVIEW DSS Response- Ombudsman draft report - opportunity to comment [SEC=UNCLASSIFIED]; Exhibit 3-3683 - DSS.5113.0001.0219_R - DSS Response to Ombudsman Draft Report on DHS OCI system March 2017; Exhibit 3-3688 - DSS.5113.0001.0066_R - DSS Response to Ombudsman Draft Report on DHS OCI system March 2017; Exhibit 3-3707 - DSS.5113.0001.0460_R - RE- FOR REVIEW DSS Response- Ombudsman draft report - opportunity to comment [SEC=UNCLASSIFIED]; Exhibit 3-3707 - DSS.5113.0001.0460_R - RE- FOR REVIEW DSS Response- Ombudsman draft report - opportunity to comment [SEC=UNCLASSIFIED]; Exhibit 3-3724 - DSS.5113.0001.0139_R - REVISED- FW- FOR DHS Comment- DSS Draft Response to Ombudsman draft report on DHS OCI system [SEC=UNCLASSIFIED]; Exhibit 3-3725 - DSS.5113.0001.0140_R - DSS Draft Response to Ombudsman Draft Report on DHS OCI system March 2017.
176 Exhibit 3-3736 - DSS.5051.0001.0386_R - FW- Draft own motion report - DHS-Centrelink's automated debt raising and recovery [DLM=For-Official-Use-Only]; Exhibit 3-3737 - DSS.5051.0001.0388_R - Draft report -DHS-Centrelink's automated debt raising and recovery-28 March 2017; Exhibit 3-3738 - DSS.5051.0001.0555_R - FW- Draft own motion report - DHS-Centrelink's automated debt raising and recovery-Appendices C and D [DLM=For-Official-Use-Only]; Exhibit 3-3739 - DSS.5051.0001.0556 - Draft report -Appendices C and D-DHS-Centrelink's automated debt raising and recovery-28 March 2017; Exhibit 3-3740 - DSS.5051.0001.0337_R - FW- Draft own motion report - DHS-Centrelink's automated debt raising and recovery-Appendices E, F and G [DLM=For-Official-Use-Only]; Exhibit 3-3741 - DSS.5051.0001.0338 - Draft report -Appendices E to G-DHS-Centrelink's automated debt raising and recovery-28 March 2017.
177 Exhibit 3-3742 - DSS.5113.0001.0057_R - FW- Revised Ombudsman Response- RE- Mark up of sections re Debt Recovery fee [DLM=Sensitive-Legal]; Exhibit 3-3743 - DSS.5113.0001.0059_R - DSS Draft Response to Ombudsman Draft Report on DHS OCI system 27 March 2017; Exhibit 3-3744 - DSS.5113.0001.0062_R - RE- Revised Ombudsman Response- RE- Mark up of sections re Debt Recovery fee [DLM=Sensitive-Legal]; Exhibit 3-3745 - DSS.5113.0001.0480_R - FW- RESPONSE FOR CLEARANCE- Draft own motion report - DHS-Centrelink's automated debt raising and recovery [DLM=For-Official-Use-Only]; Exhibit 3-3746 - DSS.5113.0001.0482_R - Draft report -DHS-Centrelink's automated debt raising and recovery-28 March 2017; Exhibit 3-3747 - DSS.5113.0001.0529_R - DSS Draft Response to Ombudsman Draft Report on DHS OCI system 30 March 2017; Exhibit 3-3748 - DSS.5113.0001.0534_R - RESPONSE FOR CLEARANCE- Draft own motion report - DHS-Centrelink's automated debt raising and recovery [DLM=For-Official-Use-Only]; Exhibit 3-3749 - DSS.5113.0001.0536_R - TRACKED CHANGES DSS Draft Response to Ombudsman Draft Report on DHS OCI system 30 March 2017; Exhibit 3-3750 - DSS.5113.0001.0539_R - DSS Draft Response to Ombudsman Draft

Report on DHS OCI system 30 March; Exhibit 3-3751 - DSS.5113.0001.0541_R - Draft report -DHS-Centrelink's automated debt raising and recovery-28 Ma; Exhibit 3-3752 - DSS.5113.0001.0200_R - TRACKED CHANGES DSS Draft Response to Ombudsman Draft Report on DHS OCI system 30 March 2017 (2) [SEC=UNCLASSIFIED]; Exhibit 3-3753 - DSS.5113.0001.0201_R - TRACKED CHANGES DSS Draft Response to Ombudsman Draft Report on DHS OCI system 30 March 2017 (2); Exhibit 3-3754 - DSS.5113.0001.0473_R - FOR REF- COPIES OF DOCS- Secretary Minute - Response to Ombudsman Draft Report on DHS OCI System ... (2) [SEC=UNCLASSIFIED]; Exhibit 3-3755 - DSS.5113.0001.0474_R - TRACKED CHANGES DSS Draft Response to Ombudsman Draft Report on DHS OCI system 30 March 2017 (2); Exhibit 3-3756 - DSS.5113.0001.0477 - Clarifications to be provides to Ombudsman's office.

178 Exhibit 3-3761 - DSS.5038.0001.0017_R - DSS Response to Ombudsman - DHS Online Compliance system.
179 Exhibit 3-3767 - DSS.5003.0001.0715_R - Updated DSS Response to Ombudsmans Report on DHS OCI System.
180 Exhibit 3-3767 - DSS.5003.0001.0715_R - Updated DSS Response to Ombudsmans Report on DHS OCI System.
181 CTH.3044.0003.7539, Exhibit 4744.
182 Transcript, Finn Pratt, 10 November 2022 [p 841: lines 10-14].
183 Transcript, Finn Pratt, 10 November 2022 [p 844: lines 38-40].
184 Transcript, Finn Pratt, 10 November 2022 [p 846: lines 36-46].
185 Transcript, Finn Pratt, 10 November 2022 [p 846: lines 28-36].
186 Transcript, Finn Pratt, 10 November 2022 [p 841: lines 20-30].
187 Transcript, Finn Pratt, 10 November 2022 [p 844: lines 36-45]; Transcript, Finn Pratt, 10 November 2022 [p 848: lines 22-35]; Transcript, Finn Pratt, 10 November 2022 [p 896: lines 12-33]; Exhibit 1-1223 – FPR.9999.0001.0001_R – 20221018 Statement of Finn Pratt dated 18 October 2022(46125371.1) [para 47.1-47.2].
188 Exhibit 3-4554 – CTH.9999.0001.0107_R – Response to NTG-0144 [para 95].
189 Transcript, Finn Pratt, 10 November 2022 [p 891: line 40].
190 Transcript, Finn Pratt, 10 November 2022 [p 892: line 45 – p 893: line 12].
191 Transcript, Finn Pratt, 10 November 2022 [p 897: line 7].
192 Exhibit 4-7131 - RGL.9999.0001.0003_R - 20230222 NTG-0204 - Signed statement of Richard Glenn (Amended) (47241269.1) [para 36-40].
193 Exhibit 2-1325 - CTH.3007.0004.4949_R - FW- Outline of OCI Own Motion investigation report (A444638) [DLM=For-Official-Use-Only].
194 This is considered in detail in the Ombudsman chapter of this report.
195 Exhibit 3-4744 - CTH.3044.0003.7539 - 4.3 Ombudsman Report-Centrelinks automated debt raising and recovery system April 2017 [para 2.28].
196 Louise Macleod, Statement (22 February 2023) (LMA.9999.0001.0008) [99]; Transcript, Louise Macleod, 8 March 2023 [p4730: line 35-p4731: line 7].
197 Exhibit 3-4744 - CTH.3044.0003.7539 - 4.3 Ombudsman Report-Centrelinks automated debt raising and recovery system April 2017 [para 2.28].
198 Transcript, Finn Pratt, 10 November 2022 [p 891: line 40].
199 Exhibit 3-4744 - CTH.3044.0003.7539 - 4.3 Ombudsman Report-Centrelinks automated debt raising and recovery system April 2017 [p 1].
200 Exhibit 3-4744 - CTH.3044.0003.7539 - 4.3 Ombudsman Report-Centrelinks automated debt raising and recovery system April 2017 [p 7].
201 Exhibit 4-7306 - CTH.3098.0011.5024_R - 170410 Minister for Human Services - Media Release - Ombudsman's Report on OCI.
202 Transcript, Alan Tudge, 1 February 2023 [p 2982: lines 1-3].
203 Transcript, Alan Tudge, 1 February 2023 [p 2920: line 22 – p 2921: line 8, p 2929: lines 34-43].
204 Transcript, Alan Tudge, 1 February 2023 [p 2927: lines 22-42, p 2929: lines 24-32, p 2956: lines 4-11]. See the Commission's findings with respect to Mr Tudge's knowledge at [insert section] above.
205 Exhibit 3-4744 - CTH.3044.0003.7539 - 4.3 Ombudsman Report-Centrelinks automated debt raising and recovery system April 2017 [p 39: para 2.12]; [p 40: para 2.22].
206 Exhibit 3-4744 - CTH.3044.0003.7539 - 4.3 Ombudsman Report-Centrelinks automated debt raising and recovery system April 2017 [p 39: para 2.12]; [p 40: para 2.22].
207 Exhibit 4-7306 - CTH.3098.0011.5024_R - 170410 Minister for Human Services - Media Release - Ombudsman's Report on OCI; Exhibit 2-3108 - ACS.9999.0001.0274_R - 2017.06.23 Letter from Minister Tudge re Compliance Integrity; Exhibit 3-4735 - CTH.3005.0006.1617_R - MB17-000572 Ag Dep Sec signed brief with attachments for progression to the Minister, p 10; Exhibit 3-4404 - CTH.3001.0041.6363_R - RE- Media and Social Media commentary re- Online Compliance System - Monday 10 April 2017 [SEC=UNCLASSIFIED], p 13; Exhibit 3-4405 - CTH.2009.0009.7133_R - RE- FOR OK- Media response -InnovationAus(DenhamRE- FOR OK- Media response -Innovations(DenhamSadler) - OCI [SEC=UNCLASSIFIED]; Exhibit 2-1657 - CTH.3001.0047.3955_R - Fwd- For

info- Ministerial response - The Canberra Times (Noel Towell) - Senate Committee Report [DLM=For-Official-Use-Only]; Exhibit 9447 - CTH.3001.0047.3151 - 2017-06-21 - media release (update 5.40am) - DHS Senate Inquiry response + with MO.docx; Transcript, Jason McNamara, 5 December 2022 [p 1077: line 39, p 1078: line 40].

208 Exhibit 9487 - CTH.3004.0008.5297_R - Re: For clearance: Media enquiry - ABC (Ange Laviopierre) - extension of automated debt recovery system [DLM=For-Official-Use-Only]; Exhibit 3-4430 - CTH.3004.0008.3450_R - RE- For approval- Media response - The Canberra Times (Doug Dingwall) and The Guardian (Paul Karp and ChristopherKnaus) - Online compliance [SEC=UNCLASSIFIED]; Exhibit 3-4482 - CTH.3004.0010.6168_R - RE- For urgent clearance - Response to The Age - OCI [DLM=For-Official-Use-Only]; Exhibit 3-4482 - CTH.3004.0010.6168_R - RE- For urgent clearance - Response to The Age - OCI [DLM=For-Official-Use-Only]. See Exhibit 4-7248 - LMA.1000.0001.3436_R - FW- OCI [SEC=UNCLASSIFIED] referring to Fairfax media on 5 April 2018 quoted Hank Jongen as stating that the Ombudsman's independent review found the online compliance system 'met all legislative requirements and accurately calculated debts when the required information was entered' and Exhibit 3-4482 - CTH.3004.0010.6168_R - RE- For urgent clearance - Response to The Age - OCI [DLM=For-Official-Use-Only].

209 Exhibit 3-4744 - CTH.3044.0003.7539 - 4.3 Ombudsman Report-Centrelinks automated debt raising and recovery system April 2017 [para 1.8-1.11].

210 Exhibit 3-4744 - CTH.3044.0003.7539 - 4.3 Ombudsman Report-Centrelinks automated debt raising and recovery system April 2017 [p 39: para 2.12], [p 40: para 2.22].

211 Exhibit 9487 - CTH.3004.0008.5297_R - Re: For clearance: Media enquiry - ABC (Ange Laviopierre) - extension of automated debt recovery system [DLM=For-Official-Use-Only]; Exhibit 3-4430 - CTH.3004.0008.3450_R - RE- For approval- Media response - The Canberra Times (Doug Dingwall) and The Guardian (Paul Karp and ChristopherKnaus) - Online compliance [SEC=UNCLASSIFIED]; Exhibit 3-4482 - CTH.3004.0010.6168_R - RE- For urgent clearance - Response to The Age - OCI [DLM=For-Official-Use-Only]; Exhibit 3-4482 - CTH.3004.0010.6168_R - RE- For urgent clearance - Response to The Age - OCI [DLM=For-Official-Use-Only]. See Exhibit 4-7248 - LMA.1000.0001.3436_R - FW- OCI [SEC=UNCLASSIFIED] referring to Fairfax media on 5 April 2018 quoted Hank Jongen as stating that the Ombudsman's independent review found the online compliance system 'met all legislative requirements and accurately calculated debts when the required information was entered' and Exhibit 3-4482 - CTH.3004.0010.6168_R - RE- For urgent clearance - Response to The Age - OCI [DLM=For-Official-Use-Only].

212 Exhibit 4-7147 - LMA.1000.0001.2996_R - Report - Centrelink's automated debt raising and recovery system - April 2017 copy.

213 Australian National Audit Office, 2016-17 Management of Selected Fraud Prevention and Compliance Budget Measures (Report, 28 February 2017) <https://www.anao.gov.au/sites/default/files/ANAO_Report_2016-2017_41a.pdf>.

214 Australian National Audit Office, 2016-17 Management of Selected Fraud Prevention and Compliance Budget Measures (Report, 28 February 2017) [p 49: para 4.16] <https://www.anao.gov.au/sites/default/files/ANAO_Report_2016-2017_41a.pdf>.

215 report.pdf

216 The Committee referred to this as "One Touch Payroll", though it came to be implemented as Single Touch Payroll.

217 Exhibit 4-6724 - MTU.9999.0001.0001_R - SIGNED - Statement of The Hon Malcolm Bligh Turnbull AC - 20.02.2023 [p 10].

218 Exhibit 3-4699 - CTH.3051.0015.6301_R - RE- Process for constit inquires - IMPORTANT [SEC=UNCLASSIFIED].

219 Exhibit 3-4701 - CTH.3094.0003.0072_R - DTA work on compliance project [DLM=For-Official-Use-Only].

220 Exhibit 3-4701 - CTH.3094.0003.0072_R - DTA work on compliance project [DLM=For-Official-Use-Only].

221 Exhibit 3-4701 - CTH.3094.0003.0072_R - DTA work on compliance project [DLM=For-Official-Use-Only].

222 Exhibit 3-4701 - CTH.3094.0003.0072_R - DTA work on compliance project [DLM=For-Official-Use-Only].

223 Exhibit 8965 - DTA.9999.0001.0001_R - 20230327 DTA Statement (signed) 22006293(47541626.1), para 32-33; Exhibit 8971 - DTA.0001.0004.7083 - 7 Feb 2017 - Employment income solution_V1.8.

224 Exhibit 8965 - DTA.9999.0001.0001_R - 20230327 DTA Statement (signed) 22006293(47541626.1), para 33; Exhibit 8970 - DTA.0001.0004.7080_R - Fwd- Employment Income Confirmation [SEC=UNOFFICIAL].

225 DTA.9999.0001.0001_R, Statement of Lucy Poole dated 27 March 2023, [33]; DTA.0001.0005.5375_R, Exhibit 8972.

226 Exhibit 8965 - DTA.9999.0001.0001_R - 20230327 DTA Statement (signed) 22006293(47541626.1), para 33; Exhibit 8972 - DTA.0001.0005.5375_R - Re- Employment Income Confirmation [SEC=UNOFFICIAL].

227 Exhibit 8965 - DTA.9999.0001.0001_R - 20230327 DTA Statement (signed) 22006293(47541626.1) [p 10: para 51].

228 Exhibit 2-1796 - CTH.3001.0034.2245_R - RE- Data61 [DLM=For-Official-Use-Only].

229 Exhibit 2-1796 - CTH.3001.0034.2245_R - RE- Data61 [DLM=For-Official-Use-Only].
230 Exhibit 8584 - CSI.0001.0001.0056_R - Data61 - Contract - Consulting Services Agreement - 2017010187 - Department~man Services - DHS - Review of algorithms - Chelle Nic Raghnaill - R-9797-1 (1).
231 Exhibit 8583 - CSI.9999.0001.0002_R - NTG-0171 - Statement.
232 Exhibit 8585 - CSI.0001.0001.0695_R - Data61 DHS Draft Report 02022017.
233 Exhibit 8586 - CSI.0001.0001.1309_R - Final_OCI V4.03 20170210.
234 Exhibit 8583, CSI.9999.0001.0002_R [p .0002_0001].
235 Exhibit 3-4762 - CTH.3004.0003.4471_R - FW- Data61 Observations [DLM=Sensitive] [p 1].
236 Exhibit 3-4762 - CTH.3004.0003.4471_R - FW- Data61 Observations [DLM=Sensitive] [p 1].
237 Exhibit 8583 - CSI.9999.0001.0002_R - NTG-0171 - Statement.
238 Exhibit 8590 - CSI.0001.0001.1174_R - Data Pack comments from DHS [SEC=UNCLASSIFIED].
239 Exhibit 8591 - CSI.0001.0001.1197_R - Re- draft email to matthew.
240 Exhibit 4-6610 - TWE.9999.0001.0002_R - 20230223 T Weber – Statement [para 15].
241 Exhibit 3-4769 - PWC.1007.0016.0005_R - Fwd- Business process improvement [SEC=UNCLASSIFIED]; Exhibit 3-3820 - PWC.1007.1001.0008_R - Business Process Improvement proposal; Exhibit 2-1664 - PWC.1007.1001.0009_R - PwC - Centrelink business process improvement_final; Exhibit 3-3821 - PWC.1007.1001.0032_R - RE- word version of draft proposal [SEC=UNCLASSIFIED]; Exhibit 3-3822 - PWC.1007.1001.0033_R - PwC - DHS compliance and fraud activities business process improvement_final_draft KF; Exhibit 3-3823 - PWC.1007.1001.0045_R - RE- word version of draft proposal [SEC=UNCLASSIFIED]; Exhibit 3-3824 - PWC.1007.1001.0047_R - PwC - Centrelink business process improvement_updated_draft_08022017; Exhibit 3-3825 - PWC.1007.1001.0057_R - RE- word version of draft proposal [SEC=UNCLASSIFIED]; Exhibit 3-3826 - PWC.1007.1001.0059_R - PwC - Centrelink business process improvement_updated_ draft_08022017; Exhibit 3-3827 - PWC.1007.1001.0086_R - PwC proposal [SEC=UNCLASSIFIED]; Exhibit 3-3828 - PWC.1007.1001.0087_R - PwC - Centrelink business process improvement_final_10022017; Exhibit 3-3817 - PWC.9999.0001.0005_R - Supplementary Statement of S West Robodebt Scheme_final - 6 December 2022 [paras 1-19].
242 Exhibit 2-1638 - CTH.3001.0035.6372_R - Sec annot brief BPI CustComp 090217.
243 Exhibit 2-1634 - PWC.1007.0001.0001_R - 1. 20170213 - DHS Business process improvement review - Engagement letter.
244 Exhibit 2-1635 - PWC.1007.0001.0013_R - 1. 20170214 - DHS Business process improvement review - Work order.
245 Exhibit 2-1634 - PWC.1007.0001.0001_R - 1. 20170213 - DHS Business process improvement review - Engagement letter.
246 Exhibit 4-6616 - PWC.1007.1001.1076 - 170307 DHS BPI project - Project Plan - v1.0.
247 Exhibit 2-1634 - PWC.1007.0001.0001_R - 1. 20170213 - DHS Business process improvement review - Engagement letter.
248 Exhibit 2-1634 - PWC.1007.0001.0001_R - 1. 20170213 - DHS Business process improvement review - Engagement letter [p 4].
249 Exhibit 3-3892 - PWC.1007.0004.3072 - DHS Legislative Review Work Plan.
250 Exhibit 9994 - PWC.1007.1003.3470 - Re: Top article The Guardian today - Centrelink inquiry told 'income averaging' creating incorrect welfare debts. PwC's review of the online compliance program involved comparisons to the Manual Program, rather than what had been in place prior to the Scheme's commencement.
251 Exhibit 9994 - PWC.1007.1003.3470 - Re: Top article The Guardian today - Centrelink inquiry told 'income averaging' creating incorrect welfare debts.
252 Exhibit 3-3816 - PWC.9999.0001.0004_R - Statement of Shane Michael West_30 November_2022_final [p 3].
253 Exhibit 3-3872 - PWC.1007.0004.2601 - 170309 Overview of Hypotheses - DRAFT - v0.2 JP.
254 Exhibit 3-4771 - PWC.1007.0015.0007 - 170310 Meeting 22 Notes - Project Sponsor Update Meeting, Jason McNamara.
255 Exhibit 9995 - PWC.1007.1003.2466 - DHS
256 Exhibit 4-6765 - PWC.1007.1008.0516_R - Re- Conversation with Kristen tonight.
257 Exhibit 4-6765 - PWC.1007.1008.0516_R - Re- Conversation with Kristen tonight.
258 Exhibit 4-6618 - PWC.1007.1003.3123_R - Preparing for the report- next steps.
259 Exhibit 9133 - PWC.1007.1012.7189_R - DHS BPI Report Outline; Exhibit 9134 - PWC.1007.1012.7190 – 170316 DHS BPI Final Report v0.01_JP.docx.
260 Exhibit 4-6618 – PWC.1007.1003.3123_R – Preparing for the report- next steps.
261 Exhibit 4-6618 – PWC.1007.1003.3123_R – Preparing for the report- next steps.
262 Exhibit 4-6619 – PWC.1007.1008.0685_R – Word or Google Docs-.
263 Exhibit 4-6622 – CTH.3007.0005.3093_R – RE- Proposed SES engagement [SEC=UNCLASSIFIED].

264 Exhibit 3-3894 – PWC.1007.1003.3467_R – Documentation for tomorrow's SES Workshops.
265 Exhibit 3-3895 – PWC.1007.1003.3468 – 170405 Insights from Current State Assessment – DRAFT – v0.2.
266 Exhibit 3-3896 – PWC.1007.1003.3469 – 170405 Priorities and Recommendations Overview – DRAFT – v0.2.
267 Exhibit 3-3890 – PWC.1007.1003.3244_R – DHS BPI update; Exhibit 9134 – PWC.1007.1012.7190 – 170316 DHS BPI Final Report v0.01_JP.docx.
268 Exhibit 4-6612 – FVH.9999.0001.0002_R – 20230223 – Statement of Frank van Hagen – 23 February 2023(61408577.1) [para 38].
269 Exhibit 3-3895 - PWC.1007.1003.3468 - 170405 Insights from Current State Assessment - DRAFT - v0.2.
270 Transcript, Frank van Hagen, 3 March 2023 [p 4345: line 19 – p 4347: line 13].
271 Transcript, Frank van Hagen, 3 March 2023 [p 4347: lines 15-19].
272 Transcript, Frank van Hagen, 3 March 2023 [p 4347: line 21 – p 4348: line 8].
273 Exhibit 4-6612 - FVH.9999.0001.0002_R - 20230223 - Statement of Frank van Hagen - 23 February 2023(61408577.1) [para 16].
274 Exhibit 4-6624 - PWC.1007.1026.0468 - RAW notes from meetings with Malisa and Jason.
275 Exhibit 4-6614 - TBO.9999.0001.0001_R - RC - Statement of Thai Bowe dated 22 February 2023 [p 6: para 40]; Exhibit 4-6612 - FVH.9999.0001.0002_R - 20230223 - Statement of Frank van Hagen - 23 February 2023(61408577.1) [p 4: para 17].
276 Exhibit 4-6620 - PWC.1007.1003.3143_R - Draft Report outline; Exhibit 4-6621 - PWC.1007.1003.3144 - 170316 DHS BPI Final Report v0.01_JP; Exhibit 4-6630 - PWC.1007.1013.4707 - 170410 DHS BPI Final Report v0.03_JP.
277 Exhibit 4-6652 - PWC.1007.1013.8856 - 170420 DHS BPI Implementation Strategy v0.14_JP; Exhibit 4-6659 - PWC.1007.1003.3896 - 170502 DHS BPI Implementation Strategy v0.22.
278 Exhibit 4-6632 - PWC.1007.1013.6440_R - Budget measure issues; Exhibit 4-6651 - PWC.1007.1013.8855_R - DHS report (or not report); Exhibit 4-6660 - PWC.1007.1003.4865_R - Talking points for meeting with Jason tomorrow; Exhibit 4-6662 - PWC.1007.1003.4993_R - DHS -report.
279 Exhibit 4-6651 - PWC.1007.1013.8855_R - DHS report (or not report); Exhibit 4-6652 - PWC.1007.1013.8856 - 170420 DHS BPI Implementation Strategy v0.14_JP.
280 Exhibit 3-4622 - ATU.9999.0001.0048_R - The Hon Alan Tudge MP - Statement of Hon Alan Tudge MP (20 January 2023 - Replacement) [REDACTED] [p 24: paras 110 – 111].
281 Exhibit 4-6612 - FVH.9999.0001.0002_R - 20230223 - Statement of Frank van Hagen - 23 February 2023(61408577.1) [para 16].
282 Exhibit 4-6625 - PWC.1007.1013.4901_R - Wednesday presentation.
283 Exhibit 4-6627 - PWC.1007.1013.4904 - DHS Business Process Review, Strategy and Plan - REQUESTED NARRATIVE; Exhibit 4-6628 - PWC.1007.1013.4910 - DHS Business Process Review, Strategy and Plan - REVISED NARRATIVE.
284 Exhibit 4-6629 - PWC.1007.1013.4706_R - Draft DHS report for review.
285 Exhibit 9182 - PWC.1007.1013.6226_R - Re: For your review: final draft presentation.
286 Exhibit 4-6639 - PWC.1007.1013.6883_R - Updated Draft Presentation; Exhibit 4-6641 - PWC.1007.1013.7052_R - Re- Updated presentation; Exhibit 4-6645 - PWC.1007.1013.7098_R - Re- Revised presentation for your review.
287 Exhibit 4-6614 - TBO.9999.0001.0001_R - RC - Statement of Thai Bowe dated 22 February 2023 [para 65, 71]; Exhibit 4-6612 - FVH.9999.0001.0002_R - 20230223 - Statement of Frank van Hagen - 23 February 2023(61408577.1) [para 44]; Exhibit 4-6650 - PWC.1007.1003.3723_R - DHS robo.
288 Exhibit 4-6646 - PWC.1007.1013.7802_R - Re- revised slides and notes for Malisa [SEC=UNCLASSIFIED].
289 Exhibit 3-3895 - PWC.1007.1003.3468 - 170405 Insights from Current State Assessment - DRAFT - v0.2.
290 Exhibit 3-3896 - PWC.1007.1003.3469 - 170405 Priorities and Recommendations Overview - DRAFT - v0.2.
291 Exhibit 4-6614 - TBO.9999.0001.0001_R - RC - Statement of Thai Bowe dated 22 February 2023 [paras 59, 61, 65-66].
292 Exhibit 4-6656 - PWC.1007.0002.0038_R - 1. 20170428_Invoice37033779_DHS.
293 Exhibit 4-6657 - PWC.1007.1003.3866_R - Re- Catch up prior to pipeline RE- DHS.
294 The word 'orientation' is used in the email. Mr Weber clarified in his statement to the Commission that this was a typographical error, and that the correct word was 'presentation'. See Exhibit 4-6610 - TWE.9999.0001.0002_R - 20230223 T Weber – Statement [para 103].
295 Exhibit 4-6657 - PWC.1007.1003.3866_R - Re- Catch up prior to pipeline RE- DHS.
296 Exhibit 9289 - PWC.1007.1001.1643 - 9.30am Kathryn/Malisa/Jason//Minister/MO Staff/PwC Officials re: compliance process improvement review [SEC=UNCLASSIFIED]; Exhibit 9999 - PWC.1007.1001.1646 - 10.00am Kathryn/Malisa/Jason/PwC Officials re: compliance process improvement review [SEC=UNCLASSIFIED].
297 Exhibit 9289 - PWC.1007.1001.1643 - 9.30am Kathryn/Malisa/Jason//Minister/MO Staff/PwC Officials re: compliance process improvement review [SEC=UNCLASSIFIED]; Exhibit 9293 - PWC.1007.1014.6101_R - Re: Meeting with the Secretary tomorrow.
298 The presentation was emailed to DHS on 11 May 2017 (see: Exhibit 9998 - PWC.1007.1001.1648 - Re: could you send me a non-pdf version of the slide deck [SEC=UNCLASSIFIED] but did not reach DHS that day because of

an email issue. It was re-sent and reached DHS on 12 May 2017 (see: Exhibit 9294 - PWC.1007.1001.1650, Re: An email message with encrypted content has been quarantined; Exhibit 9295 - PWC.1007.1001.1652 170511 Presentation on Implementation Strategy - DRAFT.pptx; Exhibit 4-6612 - FVH.9999.0001.0002_R - 20230223 - Statement of Frank van Hagen - 23 February 2023(61408577.1) [para 99].

299 Exhibit 4-6661 - PWC.1007.1001.1783_R - 8.00am Kathryn-Malisa-Jason-PwC Officials-Minister re-Minister Briefing on Compliance Process Improvement Review [SEC=UNCLASSIFIED]; Exhibit 3-4773 - PWC.1007.1003.5348 - 170509 Presentation on Implementation Strategy - DRAFT - v1.41.

300 Exhibit 4-6789 - JMN.9999.0001.0013_R - 20230214 Second Statement of Jason McNamara (NTG-0181), para 33(f), Annexure A; Exhibit 2-1625 - CTH.4700.0001.2303_R - MB17-489 Minister signed brief; Exhibit 3-4773 - PWC.1007.1003.5348 - 170509 Presentation on Implementation Strategy - DRAFT - v1.41.

301 Exhibit 3-3900 - PWC.1007.1003.4116_R - Draft Implementation Strategy; Exhibit 3-3901 - PWC.1007.1003.4117 - 170504 DHS Integrity Modernisation Implementation Strategy - DRAFT - v0.25.

302 Exhibit 3-3900 - PWC.1007.1003.4116_R - Draft Implementation Strategy; Exhibit 3-3901 - PWC.1007.1003.4117 - 170504 DHS Integrity Modernisation Implementation Strategy - DRAFT - v0.25.

303 Transcript, Frank van Hagen, 3 March 2023 [p 4356: lines 4-10].

304 Exhibit 9307 - PWC.1007.1008.1392 - Fw: Invoice.

305 Exhibit 4-6664 - PWC.1007.1003.5483_R - DHS update.

306 Exhibit 4-6614 - TBO.9999.0001.0001_R - RC - Statement of Thai Bowe dated 22 February 2023 [para 49].

307 Exhibit 4-6665 - PWC.1007.1001.1825_R - PwC Invoice; Exhibit 4-6666 - PWC.1007.1001.1826_R - Tax Invoice Number AT37047704_DHS_20170607.

308 Exhibit 4-6656 - PWC.1007.0002.0038_R - 1. 20170428_Invoice37033779_DHS; Exhibit 4-6666 - PWC.1007.1001.1826_R - Tax Invoice Number NAT37047704_DHS_20170607.

309 Exhibit 4-6610 - TWE.9999.0001.0002_R - 20230223 T Weber – Statement [para 60-61]; Exhibit 4-6612 - FVH.9999.0001.0002_R - 20230223 - Statement of Frank van Hagen - 23 February 2023(61408577.1) [para 65]; Exhibit 4-6614 - TBO.9999.0001.0001_R - RC - Statement of Thai Bowe dated 22 February 2023 [para 88].

310 Exhibit 4-6612 - FVH.9999.0001.0002_R - 20230223 - Statement of Frank van Hagen - 23 February 2023(61408577.1) [para 66]; Exhibit 4-6614 - TBO.9999.0001.0001_R - RC - Statement of Thai Bowe dated 22 February 2023 [para 89].

311 Exhibit 4-6610 - TWE.9999.0001.0002_R - 20230223 T Weber – Statement [para 46]; Exhibit 4-6614 - TBO.9999.0001.0001_R - RC - Statement of Thai Bowe dated 22 February 2023 [para 19-21].

312 Exhibit 2-1634 - PWC.1007.0001.0001_R - 1. 20170213 - DHS Business process improvement review - Engagement letter.

313 Exhibit 2-1634 - PWC.1007.0001.0001_R - 1. 20170213 - DHS Business process improvement review - Engagement letter.

314 Exhibit 4-6610 - TWE.9999.0001.0002_R - 20230223 T Weber – Statement [para 37].

315 The presentation referred to the need for the implementation approach to "be adjusted to enhance the current solution", "further enhancements to the online solution and supporting data analytics capability" and "improvements required to address issues with: use of data; customer experience; and service capacity." The word "redesign" is not used in the presentation.

316 Transcript, Frank van Hagen, 3 March 2023 [p 4347: line 21 – p 4348: line 8].

317 Transcript, Frank van Hagen, 3 March 2023 [p 4347: lines 15-19].

318 Exhibit 3-4775 - PWC.1007.1003.5090_R - 170530 DHS Integrity Modernisation Implementation Strategy - DRAFT - v1.0 [p 55-56].

319 Exhibit 3-4775 - PWC.1007.1003.5090_R - 170530 DHS Integrity Modernisation Implementation Strategy - DRAFT - v1.0 [p 54].

320 PWC.1007.1003.5090_R, Exhibit 4775, at .5107.

321 PWC.1007.1003.5090_R, Exhibit 4775, at .5106.

322 PWC.1007.1003.5090_R, Exhibit 4775, at .5121.

323 PWC.1007.1003.5090_R, Exhibit 4775, at .5121.

324 PWC.1007.1003.5090_R, Exhibit 4775, at .5121.

325 Exhibit 3-4775 - PWC.1007.1003.5090_R - 170530 DHS Integrity Modernisation Implementation Strategy - DRAFT - v1.0 [p 19].

326 Exhibit 3-4775 - PWC.1007.1003.5090_R - 170530 DHS Integrity Modernisation Implementation Strategy - DRAFT - v1.0 [p 19].

327 Exhibit 3-4775 - PWC.1007.1003.5090_R - 170530 DHS Integrity Modernisation Implementation Strategy - DRAFT - v1.0 [p 23]

328 Exhibit 3-4775 - PWC.1007.1003.5090_R - 170530 DHS Integrity Modernisation Implementation Strategy - DRAFT - v1.0 [p 23].

329 Exhibit 3-4775 - PWC.1007.1003.5090_R - 170530 DHS Integrity Modernisation Implementation Strategy -

DRAFT - v1.0 [p 23].

330 Exhibit 3-4775 - PWC.1007.1003.5090_R - 170530 DHS Integrity Modernisation Implementation Strategy - DRAFT - v1.0 [p 23].

331 Exhibit 3-4775 - PWC.1007.1003.5090_R - 170530 DHS Integrity Modernisation Implementation Strategy - DRAFT - v1.0 [p 23].

332 Exhibit 3-4775 - PWC.1007.1003.5090_R - 170530 DHS Integrity Modernisation Implementation Strategy - DRAFT - v1.0 [p 23].

333 Transcript, Jason McNamara, 6 March 2023 [p 4487: lines 18-20].

334 Transcript, Jason McNamara, 6 March 2023 [p 4489: lines 14-20].

335 Exhibit 4-6612 - FVH.9999.0001.0002_R - 20230223 - Statement of Frank van Hagen - 23 February 2023(61408577.1) [para 21]; Exhibit 4-6614 - TBO.9999.0001.0001_R - RC - Statement of Thai Bowe dated 22 February 2023 [para 22]; Exhibit 4-6610 - TWE.9999.0001.0002_R - 20230223 T Weber – Statement [para 28]; Transcript, Shane West, Day 31 [p 3137: lines 35-43, p 3138: lines 1-9, p 3145: lines 19-30].

336 Exhibit 4-6610 - TWE.9999.0001.0002_R - 20230223 T Weber – Statement [para 44-45].

337 Exhibit 4-6614 - TBO.9999.0001.0001_R - RC - Statement of Thai Bowe dated 22 February 2023 [para 54].

338 Exhibit 4-6612 - FVH.9999.0001.0002_R - 20230223 - Statement of Frank van Hagen - 23 February 2023(61408577.1), para 13-17; Transcript, Frank van Hagen,3 March 2023 [p 4341: lines 1-14].

339 Transcript, Shane West, 3 February 2023 [p 3140: lines 13-33, p 3145: line 42 – p 3146: line 15, p 3152: lines 5-6, p 3157: lines 19-37].

340 It is noted that Mr West gave evidence at an earlier point in time than the other PwC witnesses, and some of the documents referred to had not been produced at the time of Mr West's giving evidence.

341 Exhibit 4-6612 - FVH.9999.0001.0002_R - 20230223 - Statement of Frank van Hagen - 23 February 2023(61408577.1), para 53-58.

342 Exhibit 4-6612 - FVH.9999.0001.0002_R - 20230223 - Statement of Frank van Hagen - 23 February 2023(61408577.1), para 66(a).

343 Transcript, Shane West, 3 February 2023 [p 3131: lines 18-27].

344 Exhibit 4-6618 - PWC.1007.1003.3123_R - Preparing for the report- next steps.

345 Exhibit 4-6619 - PWC.1007.1008.0685_R - Word or Google Docs-.

346 Exhibit 4-6612 - FVH.9999.0001.0002_R - 20230223 - Statement of Frank van Hagen - 23 February 2023(61408577.1), para 16-17; Exhibit 4-6624 - PWC.1007.1026.0468 - RAW notes from meetings with Malisa and Jason.

347 Exhibit 4-6612 - FVH.9999.0001.0002_R - 20230223 - Statement of Frank van Hagen - 23 February 2023(61408577.1) [para 16].

348 Exhibit 4-6624 - PWC.1007.1026.0468 - RAW notes from meetings with Malisa and Jason.

349 Exhibit 4-6632 - PWC.1007.1013.6440_R - Budget measure issues; Exhibit 4-6651 - PWC.1007.1013.8855_R - DHS report (or not report); Exhibit 4-6663 - PWC.1007.1003.5015_R - Re- DHS - phase 2 proposal and JBT.

350 Exhibit 4-6620 - PWC.1007.1003.3143_R - Draft Report outline; Exhibit 4-6621 - PWC.1007.1003.3144 - 170316 DHS BPI Final Report v0.01_JP; Exhibit 4-6630 - PWC.1007.1013.4707 - 170410 DHS BPI Final Report v0.03_JP.

351 Exhibit 4-6652 - PWC.1007.1013.8856 - 170420 DHS BPI Implementation Strategy v0.14_JP, Exhibit 4-6659 - PWC.1007.1003.3896 - 170502 DHS BPI Implementation Strategy v0.22, Exhibit 4-6614 - TBO.9999.0001.0001_R - RC - Statement of Thai Bowe dated 22 February 2023 [para 40]; Exhibit 4-6612 - FVH.9999.0001.0002_R - 20230223 - Statement of Frank van Hagen - 23 February 2023(61408577.1) [para 17].

352 Exhibit 3-3900 - PWC.1007.1003.4116_R - Draft Implementation Strategy; Exhibit 3-3901 - PWC.1007.1003.4117 - 170504 DHS Integrity Modernisation Implementation Strategy - DRAFT - v0.25.

353 Exhibit 4-6660 - PWC.1007.1003.4865_R - Talking points for meeting with Jason tomorrow; 20230223 - Statement of Frank van Hagen - 23 February 2023(61408577.1) [para 23].

354 Exhibit 4-6660 - PWC.1007.1003.4865_R - Talking points for meeting with Jason tomorrow.

355 Exhibit 3-4774 - PWC.1007.1003.5089_R - For review- DHS Implementation Strategy; Exhibit 3-4775 - PWC.1007.1003.5090_R - 170530 DHS Integrity Modernisation Implementation Strategy - DRAFT - v1.0.

356 Exhibit 4-6614 - TBO.9999.0001.0001_R - RC - Statement of Thai Bowe dated 22 February 2023 [para 42].

357 Exhibit 3-4774 - PWC.1007.1003.5089_R - For review- DHS Implementation Strategy; Exhibit 3-4775 - PWC.1007.1003.5090_R - 170530 DHS Integrity Modernisation Implementation Strategy - DRAFT - v1.0.

358 Transcript, Jason McNamara, 6 March 2023 [P-4485: lines 16-21].

359 Transcript, Frank van Hagen, 3 March 2023 [P-4356: lines 4-10].

360 Transcript, Thai Bowe, 3 March 2023 [P-4364: lines 36-47].

361 Exhibit 6612, FVH.9999.0001.0002_R, [24]; Transcript of evidence of Frank van Hagen, Day 41 (03/03/2023), P-4357 lines 4-41.

362 Statement of Thai Bowe dated **, [31]; Transcript of evidence of Thai Bowe, Day 41 (03/03/2023), P-4364 lines 14-34.

363 Statement of Thai Bowe dated **, [29]-[31].
364 Transcript, Terry Weber, 3 March 2023, P-4380, lines 5-6.
365 Exhibit 2-2703 - CTH.3008.0015.7237_R2 - RE- PAYG DEBT CASES - AAT Review numbers and update [DLM=Sensitive-Legal].
366 Exhibit 4-6713 - CTH.4750.0026.0014_R - FW- PAYG AND THE AAT 1 DECISION IN THE MATTER OF [REDACTED] [DLM=Sensitive-Legal]; Exhibit 4-6714 - CTH.4750.0026.0018_R - PAYG PROJECT - APPEAL PROCESS AND TRIBUNAL FEEDBACK.
367 Exhibit 4-6714 - CTH.4750.0026.0018_R - PAYG PROJECT - APPEAL PROCESS AND TRIBUNAL FEEDBACK, p 3.
368 Provan and Secretary, Department of Families, Community Services and Indigenous Affairs [2006] AATA 831; Transcript, Brian Sparkes, 3 March 2023 [p 4395: lines 25-31].
369 Halls and Secretary, Department of Education, Employment and Workplace Relations [2012] AATA 802 at [15].
370 For example: Exhibit 3-3477 - CTH.0032.0002.0053_R - 2016 S103893 (the 15 March 2017 decision), Exhibit 3-3468 - CTH.0032.0002.0026_R - 2016 M103550 (the 24 March 2017 decision) and Exhibit 3-3490 - CTH.3043.0039.6755_R - 2016-S104394 (the 20 April 2017 decision).
371 In respect of the 15 March 2017 decision [para 8], the 24 March 2017 decision [para 17] and the 20 April 2017 decision [para 17].
372 Exhibit 3-3482 - CTH.3761.0001.0223_R - 1569 [REDACTED].
373 Transcript, Brian Sparkes, 3 March 2023 [p 4390: lines 42-46].
374 Exhibit 3-3483 - CTH.0010.0001.0020_R - 17.03.23-[REDACTED]-AAT1GeneralAFAR.
375 Exhibit 3-3544 - CTH.2001.0006.1296_R - FW- SDRT weekending 14 April 2017 [DLM=For-Official-Use-Only].
376 Exhibit 3-3544 - CTH.2001.0006.1296_R - FW- SDRT weekending 14 April 2017 [DLM=For-Official-Use-Only].
377 Transcript, Damien Brazel, 25 January 2023 [p 2379 – p 2380].
378 Transcript, Elizabeth Bundy, 25 January 2023 [p 2346: lines 5-6].
379 Exhibit 3-3478 – CTH.3044.0003.3783_R – RE- A third 'Set Aside' OCI case at AAT1 Level (now there's a fourth!) [DLM=Sensitive].
380 Transcript, Damien Brazel, 25 January 2023 [p 2350 – p 2352].
381 Exhibit 3-3544 - CTH.2001.0006.1296_R - FW- SDRT weekending 14 April 2017 [DLM=For-Official-Use-Only] .
382 Transcript, Damien Brazel, 25 January 2023 [p 2348: lines 29-39].
383 Exhibit 3-3542 - CTH.2001.0006.1353_R - FW- SDRT weekending 14 April 2017 [DLM=For-Official-Use-Only]; Exhibit 3-3543 - CTH.2001.0006.1354 - AAT Case Summaries.
384 Exhibit 3-4303A - CTH.3007.0006.1940_R - OCI debt cases [DLM=Sensitive-Legal]; Exhibit 3-3460 - CTH.3007.0006.1949_R - AAT Case Summaries LSD comments.
385 Ms Musolino accepted in her oral evidence that she also read that decision: Transcript, Annette Musolino, 31 January 2023 [p 2770: lines 10-15].
386 Exhibit 3-4303A - CTH.3007.0006.1940_R - OCI debt cases [DLM=Sensitive-Legal]; Exhibit 3-3460 - CTH.3007.0006.1949_R - AAT Case Summaries LSD comments.
387 In respect of the 15 March 2017 decision, [para 8], the 24 March 2017 decision, [para 17] and the 20 April 2017 decision, [para 17].
388 Transcript, Annette Musolino, 31 January 2023 [p 2740: lines 20-25].
389 Exhibit 3-4829 - CTH.3007.0006.6333_R - RE- AIAL National Administrative Law Conference [SEC=UNCLASSIFIED].
390 Exhibit 3-4829 - CTH.3007.0006.6333_R - RE- AIAL National Administrative Law Conference [SEC=UNCLASSIFIED].
391 Exhibit 3-4830 - CTH.3005.0005.6029_R - RE- RESPONSE REQ'D BY 4PM TODAY - AIAL conference [DLM=For-Official-Use-Only].
392 Exhibit 3-4139 - IAL.9999.0001.0002_R - Registration Database New 2017.
393 Exhibit 3-4140 - IAL.9999.0001.0001 - AIAL Conference Program FINAL.
394 Transcript, Annette Musolino, 1 March 2023 [p 4149].
395 Exhibit 3-4219 - DSS.5059.0001.0171 - Tab 15 - Peter Hanks, Administrative Law and Welfare Rights, AIAL Forum, Exhibit 3-4303 - CTH.3007.0006.7291 - AIAL Conference.
396 Exhibit 3-4219 - DSS.5059.0001.0171 - Tab 15 - Peter Hanks, Administrative Law and Welfare Rights, AIAL Forum, p 13. Almost identical words are used in Mr Daly's notes of the conference: Exhibit 3-4303 - CTH.3007.0006.7291 - AIAL Conference.
397 Exhibit 3-4141 - CTH.3007.0006.7286_R - Re- AIAL conference.
398 Exhibit 2-1742 - CTH.3007.0006.8430_R - RE- Australian Institute of Administrative Law Conference - OCI sessions [DLM=For-Official-Use-Only], Exhibit 3-4833 - CTH.3009.0023.8761_R - Sec noted A Musolino advice of 200717 re ALC Conf.
399 Exhibit 3-4833 - CTH.3009.0023.8761_R - Sec noted A Musolino advice of 200717 re ALC Conf.
400 Exhibit 4-5396 - CTH.3035.0017.4397_R - MASTERTON Madeleine v Secretary, DHS VID73-2019.

401 Transcript, Annette Musolino, 1 March 2023 [p 4152].
402 Transcript, Annette Musolino, 1 March 2023 [p 4156 – p 4158].
403 Transcript, Annette Musolino, 1 March 2023 [p 4152: lines 15-45].
404 Transcript, Maris Stipnieks, 3 February 2023 [p 3235: lines 20-30].
405 Transcript, Maris Stipnieks, 3 February 2023 [p 3205 – p 3206, p 3229].
406 Transcript, Matthew Roser, 21 February 2023 [p 3466: lines 35-45]; Transcript, Maris Stipnieks, 3 February 2023 [p 3228: lines 19 – 45, p 3230: line 41, p 3233: line 35]; Transcript, Tim Ffrench, 22 February 2023 [p 3496: line 18, p 3499: line 34]; Transcript, Anna Fredericks, 27 January 2023 [p 2510: line 18, p 2517]. See also 19 July 2017 Programme Advice & Privacy Branch Weekly Report which included the following dot point: "Consideration of OCI related issues following AIAL conference where legislative authority for debt recovery was question in main conference lecture by Peter Hanks QC.": Exhibit 3-5099 - CTH.3024.0008.8331_R - Weekly Dot Points 26.7.17. Mr Stipnieks gave evidence that his Centrelink Team including John Barnett and Matt Daly were again considering the issue following attendance at the AIAL conference: Transcript, Maris Stipnieks, 3 February 2023 [p 3234 – p 3235]. See also Transcript, Jonathan Hutson, 6 December 2022 [p 1226: lines 11-16].
407 Transcript, Maris Stipnieks, 3 February 2023 [p 3232: line 40, p 3232: line 10].
408 Transcript, Christian Porter, 2 February 2023 [p 3099: lines 1-20].
409 Transcript, Alan Tudge, 1 February 2023 [p 2900 – p 2904].
410 Exhibit 4-6874 - KCA.9999.0001.0021_R - 20221118 NTG-0043 Statement of K Campbell, para 18; Transcript, Kathryn Campbell, 11 November 2022 [p 963: line 4-7].
411 Transcript, Renee Leon, 28 February 2023 [p 3994].
412 Transcript, Renee Leon, 28 February 2023 [p 4001]. See also Exhibit 4-6213 - CTH.3003.0001.0009_R - Incoming Secretary Brief FINAL.

Chapter 8: 2018 – the Robodebt Scheme rolls on

1 The Robodebt Scheme rolls on

In 2018 the Robodebt Scheme continued to fail to meet its proponents' expectations. The notion of an online system had failed; for the 2017-2018 financial year, when the Employment Income Confirmation (EIC) iteration of the scheme was in place, 93 per cent of PAYG reviews involved staff-assisted completion.[1] The consequence was that DHS had been forced to engage 580 temporary workers on six-month contracts and from the beginning of 2018 resorted to using a labour hire force of some 1000 workers. Meanwhile, the Scheme continued to be the subject of controversy about the accuracy of its debts and the legality of income averaging and DHS continued to rely on statements in the Ombudsman's 2017 Investigation Report as justification on both counts.

2 Michael Keenan becomes Minister for Human Services

Onto the scene came a new Minister for Human Services, the Hon Michael Keenan, who was appointed on 21 December 2017.[2] As minister, Mr Keenan was responsible for all aspects of the implementation of the Robodebt Scheme during his tenure, including the lawfulness of the actions taken by his Department under the Scheme.[2]

DHS briefed its new minister with an "Incoming Minister Brief," which included income compliance matters.[3] Notably, the Incoming Minister Brief contained this information about Robodebt:

> Data-matching, sending letters and calculating differences in income and payments has been at the core of the department's welfare compliance activities since the 1990s. In 2016—17 the department introduced an online compliance portal… The portal did not change how data-matching was undertaken or the way income was assessed and differences calculated. However, the initial rollout impacted many thousands of individuals and gave rise to unprecedented media attention, sustained political commentary and community backlash. In hindsight, this is something the department could have anticipated and mitigated to some extent.
>
> The department responded by introducing a range of enhancements to the portal in line with recommendations from the Commonwealth Ombudsman. The Ombudsman did, however, find that the system could accurately calculate debts, providing assurance that debt calculations were consistent with the previous manual process. Throughout this period the Government remained firm that people should get the correct welfare payments and that debts should be repaid…

The reference to the Commonwealth Ombudsman's findings was in fact a misquoting of a passage from the Ombudsman's report about his investigation into the Robodebt Scheme[4] (the 2017 Investigation Report) in which he made a number of recommendations designed to improve the OCI iteration of the Scheme. The Executive Summary to the 2017 Investigation Report said:

> …We examined the accuracy of debts raised under the OCI. We are satisfied the data matching process itself is unchanged. The number of instances where no debts were raised following contact with a customer (approximately 20 per cent) was consistent with DHS' previous manual debt investigation process. This figure has been incorrectly referred to as an 'error' rate. We are also satisfied that if the customer can collect their employment income information and enter it properly into the system, or provide it to DHS to enter, the OCI can accurately calculate the debt. After examination of the business rules underpinning the system, we are satisfied the debts raised by the OCI are accurate, based on the information which is available to DHS at the time the decision is made. However, if the information available to DHS is incomplete, the debt amount may be affected…

Mr Keenan was provided with the Executive Summary of the 2017 Investigation Report in a briefing pack for January meetings with the secretary and deputy secretaries of his department.[5] In evidence, Mr Keenan confirmed that he "would have read the Ombudsman's report;"[6] indeed, he said that he had placed reliance on it.[7]

If he had considered the Ombudsman's report closely, Mr Keenan would have seen that it did not at all say what was attributed to it in the Incoming Minister Brief. The Ombudsman's benign assertion that the OCI could accurately determine debts was wholly contingent upon the recipient's being able to obtain the necessary employment income information and upload it to the system. The Ombudsman gave no basis for assurance that the debt calculation process was consistent with the previous manual process. Indeed, he expressly recognised that "if the information available to DHS is incomplete, the debt amount may be affected…" In any case, the assertion in the Incoming Minister's Brief that "debt calculations [under what was now the EIC program] were consistent with previous manual processes" said nothing about the accuracy (or lawfulness) of debts raised under the Scheme. The Ombudsman certainly did not express any state of satisfaction that the use of averaging was an accurate indicator of overpayments or that it was lawful.

The Incoming Minister Brief was not the only information Mr Keenan received on his commencement in the role. In evidence, he described being advised by Craig Storen (General Manager, Customer Compliance at DHS) at an initial briefing in early January 2018 that the legal position in relation to the Scheme was "sound."[8] Mr Storen was not a lawyer.

Though the Incoming Minister Brief alluded to "unprecedented media attention, sustained political commentary and community backlash," it did not give any detail of the substance of the criticisms directed at the Scheme. Nor does it appear that anyone from his department gave Mr Keenan a frank appraisal of the issues being raised about it, particularly the live controversy about the use of averaging to determine social security entitlement and its lawfulness. Mr Keenan's briefing did nothing to equip him to respond adequately to the further scrutiny and questioning of the Scheme by the public, advocacy groups, media, politicians and academics which continued through early 2018 and beyond.

2.1 ACOSS raises concerns with Mr Keenan

That questioning began quite early in the minister's tenure. On 12 February 2018, Mr Keenan met with Dr Cassandra Goldie and Charmaine Crowe from the Australian Council of Social Services (ACOSS). The first item on the agenda for that meeting was "The Department of Human Services' work in the area of debt recovery, including the Online Compliance Intervention program." The agenda noted ACOSS's priority for debt recovery to be fair and pointed out that the OCI system (more accurately, the EIC) was still causing distress among those it affected. The agenda expressed ACOSS' ambition: "We and other experts in social security are keen to work with government to develop a system of debt recovery that is accurate and humane."[9] The meeting was not documented at the time, although Ms Crowe made an email note afterwards that "taskforce integrity, narrative around Centrelink debt, and ACOSS' work with DHS" were discussed. Ms Crowe noted that the minister's office had not provided data on welfare debt as promised, although she had followed up.[10]

3 The introduction of labour hire workers

During the Scheme, DHS increased its reliance on employing short-term contract ("non-ongoing") employees and in 2018 began using the services of labour hire companies to fill staffing shortfalls. Renée Leon, Secretary of DHS from September 2017, explained that the government was forced to abandon the idea that almost all the reviews in the Robodebt reviews would take place online, and had instead to put in place capacity for recipients to call and speak to a staff member.

At the same time, the government did not want to increase APS numbers for this role, so the work of departmental staff was to be undertaken by labour hire, referred to in some documentation as the "C1000" (1,000 labour hire workers).

Mr Keenan was the Minister for Human Services when labour hire staff were brought into the department to do the work of compliance officers, but he was not aware of any associated problems.[11] The department's secretary, Ms Leon, however, gave evidence of the difficulties associated with the introduction of labour hire staff. They needed training and skill development, and they were not as expert at the beginning of their roles as permanent staff. There was higher turnover among labour hire staff, because they did not have job security. Ms Leon agreed that they were unlikely, for the same reason, to feel as committed to the work as DHS employees. They would not have the "loyalty and adherence to mission" of the permanent workforce: the culture of customer service and motivation built up over time.[12] And of course, they were much less likely to raise concerns "because if they were in any way seen as difficult, then they could just not be given more shifts."[13]

Another point Ms Leon did not make, but might have, is that labour hire employees are not bound by the APS Code of Conduct.

4 Happy days

In January 2018, Mr Bowe of PwC sent an internal email setting out "DHS Robo-debt stats" for the first half of the 2017-18 financial year.[14] It was apparent that the Scheme was continuing to struggle in its achievement of both review volumes and debt amounts. Mr Bowe set out what would be necessary in order to achieve the revised volumes to which DHS had committed over the next six months, which involved completion of significantly more reviews, and raising of significantly more debt, than had been achieved in the previous six months. Mr Weber replied to Mr Bowe, thanking him for the "sobering update."

It appeared that the significant focus on remediation of the technology and processes was failing to deliver even the revised savings targets and review volumes. Attention turned to other avenues as a potential means of improving the situation. In early 2018, in discussions with Mr West, DHS expressed an interest in PwC's ability to assist DHS with "improv[ing] the productivity of DHS compliance officers" and addressing the "challenges" faced by DHS in expanding its compliance workforce.[15] DHS subsequently engaged PwC to assist with "workforce optimisation and performance." That involved assessment of the current and future requirements of the compliance division's staffing arrangements, including labour hire workers, and the development of strategies and training packages with respect to staff.[16]

PwC produced a "Perform diagnostic" document, which identified DHS' need to complete three million reviews, over the next four years.[17] It noted that "work to improve technology and processes is ongoing, but broader solutions to uplift people productivity are needed."[18] The document stated that DHS was intending to hire a significant number of additional staff, which would "doubl[e] the size of the operation in a very short space of time."[19]

PwC's suggested solution for DHS was the use of PwC's "Perform" methodology, to "uplift" productivity and increase the finalisation of compliance reviews.[20]

In April 2018, DHS engaged PwC to implement a pilot program using that methodology.[21]

Throughout 2018, PwC assisted in the redesign and management of the compliance program, which included income compliance reviews, and was now under the responsibility of the "Integrity Modernisation" Division of DHS.[22]

The work undertaken by PwC included the development of materials such as process maps and ICT documents, and of detailed case selection and filtering methodologies to allow DHS to selectively initiate compliance reviews in line with the strategies that had been developed with the assistance of PwC.[22] PwC also provided financial analysis support to DHS as part of DHS's "redefinition" of the Budget measures and the revision of anticipated savings, (discussed in further detail in a separate section of this report[24]).

PwC continued to "provide advice, analysis and recommendations" with respect to numerous aspects of DHS's compliance activities, including: management of design, implementation and governance arrangements; case selection methodologies, strategies and initiations; forecasting and review of assumptions underpinning Budget compliance measures; establishment of the Confirm and Update Past Income (CUPI) iteration of the program; and the development of data sources and management dashboards for the senior executive of DHS.[25] It was largely as Mr Weber had predicted in an email to Mr West in April 2017, where he had indicated that the PwC budget would not be a problem: "We will be there for the next 3 years and will actually take on the outsource of the data analytics functions…Happy days." [26]

5 Interest charges

Another 2018 development in the Scheme was the expansion of the scope of interest charges on debts raised under the Scheme. Again, it was something which had been decided on before Mr Keenan commenced as Minister for Human Services. In the 2015-16 MYEFO, the Government had decided to apply interest charges (which had previously applied to some recipients of student payments) to social welfare recipients to encourage them to pay their debts or enter repayment arrangements.[27] But Mr Keenan was involved in decisions about the process. He was provided with a brief dated 12 February 2018, which explained that there were two stages which would be implemented in relation to former welfare recipients whose debts were raised after the measure was introduced. In the first stage, they would get a letter telling them that a debt had been raised with an interest warning; and if, 28 days later, they had not started complying with an arrangement for repayment, an interest charge would be applied to the debt. In the second stage, anyone who ceased repaying their debt would have an interest charge letter sent and after 28 days the charge would be applied.

The remaining question was what was to be done about people who had debts before the measure was introduced and who might have no current contact details. The minister was given three options, two of which involved more complicated processes for ensuring people were contacted, but adopted a third option. That was simply to use the Department's contact address to send the interest charge letter and apply the charge if no repayment arrangement was entered, while allowing for a reversal of the decision if it turned out the contact address was wrong. The minister seems to have been unconcerned by the scope for error, issuing a media release titled "Repay debts or face interest charges." It took a strong and censorious tone towards those affected by the measure, making no exceptions:

> All those being contacted no longer receive a benefit, but previously received payments they were not entitled to and have made no effort—in some cases for over a decade—to repay what they owe.

To make it clear what type of people the Commonwealth was dealing with here, it continued:

> Some cases involve serious criminality including one person who deliberately defrauded $800,000 from the Commonwealth and is still refusing to enter into a repayment plan.

That was to be contrasted with

> the tens of thousands of former welfare recipients who are doing the right thing by repaying what they owe [who] will not have to pay interest.[28]

It does not appear, though, that the minister, or anyone in his department, turned their mind to whether the Commonwealth was doing the right thing (or even the legal thing) by demanding payment of the debts in the first place.

6 Scheme extends in time

Despite controversy about its fairness and legality as well as its failure to the turn the expected savings, the government pressed ahead with the Scheme in the May 2018 Budget, which introduced the "Social Welfare Debt Recovery" measure. It extended the scheme for the 2019-20 financial year and the two financial years following. In addition, from 1 July 2019, DHS would focus its debt recovery activities on former recipients with high value debts where they were either not in a payment arrangement or were in one, but could pay more.

7 Departure prohibition orders

On 29 June 2018, Mr Keenan approved a proposal to enable the imposition of departure prohibition orders on individuals with debts raised under the Scheme, saying, in giving his approval, "We can go harder with this measure." As the name suggests, a departure prohibition order prevents an individual against whom it is made from leaving the country. The object was, by placing pressure on those who might be affected, to make them enter debt repayment arrangements. Mr Keenan set the tone in the first sentence of his media release:

> Welfare debt dodgers are being warned they could be hit with international travel bans as part of a new push to recover hundreds of millions of dollars owed to taxpayers.

The media release continued on the same note:

> …no apologies for the tough action... many of those in our sights have known about these debts for years... The simplest way to avoid having your travel plans disrupted is to contact the Department immediately to arrange a repayment plan.[29]

The threat was an effective one, as some of the experiences described in the chapter Effects of Robodebt on individuals, illustrate. The prospect of departure prohibition orders added another layer of punitiveness to the Scheme.

8 Update to the penalty fee application

In October 2018, the Ombudsman commenced an implementation investigation into the extent to which the recommendations contained in the 2017 Ombudsman's report had been implemented by DHS, and the extent to which the intended outcomes had been achieved.[30] As part of that investigation, the Ombudsman's office sought a detailed update from the Department about the application of the 10% penalty fee.[31]

The percentage of debts to which the fee had been applied had reduced since its peak at 74% in early 2017, to approximately 37% in the period from February 2017 to October 2018.[33] However, the Department acknowledged, upon questioning by the Ombudsman, that the reduction could have occurred partly due to the Department's not beginning to process reviews in the "due date processing pool" until May 2018.[33]

The due date processing pool was a reference to a cohort of recipients who received an initial letter some time since February 2017, and: had not contacted the Department, or had contacted but had not finished the process; had reached the due date for the finalisation of their review; but the review had not yet been finalised by the Department.[34]

The fact that the Department had not begun processing that cohort of recipients until May 2018 meant that prior to that date, the majority of reviews that were being finalised involved recipients who had responded to or communicated with the Department about their review, and no penalty fee was being applied in those circumstances.[35] As the Department worked through finalising the outstanding reviews in the due date processing pool, it was likely that there would be a significant proportion of recipients in that pool who would not engage, and would subsequently have a penalty fee imposed upon them if their review resulted in a debt.[36] As recognised by the Ombudsman, and the Department, that would likely have the effect of increasing the percentage application of the penalty fee.[37]

In its final Implementation Report (published in April 2019, and discussed further below), the Ombudsman found that its 2017 recovery fee recommendation had been met, because "customers were provided access to review of recovery fees."[38] DHS had written to all recipients who had incurred a debt between 1 July 2016 and 26 May 2017, who did not already have the debt reassessed or waived. The letter had advised that recipients could ask for a review, and that a review would "also check whether any recovery fees c[ould] be removed."[39]

However, the Ombudsman considered that DHS' approach to the implementation of the recommendation had been "narrower than [the Ombudsman's] original recommendation had envisaged."[40] This was because recipients who had been affected had had to proactively ask for a review when they made contact in order for the penalty fee to be reassessed. In the Ombudsman's view, it would have been preferable for the review rights letter to have included more information about the reasons the recovery fee was applied. The Ombudsman recommended that, for recipients who incurred a recovery fee prior to 27 May 2017, DHS should explain in any debt recovery correspondence (such as account payable notices and debt outcome letters) why a recovery fee was applied, and provide options for recipients to advise of personal circumstances affecting their ability to declare income.[41]

A declaration made by the Federal Court in the Amato proceeding would spell the end of the application of the penalty fee under the Robodebt Scheme. (That proceeding is discussed in further detail below.) Throughout the life of the Scheme, its euphemistic description as a "recovery" fee did nothing to ease the additional burden that the penalty fee's imposition represented to many of those who could least afford it.

9 Questions about legality – Professor Carney's decision

Throughout 2018, Professor Terry Carney continued in different ways to oblige DHS to consider (and dodge) the question of legality.

On 7 September 2017, Professor Carney had made a decision in the AAT on similar reasoning to that of his 8 March 2017 decision, setting aside a debt based on income averaging for want of an evidentiary basis. The social security recipient who was successful in that case sought compensation for his "time, costs and stress caused by the debt decisions" which the AAT had overturned.[42] Annette Musolino sent Ms Leon an email about the case on 26 February 2018,[43] noting that it contained comments critical of the OCI process.[44] She also warned that it might attract media attention; the recipient had said that *A Current Affair* was interested.[45] Ms Leon responded by email dated 1 March 2018, asking "Did we make an error?" and requested a copy of the decision.[46]

Ms Musolino answered Ms Leon by email dated 6 March 2018, attaching a copy of Professor Carney's decision.[47] Her opinion was that DHS had not made any error; it had based its decision on the information that it had at the particular time. Ms Musolino asserted that a decision to raise a debt based on averaging was defensible and reasonable, although she provided no legal basis for saying so. Instead, she drew support from the fact that the Ombudsman (according to her) had considered the practice in his 2017 Investigation Report and "did not conclude that [it] was improper or unlawful." Despite the fact that Ms Leon seemed to be seeking legal advice in relation to the matter, Ms Musolino provided no analysis of the legal issues in the decision or reference to relevant statute law or legal principle, relying instead on the Ombudsman's failure to address the legality of income averaging in his report; which hardly amounted to authoritative legal support for it.

This was at a time when Ms Musolino was aware that DHS' own analysis in January 2017 had not identified any convincing argument in favour of income averaging and knew that DSS had conflicting advices about it in the form of the 2014 DSS legal advice and the 2017 DSS legal advice. The second supported income averaging only as a "as a last resort," which did not apply to its use in the Robodebt Scheme, where it was the default methodology for calculating debts. Ms Musolino knew that DSS had sought to rationalise its satisfaction that the practice was lawful in 2015 on the basis that DHS had provided more information about it, without either Department obtaining further legal advice.[48] She had read Professor Carney's 8 March 2017 and 7 September 2017 decisions and was aware of what Mr Hanks had said at the 2017 AIAL conference. She knew that there were substantial legal issues with respect to the lawfulness of income averaging which required consideration from both an evidentiary and legislative perspective before the question "Did we make an error?" could be properly answered.

Instead, and as she conceded in oral evidence, Ms Musolino's response to Ms Leon was "not proposed or intended to be a comprehensive advice;" rather, it "effectively summaris[ed] the legal view held at that time."[49] Ms Musolino sought to justify the response that she provided Ms Leon on the basis that her response would have been drafted by the "Program Advice Team."[50] However, that could not obviate her own responsibility as chief counsel to ensure that her advice to the secretary of her Department answered the question the secretary asked and had a proper legal basis.

Ms Leon relied upon Ms Musolino's opinion. This was early in her tenure as secretary; it was reasonable to rely on her chief counsel's advice about the implications of AAT decisions.

9.1 Questions of legality and the "best available evidence" mantra

On 4 April 2018, an article by Professor Carney, *The New Digital Future for Welfare: Debts Without Legal Proofs or Moral Authority,* was published.[51] The article made the fundamental point that income averaging provided insufficient evidence of debts alleged under the Robodebt Scheme, there being no statutory scope for substitution of a notional average fortnightly income for actual fortnightly income.[52] The article was based on the same reasoning as Professor Carney's 8 March 2017 and 7 September 2017 AAT decisions, squarely raising once again the evidentiary sufficiency of income averaging to raise debts and the consistency of the practice with social security legislation.

On the same day that Professor Carney's article was published, an article about it was published in *The Guardian* entitled "Centrelink Robodebt program accused of enforcing illegal debts."[53] This triggered an email from Ms Leon that day in which she requested "For advice please."[54] She was immediately forwarded the media response prepared by the DHS communications team, but, she said, she was actually seeking legal advice.[55]

Two DHS lawyers were in fact preparing responses to the Carney article. The first was a "commentary" on the article, the second a draft which its writer said was meant to show "the reasonableness of the department's management of OCI processes."[56] Neither addressed Professor Carney's central point, the insufficiency of averaging as evidence of a debt.[57] Instead, the commentary justified the use of income averaging on the basis that it resulted in a calculation of fortnightly income and thereby complied with the requirement that social security entitlement be based on fortnightly income (albeit the averaged income had no anchoring in reality).[58] The other, "reasonable processes" document advanced a similarly fatuous argument, that income averaging involved the department applying "the best available evidence;" overlooking the obvious point that if evidence does not actually prove what is necessary, it is of no help that it is the best available.

While it referred to other AAT decisions said to support income averaging, the commentary did not consider whether they actually contained any statements of legal principle contrary to Professor Carney's analysis. Both documents asserted that the Robodebt Scheme complied with the administrative law requirement of procedural fairness, which was not really to the point. (Giving someone a right of reply does not fix a demand wrongly made of them in the first place, or make it any the better if they do not in fact reply.) The commentary repeated the spurious argument that the Ombudsman's failure to deal with the lawfulness of income averaging in his 2017 Investigation Report constituted an endorsement of the practice. The "reasonable processes" document said that Professor Carney was mistaken in saying that the onus of proof had been transferred to the recipient. The department was just helpfully providing an online portal to help recipients to comply with their legal obligations. Unfortunately, the writer did not think a little further, to what legal obligations there were actually were for recipients to respond to the Robodebt process. The answer, contrary to the tone of the letters sent to recipients, was that there were none, but the department was effectively placing an onus on recipients to provide information or have a debt raised against them.

The Carney article attracted the Ombudsman's attention, and a meeting was arranged between representatives of the Ombudsman's office and of DHS, including Ms Musolino and the Ombudsman himself, to discuss the Carney article.[59] The week before the meeting, on 8 May 2018, Ms Musolino provided a written briefing to Ms Leon about the article and the anticipated meeting.[60] The briefing asserted that Professor Carney had "fundamentally misunderstood aspects of the OCI process." It drew on the commentary and the "reasonable processes" document the DHS legal section had prepared and provided to Ms Musolino the previous month.[61] It similarly justified income averaging on the basis that DHS was entitled to make a decision "on the best evidence available to it that time," denied any shift of onus to the recipient, and claimed that the OCI process simply provided an online mechanism to enable recipients to meet their legal obligations.

In submissions Ms Musolino's lawyers made on her behalf, it was argued that the briefing paper was not a legal advice, it was merely a statement of DHS' proposed approach to the meeting with the Ombudsman. That is difficult to reconcile with the notation "Sensitive: Legal" which appears on every page, and the fact that the document sets out the legal points Professor Carney made and professes to address them. There is no question, though, that the briefing did represent the departmental approach. As Ms Musolino acknowledged in evidence before the Commission, it advocated for the DHS position regarding averaging, instead of providing objective advice as to whether the position had a proper foundation in law.[62] That was contrary to what she also acknowledged should have been the approach taken: to provide Ms Leon with frank, candid and objective advice about the accuracy or otherwise of Professor Carney's statements about the law.[63]

The meeting with the Ombudsman took place on 17 May 2018. The following day, Ms Musolino sent an email to the Deputy Ombudsman, Jaala Hinchcliffe, setting out "the department's presentation" in the previous day's meeting.[64] The email repeated the arguments about "best available evidence" and there being no transfer of onus. In her response, Ms Hinchcliffe noted that during the meeting, DHS had conceded that averaging could lead to debts being raised for amounts greater than was owed. She asked if DHS had considered whether, to the extent they exceeded what was owed, such debts were invalid, and whether DHS had sought external legal advice on the point. Ms Musolino sent back an email dated 8 June 2018 setting out a series of arguments effectively rejecting Ms Hinchcliffe's suggestion that the inaccuracy of debts could mean they were invalid. The email did not mention relevant legislative provisions; it repeated the incantation that the department made its debt-raising decisions "on the best information available to it."[65]

At about the same time, during one of their regular monthly meetings, Ms Leon said, she sought reassurance from Ms Musolino,[66] asking more than once whether "… [we] were confident that the program was lawful?" to which Ms Musolino replied in the affirmative. On Ms Leon's account, when pressed for a basis for that confidence, Ms Musolino informed her "… that it was a long-standing principle of administrative law that a decision-maker is entitled to rely on the best available evidence at the time." People were given the opportunity to update their information. If they did, it was relied on; if they didn't, "data-matching information" was used. Ms Musolino said that she did not recall the conversation, but the "best available evidence" terminology is entirely consistent with her regular form of words in trying to provide a legal justification for income averaging as used in the Robodebt Scheme.

The expression "best evidence available," as has already been pointed out, has no particular legal status and illuminates nothing; what is necessary is the best evidence which can actually support the decision to be made. As an experienced lawyer, Ms Musolino should have known better. As she conceded in evidence before the Commission, there is no judicial authority whatsoever supporting a principle of administrative law that she represented to Ms Leon to be "long-standing."[67] However, it seems to have sufficed to convince Ms Leon, who regarded Ms Musolino as knowing more about the subject than she.[68]

Unlike Ms Campbell and Ms Golightly, Ms Leon had not been involved in the development and implementation of the Scheme. As a relatively new DHS secretary she needed, and may have welcomed, frank and candid advice about the weakness of the legal position regarding income averaging and the need to obtain independent legal advice. Ms Musolino, however, was in a difficult position. In 2017, she had represented to Sara Samios that there was no "significant legal issue" arising from the Robodebt Scheme; she had not put in place systems to ensure that legal issues arising from AAT decisions were monitored; and she had not advised DHS executives of the weakness of the DHS legal position and of the need to obtain independent legal advice. Appropriate advice to Ms Leon now would give rise to questions as to why it was not provided in 2017, with the prospect of criticism and possible discipline by her employer. Instead, Ms Musolino emphatically represented to Ms Leon that the DHS legal position in respect of income averaging was strong, when she had no reasonable basis to do so.

9.2 Mr Keenan's response to the Carney article

Professor Carney's article also attracted political attention. On 5 April 2018, Linda Burney MP, then Shadow Minister for Human Services, issued a media release concerning "illegal debt notices on innocent Australians,"[69] which made specific reference to Professor Carney's article and raised concerns as to the lawfulness of averaging to determine social security entitlement.

The Guardian article about the Carney article was provided to Mr Keenan's office,[70] and might have been expected to cause some questioning of the Scheme's legality. The office prepared talking points in response to the article and asked DHS for "advice/words" on, most relevantly, "the legality of the averaging/smoothing method."[71] The tone of Mr Keenan's email in reference to the Carney article's author may have suggested to his staff that words about legality, rather than considered legal advice about it, would suffice: "A former member of the AAT – what a lofty authority."[72]

It does not appear that the minister's office obtained legal advice from his department. DHS officers involved in preparing responses to the Guardian article and other media reporting of the Carney article did seek advice from Ms Musolino, but Maris Stipnieks, General Counsel, let them know that she was not available. However, he suggested DHS include these words in its response: "The Department of Human Services strongly refutes any claims that it has conducted its compliance activities in· a manner which is inconsistent with the legislation."[73] He did not himself hold the degree of confidence he expressed in the legality of the Scheme.[74]

9.3 The Carney article, another AAT decision and the Clayton Utz advice

The Carney article also caught the attention of DSS employees, one of them Kristin Lumley (assistant director, Payment Integrity, Payment Conditionality, Design and Policy Branch, DSS).[75] Ms Lumley had held concerns about the lawfulness of income averaging in the Robodebt Scheme since early 2017,[76] and those concerns had strengthened in April 2018 when she became aware of Professor Carney's article.[77] She had sought approval to seek external legal advice,[78] which was declined.[79]

However, by May 2018 Allyson Essex also had concerns that the process of income averaging as it was used in the Robodebt Scheme might not be lawful,[80] having become aware of the Carney article and another AAT decision made on 4 May 2018.[81] Ms Essex was the branch manager of Ms Lumley's branch,[82] but quite frequently she was acting group manager of the Welfare and Housing Group in place of Brenton Philp, and James Kemp would sometimes become acting branch manager, assuming Ms Essex' role.

The 4 May 2018 AAT decision[83] cited and relied on the reasoning in the Carney article. It set aside a debt raised against a social security recipient on the ground that it had been unlawfully raised using income averaging. The Advice on Further Administrative Review prepared by a DHS senior government lawyer stated that an appeal was "not necessarily recommended"[84] for these reasons:

> The difficulty with this case is that DHS has been using a methodology that has an continues to be subject to criticism from a number of quarters. However, to appeal the AAT1 decision would be to put that squarely into the public arena. To successfully defend the approach the various arguments mounted against the process would need to be addressed. There is otherwise a risk that the whole approach of the OCI would be undermined.

Ms Essex was aware of the 2014 and 2017 DSS legal advices about averaging, one of which indicated that averaging was not lawful and the other that it was lawful only as a "last resort."[85] The AAT decision, however, recorded that in that case an authorised review officer (ARO) had refused to consider bank statements offered as evidence, which seemed to show that averaging was not being used as a "last resort" in the Robodebt Scheme.[86] Ms Essex had concerns which were both specific - whether the way averaging was used in that case was lawful - and general, that it might not be lawful at all.

An appeal was initially lodged against the AAT decision, but was withdrawn following legal advice.[87] Ms Essex understood this to mean that DSS had effectively accepted the position taken in the AAT decision that income averaging as it was being used in the Robodebt Scheme was unlawful.[88]

Somewhere around 9 July 2018,[89] while she was Acting Group Manager of DSS's Welfare and Housing Group,[90] Ms Essex instructed that legal advice be obtained on the lawfulness of income averaging.[91] Ms Lumley gave the necessary instructions to two DSS lawyers, Anne Pulford and Anna Fredericks, on 11 July 2018.[92] With the agreement of Ms Lumley's Director, Philip Moufarrige, the law firm Clayton Utz was retained, rather than AGS. Mr Moufarrige noted, in an apprehensive tone, "the measure that this relates to is very controversial and has already been implemented …any advice will come under intense scrutiny."[93]

The advice was to be provided on 23 July 2018.[94] By that time, DSS had been notified that the Ombudsman had commenced its Implementation Investigation.[95] Clayton Utz did not quite meet the prescribed time, but it provided its advice, in draft, by email to Ms Fredericks on 14 August 2018.[96] The advice dealt with the lawfulness of income averaging in determining entitlement for youth and Newstart allowance:

> "*The Social Security Act 1991* (Cth) **(Act)**, in its present form, does not allow the Department of Social Services **(Department)**[sic] to determine a youth allowance or Newstart recipient's fortnightly income by taking an amount reported to the ATO for a person as a consequence of data matching processes and notionally attributing that amount to (or averaging that amount over) particular fortnightly." [emphasis in original]

Ms Fredericks promptly forwarded the advice to Ms Pulford and another DSS lawyer,[97] warning them in her email that

> the advice is somewhat unhelpful if the mechanism [ie averaging] is something the Department wants to continue to rely on.

One of the Clayton Utz lawyers had said that

> they might be able to rework the advice subtly if this causes catastrophic issues for us, but … there is not a lot of room for them to do so.

Ms Pulford then forwarded the advice to Ms Lumley, noting that Clayton Utz had concluded that averaging "is not supported" by the legislation,[98] and asking, "Let me know how you'd like to progress this, given the conclusion, and limited room to adjust the outcome." Ms Lumley forwarded the advice to Ms Essex on 15 August 2018, noting the comments by Ms Pulford.[99]

On 21 August 2018, Ms Essex held a meeting with her team, Mr Moufarrige, Ms Lumley, the person who had been Acting Branch Manager in her place, and Mr Kemp, who was about to move into that role,[100] in respect of the Clayton Utz advice. She told those present that she would raise the advice with the DSS deputy secretary to whom she then reported, Nathan Williamson, "when the time was right;"[101] by which she meant, she said in evidence, that she would raise it with him once she had read it and had enough facts to have a sensible conversation with him.[102]

According to Ms Essex, she discussed the Clayton Utz advice with Mr Williamson during one of their regular meetings, within a week of the meeting with her own team.[103] (One of her meetings with Mr Williamson occurred on 26 August 2018.[104]) On Ms Essex's account, Mr Williamson told her that there "was an established view that the program was legal based on the Ombudsman's consideration of the Robodebt Scheme"[105] and that while "people have said it is unlawful before. It has been found to be lawful."[106] She did not recall discussing the Scheme with Mr Williamson again.[107]

Mr Williamson gave different evidence, denying that he had made the statements Ms Essex attributed to him.[108] He recalled that he had a very brief conversation with someone in 2018 who told him that DSS getting legal advice on the online compliance program."[109] He recalled wondering why DSS was getting advice on a program DHS administered;[110] he did not recall being aware that the advice would go to the "fundamental lawfulness" of the Robodebt Scheme.[111] He had pointed out that advice should only be obtained in consultation with DHS, reflecting his concerns that any instructions to the lawyers would

otherwise be incomplete.[112] He did not become aware of the Clayton Utz advice until November 2019.[113]

There was a need for those who knew of the Clayton Utz advice to act with alacrity in respect of it. If correct, the effect of the advice was that income averaging was being unlawfully used on a massive scale against recipients of Newstart and Youth Allowance, the two categories of social security payments with which it dealt.[114] Ms Essex, seeking to explain a failure to act on it, said that she told the attendees at the 21 August 2018 meeting that they were to work with the DSS legal branch to ensure that all relevant questions had been asked and all possible issues had been explored.[115] She had asked them to discuss differences in the legal reasoning between the Carney article and the Clayton Utz advice.[116] In addition the advice was confined to two types of payment, so that raised the question whether it would apply in relation to other payment types. That might involve getting other advices, which might take months. Ms Essex did not think there was urgency, because she believed that in connection with an Estimates Variation process, DSS had taken the position, in response to a DHS proposal for additional funding for an extension of the Scheme, that it should end.[117]

As already mentioned, the Scheme was extended in the May Budget, and although it did not in 2018 meet its Budget projections, it seems most improbable that Ms Essex had any reason to believe that it would not continue in some form. The differences in reasoning between the Clayton Utz advice and the Carney article were merely that the advice's authors based their conclusions on principles of statutory interpretation, rather than legal principles relating to standards of proof[118] and procedural fairness.[119] The difference in the paths by which the different lawyers reasoned was no cause for inaction; their conclusions were the same. Moreover, it had been made clear in Ms Fredericks' email that there was unlikely to be any change of substance to the opinions expressed in the Clayton Utz advice once it was finalised. It was also clear to Ms Lumley that all relevant questions had been asked of Clayton Utz.[120] Even if some distinction could be identified between the payments the subject of the Clayton Utz advice and other social security payments, these were the bulk of the payments subject to the Scheme. In the circumstances, the puzzle is why the Clayton Utz advice was not finalised in a matter of weeks.

Other events in August made the advice highly relevant. On 20 August 2018, the Ombudsman had written recommending that DSS make publicly available guidelines for decision-makers about how their information gathering powers under s 192 of the Social Security (Administration) Act would be used.[121] The letter noted the Ombudsman's acceptance in that context that "it may be open to the Government to argue that the EIC process of 'averaging' income is legal." A response to the letter was to be provided by 18 September 2018.

The government's firm line on the legality of averaging was, there is no doubt, a factor affecting independent office-holders' investigations conducted in the public interest under a Commonwealth statute. The previous (Acting) Ombudsman, Richard Glenn, had been influenced by the representations of public servants that they were satisfied of the lawfulness of the Scheme in deciding not to comment on the legality of averaging in the 2017 Investigation Report.[122] As it turned out, the current Ombudsman would later rely on the government's maintaining its position to similarly refrain from commenting on the issue in his 2019 Investigation Report.[123] Any position that DSS might take in respect of the Clayton Utz advice was clearly material to what the Ombudsman had raised in his 20 August 2018 letter, so there was a need to settle on that position before the due date for response to it.[124] As it happened, the DSS response to the Ombudsman's letter sent in September 2018 attached draft guidelines as recommended by the Ombudsman, but said nothing about the independent legal advice in DSS' possession, which indicated that income averaging was unlawful.[125]

There was another reason to act promptly on the Clayton Utz advice. A new Minister for Social Services, Paul Fletcher, took office at the end of August 2018.[126] It might ordinarily be expected that a new minister would be informed of advice as significant in its implications as the Clayton Utz advice in his incoming ministerial brief.[127] However, that did not occur.[128]

On 11 September 2018, prompted by Ms Lumley,[129] James Kemp, who was then Acting Branch Manager,[130] raised the Clayton Utz advice with Ms Essex. Ms Essex agreed that a ministerial submission should be prepared outlining the advice and the issues that it raised.[131] Mr Kemp ceased acting in the role of

Branch Manager on 14 October 2018,[132] having given Ms Essex, who returned to the role,[133] a handover document[134] indicating that the next step in relation to the Clayton Utz advice was the preparation of a ministerial submission.[135]

Ms Essex in turn handed over the Group Manager role to Brenton Philp,[136] and claimed in evidence that she raised the Clayton Utz advice, and the fact that a ministerial submission was to be prepared, with him during the handover. In her first written statement to the Commission she described their discussion about the advice as "short" because MYEFO was looming and DSS was dealing with a number of matters at the time.[137] In her oral evidence, Ms Essex said that Mr Philp observed in respect of the Clayton Utz advice, "advice is just advice" and did not necessarily have to be followed.[138] In a supplementary statement, Ms Essex said she told Mr Philp she had a draft advice from Clayton Utz as to which she still had some questions before it was finalised, to which he responded, "Keep me in the loop."[139]

Mr Philp said he did not recall ever being informed of, discussing, or reading the Clayton Utz advice,[140] which he said he would have recalled, given its significance to the Robodebt Scheme.[141] He pointed to an email Ms Essex sent him on 28 November 2018 with the subject matter "robo debt – context," in which she recounted the Government's enthusiasm for ensuring the integrity of the welfare system and described enhancements to the Scheme, without a word of the Clayton Utz advice.[142] And he denied making the remarks about legal advice which Ms Essex attributed to him.[143] Dismissive remarks of the character Ms Essex ascribed to Mr Philp do not really seem consistent, it must be said, with a desire to be kept in the loop.

At some time, possibly in November 2018, Ms Lumley provided Ms Essex with a hard copy folder containing a chronology she had prepared, listing various legal advices related to Robodebt, and all the advices, including the Clayton Utz advice.[144]

On 11 December 2018, Ms Lumley became more concerned about the fate of the Clayton Utz advice[145] after seeing A Current Affair segment on the legality of income averaging as used in the Scheme and, in particular, the prospect that a prominent silk, Gavin Silbert QC, would challenge the Scheme in the Federal Court.[146] Alarmed, she emailed Mr Moufarrige:[147]

> I am extremely concerned that we are sitting on the legal advice. I think you should make sure that Brenton is aware of it. It will definitely end up in the Federal Court – Kristin.[148]

Mr Moufarrige forwarded Ms Lumley's email to Ms Essex on 11 December 2018.[149] She spoke to him briefly in person, telling him that the Advice was being dealt with at senior levels within the department,[150] and later that day emailed both him and Ms Lumley:

> Philip-Kristin, I am aware of both the legal advice and its contents. I am also aware of at least two external legal advices (to the Ombudsman and DHS) which come to a different (and opposite) conclusion. In formulating further advice, I am having regard to the inconsistences between the advices and the differences between the various requests for advice. I am not 'sitting on' the advice, which could have been clarified by further discussion with me. I do not think it will 'definitely end in the Federal Court.[151]

When asked in evidence what external advices she was referring to, Ms Essex said that they were "…two that Mr Williamson had mentioned…in the past," which she had not seen.[152] The Commission has found no evidence of the existence of legal advices meeting the description in the email and it is difficult to see how Ms Essex could have regard to "inconsistencies" in them if she had not seen them.

The evidence before the Commission suggests that by the time of the 11 December email, nothing was in fact being done with the Clayton Utz advice. Ms Essex said in evidence that she had discussed the advice with Ms Lumley and Mr Moufarrige around 21 December 2018, and told them that she would be comfortable with its being finalised; in fact she would have been happy to finalise it a couple of weeks earlier.[153] They did not give any equivalent recollection. But at that date, none of the further work discussed in the 21 August 2018 meeting, which Ms Essex said was necessary before the advice could be finalised,[154] had been carried out.

Ms Essex claimed that she discussed the Clayton Utz advice with Mr Philp on 17 December 2018 and provided him then with the hard copy folder containing the advice and the chronology that Ms Lumley had given her.[155] In a supplementary statement, Ms Essex said it was during this discussion that Mr Philp made the "advice is just advice" statement;[156] but that was contrary to her oral evidence that he made that statement during their handover meeting in October 2018.[157] In her supplementary statement, Ms Essex said she had informed Mr Moufarrige that she had given the Clayton Utz advice and folder to Mr Philp;[158] but Mr Moufarrige had no recall which could support that.[159] Ms Essex also said that she reminded Mr Philp of the Clayton Utz advice on 14 January 2019, after he returned from leave,[160] just before she herself ceased working at DSS.[161] Those claims, of course, are contrary to Mr Philp's evidence.

Ms Essex's former Executive Assistant gave evidence that when Ms Essex left DSS, as part of the packing up process, she (the EA) delivered half a dozen folders to Mr Philp's office. They included the hard copy folder containing the advice. She told Mr Philp that the folder contained "Robodebt and other documents."[162] She could not recall whether he told her to put it on the bookshelf or on his desk. Her statement came after Mr Philp gave evidence, but assuming it to be correct, there is no evidence he ever looked at the content of the folder or appreciated that it contained the Clayton Utz advice.

The Commission accepts the evidence of Mr Philp and Mr Williamson that they were not told about the Clayton Utz advice. There is a pattern of inconsistency and evasiveness which emerges from Ms Essex's evidence. The Commission concludes that when she emailed Mr Moufarrige and Ms Lumley on 8 December, denying that she was "sitting on" the advice, she was prevaricating; that is precisely what she was doing. She had done nothing to have the advice finalised and briefed to those who most needed to know about it: the Minister for Social Services, Mr Fletcher, the secretary, Ms Campbell, and the deputy secretary, Mr Williamson. It may be that, having been responsible for procuring an advice she must have realised would be highly problematic for Ms Campbell, Ms Essex dithered about what to do with it for months until she left the Department and it was no longer her problem.

The Clayton Utz advice was never finalised, despite the firm's invoice being paid by DSS.[163] Consistent with what appears to be the usual practice within the Australian Public Service, the DSS legal unit left it to the officers within DSS who had requested that the advice be obtained to decide what to do with it.[164] Ultimately, that was nothing. More than a year after DSS received the Clayton Utz advice in draft, the Scheme was continuing and debts were still being raised unlawfully against social security recipients on a massive scale.

10 The Check and Update Past Income program

PwC had continued to work with DHS throughout 2017 on the systems and processes involved in DHS's compliance activities, including those associated with PAYG.[165] In line with the recommendations developed by PwC at the time, while short to medium term improvements to DHS' systems and processes were implemented, there was a need for a long term solution in the form of a redesign of the online platform.[166]

In September 2017, PwC was asked, among other things, to provide advice and assist with the design and management of the "user-centric online compliance tool" to be implemented from February 2018.[167] A 'key focus' for that tool was the PAYG compliance activity, and the plan was to establish that online service in February 2018 and 'phase out' the old service, with the transition to occur over the months up to June or July 2018.[168]

By January 2018, the Compliance Modernisation Programme Board minutes record that the service was not ready for full release in February 2018.[169] The Board decided to instead release the system iteratively, over stages, or "drops."[170] Throughout 2018, a series of system enhancements was introduced, with updates to the content of letters and staff workflows, and further updates to the online system, including changes to the selection of cases for review and attempts to improve the usability of the online system.[171]

Compliance reviews within the system, which had come to be known as the Check and Update Past Income (CUPI) platform, commenced on 2 October 2018.[172]

Despite the changes that had been made to the system, the methodology of applying averaged ATO income information remained the same under CUPI as it had been under EIC (after the refinements made to that system).[173] There was still a range of circumstances in which averaging was used in CUPI. Firstly, averaging occurred where a recipient accepted the use of the ATO data in either an online or manual compliance review.[174] Secondly, where a recipient had either not responded to an initial letter, or where they had commenced, but not finalised, a review, and the due date had passed for its completion, compliance officers would make two attempts to contact a recipient by telephone prior to finalising the review.[175] Where these attempts were unsuccessful, the review would be finalised using the averaged ATO income information.[176]

Under the EIC, the percentage of recipients that were issued with an initial letter, but did not have a debt raised against them, was approximately 48 per cent. Over the EIC and CUPI iterations of the program, across the 2017/18, 2018/19 and 2019/20 financial years, the percentage rate at which averaging was used in the calculation of debts ranged between approximately 52 per cent to 66 per cent.

11 Mr Keenan's office receives more media enquiries about legality

On 22 November 2018, DHS received an enquiry from Mr Cameron Houston, a journalist from The Age, about whether DHS had "successfully defended debts generated by the robo-debt program in a court or tribunal."[177] Subsequently, an adviser from Mr Keenan's office wrote to DHS requesting information about AAT decisions, albeit with a certain slant: "are there any recent AAT decisions that back us up that we can point to?" The adviser continued:

> …Lets also get a copy of the ombudsman's report out and reference it heavily in our response. Our response should also not be shy about selling the virtues of "robodebt" It is this simple; people told the tax office one thing about their earnings and told DHS another. We contacted them and asked them to explain the discrepancy. Those who couldn't copped a debt.[178]

There is no evidence that Mr Keenan's office was provided with any information about AAT decisions in response to the request, possibly because DHS encountered some difficulty in finding any that would actually back up the debts produced by income averaging. But the statement, "It is this simple; people told the tax office one thing about their earnings and told DHS another" demonstrated either a profound misunderstanding, or a cynical misrepresentation, of the Scheme and the limitations of the evidence relied upon in the Scheme. Mr Keenan, at least, knew that for any number of reasons a discrepancy between ATO PAYG income data and social security recipients' income reports to DHS did not necessarily indicate a debt, let alone a deliberate misleading of DHS.[179] The adviser's enthusiasm for heavily referencing (and usually misquoting) the Ombudsman's report was, as is shown elsewhere in this chapter and this report, typical of DHS strategy in responding to Robodebt criticism.

12 Mr Keenan's performance as minister

During his tenure as Minister for Human Services, Mr Keenan became aware that, under the Scheme, averaging was being used to determine social security entitlement, and he knew it could produce inaccurate debts. DHS did not properly brief him, however, on the controversies associated with the lawfulness of averaging. He was told, instead, that the legal basis for the Scheme was "sound" and that the Ombudsman had endorsed the capacity of the Scheme to accurately determine debts.

In his statement, Mr Keenan asserts:[180]

> I did not regard it as my function, as someone without legal qualifications, to second- guess the views of lawyers in the public service. That was especially true in relation to the Scheme, because my understanding was that: (A) the Ombudsman had confirmed it was consistent with the legislation; (B) the same basic framework had been in place since the 1995…; (C) before my time as Minister, the latest iteration of the Scheme had gone through the Cabinet process, which meant the Commonwealth's lawyers would have had to consider its legality.

Notably, Mr Keenan's understanding of the matters described at (A) and (B) above is wrong, but it is traceable to representations made to him in DHS briefs. In evidence, Mr Keenan said it was not his practice to seek legal advice, and he had "great confidence" in what his department told him.[181] In his statement he indicated that he had "relied on the many lawyers employed by Commonwealth departments to alert [him] if there was real merit in any suggestion in the media that the government had done something illegal."[182] He assumed that DHS's recommended responses to criticisms of the Scheme in the media "had been cleared by its lawyers."[183] In his submissions, Mr Keenan made the further point that had he made requests for advice from his departmental secretary or DHS chief counsel, he would have received assurances that the Scheme was lawful (consistent with other representations they made).

That is true, but Mr Keenan did not think that at the time. Yet, while there is evidence of Mr Keenan seeking advice generally for the purposes of responding to public criticism in the media and academia, there is no evidence that he sought advice directly from the secretary or the chief counsel at DHS about the legal questions raised about the Robodebt Scheme. And ministers are not wholly dependent on the information their departments give them. Mr Keenan could, for example, have indicated that he wished to have external legal advice sought.

In submissions, Mr Keenan's representatives argued that besides the fact that his department and its senior lawyers were telling him the Scheme was lawful, it could not be concluded that he should have questioned that position, because the Solicitor-General in his Opinion given in respect of the Scheme in 2019[184] confirmed that in "key respects" the Scheme did operate lawfully, and expressed his view of the unlawfulness of income averaging as used in the Scheme at no higher level than that there was

> "a considerable risk that court would set aside a debt decision … based on inferences drawn from a comparison of the ATO PAYG information and the customer's reported earnings and an adverse inference from failure to provide information in response to appropriate correspondence in circumstances where a power exists to enable the officer to make relatively straight forward inquiries that would yield information capable of confirming or denying the correctness of the assumption that underlies the use of the ATO PAYG data."[185]

Putting it in terms of "considerable risk" showed, Mr Keenan's lawyers said, that the Solicitor-General's opinion was equivocal, and anyway it was judicially untested.

The first argument, that the Scheme was a little bit lawful, turned on the Solicitor-General's recognition in his Opinion that income averaging could be a legitimate way of identifying that a debt might exist, but not its amount, and that it could be the basis for a debt decision where there was evidence that the recipient received a consistent fortnightly income over the period in question. There is no argument with either of those points, but they do not assist here, where the use of the ATO PAYG data did not stop at identifying the existence of the debt but went on to its calculation in the absence of any other evidence. As to that, the Solicitor-General expressed the following view:

> In our opinion, apportioned ATO PAYG data cannot properly be given "decisive" weight in deciding either that a debt is due, or the amount of that debt. That is, apportioned ATO PAYG data cannot, without more, support a conclusion that a person has received benefits to which they were not entitled.[186]

The passage cited as to "considerable risk" as to what a court would do, is taken out of context from the Solicitor-General's answer on the point, which was :

> … in the absence of some evidence that a customer earned income in equal fortnightly amounts during the period that he or she received benefits, it is not open to a decision-maker to base a debt decision solely on apportioned ATO PAYG data, taken together with the customer's failure to respond to the Department's letters.[187]

That was hardly equivocal. The reason the Solicitor-General's view of the unlawfulness of income averaging as used in the Robodebt Scheme went judicially untested was that the Commonwealth Government agreed to settlement of the Amato proceedings, with relief including a declaration that an alleged debt raised against Ms Amato on the basis of averaging 'was not validly made because the information before the decision-maker acting on behalf of the Respondent was not capable of satisfying the decision-maker that a debt was owed.'[188] And of course, Mr Keenan was part of the government when it, in 2020, admitted that the practice of averaging to determine social security entitlement was unlawful.

Accordingly, the Commission does not accept Mr Keenan's submissions on this issue.

In any case, the issue is not whether in 2018 Mr Keenan should have reached any firm view either way about the lawfulness of income averaging as used in the Robodebt Scheme. It is whether, as minister, he should have recognised that there was a question that needed consideration and independent legal advice.

Apart from his general responsibility as minister for ensuring that his department acted lawfully, there are three reasons for thinking Mr Keenan should have taken action to check that the Scheme was operating in accordance with the law.

The first was the making of specific and rational criticisms of the Scheme by Professor Carney and ACOSS, sources with knowledge and expertise, and the persistence of more general media complaints about it, including the reported threat of litigation by Mr Silbert QC, throughout Mr Keenan's tenure. The second was the implications if the Scheme were being carried out using an unlawful practice. Mr Keenan was responsible for a program that affected many thousands of social security recipients. If the advice to him that the Scheme's legality was 'sound' proved to be wrong (as it did), it would have followed that DHS was demanding and recovering money from recipients to which it had no lawful entitlement. The third was that Mr Keenan was himself involved in taking steps to increase the onerousness of the Scheme for the recipients against whom debts were raised, in the imposition of interest charges on debts and the prospect of departure prohibition orders where debt repayment arrangements were not made. It was incumbent on him to make sure that the underlying debts were lawfully imposed.

Given that there was reason to question the Scheme's legality, the implications of illegality were dire, and further hardship was being inflicted by his department on those affected, Mr Keenan failed in his responsibility as minister to satisfy himself that his department was acting lawfully.

1 Exhibit 2-1649 - CTH.3004.0009.0076 - Item 9.2 CMP Programme Data Dashboard 22 June; Transcript, Craig Storen, 6 December 2022 [p 1161: lines 26-46].
2 Exhibit 4-6126 - MKE.9999.0001.0001_R - 230106 - Keenan Statement for Filing [p 2: para 5].
3 Exhibit 4-6129 - CTH.3789.0001.0001_R - Incoming Minister Briefing- Final scanned version.
4 Exhibit 4-6130 - CTH.3004.0007.7865_R - Combined Meeting Pack - Minister Keenan and Deputy Secretaries.
5 Exhibit 4-6130 - CTH.3004.0007.7865_R - Combined Meeting Pack - Minister Keenan and Deputy Secretaries.
6 Exhibit 4-6128 - MKE.9999.0001.0021_R - Hon M Keenan Response to NTG-0195 230222 - Copy [p 4: para 13].
7 Transcript, The Hon Michael Keenan, 28 February 2023 [p 4057: lines 40-42].
8 Transcript, The Hon Michael Keenan, 28 February 2023 [p 4078: lines 39-40].
9 Exhibit 2-3045 - ACS.9999.0001.0210 - 2018.02.09 Attachment Agenda.
10 Exhibit 2-3134 - ACS.9999.0001.0301_R - 2018.02.12 Email notes of meeting with Minister Michael Keenan_Redacted.
11 Transcript, The Hon Michael Keenan, 28 February 2023 [p 4061: line 1 – p 4067: line 15].
12 Transcript, Renee Leon, 28 February 2023 [p 4006: line 45].
13 Transcript, Renee Leon, 29 February 2023 [p 4007: lines 29-30].
14 Exhibit 3-3947 - PWC.1007.1003.9559_R - Re- DHS Robo-debt stats.
15 Exhibit 3-3816 - PWC.9999.0001.0004_R - Statement of Shane Michael West_30 November_2022_final [p 13].
16 Exhibit 3-3816 - PWC.9999.0001.0004_R - Statement of Shane Michael West_30 November_2022_final [p 13-14].
17 Exhibit 3-3835 - PWC.1007.1004.0606 - 180201_DHS Perform diagnostic v.7.0 [p 3].
18 Exhibit 3-3835 - PWC.1007.1004.0606 - 180201_DHS Perform diagnostic v.7.0 [p 3].
19 Exhibit 3-3835 - PWC.1007.1004.0606 - 180201_DHS Perform diagnostic v.7.0 [p 3].
20 Exhibit 3-3835 - PWC.1007.1004.0606 - 180201_DHS Perform diagnostic v.7.0 [p 30].
21 Exhibit 3-3816 - PWC.9999.0001.0004_R - Statement of Shane Michael West_30 November_2022_final [p 14].
22 Exhibit 3-3816 - PWC.9999.0001.0004_R - Statement of Shane Michael West_30 November_2022_final [p 9-10].
23 Exhibit 3-3816 - PWC.9999.0001.0004_R - Statement of Shane Michael West_30 November_2022_final [p 9-10].
24 Exhibit 3-3816 - PWC.9999.0001.0004_R - Statement of Shane Michael West_30 November_2022_final [p 9-10].
25 Exhibit 3-3816 - PWC.9999.0001.0004_R - Statement of Shane Michael West_30 November_2022_final [p 10-13; p 18-24].
26 Exhibit 4-6657 - PWC.1007.1003.3866_R - Re- Catch up prior to pipeline RE- DHS.
27 Exhibit 2-2566 - SMO.0001.0002.0013 - MYEFO_2015-16_Final [p 115].
28 Exhibit 4-6144 - MKE.9999.0001.0009 - 79f_Repay Debts or Face Interest Charges.
29 Exhibit 4-6155 - MKE.9999.0001.0018 - 79m_Welfare Debt Dodgers to Face Travel Bans; Transcript, The Hon Michael Keenan, 28 February 2023 [p 4093].
30 Exhibit 4-7328 - CTH.3005.0010.3076_R - Attachment A - Centrelink's Automated Debt Raising and Recovery System - Implementation Report.
31 Exhibit 4-7798 - CTH.3004.0010.5743_R - Attachment A - s8 request - IMP OF RECOMMENDATIONS OF OWN MOTION REPORT (002).
32 Exhibit 4-7798 - CTH.3004.0010.5743_R - Attachment A - s8 request - IMP OF RECOMMENDATIONS OF OWN MOTION REPORT (002) [p 3].
33 Exhibit 4-7798 - CTH.3004.0010.5743_R - Attachment A - s8 request - IMP OF RECOMMENDATIONS OF OWN MOTION REPORT (002) [p 3].
34 Exhibit 10129 - CTH.1000.0009.9703 - Due date processing pool. [SEC=UNCLASSIFIED].
35 Exhibit 4-7798 - CTH.3004.0010.5743_R - Attachment A - s8 request - IMP OF RECOMMENDATIONS OF OWN MOTION REPORT (002) [p 3].
36 Exhibit 4-7798 - CTH.3004.0010.5743_R - Attachment A - s8 request - IMP OF RECOMMENDATIONS OF OWN MOTION REPORT (002) [p 3].
37 Exhibit 4-7798 - CTH.3004.0010.5743_R - Attachment A - s8 request - IMP OF RECOMMENDATIONS OF OWN MOTION REPORT (002) [p 3].
38 Exhibit 4-7328 - CTH.3005.0010.3076_R - Attachment A - Centrelink's Automated Debt Raising and Recovery System - Implementation Report [p 7-10].
39 Exhibit 4-7328 - CTH.3005.0010.3076_R - Attachment A - Centrelink's Automated Debt Raising and Recovery System - Implementation Report [p 7-10].
40 Exhibit 4-7328 - CTH.3005.0010.3076_R - Attachment A - Centrelink's Automated Debt Raising and Recovery System - Implementation Report [p 7-10]..
41 Exhibit 4-7328 - CTH.3005.0010.3076_R - Attachment A - Centrelink's Automated Debt Raising and Recovery System - Implementation Report [p 28].
42 Exhibit 3-4254 - CTH.2001.0009.3942_R - Secretary Question - [REDACTED] - Earned Income Intervention program debt and claim for compensation - potential media interest [DLM=Sensitive-Legal].
43 Exhibit 3-4254 - CTH.2001.0009.3942_R - Secretary Question - [REDACTED] - Earned Income Intervention program debt and claim for compensation - potential media interest [DLM=Sensitive-Legal].

44 Exhibit 3-4254 - CTH.2001.0009.3942_R - Secretary Question - [REDACTED] - Earned Income Intervention program debt and claim for compensation - potential media interest [DLM=Sensitive-Legal].
45 Exhibit 3-4254 - CTH.2001.0009.3942_R - Secretary Question - [REDACTED] - Earned Income Intervention program debt and claim for compensation - potential media interest [DLM=Sensitive-Legal].
46 Exhibit 3-4254 - CTH.2001.0009.3942_R - Secretary Question - [REDACTED] - Earned Income Intervention program debt and claim for compensation - potential media interest [DLM=Sensitive-Legal].
47 Exhibit 3-4254 - CTH.2001.0009.3942_R - Secretary Question - [REDACTED] - Earned Income Intervention program debt and claim for compensation - potential media interest [DLM=Sensitive-Legal].
48 Transcript, Annette Musolino, 30 January 2023 [p 2645: lines 14-44]; Exhibit 3-3667 - CTH.3827.0001.0907_R - RE- Issue re brief [DLM=For-Official-Use-Only]; Exhibit 3 – 3665 – DSS.5086.0001.1110_R.
49 Transcript, Annette Musolino, 1 March 2023[p 4164: lines 33-37].
50 Response to NAF-MUS, 5 May 2023 [para 145].
51 Exhibit 3-4218 - CTH.3004.0008.3193 - 006-Carney.
52 Transcript, Maris Stipnieks, 3 February 2023 [p 3236: lines 6-11].
53 Exhibit 4-6046 - CTH.3009.0011.0131 - Sec annot news alert of 040418 re debts; Transcript, Renee Leon, 28 February 2023 [p 4016-4017].
54 Exhibit 4-6046 - CTH.3009.0011.0131 - Sec annot news alert of 040418 re debts; Transcript, Renee Leon, 28 February 2023 [p 4016-4017].
55 Transcript, Renee Leon, 28 February 2023 [p 4017: lines 5-10].
56 Exhibit 10023 - CTH.3007.0008.5899 - OCI - issues in response to Carney article [DLM=For-Official-Use-Only]; Exhibit 10024 - CTH.3007.0008.5900.
57 Exhibit 3-4287 - CTH.3007.0008.4138_R - OCI Programme - Journal publication by Professor Carney AO - and media articles [DLM=Sensitive-Legal]; Exhibit 3-4288 - CTH.3007.0008.4139 - OCI Programme - Article in The Guardian.
58 This was the same misconceived justification on which Mr Britton and Mr Ryman had relied in response to the DSS Dot points in 2015.
59 Exhibit 3-4257 - CTH.3007.0009.1941_R - OCI [DLM=Sensitive-Legal]
60 Exhibit 4-6252 - CTH.3005.0008.6235_R - EC18-000840 Sec noted brief with annot.
61 Response to NAF-MUS, 5 May 2023 [para 149-150].
62 Transcript, Annette Musolino, 1 March 2023 [p 4174: lines 35-36].
63 Transcript, Annette Musolino, 1 March 2023 [p 4172-4173].
64 Exhibit 3-4257 - CTH.3007.0009.1941_R - OCI [DLM=Sensitive-Legal].
65 Exhibit 3-4257 - CTH.3007.0009.1941_R - OCI [DLM=Sensitive-Legal].
66 Transcript, Renee Leon, 28 February 2023[p 4017: line 15].
67 Transcript, Annette Musolino, 1 March 2023 [p 4176].
68 Transcript, Renee Leon, 28 February 2023[p 4017: lines 35-40].
69 Exhibit 4-6168 - CTH.3004.0008.3490_R - FW- For information- Linda Burney MP media release - 'Turnbull accused of enforcing illegal debt notices on innocent Australians' [SEC=UNCLASSIFIED]. .
70 Exhibit 2-1724 - CTH.2000.0007.5553_R - FW- BREAKING NEWS ALERT- The Guardian reports Centrelink robo-debt program accused of enforcing 'illegal' debts [DLM=For-Official-Use-Only]; Exhibit 4-6203 - CTH.3735.0001.0404_R - 06.04.2018 - The Guardian - Paul Karp follow up; Exhibit 3-3495 - TCA.9999.0001.0013 - Terry Carney, The New Digital Future for Welfare- Debts Without Legal Proofs or Moral Authority (UNSW Law Journal).
71 Exhibit 2-1724 - CTH.2000.0007.5553_R - FW- BREAKING NEWS ALERT- The Guardian reports Centrelink robo-debt program accused of enforcing 'illegal' debts [DLM=For-Official-Use-Only].
72 Exhibit 10023 - OCI - issues in response to Carney article [DLM=For-Official-Use-Only].
73 Exhibit 10088 - CTH.3007.0008.3964_R - RE: For urgent approval: Media response - The Canberra Times (Doug Dingwall) and The Guardian (Paul Karp and Christopher Knaus) - Online compliance [SEC=UNCLASSIFIED].
74 Transcript, Maris Stipnieks, 3 February 2023 [p 3207: lines 40-42, p 3224: lines 30-32, p 3229: lines 29-32].
75 Transcript, Kristin Lumley, 27 January 2023 [p 2531: lines 10-14].
76 Transcript, Kristin Lumley, 27 January 2023 [p 2540: line 34].
77 Transcript, Kristin Lumley, 27 January 2023 [p 2543: lines 34-40].
78 Transcript, Kristin Lumley, 27 January 2023 [p 2543: line 41-45].
79 Transcript, Kristin Lumley, 27 January 2023 [p 2544: lines 1-5].
80 Transcript, Allyson Essex, 27 January 2023 [p 2569: lines 32-45].
81 Transcript, Allyson Essex, 27 January 2023 [p 2571: line 1].
82 Exhibit 3-4136 - AES.9999.0001.0001_R - NTG-109 - Statement of A Essex (Footnote Amendments), para 12.
83 Exhibit 3-4176 - DSS.5036.0001.0163_R - AAT Decision 2018-AA119369 .
84 Exhibit 3-4179 - DSS.5036.0001.0008_R - [REDACTED] - AFARm.
85 Transcript, Allyson Essex, 27 January 2023 [p 2571: lines 15-38]; Exhibit 1-0116 - DSS.8001.0001.5219_R - [D17

226681] Legal to Emmakate - advice re using smoothed tax data as last resort to raise debt Advice please; Exhibit 3-4152 - DSS.5093.0001.0361_R - DSS 2014 - Legal Advice - Data matching- notifications and debt raising [DLM=Sensitive-Legal].

86 Transcript, Allyson Essex, 27 January 2023 [p 2570: lines 30-42].
87 Transcript, Allyson Essex, 27 January 2023 [p 2578: lines 12-14].
88 Transcript, Allyson Essex, 27 January 2023 [p 2579: lines 1-6].
89 Transcript, Allyson Essex, 27 January 2023 [p 2568 – p 2569]; Exhibit 3-4142 - DSS.5093.0001.0314_R - RE- Robodebt Articles [DLM=For-Official-Use-Only].
90 Exhibit 3-4136 - AES.9999.0001.0001_R - NTG-109 - Statement of A Essex (Footnote Amendments) [para 14].
91 Transcript, Allyson Essex, 27 January 2023 [p 2570: lines 17-21].
92 Exhibit 3-4144 - DSS.5044.0001.2430_R - RE- REQUEST FOR LEGAL ADVICE- Request for AGS advice - income averaging [DLM=Sensitive-Legal] .
93 Exhibit 3-4144 - DSS.5044.0001.2430_R - RE- REQUEST FOR LEGAL ADVICE- Request for AGS advice - income averaging [DLM=Sensitive-Legal] .
94 Exhibit 3-4145 - DSS.5036.0001.0004_R - RE- REQUEST FOR LEGAL ADVICE- Request for AGS advice - income averaging [DLM=Sensitive-Legal] .
95 Exhibit 3-4145 - DSS.5036.0001.0004_R - RE- REQUEST FOR LEGAL ADVICE- Request for AGS advice - income averaging [DLM=Sensitive-Legal].
96 Exhibit 1-0135 - DSS.5006.0001.4242 - Draft advice on income averaging 7.08.18.
97 Exhibit 1-0135 - DSS.5006.0001.4242 - Draft advice on income averaging 7.08.18.
98 Exhibit 1-0135 - DSS.5006.0001.4242 - Draft advice on income averaging 7.08.18.
99 Exhibit 1-0135 - DSS.5006.0001.4242 - Draft advice on income averaging 7.08.18.
100 Exhibit 9841 - PMO.9999.0001.0001_R - NTG-0255 Philip Mofarrige [para 15].
101 Transcript, Allyson Essex, 27 January 2023 [P-2593: lines 25-27]; Transcript, Kristin Lumley, 27 January 2023 [p 2553]; Exhibit 3-4159 - DSS.5093.0001.0313_R - RE- Online Compliance Legal Advice Timeline and Summary [DLM=Sensitive-Legal].
102 Transcript, Allyson Essex, 27 January 2023 [p 2593: lines 30-35].
103 Transcript, Allyson Essex, 27 January 2023 [p 2593: lines 30-35].
104 Exhibit 3-4156 - DSS.5099.0001.0001_R - FW- EIC implementation phase 2 - letter [SEC=UNCLASSIFIED].
105 Exhibit 3-4136 - AES.9999.0001.0001_R - NTG-109 - Statement of A Essex (Footnote Amendments) [para 24].
106 Transcript, Allyson Essex, 27 January 2023 [p 2592: line 8].
107 Exhibit 3-4136 - AES.9999.0001.0001_R - NTG-109 - Statement of A Essex (Footnote Amendments) [para 24].
108 Transcript, Nathan Williamson, 3 February 2023 [p 3183: lines 16-21].
109 Exhibit 3-5092 - NWI.9999.0001.0001_R - NTG-0110 Statement of Nathan Williamson [para 24].
110 Exhibit 3-5092 - NWI.9999.0001.0001_R - NTG-0110 Statement of Nathan Williamson [para 25].
111 Exhibit 3-5092 - NWI.9999.0001.0001_R - NTG-0110 Statement of Nathan Williamson [para 29].
112 Exhibit 3-5092 - NWI.9999.0001.0001_R - NTG-0110 Statement of Nathan Williamson [para 27].
113 Exhibit 3-5092 - NWI.9999.0001.0001_R - NTG-0110 Statement of Nathan Williamson [para 14].
114 Transcript, Allyson Essex, 27 January 2023 [p 2588: lines 15-20].
115 Exhibit 3-4136 - AES.9999.0001.0001_R - NTG-109 - Statement of A Essex (Footnote Amendments) [para 23].
116 Exhibit 3-4136 - AES.9999.0001.0001_R - NTG-109 - Statement of A Essex (Footnote Amendments) [para 23].
117 Transcript, Allyson Essex, 27 January 2023 [p 2588: lines 10-12; p 2589: line 25].
118 As identified in the High Court decision in Briginshaw v Briginshaw (1938) 60 CLR 336.
119 Exhibit 1-0135 - DSS.5006.0001.4242 - Draft advice on income averaging 7.08.18 [p 6: para 5.3].
120 Transcript, Kristin Lumley, 27 January 2023 [p 2551: lines 25-30].
121 Exhibit 3-4157 - DSS.5099.0001.0003_R - EIC Implementation Phase 2 - SAO letter to DSS post entry meeting.
122 Exhibit 4-7131 - RGL.9999.0001.0003_R - 20230222 NTG-0204 - Signed statement of Richard Glenn (Amended) (47241269.1) [p 5: para 36-40].
123 Exhibit 4-7129 - MMA.9999.0001.0001_R - 20230227 NTG-0202 - Statement of Michael Manthorpe dated 27 Febraury 2023(47265784.1) [p 11: para 59].
124 Transcript, Nathan Williamson, 3 February 2023 [p 3188-3189].
125 Exhibit 3-4162 - DSS.5003.0001.0770_R - BM SIGNED - DSS Response to Commonwealth Ombudsman on phase 2 of the inv.
126 Exhibit 3-5092 - NWI.9999.0001.0001_R - NTG-0110 Statement of Nathan Williamson [p 2: para 18].
127 Exhibit 3-5092 - NWI.9999.0001.0001_R - NTG-0110 Statement of Nathan Williamson [para 17].
128 Exhibit 3-5092 - NWI.9999.0001.0001_R - NTG-0110 Statement of Nathan Williamson [para 18].
129 Exhibit 3-4159 - DSS.5093.0001.0313_R - RE- Online Compliance Legal Advice Timeline and Summary [DLM=Sensitive-Legal].
130 Exhibit 3-4134 - KLU.9999.0001.0003_R - NTG-0108 Statement of K Lumley (Amended Doc IDs) [para 16(c)].

131 Exhibit 9727 - JKE.9999.0001.0001_R - Royal Commission into the Robodebt Scheme - NTG-0254 James Kemp - Signed Copy [para 20].
132 Exhibit 9727 - JKE.9999.0001.0001_R - Royal Commission into the Robodebt Scheme - NTG-0254 James Kemp - Signed Copy [para 11].
133 Ms Essex's evidence was slightly different from that of Mr Kemp in that the date that she identified was 12 October 2018 (Essex 2 December 2022 statement). The difference is not material.
134 Exhibit 3-4136 - AES.9999.0001.0001_R - NTG-109 - Statement of A Essex (Footnote Amendments) [para 26].
135 Exhibit 3-4160 - DSS.5095.0001.0019 - DSS.000588943.
136 Exhibit 4-6778 - BPH.9999.0001.0003_R - 20230220 NTG-0200 (Philp) Statement of Brenton Philp (Redacted) [para 12].
137 Exhibit 3-4136 - AES.9999.0001.0001_R - NTG-109 - Statement of A Essex (Footnote Amendments)[para 25].
138 Transcript, Allyson Essex, 27 January 2023 [p 2592: line 21; 35-40]; Transcript, Allyson Essex, 27 January 2023 [p 2590: lines 1-5].
139 Exhibit 10128 - AES.9999.0001.0003_R - Statement - Allyson Essex - FINAL(62433751.5) copy.pdf [para 30].
140 Transcript, Brenton Philip, 6 March 2023 [p 4510: lines 2-13].
141 Transcript, Brenton Philip, 6 March 2023 [p 4509: lines 39-41]. Exhibit 4-6778 - BPH.9999.0001.0003_R - 20230220 NTG-0200 (Philp) Statement of Brenton Philp (Redacted) [para 24].
142 Exhibit 4-6780 - DSS.8500.0001.0007_R - robo debt - context [DLM=For-Official-Use-Only].
143 Transcript, Brenton Philip, 6 March 2023 [p 4511: lines 39-31].
144 Exhibit 3-4136 - AES.9999.0001.0001_R - NTG-109 - Statement of A Essex (Footnote Amendments)[para 28]; Exhibit 9841 - PMO.9999.0001.0001_R - NTG-0255 Philip Moufarrige [para 16].
145 Transcript, Kristin Lumley, 27 January 2023 [p 2557: line 16].
146 Exhibit 3-4165 - RBD.9999.0001.0335 - Centrelink robo-debt recovery scheme at centre of legal case.
147 Exhibit 3-4166 - DSS.5093.0001.0312_R - RE- Media - Robodebt [SEC=UNCLASSIFIED].
148 Exhibit 3-4167 - DSS.5093.0001.0316_R - FW- Online Compliance Legal Advice Timeline and Summary [DLM=Sensitive-Legal] .
149 Transcript, Kristin Lumley, 27 January 2023 [p 2557: lines 40-41].
150 Exhibit 9841 - PMO.9999.0001.0001_R - NTG-0255 Philip Moufarrige [para 23].
151 Exhibit 3-4167 - DSS.5093.0001.0316_R - FW- Online Compliance Legal Advice Timeline and Summary [DLM=Sensitive-Legal].
152 Transcript, Allyson Essex, 27 January 2023 [p 2596: lines 15-26].
153 Transcript, Allyson Essex, 27 January 2023 Transcript [p 2590: line 15].
154 Transcript, Allyson Essex, 27 January 2023 Transcript [p 2586; p 2588].
155 Exhibit 3-4136 - AES.9999.0001.0001_R - NTG-109 - Statement of A Essex (Footnote Amendments)[para 31].
156 Exhibit 10128 - AES.9999.0001.0003_R - Statement - Allyson Essex - FINAL(62433751.5) copy.pdf [para 39].
157 Transcript, Allyson Essex, 27 January 2023 [p 2592: line 21; 35-40].
158 Exhibit 10128 - AES.9999.0001.0003_R - Statement - Allyson Essex - FINAL(62433751.5) copy.pdf [para 44; 48].
159 Exhibit 9841 - PMO.9999.0001.0001_R - NTG-0255 Philip Moufarrige [para 27].
160 Exhibit 3-4136 - AES.9999.0001.0001_R - NTG-109 - Statement of A Essex (Footnote Amendments)[para 32].
161 Exhibit 3-4136 - AES.9999.0001.0001_R - NTG-109 - Statement of A Essex (Footnote Amendments)[para 34].
162 Exhibit 9746 - BTI.9999.0001.0036_R - NTG-0252 - Statement of E Tisdell (updated Doc IDs) (48063575.1).pdf [para 34].
163 Transcript, Anne Pulford, 2 November 2022 [p 258].
164 Transcript, Melanie Metz, 10 March 2023[p 4973].
165 Exhibit 3-3816 - PWC.9999.0001.0004_R - Statement of Shane Michael West_30 November_2022_final [p 8-10].
166 Exhibit 3-3895 - PWC.1007.1003.3468 - 170405 Insights from Current State Assessment - DRAFT - v0.2; Exhibit 3-4775 - PWC.1007.1003.5090_R - 170530 DHS Integrity Modernisation Implementation Strategy - DRAFT - v1.0; Transcript, Frank van Hagen, 3 March 2023 [p 4347: line 21 – p 4348: line 8]; Exhibit 3-4778 - PWC.1007.1001.1842_R - FW- Amendment to PWC (Phase 2) contract - Integrity Modernisation support [SEC=UNCLASSIFIED].
167 Exhibit 3-3816 - PWC.9999.0001.0004_R - Statement of Shane Michael West_30 November_2022_final [p 11-12; Exhibit 9322 - PWC.1007.0001.0164_R - 3. 20170911 - DHS Advice and programme management - Work order.pdf; Exhibit 9323 - PWC.1007.0001.0170_R - 4. [date]- DHS Extension of advice and programme management - Work order.pdf.
168 Exhibit 10130 - CTH.3004.0007.4968_R - Agenda Item 2 CMP Board - Previous Meeting Minutes.doc [p 2-3].
169 Exhibit 10131 - CTH.3000.0039.6566_R - Item 2 CMP Board - Previous Minutes 25 Jan 2018.doc.
170 Exhibit 10131 - CTH.3000.0039.6566_R - Item 2 CMP Board - Previous Minutes 25 Jan 2018.doc; Exhibit 8538 – CTH.9999.0001.0144, [Final] Services Australia - Response to NTG-0097 - Revised [p 8: paras 2.1 to 2.3].
171 Exhibit 8538 – CTH.9999.0001.0144, [Final] Services Australia - Response to NTG-0097 - Revised [p 7: para 2.1 – p 8: para 2.3].

172 Exhibit 8538 – CTH.9999.0001.0144, [Final] Services Australia - Response to NTG-0097 - Revised [p 7: para 2.1 – p 8: para 2.4].
173 Exhibit 8538 – CTH.9999.0001.0144, [Final] Services Australia - Response to NTG-0097 - Revised [p 18: para 4.1].
174 Exhibit 8538 – CTH.9999.0001.0144, [Final] Services Australia - Response to NTG-0097 - Revised [p 18: para 4.2].
175 Exhibit 4-7117 – CTH.3500.0003.5300 – Customer support for EIC online compliance interventions 110-13090010, 20 August 2019; Exhibit 8538 – CTH.9999.0001.0144, [Final] Services Australia - Response to NTG-0097 - Revised [p 18: para 4.2 and 4.20].
176 Exhibit 8538 – CTH.9999.0001.0144, [Final] Services Australia - Response to NTG-0097 - Revised [p 18: para 4.21].
177 Exhibit 3-4484 - CTH.3010.0010.2042_R - RE- NEW ENQUIRY- The Age (Cam Houston) - debts [SEC=UNCLASSIFIED].
178 Exhibit 3-4485 - CTH.3010.0010.2074_R - RE- For action - Response to The Age - OCI [DLM=For-Official-Use-Only].
179 Transcript, The Hon Michael Keenan, 28 February 2023 [p 4088-4089]; Exhibit 4-6177 - CTH.0009.0001.1104_R - MB18-000254 MO TAB 55.
180 Exhibit 4-6128 - MKE.9999.0001.0021_R - Hon M Keenan Response to NTG-0195 230222 - Copy [p 4: para 13].
181 Transcript, The Hon Michael Keenan, 28 February 2023 [p 4077, 43-46].
182 Exhibit 4-6128 - MKE.9999.0001.0021_R - Hon M Keenan Response to NTG-0195 230222 - Copy [p 3: para 10].
183 Exhibit 4-6128 - MKE.9999.0001.0021_R - Hon M Keenan Response to NTG-0195 230222 - Copy [p 2: para 6(f)].
184 Exhibit 1-0001 - CTH.2013.0012.5070_R - Advice prepared by Solicitor General to AGS re use of apportioned ATO PAYG data.
185 Exhibit 1-0001 - CTH.2013.0012.5070_R - Advice prepared by Solicitor General to AGS re use of apportioned ATO PAYG data [p 42: para 80].
186 Exhibit 1-0001 - CTH.2013.0012.5070_R - Advice prepared by Solicitor General to AGS re use of apportioned ATO PAYG data [p 20: para 33].
187 Exhibit 1-0001 - CTH.2013.0012.5070_R - Advice prepared by Solicitor General to AGS re use of apportioned ATO PAYG data [p 4-5 Answer 4].
188 Exhibit 4-5799 - CTH.3009.0020.0893_R - 20191118 Consent orders.

Chapter 9: 2019 – The end of Robodebt

1 Preliminary

The Robodebt Scheme remained just as troubled in 2019. A number of events demonstrate that although some years had passed since the Scheme's inception, it continued to be plagued by problems.

On 21 March 2019, a brief to Ms Leon, secretary of DHS, noted that technical issues were affecting the debt explanation letters sent to participants in the EIC and CUPI platforms.[1] The letters purported to detail the elements of the debt calculation but were erroneous and incomplete.

On 28 March 2019, at a meeting of the Compliance Modernisation Programme (CMP) Board, DHS considered the results of user testing undertaken in relation to the initiation letter used under the CUPI phase of the Scheme.[2] The user testing took place in November 2018, on the recommendation of the Commonwealth Ombudsman, and was aimed at testing ways to better explain the concept of income averaging to recipients.[3] The results of the testing were an indictment on the Scheme's reliance on placing the onus on the recipient to provide information. Of the 15 participants involved in the testing, only two participants understood and could articulate the concept of income averaging after reading the revised initiation letter that was designed to explain the process to them.[4] The vast majority of the participants did not understand from the letter what would happen if they did not provide the information requested, with most participants thinking that their payments would either be suspended, cancelled or otherwise affected, and other participants simply stating that they were "going to be in trouble."[5]

This testing was a clear illustration that most recipients were unlikely to understand the basis upon which debts were being raised by DHS, even in 2019, when the letters had undergone years' worth of "refinements" and "improvements." This was not a reflection on recipients; rather, it was indicative of the fundamental lack of understanding of those developing and administering the Scheme that the social security system was complex and intricate, and if the onus was to be borne by those subject to the Scheme, it required much more than the materials the Department was producing to assist recipients.

The Department continued to deal with outstanding reviews from the Scheme's first online iteration, OCI, well into 2019. A debt recovery pause with respect to these reviews had been in place up to 30 April 2019, which was longer than had originally been intended.[6] In what was described as an absence of "appropriate controls…to govern the continuance of this pause activity," the debt recovery pause was lifted and close to 9000 debt letters were issued in error to recipients.[7]

The difference in 2019, was that the Scheme encountered some problems that proved insurmountable. The year 2019 represented the beginning of the end for the Robodebt Scheme. On 18 November 2019, the use of averaging to determine social security entitlement under the Scheme was ceased. On 30 June 2020, the Scheme was ended altogether.

The catalyst for the Scheme's demise was two judicial review proceedings in the Federal Court, both commenced by former social security recipients against the Commonwealth in 2019. Both sought to challenge alleged debts raised on the basis of averaging. The first, an application by Madeleine Masterton, led to DHS seeking advice from the Australian Government Solicitor (AGS) and the Solicitor-General that would affirm the illegality of averaging. The second, an application by Deanna Amato, was the first proceeding in which the Commonwealth made an explicit concession that the practice was unlawful.

2 Commencement of *Masterton*, advice from the Australian Government Solicitor and recalculations

On 4 February 2019, Ms Masterton filed an originating application for judicial review in the Federal Court.[8] Her application challenged a decision by the secretary of DHS to raise and recover from her an alleged debt resulting from overpayment of social security benefit.

The alleged debt the subject of Ms Masterton's application arose from a supposed overpayment of social security benefit in the period 2011 to 2016. Originally in the amount of $4049.29, it had been raised on 12 June 2018 by averaging Ms Masterton's earnings as they appeared in PAYG information. It was added to by erroneous duplication of some of that data.

Ms Masterton sought, amongst other things, a declaration that the alleged debt was not "a debt due to the Commonwealth" under the *Social Security Act 1991* (Cth) and that it could not lawfully be demanded. The core argument Ms Masterton advanced was that the use of averaged PAYG data was not sufficient basis to raise an overpayment debt under the relevant statutory framework. The litigation was significant. A ruling on that core ground would, in effect, be a ruling on the lawfulness of the averaging component of the Scheme.

Ms Masterton's motivations in making the application went beyond self-interest. She recognised that success in the proceeding "would have a greater impact socially."[9] The proceedings were the culmination of work done by her legal representatives, Victoria Legal Aid, in identifying a test case to challenge the lawfulness of the Scheme.[10]

2.1 Initial recalculation

Shortly after the filing of Ms Masterton's application, on 9 February 2019, DHS conducted a recalculation of Ms Masterton's debt. This initial recalculation caused some confusion within the department. Mr Ffrench's evidence was that the recalculation had taken place in the absence of instructions and that he had not been made aware of it until a later time. [11]

In the initial recalculation, DHS removed duplicated amounts wrongly included in the debt. It had been alerted to the error by the affidavit material filed on Ms Masterton's behalf in support of the application (the Masterton affidavit material).[12] A recovery fee was also removed. The recalculation reduced the debt from $4049.29 to $748.26.[13]

DHS then decided to conduct a further recalculation, the impetus for which was, to say the least, unclear. At a case management hearing in the Masterton case on 8 March 2019, the Commonwealth's representatives said it was necessary because of a "clear calculation error." There was said to have been "a degree of double-counting that occurred in the calculation of the debt" and it was proposed to "withdraw the penalty and the interest related to the debt and to recalculate the debt… having regard to the information that is available now."[14]

The Commission does not doubt that the Commonwealth's representatives had instructions to that effect, but the basis of those instructions is mysterious. The purpose of the initial recalculation was to correct the erroneous inclusion of the duplicated amounts and to remove the recovery fee. Why the Commonwealth was proposing to do the same thing again is mysterious. In material provided to the Commission, Services Australia asserted that the further recalculation was necessary because "the [initial] recalculation did not properly apply income credits to the debt amount,"[15] but in fact, the further recalculation did not account for income credits. Instead, it involved relying on representations made in the Masterton affidavit material as a basis for reducing the debt.

Whatever the reason, the Commonwealth sought and obtained orders from the Federal Court contemplating a redetermination of the debt.[16] DHS then set about deciding the way in which the recalculation would take place. In doing so, it sought advice from AGS.

2.2 Draft Implementation Report and a "comment on legality"

On 22 February 2019, Mr Manthorpe sent Ms Leon the Draft Implementation Report,[17] which concerned the implementation of recommendations in the Ombudsman's April 2017 Report. Mr Manthorpe gave Ms Leon an "opportunity to comment" on the Draft Implementation Report.

Part 4 to the Draft Implementation Report was described as a "comment on legality." In it, the Ombudsman made a number of observations regarding the legality of the Scheme. They included:

- that "the question around the legality of the EIC system [was] still a matter of public debate"
- that the Ombudsman had "concluded that the complex question of the system's legality could only be resolved with certainty by a court" and that "it would be unhelpful to speculate in a public report about what the Federal or High Court might decide on the untested and complex questions of legality raised by the EIC"
- that there was "a matter before the Federal Court where [issues of legality] may be considered" and that "with the benefit of hindsight, we consider a lesson arising from the implementation of the EIC is the importance of providing public assurance about the legality of decisions made under new digital systems," and
- that 'if the legality of programs of automation are [sic] not reasonably certain … agencies should ensure a mitigation strategy is in place."

Express reference was made in the Draft Implementation Report to the Masterton proceeding and the prospect of questions of legality being considered in the course of that litigation. However, the Ombudsman did not make any finding or express any settled view as to the legality of the Scheme or the practice of income averaging.

2.3 Briefing of Ms Leon and 1 March meeting

Ahead of a scheduled meeting between Ms Leon and Mr Manthorpe on 1 March 2019, DHS officers, including Mr Ffrench and Ms Musolino,[18] prepared a brief for Ms Leon. The Ombudsman's inclusion of Part 4 in the Draft Implementation Report was evidently of particular concern to those preparing the brief.[19]

The brief, dated 25 February 2019,[20] advanced a number of recommendations, including that Ms Leon adopt the position that:

> the department considers that the "Comment on Legality" at paragraphs 4.4 and 4.5 of the Draft Implementation Report is beyond the scope of the implementation investigation and should be removed.

The brief asserted that "The legality of procedures for the EIC program [was] not uncertain." It expanded on that proposition:

> The draft report suggests the department should have obtained external legal advice that could be cited to reassure the public on the issue of legality. There was no need in the design of the EIC program to obtain legal advice given the measures at its heart were well established. Obtaining external legal advice, and then citing that advice in public, would amount to a waiver of privilege in circumstances where, as here, programs may be the subject of legal challenge. The department would be acting contrary to the interests of the Commonwealth were it to do so. Given that [issues of legality] may soon be considered by the Federal Court, such action would also have the potential to undermine the administration of justice.

Having received the brief, Ms Leon met Mr Manthorpe on 1 March 2019[21] to discuss the matters raised in his 21 February 2019 correspondence and DHS' attitude in respect of the Draft Implementation Report. Ms Leon's evidence was that she expressed views to Mr Manthorpe consistent with the recommendation in the brief she had been given – that is, that Part 4 should be removed from the Draft Implementation Report.[22]

2.4 5 March 2019 AGS Advice

On 5 March 2019, AGS provided email advice to DHS about the proposed further recalculation of Ms Masterton's debt. That advice was provided to Ms Leon on 6 March 2019.[23] AGS presented two options. The recalculation could be done using averaging ('Option 1') in which case Ms Masterton's challenge would probably proceed, or on the basis of a proper investigation of Ms Masterton's income ('Option 2'), which would avoid the arguments as to legal error associated with averaging. The writer noted, delicately, that AGS did not understand DHS to hold any "positive desire" to have the Federal Court rule on the legality of averaging or the "OCI system" (apparently a general reference to the Robodebt scheme, which had moved on from the OCI iteration by this time). In relation to Option 2, the advice observed:

> If the debt is recalculated without averaging, Ms Masterton would not appear to have a sufficient continuing legal interest to seek the declarations in the present application that are predicated on the use of averaging, since they would relate to a debt that is no longer pursued on the impugned basis.

The advice continued:

> In providing this short advice we have not been asked to consider the prospects of the present challenge to the lawfulness of the debt presently sought from Ms Masterton succeeding. Our observations here are confined to practical considerations. For the purpose of this advice, we observe only that on our present understanding of the case, Ms Masterton's application does not appear to us to be hopeless such that the Department would prefer Option 1 on the basis that the Department could presently be very confident of a favourable judicial ruling... [emphasis added]

This aspect of the advice was significant. What was, in effect, a legal challenge to a fundamental feature of the Scheme – that is, the use of averaging to determine social security entitlement - had been described by AGS as not appearing to be hopeless; a roundabout way of saying that it had prospects of success. While the 5 March 2019 advice did not descend into any analysis of those prospects, it should have been clear at this time to Ms Leon and other readers of the advice that the legality of the Scheme was far from certain.

In her evidence (and in submissions to the Commission), Ms Leon expressed doubt as to whether the 5 March 2019 AGS advice was provided to her. She did not believe anyone had expressed to her an opinion that Ms Masterton's application was not hopeless.[24] But an email from the DHS Chief Operating officer makes it clear that Ms Leon was provided, at her own request, with the 5 March 2019 advice on 6 March 2019 in connection with a meeting planned for the following day.[25] The advice was of importance to DHS, Ms Leon had asked for it, and she was to have a meeting about the litigation it concerned the following day. Despite her lack of recollection, the Commission's view is that Ms Leon read and understood that advice before 8 March 2019.

There is evidence that, in a meeting on 7 March 2019, Ms Leon agreed to the suggestion of her acting Chief Counsel, Mr Ffrench, that comprehensive advice from AGS in relation to prospects in the Masterton litigation should be sought.[26] In her statement, Ms Leon said she did not recall "being asked about seeking the [prospects] advice,"[27] and, by implication, had no recollection of having asked for it. Given Mr Ffrench's account and contemporary documentary support, the Commission considers it more probable than not that, at his urging, Ms Leon did instruct Mr Ffrench to seek the advice.

2.5 Initial adoption of Option 2

Initially, DHS decided to pursue Option 2. In doing so, on 18 March 2019, it sought to obtain evidence from Ms Masterton as to her actual income for the period 2011 to 2016 that "would assist in the recalculation of the amount of any debt that may be owed."[28] Ms Masterton refused to provide that evidence.[29] Her representatives explained to AGS: "In circumstances where neither the motivation for the proposed recalculation nor its relevance to the proceeding is apparent, the applicant does not propose to undertake searches for (or provide) the information sought."[30]

Ms Masterton's refusal to engage in the recalculation process posed a problem for DHS. The absence of direct evidence of Ms Masterton's fortnightly earnings for the relevant periods made it impossible for DHS to accurately determine her entitlement and to, in turn, recalculate the debt in a way that would extinguish its averaging component. In effect, DHS was stranded with a debt infected by averaging.

2.6 8 March 2019 correspondence by Ms Leon to Mr Manthorpe

On 8 March 2019, Ms Leon sent email correspondence, prepared by Mr Ffrench and others,[31] to Mr Manthorpe.[32] In it, Ms Leon made comments about the Draft Implementation Report and expressed concern about the inclusion of Part 4:

> …I should note that the Department does advocate for amendment of legislation to the relevant policy agency where it considers this would clarify legislation. We have not done so in this case because our position is and remains that the legal position in relation to the program is not uncertain. Accordingly it would be premature for your report to suggest the legislation needs amending…
>
> …
>
> I am concerned that your comments clearly imply that there is doubt as to the legality of the EIC system. Comments made by the Ombudsman on this aspect will undoubtedly be cited in public commentary, in circumstances where a court is yet to determine the matter. I think it is particularly undesirable to buy into the argument about legality when litigation is on foot, as comments from the Ombudsman as a significant part of the administrative law system may be considered to be pre- judging the outcome or may in fact prejudice the issue.'
>
> For these reasons, I ask that the commentary regarding the legality of the EIC system be removed from the Implementation Report and that further commentary be reserved until after the Federal Court matter has concluded. [emphasis added]

Those representations were significant. Firstly, Ms Leon was placing pressure on Mr Manthorpe to refrain from commenting on the legality of the Scheme on the basis that doing so had the capacity to influence or prejudice the Court's decision-making process. Secondly, she had represented to Mr Manthorpe that DHS was satisfied there was no doubt or uncertainty about the legal position of the Scheme: that is, that it was lawful.

2.7 The Ombudsman yields

The pressure that Ms Leon had placed upon the Ombudsman had the desired effect. By email to Ms Leon dated 13 March 2019, Mr Manthorpe indicated that he had decided to remove the "section on the 'legality' issue" from the report.[33]

2.8 Consideration

Ms Leon's response to the Ombudsman's commentary on legality arose in circumstances where DHS had, almost as a matter of reflex, used the April 2017 Ombudsman Report to justify the legal foundations of the Robodebt scheme in response to external criticism. It had done so despite the fact that the previous report had not descended into any substantive commentary as to the Scheme's lawfulness. Now, when the Ombudsman actually proposed to provide some commentary on that very issue of legality, DHS was determined to prevent its publication.

The "prejudice to litigation" argument

Ms Leon argued that it was "undesirable" for Mr Manthorpe "to buy into the argument about legality" on the basis that doing so might serve to prejudice or otherwise affect the Masterton proceedings. That was not a credible argument.

The Ombudsman was not a party to the Masterton proceedings, nor did he have any capacity to influence the Court's decision-making. In any case, all his commentary did was to record the fact that there was a matter before the Federal Court, with the appropriate observation that it would not be appropriate to speculate on what superior courts in general might decide on the Scheme's legality; make the unexceptionable point that it was a good idea to reassure the public about the legality of digitally-made decisions; and recommend more cryptically, a "mitigation strategy" where the legality of automation programs was uncertain. None of that amounted to the expression of a view about the legality of income averaging or the likely or proper outcome of the litigation.

There was absolutely no reason Mr Manthorpe should not have made observations of the kind that he did in Part 4 to the Draft Implementation Report. It was consistent with the Ombudsman's functions to make such a comment.

Ms Leon was, or should have been, aware that her arguments to Mr Manthorpe regarding prejudice to the judicial process lacked any legal merit. Indeed, giving evidence, she accepted the proposition advanced by Senior Counsel Assisting that "irrespective of what the Ombudsman might say in the exercise of their statutory function, [she] would have appreciated that the Federal Court….would be unaffected."[34]

As to the motivation for Ms Leon's pressuring of Mr Manthorpe: by this stage, public and political criticism of the Robodebt scheme had been raging for some years. Commentary by the Ombudsman that suggested frailty in the legal foundations of the scheme would have undoubtedly added fuel to that fire. The risk of this further public scrutiny and political pressure is a far more likely explanation for the desire to have it removed than a misplaced concern for the integrity of a judicial process.

In submissions, Ms Leon's representatives denied that she was 'aiming to avoid public or political scrutiny of the Scheme', asserting that there was no evidence to attribute to her motivations of this kind. It was also argued that caution was appropriate in commentary by parties to a matter before the Court and there was a real basis for thinking it undesirable for the Ombudsman to prejudge the legality of the matters in the Federal Court. The Commission does not accept these submissions. The inference it has drawn as to Ms Leon's motivations is clearly open on the evidence. For the reasons described above, there was no impediment to the Ombudsman making observations of the kind that he proposed.

In the Commission's view, Ms Leon's request to Mr Manthorpe to remove comments concerning legality from the Draft Implementation Report was not borne of any genuine concern to preserve the integrity of the Court's decision-making processes in the Masterton litigation. Rather, it was designed to avoid public and political scrutiny of the Scheme. Ms Leon's representations to the Ombudsman about the possible effect of those comments on the Masterton litigation were misleading and made without any proper basis.

The contention that DHS's legal position was "not uncertain"

Ms Leon represented to Mr Manthorpe, in her 8 March 2019 email, that the legal position of the Robodebt scheme was "not uncertain" in circumstances where she had received information that, to any reasonable person in her position, cast real doubt on the lawfulness of the practice of income averaging which was integral to the Scheme. This information was in the following forms:

- significant public questioning of the legal basis for the Robodebt scheme, in the media and academia[35]
- at least one AAT decision where findings had been made to the effect that the practice of averaging was unlawful[36]
- the 5 March 2019 AGS advice to the effect that Ms Masterton's application did not appear to be hopeless,[37] and
- the (accepted) advice of her Acting Chief Counsel, Mr Ffrench, on 7 March 2019 that an AGS advice on prospects in the Masterton litigation was needed.

The claimed position of DHS that the lawfulness of the Robodebt scheme was "not uncertain" cannot rationally be reconciled with that information. The claimed position can also not be reconciled with DHS' approach to the Masterton litigation - that is, DHS' adopting of Option 1 (as it had been described in the 5 March 2019 AGS Advice).

Ms Leon gave evidence that she had relied on advice from DHS legal officers in making the relevant representations to Mr Manthorpe as to the legal position of the Scheme. By her oral evidence, Ms Leon explained that, at the time of her 8 March 2019 correspondence to Mr Manthorpe, she "didn't know that [her] legal people by then had doubts."[38] In evidence and in submissions, Ms Leon asserted that she had not read the 5 March 2019 AGS advice. For the reasons explained above, the Commission does not accept these arguments.

Both Ms Leon and Mr Ffrench in their evidence (and Ms Leon in her submissions) emphasised that the representation to the Ombudsman that the lawfulness of the Scheme was "not uncertain" was a description of DHS's position at the time (as they understood it), not their personal view. Nonetheless, Ms Leon did not qualify her representation to the Ombudsman in that way; she described the absence of uncertainty as to the Scheme's legal position as 'our position'.

The Commission has carefully considered that evidence. It is true that, prior to 5 March 2019, there is no evidence that departmental officers had expressed to Ms Leon any uncertainty as to the lawfulness of the Scheme. To the contrary, Ms Musolino had informed Ms Leon on a number of occasions that the legal foundations of the Scheme were sound. In submissions, Ms Leon emphasised that, in making the relevant representations to the Ombudsman, she relied upon the advice of DHS lawyers.

It is necessary here to make a general comment about Secretaries' reliance on advice from departmental officers. As a matter of practice, Secretaries are regularly briefed with advice, and there is always a risk that it will be wrong or misleading. But Secretaries are not, or ought not be, utterly reliant on the advice that they receive. They can undertake critical analysis of the reasoning expressed in advice and seek external opinions to validate (or refute) that reasoning. Whether it is necessary to do so depends, of course, on a number of factors; but a critical factor is the implications of acting in accordance with the advice if it turns out to be wrong.

In this case, the implications were significant. Ms Leon was making representations to an entity charged with the statutory function of investigating the Scheme and its administration. If the advice to her that the Scheme's legality was not uncertain proved to be wrong, she would have misled the Ombudsman and caused him to act under a serious misapprehension in exercising his functions. It was therefore critical in this case that Ms Leon take substantial steps to make sure the advice was right.

Even if it were the position of some within DHS at the time of Ms Leon's representation to Mr Manthorpe that the lawfulness of the Scheme was "not uncertain," that position had no proper basis. Ms Leon did not delve into the grounds for the purported DHS position (by, for example, seeking from the legal officers

any legal advice underpinning the Scheme or asking what the relevant provisions of the Social Security Act which governed it were). If she had made those inquiries, she would have known that any position that the lawfulness of the Scheme was "not uncertain" could not be sustained.

In oral evidence, Ms Leon sought to distinguish between a representation (as was contained in the 5 March 2019 AGS advice) that "someone's case is not hopeless" and a representation that the Applicant "had very good prospects of succeeding."[39] The distinction is not a significant one in the context of what should have been drawn from the advice. It was enough to raise a question in the mind of any reasonable person in her position as to the lawfulness of the Scheme and the practice of income averaging. In light of that advice, the representation to Mr Manthorpe that the legality of the Scheme was "not uncertain" did not disclose the true state of affairs.

In submissions, Ms Leon's representatives made a slightly different argument about the significance of the 5 March 2019 AGS advice: that it "was not advice that the Robodebt Scheme was unlawful" but was instead advice that "Ms Masterton's case that she did not owe a debt was not hopeless." That distinction is artificial. The central argument advanced in the Masterton proceeding was that the use of averaged PAYG data was not sufficient basis to raise an overpayment debt. A ruling on that core ground would, in effect, be a ruling on the legality of the Scheme. This would have been clear to Ms Leon.

Additionally, in submissions, it was said that material provided to Ms Leon was indicative that "Ms Masterton's debt was erroneously calculated, not that there was a problem with the Robodebt Scheme." But the statement that Ms Masterton's application did not appear to be hopeless was made in the context of advice that Option 1 (i.e. a recalculation done using averaging) was not preferable. It was averaging, not some error in arithmetic that made Ms Masterton's prospects of success not "hopeless."

Ultimately, in the Commission's view, Ms Leon represented to Mr Manthorpe that the lawfulness of the Scheme was "not uncertain" in circumstances where:

- there was no legal or factual basis for that position
- Ms Leon had been in receipt of information prior to her representations to Mr Manthorpe that would have been sufficient to raise doubts in the mind of any reasonable person that the lawfulness of the Scheme was certain, and
- Ms Leon had not made proper inquiries to satisfy herself that there was sufficient basis to make that assertion to Mr Manthorpe.

The representation made by Ms Leon to Mr Manthorpe in March 2019 that the lawfulness of the Scheme was "not uncertain" was misleading.

2.9 Draft Australian Government Solicitor advice

The situation that DHS found itself in became more pressing. On 27 March 2019, AGS provided the Draft AGS advice. It was sent to Ms Leon on the same date.[40] The Draft AGS advice concerned the prospects of Ms Masterton's claim succeeding and said:

> There is no statutory basis in the SSA, or related legislation, for deeming apportioned fortnightly income to be accurate or provide a sufficient basis on which to raise and pursue a debt.

It continued:

> [Ms Masterton] would have good prospects of succeeding in a claim for relief on the basis that the use of apportioned ATO PAYG data will not establish that she owed a debt under s 1223(1).

AGS added the qualification that this was a complex question, and not all the factual instructions had been received; but (it said) the view expressed was sufficiently robust to inform decision-making for the purposes of the Masterton litigation. Before any final decision about its implications for the Scheme as a whole, the obtaining of senior counsel's advice was recommended. It was said that the Solicitor-General might wish to give an opinion.

The views expressed in the Draft AGS Advice had serious implications for DHS, not only in relation to *Masterton*, but also the Scheme at large. It was a strong indicator that the practice of averaging was unlawful. If correct, it followed that DHS was demanding and recovering money to which it had no lawful entitlement. The many thousands of social security recipients from which it did so included cohorts who were socially and financially vulnerable. It was imperative that DHS act quickly.

In accordance with the recommendation in the Draft AGS Advice, DHS set about briefing the Solicitor-General to provide advice on the lawfulness of averaging to determine social security entitlement. This process is dealt with in detail below.

2.10 Finalisation of Implementation Report

On 29 March 2019, Mr Manthorpe provided Ms Leon with an embargoed version of the Implementation Report concerning "Centrelink's Automated Debt Raising and Recovery System" ("Embargoed Implementation Report").[41] What had appeared as Part 4 to the Draft Implementation Report had vanished from the final report.

Ms Leon failed to advise Mr Manthorpe after she received the 27 March 2019 advice from AGS on 29 March 2019 that her description of the position in relation to the legality of the Scheme was wrong. Having received the 27 March 2019 opinion, any reasonable person would have understood that the lawfulness of the Scheme was very much in doubt.

In evidence, Ms Leon was questioned as to why she had not ensured that "the Ombudsman was informed that there was a legal question and that the Department was engaging with that question by taking various steps." She responded, "I don't think I turned my mind to the reply I had sent to the Ombudsman some weeks earlier on the day I received the AGS advice."[42] In submissions on this issue, Ms Leon referred to her volume of work at the time and her reliance on those below her to bring her attention to events requiring "revisiting earlier correspondence." The Commission does not accept these submissions.

Having adopted the position consistent with the representation to the Ombudsman that the legal position of the Scheme was "not uncertain," it was incumbent on Ms Leon to correct the record when that position changed. It became clear, in light of the 27 March 2019 advice that such a position was no longer sustainable. At no point after receiving the advice did Ms Leon advise the Ombudsman that there were serious questions as to the legality of the program and that her previous description to the Ombudsman of the position was no longer accurate. In fact, it was not until after DHS (now Services Australia) received the Solicitor-General's opinion on 24 September 2019 that Ms Leon contacted the Ombudsman again in relation to the issue of legality.

In the Commission's view, Ms Leon's failure to advise Mr Manthorpe that her previous representation to him in relation to the legality of the Scheme had no proper basis was, in its effect, misleading, and denied him any opportunity to reconsider his findings. It was not sufficient for Ms Leon to rely upon other DHS officers to bring to her attention the need to correct the record.

2.11 Further recalculation

On 1 April 2019, Ms Leon met with a number of officers, including Mr Ffrench, Acting Chief Counsel for DHS and Ms Musolino, acting deputy secretary, to discuss *Masterton*.[43] Ahead of the meeting, DHS officers sent a brief to Ms Leon seeking instructions as to how the Agency should proceed with the recalculation in the Masterton case.[44] Three options were canvassed: Options 1 and 2 described in the 5 March 2019 AGS advice and a further option (Option 3).

Option 3 contemplated a "recalculation" of the debt on the basis of depositions in the Masterton affidavit material filed. The plan was to determine Ms Masterton's entitlement to benefit by relying on paragraphs 6(a) and 53 of an affidavit dated 4 February 2019 by Mr Miles Browne, a lawyer at Victoria Legal Aid. Mr

Browne had stated in his affidavit that Ms Masterton had told him that she had "properly reported her income to Centrelink whilst receiving social security payments;" and that "she reported income amounts fortnightly to Centrelink from July 2011 to March 2012."

Although those briefing Ms Leon spoke of Option 3 as an approach to a "recalculation" of Ms Masterton's debt, there was no arithmetic involved. Instead, it involved DHS, in effect, taking Ms Masterton's word (or her solicitor's recounting of it) for it.

Option 3 was presented to Ms Leon as the "best means of managing litigation risk." There is not much doubt why. If it were accepted that Ms Masterton had correctly reported her income amounts to DHS, there could have been no overpayment of benefit. The debt the subject of the judicial review would likely be extinguished, leaving open the jurisdictional argument (that there was nothing left for the court to decide) eventually run by the Commonwealth.

The approach contemplated by Option 3 was unusual, to put it mildly. DHS was proposing to rely on hearsay evidence from Mr Browne that Ms Masterton had told him she had "properly reported her income." There was no DHS policy operating in respect of the Robodebt Scheme that contemplated reliance upon bare assertions by social security recipients that they had properly reported in determining social security entitlement, much less second-hand evidence of such assertions.

At the meeting on 1 April 2019, Ms Leon agreed to pursue Option 3.[45] DHS then sought advice from AGS as to whether Option 3 was "properly open to the Commonwealth" and whether it accorded with obligations imposed on DHS by the *Legal Services Directions 2017*. In advice dated 8 April 2019, AGS said in relation to Option 3:

> The information that is taken into account, or not, in that recalculation is largely a matter of Departmental policy and decision-making guidelines, as well as ordinary good administrative decision-making principles. We understand the proposed approach is consistent with the Department's policy and will have the approval of the necessary decision makers. Subject to the qualification below, we are not aware of any reason why the recalculation should not be conducted on the basis proposed. [emphasis added.]

Notably, AGS had assumed, for the purposes of the advice, that the approach contemplated by Option 3 would be approved and was "consistent with the Department's policy." It might have been approved by the "necessary decision-makers," but it was certainly not DHS policy.

On 12 April 2019, DHS recalculated Ms Masterton's debt in accordance with Option 3. The result of the recalculation was that Ms Masterton's debt was reduced to zero and set aside. On the same date, DHS wrote to Ms Masterton's legal representatives and explained that, by virtue of the "recalculation decision," Ms Masterton owed no debt to the Commonwealth.[46] It continued: "As a result of the recalculation decision, the Respondent considers that there is no continuing utility to the present proceeding..."

On 26 April 2019, there was a case management hearing in the Masterton matter. Mr Peter Hanks KC appeared on behalf of Ms Masterton. Counsel for the Commonwealth submitted that the court no longer had jurisdiction to make the declarations Ms Masterton sought because the extinguishment of the debt meant that there was no longer "a matter in the sense of there being an immediate right, duty or liability to be established by the determination of the court" for the purposes of s 39B(1A)(c) of the *Judiciary Act 1903* (Cth).[47] In response, Mr Hanks made allegations of "bad faith" against the Commonwealth, describing it as having exploited a "forensic advantage" by "destroying the debt" to avoid judicial determination of the lawfulness of that debt.[48]

Eventually, Ms Masterton would discontinue the proceeding before the Commonwealth's jurisdictional argument could be resolved. The events that led to the conclusion of the Masterton proceeding are discussed in detail below.

2.12 More papering over the cracks

The Commonwealth's approach to the Masterton case revealed a good deal about its motives and designs. The fundamental question in the proceeding was whether averaging could be used to determine social security entitlement. Through the Draft AGS Advice, DHS had been given a strong indication of what the answer to that question was. Armed with this knowledge, it was for DHS to decide how it wished to proceed. To fall on its sword and concede was one option. To allow the Court to decide the issue upon a contested hearing was another. Both scenarios would likely have exposed the unlawfulness of the Scheme to the world, vindicating those who had been critical of the program since its inception.

But DHS's adoption of Option 3 was an attempt to avoid this outcome entirely. It was a strategy designed not only to avoid a judicial determination of the fundamental question, but also to ensure that the Commonwealth was not forced to show its hand.

The Draft AGS Advice was expressed to be sufficient to properly inform decision-making about the Masterton litigation while proposing more detailed consideration in connection with the "implications… for the system as a whole." The distinction between "decision-making" in the Masterton case and decisions about "the system as a whole" was artificial. A concession by the Commonwealth that the use of averaged PAYG data was not sufficient basis to raise the asserted debt in *Masterton* would have been an effective concession that the averaging component of the Scheme was unlawful.

Still, it was arguably premature for the Commonwealth to concede that the debt had been raised unlawfully without obtaining more definitive advice, given the implications for the Scheme at large and given the reservations expressed in the Draft AGS Advice. At the same time, it would have been inappropriate for the Commonwealth to proceed to a contested hearing on the substance of the application, given the strong indications in the Draft AGS Advice that it would be unsuccessful. But the Commonwealth could instead have given its lawyers instructions to seek further time from the Federal Court to consider its position and to seek the necessary advice. That would not have had the effect of frustrating Ms Masterton's claim.

Instead, the Commonwealth sought to avoid having to put its cards on the table altogether. It extinguished the debt, in a way that was inconsistent with its own policies, and ran the jurisdictional argument. The extinguishment of the debt was no solace to Ms Masterton. Her objectives were more ambitious than merely having it set aside; she sought declarations from the Court that would have wider implications for the Scheme at large.

The Commission does not ascribe any bad faith to Ms Leon in the making of this decision. She was acting upon advice from DHS officers. But in a broader sense, the Commonwealth's behaviour in using its powers in an attempt to frustrate Ms Masterton's objective was disingenuous. It was consistent with the Commonwealth's continuing desperation to paper over the fissures in the Scheme's foundations; fissures that were becoming more and more difficult to conceal.

3 Commencement of *Amato*

On 6 June 2019, Deanna Amato filed an originating application for judicial review in the Federal Court.[49] Her application challenged a decision by the secretary of Services Australia to raise and recover from her an alleged debt resulting from overpayment of social security benefit. Like Ms Masterton, Ms Amato was represented by Victoria Legal Aid.

The debt the subject of Ms Amato's application arose from alleged overpayment of social security benefit in 2012. It had been raised on 28 February 2018 by averaging Ms Amato's earnings as they appeared in PAYG data and at the time of the Application, that debt was in the amount of $2,754.82.

By her application, Ms Amato sought declarations similar to those Ms Masterton sought, including a declaration that the alleged debt the Commonwealth was demanding was not "a debt due to the Commonwealth" under the *Social Security Act 1991* (Cth). Again, the core argument advanced by Ms Amato was that the use of averaged PAYG data was not sufficient basis to raise an overpayment debt under the relevant statutory framework.

There were differences between Ms Amato's case and Ms Masterton's. On 3 September 2018, a total of $1,709.87 had been garnished from Ms Amato's tax refund to recover part of her debt.[50] By her application, Ms Amato sought an order requiring the Commonwealth pay to her money received through the garnishee, together with interest on that money pursuant to s 51A of the *Federal Court of Australia Act 1976* (Cth). Ms Masterton had no such claim.

The claim that Ms Amato was entitled to interest on the garnished amount later enabled her to avoid the same jurisdictional arguments that had been made by the Commonwealth in the Masterton case.[51]

3.1 Amato recalculation

As in the Masterton case, the Commonwealth took steps in the Amato case to avoid a determination on the lawfulness of averaging. Days after Ms Amato's filing of her application, Services Australia sought to obtain evidence of her actual income for the relevant period. No doubt the wiser for its experience in Masterton, Services Australia did not ask Ms Amato to provide any information herself. Instead, it sought and obtained information from her bank and former employer.

On 21 August 2019, Services Australia undertook a recalculation of Ms Amato's debt, based upon the information it had obtained from her employer. With that recalculation, Ms Amato's debt was reduced from $2,754.82 to $1.48. The debt was then waived[52] and Ms Amato was reimbursed the total amount paid to service the debt (including the amount garnisheed from her tax return). Ms Amato was not paid interest on the amount taken from her tax refund.

The Commonwealth's attempts to avoid having to show its hand proved unsuccessful. On 3 September 2019, Services Australia obtained an opinion from AGS. AGS advised that there was no basis for the Commonwealth to contend that there was "no jurisdiction or utility" in the Amato proceeding, because there was "still a live controversy": Ms Amato's claim for interest. In a briefing on 4 September 2019, Mr Ffrench advised Ms Leon:[53]

> …there is still an issue for the Court to decide as Ms Amato has claimed interest on the money garnisheed from her tax return. This means that the Amato proceedings cannot be managed in the same fashion as Masterton, where the Commonwealth is arguing there is no purpose to the application after the debt was reduced to zero.

On 6 September 2019, there was a case management hearing for both the Masterton and Amato proceedings. Amato was set down for hearing on 2 December 2019. The Masterton case, in which the jurisdictional issue had been raised would be determined after a decision in Amato was handed down. The resolution of the *Amato* and *Masterton* litigation is dealt with in detail below.

4 Briefing Mr Robert

On 11 June 2019, the Hon Stuart Robert MP, Minister for Human Services, was given a brief on the Masterton case.[54] It indicated that if the litigation were to result in an adverse decision concerning the lawfulness of the debt, consideration would have to be given to "legislative or revised administrative arrangements" for the Scheme. Ms Leon had reviewed a draft of the brief some days earlier. She had noted on the draft that the minister would "also need to be briefed orally."[55]

Mr Robert read and signed the brief on 22 June 2019,[56] adding a comment that the deputy secretary, Integrity, (Ms Annette Musolino) was to brief him in the first week of July. That briefing duly took place on 4 July 2019. There is controversy as to what occurred at it.

4.1 Communication of Draft AGS Advice

Mr Robert was not, at any point, provided with a copy of the Draft AGS Advice. In evidence, Mr Robert emphasised that it would be extraordinary if an advice of such significance as the Draft AGS Advice were not presented to him as minister as a part of a written brief. There is force in that comment, but it seems that is what occurred.

What was the subject of dispute was whether Mr Robert was nevertheless briefed orally about the Draft AGS Advice. Ms Leon had made a notation on a brief delivered to her that the minister was to be briefed orally,[57] in order to keep distribution of the advice itself to a more limited group than would receive a written ministerial briefing.[58] Mr Ffrench said that in accordance with Ms Leon's instruction, he attended the 4 July meeting, with Ms Musolino and others, to brief the minister. His evidence was that he took a copy of the Draft AGS Advice with him and explained to Mr Robert the difficulties raised by the Advice in relation to aspects of the Scheme. He informed Mr Robert that, as a result of the Draft AGS Advice, steps had been taken to obtain an opinion from the Solicitor-General.[59]

According to Mr Ffrench, Mr Robert did not ask whether there was any existing legal advice on the issue of averaged PAYG data and did not say anything about obtaining external legal advice on the question.[60] He believed that it might have been in this meeting that the minister made a statement to the effect that a legal advice was merely an opinion until a Court declared the law.[61] Unfortunately, however, Mr Ffrench did not document the meeting in any way.

Mr Robert, on the other hand, maintained that he was never advised of the Draft AGS Advice, orally or in writing.[62] Had he been, he said, he would have acted immediately to halt the Scheme. To the contrary, it was he who, in the 4 July 2019 briefing, first confirmed that there was no existing legal advice as to the use of averaged PAYG data[63] and directed that legal advice be obtained from AGS or the Solicitor-General (he was not certain which) as to: the legality of using averaged PAYG data; options to move away from its use; and the litigation (*Masterton* and *Amato*) then on foot.[64]

Mr Robert's representatives made submissions as to why his recall should be preferred. Mr Ffrench's account was not supported by documentary evidence, such as meeting notes; there was a lack of detail about the claimed briefing; Mr Ffrench had said his usual practice was to confirm oral advice in writing, and that had not occurred. Others present at the meeting - Mr Storen and Mr McNamara - had not given evidence about this aspect and they were not asked about it. (Ms Musolino was, but she maintained she had no independent recollection of it.) He had not appreciated that the evidence of Ms Leon and Mr Ffrench on the point would be given weight and had not therefore appreciated any need to seek leave to cross-examine them.

After the receipt of Mr Robert's submissions, Mr Storen and Mr McNamara were asked for their recall of the 4 July 2019 meeting and what was discussed at it. Mr Storen said that while the Draft AGS Advice and emails about the meeting were familiar to him he had no particular recollection of the meeting itself or discussions about the Draft AGS Advice with the minister. Mr McNamara, while having no independent

recollection of attending the meeting or what was discussed or who was involved in it, nonetheless, was able to give his opinion that because he was not aware the income compliance program was "legally problematic" until he became aware of the content of the Solicitor-General's advice later that year, he did not believe that the 4 July meeting involved discussions with the minister about income averaging being "legally problematic."

Neither Mr Storen's nor Mr McNamara's evidence assists in resolving the question of whether Mr Ffrench did tell the minister about the Draft AGS Advice. It is not surprising that they were not able to assist with any recollection on that point. Neither was a lawyer and they were at the briefing for the purpose of speaking to slides which detailed the current compliance measures.

Mr McNamara's opinion is not useful, because there is not actually any dispute as to whether the legality of income averaging was discussed at the meeting. Mr Robert's own account was that he directed the obtaining of legal advice about the legality of its use and options to move away from it, as well as about the *Masterton* and *Amato* litigation. An email which Ms Musolino sent a couple of days later to the participants in the meeting identified the matters the minister's office had sought briefing on as a result of it. It contained as its first item "Options for continuing or replacing income averaging (in light of current Federal court cases)" with an item which speaks of adjustments in the event of an adverse court outcome. That also very strongly suggests that the "legally problematic" aspects of income averaging were discussed.

Mr Ffrench's account of telling Mr Robert about the Draft AGS Advice at the 4 July 2019 meeting was squarely put to Mr Robert when he gave evidence. He responded that he did not recall it occurring.[65] For completeness, Ms Leon's recollection was that she thought she or a staff member would have told Mr Robert about the advice, and he disagreed with that.[66] Mr Robert did not seek leave to cross-examine either Mr Ffrench or Ms Leon on the matter, either when they gave evidence or subsequently, as he could have done.[67] (The Commission in fact has not taken into account Ms Leon's evidence on the point, because of its vagueness.)

The Commission found Mr Ffrench a credible witness, notwithstanding the lack of documentary record of the meeting, and found Mr Robert less compelling. Surrounding circumstances support Mr Ffrench's account. Contemporaneous emails confirm that he was preparing an oral briefing for the minister on the *Masterton* litigation.[68] The only point of his being at the 4 July 2019 meeting was to explain the legal position that Services Australia found itself in. Any such explanation would have involved describing the doubts arising from the Draft AGS Advice on prospects. It would also make very little sense, had Mr Robert expressed a desire to obtain external legal advice, that he would not have been informed by Mr Ffrench - or others at the meeting - that steps were already under way to obtain the Solicitor-General's Opinion (as they were);[69] and it seems highly probable that he would have been told that was AGS' recommendation in the Draft AGS Advice.

A further brief was provided to Mr Robert on 19 July 2019 (the 19 July brief). The 19 July brief referred to the *Masterton* and *Amato* litigation and went on to say that, given the risks and costs associated with that litigation, the use of income apportioning within the compliance program was actively being considered, by way of exploration of risk mitigations to support its continued use and other process changes. The brief did not elaborate on the risks but advised that a request to brief the Solicitor-General for advice on the use of PAYG data was in progress.

The content of the 19 July brief, referring to the risks and costs associated with the *Masterton* and *Amato* litigation is consistent with Mr Robert's having received an account of the problems identified in the Draft AGS Advice. The reticence of the brief's authors to elaborate on those risks is explicable if Mr Ffrench had, as he said, already explained them by reference to the AGS Draft Advice.

The Commission's view is that, remarkable though the failure to provide the Draft AGS Advice in written form to Mr Robert was, he was nonetheless informed of its existence and effect on 4 July 2019. However, the Commission agrees with a further submission advanced on Mr Robert's behalf. His being verbally briefed in relation to the Draft AGS Advice is unlikely to have changed the sequence of events. It is probable that the next step would have been the obtaining of legal advice from the Solicitor-General.

5 Mr Robert's public comments

In his evidence, Mr Robert said that early in his tenure as Minister for Government Services, from around June or July 2019, he appreciated that only 10 per cent of welfare recipients had been engaging with the current iteration of the Scheme (the CUPI)[70] and that a recipient who did not engage or explain their earnings would have a debt raised against them through the averaging of PAYG data.[71] He also appreciated that averaged PAYG data alone was insufficient to raise a debt.[72] In fact, his misgivings about the use of PAYG data were such, he said, that he delayed extending the Robodebt Scheme to vulnerable cohorts.[73]

Despite what Mr Robert said was his "strong personal view"[74] that income averaging led to incorrect calculations of debt, he was prepared to advocate for its use. In particular he claimed publicly that in 99.2 per cent of cases where a debt was raised, the debt was correct. He explained this figure in different ways.

In an interview on 31 July 2019,[75] Mr Robert asserted that in 99.2 per cent of the 80 per cent of cases where recipients could not explain their income, Services Australia had conducted a review which showed that the recipient in fact had the debt. In a later doorstop interview, on 17 September 2019,[76] he said it was based on a calculation that of the 80 per cent of cases where the recipient had not explained their earnings satisfactorily, only 0.8 per cent had been overturned on appeal, which meant a 99.2 per cent effectiveness rate. (A media release authorised by Mr Robert on the same day made a similar claim). In evidence, Mr Robert suggested that the 0.8 per cent might consist of cases which succeeded on application to the AAT or, more generally, cases where error by Services Australia or the ATO had been identified.[77]

The Commission has tried to establish how a figure of 0.8 per cent could have been arrived at as representing the percentage of inaccurate debts in those cases where a debt was raised. To begin with, the claim that debts were raised in 80 per cent of cases is flawed. According to figures provided to the Commission by Services Australia,[78] across the life of the Robodebt Scheme, debts were actually raised in about 55 per cent of cases where recipients were required to respond to a discrepancy between declared income and PAYG data.

Turning to the figures for debts raised, a percentage as low as 0.8 per cent could only be arrived at confining consideration to debts revised after review in the Administrative Appeals Tribunal. This is to ignore debts revised internally after reassessment by Services Australia officers, after Subject Matter Expert (SME) review and after Authorised Review Officer (ARO) review, which, on the figures provided by Services Australia, accounted for about 16 per cent of cases where debts were raised. And, of course, it was based upon the unsafe assumption that if a recipient did not have the capacity to seek review, the debt raised against them must have been accurate.

The statement made in the 31 July 2019 interview was untrue (Services Australia had not reviewed 99.2 per cent of the cases where the income discrepancy had not been explained, let alone found the debt to be correctly raised). The statement made in the 17 September 2019 interview was, at best, misleading; it suggested that only a fraction of debts had been challenged and that the balance of 99.2 per cent was therefore correct.

In oral evidence, Mr Robert explained his interview statements as being part of his duty to defend the government's programs, which Cabinet solidarity required ministers to do whether they agreed with the programs or not.[79] "Government Ministers are expected to show confidence in the agenda of the government… Cabinet Ministers can't go out and defend some parts of a government's program and be wishy-washy on others."[80]

To the proposition that being a Cabinet minister did not compel him to say things that he did not believe to be true, Mr Robert replied: "until such time…as I've got the legal opinion, I could be wrong."[81] However, when it was pointed out to him that this was not a matter of law, it was a matter of maths, which he could see could not be correct, Mr Robert admitted that, "in [his] view, the maths could not possibly add up."[82]

Mr Robert's lawyers made these submissions on this issue. He had adhered to "the letter of the Cabinet Handbook" and what he said was appropriate given that his personal views at the time were unsupported by legal advice. He was not aware when he made the 99.2 per cent effectiveness rate claim that it was untrue; the concession in his evidence that it was untrue was a reflection of what he knew at the time of his giving evidence, not when he made the representation. Mr Robert was not the "architect" of the flawed representation; DHS had given him the relevant figures.

The submission that all Mr Robert was conceding in evidence was that he knew now the figure was false, not that he knew it at the time, does not sit well with his actual evidence:

> MR SCOTT: Well, your evidence was that you could not raise a debt based solely on averaging.
>
> THE HON STUART ROBERT: That was my belief, yes.
>
> MR SCOTT: And in 90 per cent of cases, that's exactly what was happening under the program to your knowledge at the time.
>
> THE HON STUART ROBERT: Yes, that is correct.
>
> MR SCOTT: So what you said there, to your knowledge at the time, was false, wasn't it?
>
> THE HON STUART ROBERT: To my personal view, yes. But I'm still a Government Minister, and it's still a government program. And this was the approach that Cabinet has signed off on three or four years earlier and had been going on. And until such time as I'm not a lawyer, I've got a competent legal view, it is still just my opinion.[83] [Emphasis added.]

And later, on the same topic:

> COMMISSIONER: But you are saying they were the Departmental figures. But you knew they couldn't be right.
>
> THE HON STUART ROBERT: I had a massive personal misgiving, yes, but I'm still a Cabinet Minister.

If Mr Robert did not know at the time he made the representations that the claim of a 99.2 per cent effectiveness rate was false, he at least had a very good idea, "a massive personal misgiving," that it was most unlikely to be right.

Mr Robert's views about the legality of averaging are irrelevant to this point. He was citing a figure as to the supposed 99.2 per cent accuracy achieved by CUPI, not making a statement as to whether the program was legal. As to the source of the figure, ministers are not entirely at the mercy of the information that they receive from their departments. Where dubious figures are provided, the minister is in a position to demand the basis for the information and confirmation of its accuracy. And Mr Robert held the view that "the maths could not possibly add up."[84]

It can be accepted that the principles of Cabinet solidarity required Mr Robert to publicly support Cabinet decisions, whether he agreed with them or not.[85] But Mr Robert was not expounding any legal position, and he was going well beyond supporting government policy. He was making statements of fact as to the accuracy of debts, citing statistics which he knew could not be right. Nothing compels ministers to knowingly make false statements, or statements which they have good reason to suspect are untrue, in the course of publicly supporting any decision or program.

6 Delay in briefing Solicitor-General

On 27 March 2019, Ms Leon had been provided with the Draft AGS Advice,[86] which while expressing the view that Ms Masterton had good prospects of succeeding her claim based on averaging, recommended that, before any decision about the implications for and the steps to be taken in respect of the Scheme as a whole, senior counsel's advice, possibly from the Solicitor-General, be obtained.

On 1 April 2019, Ms Leon met with a number of officers, including Mr Ffrench and Ms Musolino, to discuss the Masterton case. During this meeting, Ms Leon asserts, she asked that DHS officers proceed with obtaining the Solicitor-General's advice.[87] However, it was not until 27 August 2019 that the Solicitor-General was briefed to provide advice on the Scheme.[88]

In the period between DHS' receipt of the Draft AGS Advice on 27 March 2019 and its briefing of the Solicitor-General, the Scheme marched on. Debts determined on the basis of averaging continued to be raised, pursued and recovered in circumstances where the Government had advice that raised serious doubt as to the lawfulness of these practices. In the Commission's view, this delay was excessive.

Mr Ffrench said that there was a delay during the period of the 2019 election (which was announced on 11 April 2019), and it was not unreasonable to hold off seeking the advice during that period, because if the government changed it might abandon the Scheme, or the questions to be asked of the Solicitor-General might be different.[89] But it is highly improbable that a new government would not want an answer to the same fundamental question of whether averaging as used in the Robodebt Scheme was legal, particularly given that it was the respondent to litigation on that issue.

Ms Leon did seek and receive an update on the progress of the brief in early June 2019, and was told the questions for the Solicitor-General were still under development.[90] Services Australia's engagement with DSS in the formulation of the questions to be put to the Solicitor-General caused some delay.[91] By early August 2019, she was becoming concerned about the length of time the process was taking. There was an email exchange with Mr Ffrench about the work being done with DSS on the brief, followed by a meeting between Ms Leon, Ms Campbell and their senior lawyers on 7 August 2019, at which both Secretaries conveyed, according to Mr Ffrench, "a desire to move things faster." The brief was delivered to the Solicitor-General at the end of that month.

In evidence, Ms Leon explained:[92]

> …it's possible that I didn't follow [briefing the Solicitor-General advice] up as frequently as I might otherwise have done during that period. But in any event, when I then inquired in late July or early August, by then it seemed to me to have gone on too long. And I conveyed that to people in the Department who, by then, had been engaged in some protracted negotiations with the Department of Social Services about the wording of the question, which agreement had to be obtained because they owned the legislation. And so I hurried it along to get it finalised, and then it was.

In submissions made on Ms Leon's behalf, it was said that she followed up the progress of the brief with the relevant DHS officers in accordance with the expected timeframe; her staff had told her that it would take some months to brief the Solicitor-General because DSS would have to be consulted, AGS would have to settle the question and there was a "technical process" involved in the briefing. When it became apparent that it was taking too long, she intervened to make sure "the brief was finalised in a timely manner." It was conceded that she had not followed up the matter as often as she might have, but that was because she was "significantly occupied with certain other time critical matters" during the briefing process.

However, in the Commission's view, none of this justifies the five-month delay in preparing and delivering the brief. The question that needed answering was a simple one – was the use of averaging to determine social security entitlement lawful? It should not have taken almost half a year for the question to be asked. If it were the case that Ms Leon was told that briefing the Solicitor-General would take "some months," she should have made it clear that the urgency of the situation made that kind of timetable unacceptable.

As to the suggestion that Ms Leon was occupied with other "time critical" matters, it is difficult to conceive of a matter more critical than this. In light of the unambiguous opinion from AGS that the component of Ms Masterton's claim relating to the lawfulness of averaging had "good prospects of succeeding," it should have been clear to Ms Leon that the legality of the use of averaged PAYG data to establish a debt was in serious doubt. If that was correct, it followed that DHS was demanding and recovering money to which it had no lawful entitlement. The cohort from which it did so included many who were socially and financially vulnerable. Given her position as secretary of DHS and then Services Australia, it was Ms Leon's responsibility to ensure that the Solicitor-General was briefed as a matter of urgency.

7 The Solicitor-General's opinion

7.1 Receipt of the Solicitor-General's opinion

Services Australia received the advice of the Solicitor-General[93] (the Solicitor-General's Opinion, or the Opinion) on 24 September 2019. Ms Musolino gave Ms Leon a copy of the advice the same day.[94] In relation to "*the use of apportioned ATO PAYG data in making debt decisions*," the Solicitor-General expressed the following view:

> In our opinion, apportioned ATO PAYG data cannot properly be given "decisive" weight in deciding either that a debt is due, or the amount of that debt. That is, apportioned ATO PAYG data cannot, without more, support a conclusion that a person has received benefits to which they were not entitled.

The Solicitor-General's Opinion was an authoritative opinion that the Commonwealth did not have a proper legal basis to raise, demand or recover asserted debts solely on the basis of income averaging, a practice fundamental to the Scheme. The effect of the Opinion was to make clear that, over the life of the Scheme in its various iterations, the Commonwealth had unlawfully been raising asserted debts against welfare (or former welfare) recipients.

Given the significance of the Solicitor-General's Opinion to the Scheme and to Government more broadly, it was imperative that the Opinion be acted upon as soon as practicable. It should have been immediately obvious to those who received it that, at the very least, the practice of using averaging as a basis to raise and recover purported debts could not continue.

Instead, there was substantial delay before Services Australia acted on the Solicitor-General's Opinion in any meaningful way. In the period between Services Australia's receipt of the Solicitor-General's Opinion on 24 September 2019 and the practice of averaging being ceased on 18 November 2019, the Scheme continued for a period of almost two months. Debts determined on the basis of averaging were still being raised, pursued and recovered in circumstances where the Government had unambiguous advice to the effect that these practices were unlawful. The following is a summary of events that occurred at the time and in the immediate aftermath of Services Australia's receipt of the Solicitor-General's Opinion.

7.2 Initial response

Not long before she gave Ms Leon the Solicitor-General's Opinion on 24 September 2019, Ms Musolino sent a text message to Ms Leon saying:[95]

> Secretary - the standard practice is that an advice from the SG will be copied to the AG. Given this I propose reaching out to MO tomorrow to indicate we are considering the advice but need to clarify a number of issues before briefing Min on advice and implications. Annette.

Ms Leon said in her evidence that she understood from the text message that Ms Musolino would be contacting Mr Robert's office in relation to the Solicitor-General's Opinion, and she had relied on her to do so.[96] Mr Ffrench gave similar evidence: soon after Services Australia's receipt of the Solicitor-General's Opinion, Ms Musolino had advised him not to share the document and told him she would "attend to all further escalation" of the advice, including to DSS.[97]

Notwithstanding those indications to the contrary, it does not seem that Ms Musolino made any contact with Mr Robert's office or DSS in relation to the Solicitor-General's Opinion. On the evidence the Commission accepts, Mr Robert was not made aware of the Opinion until 29 October 2019 and DSS received it on 7 November 2019.

7.3 Consideration of options

There is very little documentary evidence about what happened immediately after Services Australia's receipt of the Solicitor-General's Opinion. Ms Leon said there was a period of some weeks after she received it that departmental staff spent in exploring "what changes could be made to the Robodebt scheme to bring it within legislation or whether the scheme was to be ceased." During that time, she had "a number of meetings and received verbal briefings about these issues."[98]

According to Ms Leon, Mr Storen and Mr McNamara "spent about a month trying to work up other options for how we might be able to change how the online compliance program operated, to make it consistent with what we now knew to be the legal position." Once the work was done, it was obvious that "we could not find a way to continue operating the scheme," [99] so she then made the decision to inform Mr Robert and DSS.

There is evidence that, under Ms Leon's instruction, Services Australia officers worked throughout October 2019 to prepare a briefing to Mr Robert that outlined options for the redesign of the program. The work informed briefings given to Mr Robert after he was advised of the Solicitor-General's Opinion.[100]

7.4 Bringing the Solicitor-General's Opinion to Mr Robert's attention

The time at which Mr Robert was made aware of the Solicitor-General's Opinion is the subject of dispute. He says he was first told about it by way of a brief that he received on or about 7 November 2019.[101] Ms Leon's evidence, however, was that she had made Mr Robert aware of the Solicitor-General's Opinion's nine days earlier during a teleconference on 29 October 2019.[102]

On Ms Leon's account, during that teleconference, she told Mr Robert about "the thrust of the advice" and made these points:[103]

- "As a result of the Solicitor-General's advice it is not permissible to raise debts based on averaging of income. We have held this advice very close due to its sensitivity. DSS is not yet aware of it. We will prepare a briefing to you to inform the Prime Minister"
- "Due to the timeframes in the Amato proceeding, we will need to act fairly swiftly to cease the averaging of income. DSS needs to take action in relation to the program, and its ongoing operation," and
- "There will be financial implications and we will need to consider what should be done about past debts raised using averaging"

According to Ms Leon, Mr Robert responded: "Legal advice is just advice."

In oral evidence, Mr Robert said he did not recall any conversation with Ms Leon on 29 October 2019. He denied having been notified of the Solicitor-General's Opinion at this time or saying to Ms Leon, "Legal advice is just advice."[104]

The evidence points to Mr Robert's recollection being flawed on this point. Ms Leon was able to produce a handwritten diary entry, which appears to be a contemporaneous note of her conversation with Mr Robert on 29 October 2019.[105] The discussion recorded largely reflects Ms Leon's account of the teleconference, and contains the phrase, "Advice is just advice."

Mr Ffrench also observed that it was apparent from something Mr Robert said during a meeting on 8 November 2019 that the latter had been aware of the Solicitor-General's Opinion for some time prior to the meeting, because he referred to his previous knowledge of it;[106] which lends some further support to Ms Leon's account of having informed him of it on 29 October 2019.

Also reinforcing Ms Leon's evidence is the statement of Dr Roslyn Baxter, who commenced as deputy secretary, Integrity & Information Group at Services Australia on 28 October 2019.[107] On 29 October 2019, on her second day in the role, Dr Baxter said, Ms Leon telephoned her and informed her of a conversation she had just had with Mr Robert. It included the detail that she had advised him that while the agency was still in the process of preparing a formal briefing about the Solicitor-General's Opinion, it had no reason for confidence about the legal basis of income averaging and it would be necessary for the minister to come to a decision soon; to which Mr Robert responded that she should make some cautious overtures to the Department of Finance about the financial implications of halting the Robodebt Scheme.

Ms Leon also, in Dr Baxter's recollection, referred to the expression "Advice is 'just advice'," but in the context of Mr Robert's having attributed it to the Attorney-General, to whom, he said, he had spoken about the legality concerns in relation to the Robodebt Scheme.

In submissions on this issue, Mr Robert's representatives again made the point that Ms Leon Mr Ffrench and Dr Baxter had not been cross-examined, and that part of Dr Baxter's statement was redacted. Again, it was entirely predictable that there would be conflicts between the evidence of Mr Robert and Ms Leon on this issue. It was open to him to seek leave to cross-examine Ms Leon, and Mr Ffrench so far as his evidence supported hers. Dr Baxter's statement was redacted for reasons of public interest immunity and it is to be noted that Mr Robert's solicitors did not respond when asked if they wanted to apply for a ruling on whether that privilege should be maintained. Because Dr Baxter's statement was given after hearings had closed, Mr Robert did not have the opportunity to seek leave to cross-examine her. But as has already been pointed out, the lack of cross-examination affects the weight to be given to a witness' evidence, but it does not preclude its acceptance. Dr Baxter had a practice of making daily contemporaneous notes recording to whom she had spoken and what was said, which gives some confidence in the accuracy of her recollection.

Mr Robert's solicitors were particularly concerned to rebut the claim that Mr Robert made the statement "Advice is just advice" on 29 October 2019, but in the alternative contended that if it were said, it was of "little consequence" and only "peripherally relevant" in light of what happened after.

The evidence of the three witnesses weighs strongly in favour of Ms Leon's having spoken to Mr Robert about the Solicitor-General's Opinion on 29 October 2019, and the Commission accepts that the conversation did occur. It seems probable, too, that the "Advice is just advice" comment was made in some context in this conversation. Mr Ffrench remembered Mr Robert saying something of the sort, although probably on a different occasion and in relation to a the Draft AGS Advice. Both Ms Leon and Mr Ffrench pointed to the fact that a brief delivered to Mr Robert on 7 November 2019 cautioned that, while the Solicitor-General's Opinion did not amount to a "judicial declaration of law," there was considerable reputational and legal risk in continuing the Robodebt Scheme. Both said the phrase was included as a counter to Mr Robert's dismissive attitude to legal advice. And both Ms Leon and Ms Baxter had a contemporaneous record of the phrase's use in the 29 October conversation.

But what is unclear is the context in which it was said – Dr Baxter recalled Ms Leon saying that Mr Robert attributed it to the Attorney-General – and whether it mattered. At the time of the 29 October conversation, Mr Robert had only just become aware of the Solicitor-General's Opinion's existence and had not had an opportunity to read it in full. Ms Leon and Mr Ffrench were sufficiently anxious about what Mr Robert's comment portended to include a warning note in the July 7 brief, but in fact Mr Robert did act upon the Opinion soon after receiving a copy of it. The Commission does not consider that the evidence justifies attaching any significance to it.

8 Delay in informing Mr Robert and Ms Campbell of the Solicitor-General's Opinion

What is more important is Ms Leon's delay in telling Mr Robert and Ms Campbell about the Solicitor-General's Opinion. Ms Campbell was not told it had been received until 7 November 2019.[108] That was the first time that DSS was notified of the advice; not surprisingly, Ms Leon recalled in evidence that Ms Campbell was "unhappy that it had not been shared with her earlier."[109]

The five-week delay between receiving the Solicitor-General's Opinion and bringing it to Mr Robert's attention, and the six week lapse of time before Ms Campbell was informed of it, are of concern. Having been provided with the Opinion, Ms Leon was in a pressing situation. Debts determined on the basis of averaging continued to be raised and recovered in circumstances where Services Australia had unambiguous advice that these practices were unlawful. It was vital that the Opinion be acted upon as soon as practicable.

Having received the Solicitor-General's Opinion, Services Australia was obliged to do two things as a matter of urgency. The first was to provide Mr Robert with a copy of it. He was the minister responsible for Services Australia and had to deal with the significant implications that the advice posed for Services Australia's activities. The second was to provide the Solicitor-General's Opinion to DSS. It was the owner of the legislation under which the Scheme had been established. The involvement of both the minister and DSS was essential in order to bring the issue before Cabinet so that a decision could be made whether to cease the practice of averaging under the Scheme.

Services Australia's obligation to provide DSS with the Solicitor-General's Opinion was codified by paragraph 10.4 of the *Legal Services Directions 2017* (the Directions). The effect of that provision was that, because Services Australia had obtained legal advice on the interpretation of legislation administered by DSS, Services Australia was required to provide DSS with a copy of the advice.

Subsection 19(1) of the *Public Governance, Performance and Accountability Act 2013* (Cth) imposed statutory obligations on Services Australia to keep Mr Robert informed of the activities of Services Australia, to give to Mr Robert any documents or information he required in relation to those activities and to give Mr Robert reasonable notice if Services Australia became aware of any significant issue that may affect Services Australia. Clearly, the Solicitor-General's Opinion was a significant issue that was likely to affect Services Australia and its activities.

But quite apart from those provisions, it was obvious that steps had to be taken without delay because the advice of the Commonwealth's second law officer was that the Commonwealth was acting unlawfully. As secretary of Services Australia, it was Ms Leon's responsibility to ensure that these steps were taken. Ms Musolino's intimations that she would "reach out" to the minister's office to let it know the Opinion was being considered and would "escalate" it to DSS did not absolve Ms Leon of her obligation to make sure that those who needed to know about the advice were told immediately and were given copies.

In her statement, Ms Leon said that on receiving the Solicitor-General's Opinion, she formed the view that it would be necessary either to change the Scheme to "bring it within the parameters" of the Opinion or to cease it. She and Mr Ffrench discussed whether she could, consistent with her obligations under the *Public Governance, Performance and Accountability Act 2013* (Cth), allow the Scheme to continue to operate while she explored the implications of the Solicitor-General's Opinion.[110] According to her, Mr Ffrench told her she could, "provided it was only for a reasonable time needed to properly explore the way forward."[111] (Mr Ffrench did not give evidence on the point, but advice to that effect would have been consistent with advice he later gave Ms Leon on 17 November 2019 [detailed below].[112]) The minister would expect a rigorous testing of options. Accordingly, Ms Leon said Mr Storen and Mr McNamara spent a month trying

to find ways to adapt the program so that it was lawful. When it became apparent there was not a way to continue the Scheme, she made the decision to inform the minister and DSS.

In oral evidence, Ms Leon was questioned specifically about the delay in notifying DSS of the Solicitor-General's Opinion. She said that delaying telling DSS about the advice had no impact on the steps DHS took to respond to it. She was concerned to ensure that the Opinion remained confidential, given its significance. There was not, Ms Leon explained "a high volume of trust and comity" between her and Ms Campbell and Ms Campbell might have found it "somewhat uncomfortable" that the Scheme had been found to be unlawful. She said that she wanted to ensure that any briefing of Ms Campbell in relation to the advice was "conveyed appropriately." [113]

Ms Leon's solicitors submitted in relation to this issue that the delay was a short one borne of a reasonable desire to work through the implications of the Solicitor-General's Opinion, justifiable concern that it would be leaked, and a "judgment call that the best and fastest way to end the Scheme was to work out how to do so" before informing Mr Robert and Ms Campbell. That judgment call should not be considered in the light of hindsight, particularly when there was no evidence that Ms Leon was acting other than in good faith.

Ms Leon's point in evidence, that the delay in providing the Solicitor-General's Opinion to DSS had no impact on the steps Services Australia was taking to respond to it, was reiterated in submissions. Anyway, it was said, Ms Campbell was in no position to end the Scheme. And while the matter could not be brought before Cabinet without the involvement of Mr Robert and DSS, it also could not be brought before Cabinet without Service Australia's work in the intervening period.

None of that, however, is an adequate explanation for the delay in Services Australia's providing Mr Robert and Ms Campbell with the Solicitor-General's Opinion. Both needed to know of it, and there was no reason that had to await Services Australia's settling on a position in relation to the Opinion and its implications. The risk of the Opinion's being leaked did not justify its being withheld from them.

Given the 27 March 2019 advice from AGS, the substance of the Solicitor-General's Opinion should not have taken Services Australia by surprise. Ms Leon's evidence that she was shocked upon receiving the Solicitor-General's Opinion[114] is difficult to reconcile with its confirming, in effect, the view that AGS had already expressed to Services Australia. In the five months that elapsed between the 27 March 2019 advice and Services Australia's receipt of the Solicitor-General's Opinion, senior Services Australia officers could have been contingency planning in the event of advice of the kind that was ultimately provided.

In fact, work does seem to have been under way. The 19 July 2019 brief mentioned earlier referred to the expected brief to the Solicitor-General and the fact that the use of "income apportioning" in the Scheme was being "actively considered." DHS was currently exploring "risk mitigations [to] support the continued use of apportioned income" and process changes to support the program. Possible options were a letter reminding recipients of their obligations to provide income information and a requirement for the use of coercive powers to confirm income information through employer payslips or bank details before a debt was finalised. A further brief would be sent on receipt of the Solicitor-General's advice.

That seems to have been the brief MS19-000365,[115] sent to Mr Robert on 7 November and drawing on the work of Mr McNamara and Mr Storen. It identified proposed changes in the face of legal risks to the Robodebt Scheme and referred to the current Federal Court litigation, with its central issue of whether a debt could be raised based solely on income averaging. The brief suggested using quarterly superannuation information from the ATO to assist in determining whether customers had regular income; the possibility of better online and automated solutions for processing income from banks and employees; and an increased use of coercive powers to obtain information from financial institutions in place of averaging where recipients did not engage with Services Australia. It had nothing to say about the cessation of the Scheme as a whole.

In evidence, Ms Leon indicated that it "effectively had to be business as usual up to the receipt of the advice;" nothing could be put in place that might alert staff to the prospect that the Scheme might cease.[116] But Services Australia was not contemplating an imminent wind-down of the Scheme, even with

the Solicitor-General's Opinion; the considerations taking place in October 2019 were about how the Scheme might be adapted to conform with the Opinion;[117] and they could have been (and probably were, to some extent) commenced earlier, with the briefing of Mr Robert.

One can only speculate whether the unlawful components of the Scheme would have been ceased any more quickly had Mr Robert or Ms Campbell been promptly notified of the content of the Solicitor-General's Opinion. At the least, they lost an opportunity to act on the Opinion some weeks earlier.

There is no suggestion that Ms Leon was acting in bad faith at any time. It is possible that her hesitance in passing on the Opinion to the minister and her colleague at DSS was, at least in part, symptomatic of a culture at Services Australia and DSS that discouraged the conveying of adverse information; a culture that existed long before Ms Leon's tenure as secretary.

9 Cessation of averaging

At the end of the first week in November 2019, Services Australia delivered two briefs to Mr Robert's office.

The first was the MS19-000365[118] brief already referred to. Dr Baxter was involved in its preparation; she described it as a policy issues brief. Attachment A to the brief was a draft letter to the Prime Minister. Attachment C set out "Implementation steps and indicative timeframe." The brief was sent to the minister's office on 6 November 2019, but with the wrong version of Attachment C. Dr Baxter forwarded a replacement brief at 6.34pm on 7 November 2019. She then sent an email to Ms Leon advising that Ms Mulhearn, the staff member in the minister's office who received it, had undertaken to replace the brief, assuring her that she was the only one in possession of it at that stage.[119] Mr Robert later signed the MS19-000365 brief with the date 14 November 2019.

The second brief, MS19-000372, [120] prepared by Mr Ffrench, had attached to it the Solicitor-General's Opinion. The brief conveyed the effect of the Opinion: a decision-maker could not rely only on averaged PAYG data in deciding whether a debt existed, because that data could not by itself support a conclusion as to entitlement. Included in the brief was the caution that although the Opinion was not a judicial declaration of law, there was considerable risk in continuing the program, and there was also personal risk to the secretary, given her obligations under the *Public Governance, Performance and Accountability Act 2013* (Cth).

Mr Robert signed that brief and dated it 6 November 2019, although he said that the date must have been an error, because as his diary note for 7 November 2019 demonstrated, he was not in fact in Canberra until the following day. That must be right, because not only was he not in Canberra, but the brief had not yet been sent. Mr Ffrench sent an unsigned version of the brief to the minister's office at 6.18pm on 7 November 2019,[121] advising that a signed copy would be provided the following day. The signed copy was in fact forwarded at 9.34am on 8 November 2019.[122]

9.1 8 November 2019 meeting

According to Mr Robert's statement, after he received the Solicitor-General's Opinion, he formed the view that the sole or partial use of ATO averaged income data should cease immediately, the program should be closed entirely and refunds should be provided.[123] Mr Robert said he met Ms Leon on 8 November 2019 to discuss the Solicitor-General's Opinion, the two briefs he had received (MS19-000365 and MS19-000372) and a discussion he had with the Prime Minister. At the conclusion of the meeting, he instructed her to cease the use of PAYG data as the sole or partial trigger for raising a welfare debt effective immediately and informed her that he would put the request in writing.[124]

In support of his version of events, Mr Robert relied on the content of two electronic diary entries, the first bearing a time of 06:43 on 7 November 2019[125] and the second, 06:43 on 8 November 2019[126]. The first diary note records that Mr Robert had flown to Canberra to find "Robodebt debacle legal briefs" waiting for him, which in the course of the entry, he identified as briefs MS19-000365 and MS19- 000372.

According to the 7 November 2019 diary note, Mr Robert took the following steps: he asked to meet the secretary the following day; annotated brief MS19-000365, suggesting another approach; and revised the letter to the Prime Minister which was attached to it, replacing it with one that said there was a need to stop using averaging, solely and partially. He then had his staff rewrite the letter before taking it with him to see the Prime Minister. He discussed the Solicitor-General's Opinion with the Prime Minister and requested an urgent ERC meeting, to which he would put a strong recommendation to cease raising debts based on sole or partial averaging. His diary note records that he also informed the Prime Minister that, regardless of any such decision, he had immediately instructed the secretary, on the basis of the Solicitor-General's Opinion he had received, to cease averaging income as the sole or partial basis for raising debts.

Mr Morrison, in the chronology which forms part of his statement,[127] similarly records a meeting on 7 November 2019 with Mr Robert at which he was briefed on the Solicitor-General's Opinion and the action Mr Robert had taken to instruct Services Australia "to immediately cease relying only on averaged income data to raise debts," consistent with the Solicitor-General's Opinion. He was not asked about the entry, and the source of his recollection is not known.

Mr Robert's diary note for 8 November 2019 records that on that day, Mr Robert met with Ms Leon, formally instructed her to cease the use of PAYG data "for the sole or partial use of raising welfare debts" and informed her that he would be noting the instruction and putting it in writing.

Ms Leon gave a different account of the 8 November meeting. According to her, she said to Mr Robert words to the effect, "[T]he best course is to apologise to our customers, to admit the error, and to inform customers and staff of the steps we will take to correct the error." She alleged that Mr Robert responded, "We absolutely will not be doing that, we will double down" and expressed an intention to "…find other means or other sources of data that could enable decisions to continue to be taken to identify debts."[128]

In evidence, Mr Robert denied making the "double down" comment to Ms Leon. He said that a response of the kind Ms Leon had attributed to him would be completely inconsistent with the steps he said he had taken: of obtaining the Solicitor-General's Opinion and taking it to the Prime Minister, who had agreed to ceasing averaging and the holding of an urgent ERC meeting. It would make no sense for him to say that Government would "double down" on the same project.[129]

Mr Ffrench and Dr Baxter were both present for the meeting. Mr Ffrench recalled discussion of whether the Robodebt Scheme could be saved and whether other forms of data could be used to determine income; whether, and if so, how the Robodebt Scheme should be ceased; whether there should be a pause of raising new debts; and whether debts would need to be refunded.[130]

Dr Baxter said that it was clear to her at the meeting that Mr Robert understood and accepted the advice that the Scheme could not be continued legally and sought advice as to what should be done next. In that connection the options of writing to the Prime Minister and seeking an ERC determination were raised.[131]

9.2 Steps taken after the 8 November 2019 meeting

An ERC meeting was scheduled for 12 November 2019. Dr Baxter gave an account[132] of what she was told by Mr Robert's advisor of the discussions between Mr Robert and Ms Ruston, Minister for Social Services in advance of that meeting. According to the advisor, they intended to seek an in-principle agreement to stop the use of income averaging, with an NPP to be prepared in relation to debt determination in the future:

> The plan was to 'double down', that is, highlight the importance of protecting social outlays, and indicate that while averaging would be ceased, the next steps would be better and smarter, to ensure customers doing the wrong thing could still be detected, but through a more targeted pool.

Before the ERC meeting began, Mr Robert, Ms Leon, Dr Baxter, Mr Ffrench and others met in the Cabinet anteroom. The evidence of all those present, including Mr Robert, was that he asked the Attorney-General whether he agreed with the Solicitor-General's Opinion and the latter answered that he did. On his evidence, Mr Robert then told Ms Leon that his instruction to cease the use of PAYG data had been confirmed by the Attorney-General and he handed a letter dated that day, 12 November 2019,[133] to Ms Leon.

Asked whether his question of the Attorney-General was inconsistent with his evidence that he had accepted the Solicitor-General's Opinion, Mr Robert said that he had wanted to make the position clear to those present so that he could give Ms Leon the letter and "get that moving."[134] Ms Leon's impression, on the other hand, was that until the Attorney-General endorsed the Solicitor-General's Opinion Mr Robert was "open to the notion" that a different legal view might be available.

The ERC meeting concluded on 13 November 2019 with the following results:

> …
> 2. Noted the insufficiency of apportioned Australian Tax Office pay as you go data ('income averaging') information used in an unsupported way as an adequate factual basis for making a debt decision.
> 3. Noted the use of income averaging as the exclusive basis of making a debt decision would no longer continue but that its use as part of determining the existence of a debt has a legal basis.
>
> …
> 5. Agreed the Minister and the Minister for Families and Social Services would come back to ERC as soon as practicable with welfare integrity improvement options:
> (a) to conduct a review, assessment and further reconciliation of past debts, noting that:
> …
> (ii) individuals who had a debt raised via the use of income averaging as the exclusive basis for the decision may still be liable for the debt
>
> (b) for a process to be applied in future welfare compliance measures that ensures that income averaging is not the exclusive basis for making a debt decision
> …

In evidence, Mr Robert said the date of an announcement by the Government was yet to be agreed at the time of the ERC meeting. Dr Baxter noted that, notwithstanding the ERC decision, there remained a need for a direction to Services Australia staff in order to affect the cessation of averaging. She understood from her communications with Mr Robert's staff that he preferred the direction to await a public announcement by the Government and a clear decision about the next steps to be taken.[135]

On 15 November 2019, Mr Robert received a brief from Services Australia (signed by him on 18 November 2019),[136] which recorded that ERC had decided to end income averaging in cases where it was the sole basis for determining the existence of a debt and that Services Australia had, from 18 November 2019, taken steps to end any action on compliance reviews which required unilateral income averaging and suggested different options for pausing debt recovery. (The steps were described in the past tense, although they were yet to be taken at the time the brief was delivered.) Some communication materials to assist with community enquiries were provided but Mr Robert decided that his office would be responsible for communication.

Dr Baxter said that on 15 November 2019, she was advised by Mr Robert's chief of staff that the minister intended to write to Ms Leon to instruct her to cease averaging, but Dr Baxter did not recall seeing that letter before Ms Leon gave Services Australia the instruction to do so. In the same conversation, the chief of staff advised her that Services Australia staff should not be told to cease averaging until everything was agreed at a government level and ERC had made the decision.[137]

Ms Leon said that on 15 November 2019, she informed Mr Robert, in a telephone conversation, that Services Australia had started the process to end income averaging. She had already informed the Commissioner of Taxation and the secretary of the Department of Prime Minister and Cabinet that her statutory obligations required her to stop the use of income averaging. On 18 November 2019, Mr Robert informed Ms Leon that he had conveyed that information to the Prime Minister's office and he would send a letter formalising a direction to her to stop using the averaging process, but communications to staff should be aligned with the Attorney-General's settlement of consent orders in current litigation. Because she did not believe the Department had any reasonable basis to continue averaging, Ms Leon gave an instruction that staff were to be informed that afternoon that averaging was to cease.

Dr Baxter's recollection was that Ms Leon was in "regular, increasingly urgent communication" with Mr Robert, his staff and the secretary of the Department of Prime Minister and Cabinet about the need to cease averaging before she actually gave that instruction on 18 November 2019. Ms Leon's decision was made once she was informed by Mr Robert's chief of staff that Mr Robert had signed the brief recording the decision to end income averaging, although she was also told that the minister wanted to delay the direction to staff until the announcement could be tailored to include government messaging. It was Dr Baxter who communicated Ms Leon's determination to proceed to the minister's chief of staff.[138]

On 19 November 2019, Mr Robert met Ms Leon to advise her of the announcement he proposed to make. That afternoon he announced that the Government had commenced some refinements to the income compliance system, while making no apologies for fulfilling its obligations to collect debts with the income compliance system. The key refinement in question was that "income averaging plus other proof points [would] be used as the final determinate [sic] for a debt to be crystallised or for a debt to be raised." He had asked Services Australia to identify "the small cohort" of recipients who had a debt raised solely on the basis of income averaging. Services Australia would work with them to identify further proof points and ask them to engage with the Department to identify through bank statements or pay slips or other means that they did not have a debt; there was no change to the construct of the onus of proof.[139]

9.3 When were the instructions for the cessation of averaging first given?

Mr Robert asserted that he instructed Ms Leon to cease the use of averaged PAYG data as the sole or partial trigger for raising a welfare debt on 8 November 2019[140] and its use in that way ceased following his instruction.[141] In contrast, Ms Leon asserts that, at their meeting on 8 November 2019, Mr Robert did not instruct her to cease the practice of averaging. Instead, it was she who commenced the steps to cease the use of income averaging and informed Mr Robert that she had done so.[142]

In their submissions, Mr Robert's representatives said that there was no basis in the evidence for finding Mr Robert's account to be deliberately untruthful; there was competing evidence about what occurred on 8 November 2019 and there was no compelling reason to reject the contemporaneous evidence of Mr Robert's diary notes. In addition, the suggestion that Mr Robert was dismissive in speaking of the Solicitor-General's Opinion should not be accepted. Instead it should be found that Mr Robert understood and accepted the advice that the Scheme could not be continued legally.

In fact, there is reason to reject the contemporaneous diary notes as accurate records of what happened when, and reason to think that both Mr Robert's notes and Mr Morrison's chronology are wrong about a meeting on 7 December and the matters recorded as discussed in it.

Firstly, it seems improbable that Mr Robert could have come into possession of the two briefs on 7 November 2019 in time to take all the steps recorded in his diary note of that date. The unsigned version of brief MS19-000372 was sent to the minister's office at 6.18pm on 7 November 2019,[143] and a little later, at 6.34pm that day, a staff member in the minister's office was assuring Dr Baxter that she was the only person in possession of brief MS19-000365.[144] So it is clear that by the evening of 7 November 2019, Mr Robert had not yet personally received both briefs, and it seems improbable that he had time if he received them after that to carry out all the steps set out in the 7 November diary note. In fact, it seems more probable than not that he did not see the two briefs until the morning of 8 November 2019.

Secondly, the two diary notes conflict. The 7 November note has Mr Robert informing Mr Morrison that day that he had already instructed the secretary to cease using averaged income data as the sole or partial basis for raising debts (although there is no evidence that he and Ms Leon met or spoke at all on 7 November 2019, much less at night). But the 8 November diary note has him giving her that instruction at their meeting that day.

Thirdly, it is more likely that Mr Robert met Mr Morrison on 8 November 2019, after the meeting with Ms Leon, Dr Baxter and Mr Ffrench at which, on the evidence of all three, the question of how to proceed was discussed. Dr Baxter's recollection in particular was that the options of approaching the Prime Minister and seeking an ERC meeting were raised. It is probable that Mr Robert decided after that meeting to act on those options.

Fourthly, the instruction to cease using income averaging as the sole or partial basis for debt raising recorded in both diary notes (Mr Morrison's version is different in this regard) seems to reflect a different approach from that which was actually taken: what was decided by ERC (consistently with the Solicitor-

General's Opinion) and announced by Mr Robert on 18 November 2019 was the cessation of debt-raising solely on the basis of income averaging.[145]

More generally, a clear instruction that averaging was to cease, whether given on 7 or 8 November 2019, does not seem consistent with the letter which Mr Robert handed to Ms Leon on 12 November 2019.[146] It referred to their meeting of 8 November 2019, noting that he had been briefed then on the use of income averaging, but made no mention of any such instruction. Instead, it said that the Government had decided to strengthen the Income Compliance Program by using additional evidence-gathering processes, checklists and proof points before raising a debt. That is consistent with Ms Leon's recall of the minister's outlining his view that other sources of data, such as bank statements and employer records, would be found to enable continued identification of debts. It is also consistent with Mr Ffrench's recollection to similar effect. And the giving of an instruction to Ms Leon to cease averaging is not consistent with Dr Baxter's recall that as late as 15 November 2019, Mr Robert's chief of staff was indicating the minister's intention to write to Ms Leon to give her that instruction.

The Commission's view is that the weight of the evidence is strongly against Mr Robert's having given any instruction to Ms Leon on 7 or 8 November 2019 to cease income averaging as a sole or partial basis for debt raising. What seems to have happened at the meeting on 8 November 2019 was a canvassing of options. It is reasonable to suppose that Mr Robert still hoped to salvage the Robodebt Scheme in some respects.

The lack of a clear instruction to Ms Leon to cease income averaging is not surprising in light of the Government's intention to publicly announce, through the minister, the end of income averaging in the most palatable terms it could find. Plainly, if a direction were given to departmental staff to end the process there was a strong risk that the announcement would be pre-empted by the media's being informed of it.

Consequently, the Commission rejects Mr Robert's claim to have acted to end the Robodebt Scheme quite as promptly as he professes. Ms Leon was in fact the first to take steps for that purpose. There is no reason to suppose, however, that had Ms Leon not taken the step she did, the Government's announcement of the cessation of the practice would have been far behind.

The Commission does not consider that the evidence supports a conclusion that Mr Robert was dismissive of the Solicitor-General's Opinion. Ms Leon did not say that Mr Robert rejected the proposition that debts could not be raised solely on the basis of income averaging; instead he wanted to look for other sources of information to identify debts. Dr Baxter's firm impression was that Mr Robert accepted the advice that the Scheme could not continue as it was.

The expression "double down" (which the Commission finds probably was used) should not be taken as Mr Robert's or the Government's rejection of the Solicitor-General's Opinion in respect of income averaging. It is likely to have been used in the sense that the Government would find other means of debt recovery and had no intention of admitting error, let alone apologising. That view is consistent with: the tenor of the letter of 12 November 2019; what Dr Baxter recalled she had been told of the use of the term in discussions prior to the ERC meeting; and what Mr Robert said on 19 November 2019 when he announced that income averaging would only be used with other proof points. The question Mr Robert asked of the Attorney-General prior to the ERC meeting does not suggest otherwise; it was reasonable to seek the Attorney- General's assurance.

10 Resolution of Masterton and Amato

On 11 October 2019, DHS obtained advice from Counsel in relation to the Solicitor-General's Opinion and its impact on the Masterton proceeding. That advice said:

- that there was no "material factual difference between the circumstances applicable to Ms Amato's case and those upon which the opinions in the SG Advice were expressed," and
- that the Commonwealth did not have "a properly arguable defence to Ms Amato's claim" and that "every endeavour should be made to resolve the matter."

On 13 November 2019, AGS wrote to Victoria Legal Aid and indicated that the Commonwealth "would consent to orders being made in substantially the terms sought by the Applicant" in the *Amato* proceeding. On 27 November 2019, Davies J made orders by consent in *Amato*. They included this declaration:

> The alleged debt was not validly made because the information before the decision-maker acting on behalf of the Respondent was not capable of satisfying the decision-maker that a debt was owed (within the scope of s 1222A(a)), and any of the necessary preconditions for the addition of a 10% penalty were present.

This was the first time in which the Commonwealth made an explicit concession in Court that the practice of averaging was unlawful. On 24 December 2019, Ms Masterton discontinued her proceeding. She did so in light of the result in Amato and on the condition that the Commonwealth pay Victoria Legal Aid's costs.[147]

11 The end of the Robodebt scheme

The cessation of averaging in November 2019 represented the beginning of the end for the Scheme. On 19 November 2019, the day on which Mr Robert announced that debts would no longer be raised solely on the basis of income averaging, a class action, *Prygodicz v Commonwealth of Australia,* was commenced, seeking various forms of relief in respect of debts raised unlawfully under the Scheme.

The Government made efforts to "investigate a replacement policy for Robodebt." Mr Robert and others considered whether "other forms of data [could be used] to meet the threshold of sufficiency to raise a debt." [148] This work proved unsuccessful. In February 2020, the Government commenced work "to design a solution to refund debts [raised under the Scheme] via the MyGov platform."[149]

On 22 May 2020, the Solicitor-General gave his opinion[150] that the Commonwealth was bound to fail in defending a claim for unjust enrichment made in the class action. On 29 May 2020, Mr Robert announced that Services Australia would refund all repayments made on debts raised wholly or partially using averaging of ATO data. The process for making refunds commenced in July 2020.[151]

The Scheme was closed altogether on 30 June 2020. The Government's decision to halt the Scheme signalled the end of a "shameful chapter in the administration of the Commonwealth social security system" and "a massive failure of public administration."[152]

The litigation in *Masterton* and *Amato*, in both cases conducted by Victoria Legal Aid, played a crucial role in the demise of the Scheme. It succeeded in exposing the illegality of Robodebt where other possible forms of check on the Scheme – the AAT, the Commonwealth Ombudsman, the sound advice of some lawyers – did not or could not.

1 Exhibit 4-6259 - CTH.3004.0011.7271_R - Secretary signed brief - ICT issues EC19-000273.
2 Exhibit 9983 – CTH.3005.0010.4355 – Minutes CMP Board 28 March 2019 [p 3-4].
3 Exhibit 2-1684 – CTH.3004.0011.8835 – Agenda Item 6.1 AttD – User testing report; Transcript, Jason McNamara, 5 December 2022 [p 1113: lines 11-13].
4 Exhibit 2-1684 – CTH.3004.0011.8835 – Agenda Item 6.1 AttD – User testing report.
5 Exhibit 2-1684 – CTH.3004.0011.8835 – Agenda Item 6.1 AttD – User testing report.
6 Exhibit 1-0132 - CTH.3007.0020.0538_R - ADVICE- Issue relating to Recovery Fee and PAYG Online Intervention [DLM=Sensitive-Legal].
7 Exhibit 1-0132 - CTH.3007.0020.0538_R - ADVICE- Issue relating to Recovery Fee and PAYG Online Intervention [DLM=Sensitive-Legal]..
8 Exhibit 1-0038 - VLA.9999.0001.0001 - Originating application; Exhibit 1-0039 - VLA.9999.0001.0012 - Affidavit of Miles Browne.
9 Transcript, Ms Masterton, 31 October 2022, Brisbane [p 53: lines 10-20].
10 Transcript, Ms McRae, 24 February 2023, Brisbane [p 3806: lines 34-40].
11 Exhibit 4-5356 - TFF.9999.0001.0005_R - 3 January 2023 Tim Ffrench Signed Statement [p 18: paras 98 – 99].
12 Exhibit 1-0042 - VLA.9999.0001.0021 - Affidavit of Joel Townsend.
13 Exhibit 1-0012 - CTH.9999.0001.0012 - Response to NTG-0060.
14 Exhibit 4-5788;Exhibit 1-0041 - VLA.9999.0001.0020 - 5. Transcript of CMH 08.03.19 [p 5: lines 3-5].
15 Exhibit 1-0012 - CTH.9999.0001.0012 - Response to NTG-0060.
16 The Commonwealth sought and obtained orders from the Federal Court contemplating a recalculation of the debt. Those made on 8 March 2019 required that the Commonwealth provide Ms Masterton with "notice of the outcome of the reconsideration of the debt…" by 12 April 2019: Exhibit 1-0040 - VLA.9999.0001.0019 - Order of Justice Davies at Case Management hearing.
17 Exhibit 4-6054 - CTH.1000.0011.5562_R - Draft Ombudsman's report for comment - Employment Income Confirmation [SEC=UNCLASSIFIED]; Exhibit 4-6055 - CTH.1000.0011.5563_R - Ombudsman to Secretary DHS Draft EIC Report; Exhibit 4-6056 - CTH.1000.0011.5564 - 001 Draft Report V3.0 - EIC Stage 2 Implementation - draft for Secretary Comment.
18 Exhibit 4-5367 - CTH.3004.0011.4092_R - Ombudsman draft EIC Implementation Report received [DLM=Sensitive-Legal].
19 Exhibit 4-5368 - CTH.3007.0011.2505_R - FW- Ombudsman draft EIC Implementation Report received [DLM=Sensitive-Legal].
20 Exhibit 4-6057 - CTH.3005.0010.1208_R - Brief to Sec - mtg with Ombudsman [DLM=Sensitive-Legal]; Exhibit 4-6058 - CTH.3005.0010.1209_R - EC19-000243 v0.19.
21 Exhibit 4-6041 - RLE.9999.0001.0002_R - 20221123 RL Statement FINAL 22006293(46499412.1) [para 175]; Exhibit 4-7129 - MMA.9999.0001.0001_R - 20230227 NTG-0202 - Statement of Michael Manthorpe dated 27 Febraury 2023(47265784.1) [para 50].
22 Exhibit 4-6041 - RLE.9999.0001.0002_R - 20221123 RL Statement FINAL 22006293(46499412.1) [para 175]; Exhibit 4-7129 - MMA.9999.0001.0001_R - 20230227 NTG-0202 - Statement of Michael Manthorpe dated 27 Febraury 2023(47265784.1) [para 50].
23 Exhibit 4-6059 - CTH.2001.0013.0040_R - FW- Masterton v Secretary, Department of Human Services - Update and request for instructions by 4pm 7 March [DLM=Sensitive-Legal]; Exhibit 4-6060 - CTH.2001.0013.0043_R - AGS Advice 5 March 2019.
24 Transcript, Renee Leon, 28 February 2023 [p 4036: lines 40-45].
25 Exhibit 4-6059 - CTH.2001.0013.0040_R - FW- Masterton v Secretary, Department of Human Services - Update and request for instructions by 4pm 7 March [DLM=Sensitive-Legal]; Exhibit 4-6060 - CTH.2001.0013.0043_R - AGS Advice 5 March 2019.
26 Exhibit 4-5356 - TFF.9999.0001.0005_R - 3 January 2023 Tim Ffrench Signed Statement [para 138]; Transcript, Tim Ffrench, 22 February 2023 [p 3524: lines 6-34]; see also Exhibit 4-5384 - CTH.3035.0017.2984_R - RE-Masterton v Commonwealth [DLM=Sensitive-Legal]; Exhibit 4-5380 - CTH.3035.0017.2758_R - Masterton actions [DLM=Sensitive-Legal].
27 Exhibit 4-6041 - RLE.9999.0001.0002_R - 20221123 RL Statement FINAL 22006293(46499412.1) [para 80].
28 Exhibit 1-0042 - VLA.9999.0001.0021 - Affidavit of Joel Townsend.
29 Exhibit 1-0042 - VLA.9999.0001.0021 - Affidavit of Joel Townsend.
30 Exhibit 1-0042 - VLA.9999.0001.0021 - Affidavit of Joel Townsend.
31 Exhibit 4-5374B - CTH.3004.0011.6397_R - Draft email to send to Ombudsman - EIC processes [DLM=For-Official-Use-Only]; Exhibit 4-5374D - CTH.3004.0011.6400 - Secretary's email to Michael Manthorpe - draft for Secretary.
32 Exhibit 4-6062 - CTH.3004.0011.6694_R - Draft Implementation Report into Centrelink's Automated Debt Raising and Recovery System [DLM=For-Official-Use-Only].

33 Exhibit 4-6063 - CTH.3003.0001.0719_R - Fwd- Draft Implementation Report into Centrelink's Automated Debt Raising and Recovery System [DLM=For-Official-Use-Only].
34 Transcript, Renee Leon, 28 February 2023 [p 4036: lines 16-21].
35 Exhibit 4-6046 - CTH.3009.0011.0131 - Sec annot news alert of 040418 re debts; Exhibit 3-3495 - TCA.9999.0001.0013 - Terry Carney, The New Digital Future for Welfare- Debts Without Legal Proofs or Moral Authority (UNSW Law Journal).
36 Exhibit 4-6043 - CTH.3004.0008.1801_R - RE- [REDACTED] - Earned Income Intervention program debt and claim for compensation - potential media interest [DLM=Sensitive-Legal]; Exhibit 4-6044 - CTH.3004.0008.1802_R - EII program debt and claim for compensation Secretary Annotations 010320; Exhibit 2-2707 - CTH.3000.0039.6396_R2 - Secretary Question - [REDACTED] - Earned Income Intervention program debt and claim for compensation - potential media interest [DLM=Sensitive-Legal]; Exhibit 4-6045 - CTH.3000.0039.6398_R - [REDACTED] - AAT1 decn Sept 2017.
37 Exhibit 4-6059 - CTH.2001.0013.0040_R - FW- Masterton v Secretary, Department of Human Services - Update and request for instructions by 4pm 7 March [DLM=Sensitive-Legal]; Exhibit 4-6060 - CTH.2001.0013.0043_R - AGS Advice 5 March 2019.
38 Transcript, Renee Leon, 28 February 2023 [p 4036: line 27].
39 Transcript, Renee Leon, 28 February 2023 [p 4036: lines 40-45].
40 Exhibit 4-6064 - CTH.3007.0011.6407_R - Masterton v the Commonwealth - Litigation re OCI - further discussion [DLM=Sensitive-Legal]; Exhibit 4-6065 - CTH.3007.0011.6408_R - Advice on prospects - Masterton - DRAFT.
41 Exhibit 4-6066 - CTH.3009.0016.2171_R - FW- Embargoed report into the implementation of Employment Income Confirmation recommendations [SEC=UNCLASSIFIED]; Exhibit 4-6067 - CTH.3009.0016.2172_R - 001 Embargoed report; Exhibit 4-6068 - CTH.3009.0016.2217_R - A1738660 IOI-2017-200008 - Ms Renee Leon PSM.
42 Transcript, Renee Leon, 28 February 2023 [p 4038: lines 1-2].
43 Exhibit 4-6042 - RLE.9999.0001.0004_R - 20230220 R LEON Signed Supplementary Witness Statement(47199927.1) [para 21]; Exhibit 4-5398 - CTH.3008.0025.3948_R - 10.15am Discuss Masterton (Annette-Roxanne-Tim) [DLM=For-Official-Use-Only]; Exhibit 4-5399 - CTH.2001.0013.5081_R - RE- Masterton v the Commonwealth - Litigation re OCI - further discussion [DLM=Sensitive-Legal]; Exhibit 4-5400 - CTH.2001.0013.5083_R - Masterton - key points and options - for discussion 1 April; Exhibit 4-5401 - CTH.2001.0013.5086_R - FOR ACTION- recalculation of debt - Masterton [DLM=Sensitive-Legal].
44 Exhibit 4-5402 - CTH.3007.0011.6487_R - RE- Masterton v the Commonwealth - Litigation re OCI - further discussion [DLM=Sensitive-Legal]; Exhibit 4-6069 - CTH.3007.0011.6488 - Masterton - key points and options - for discussion 1 April.
45 Exhibit 4-6042 - RLE.9999.0001.0004_R - 20230220 R LEON Signed Supplementary Witness Statement(47199927.1) [para 21].
46 Exhibit 1-0042 - VLA.9999.0001.0021 - Affidavit of Joel Townsend.
47 Exhibit 4-5791 - CTH.2000.0011.2935_R - VID73_2019 20190426_Department of Human Services, Commonwealth [p 8: lines 0-5].
48 Exhibit 1-0045 - VLA.9999.0001.0024 - Transcript of CMH hearing.
49 Exhibit 4-5753 - VLA.9999.0001.0075_R - 19 190606 Originating Application.
50 Exhibit 1-0045 - VLA.9999.0001.0024 - Transcript of CMH hearing.
51 Federal Court of Australia Act 1976 (Cth) s 51A.
52 This waiver was said to have been done in accordance with s 1237AA of the Social Security Act 1991 (Cth).
53 Exhibit 4-5451 - CTH.3004.0014.3119_R - RE- Masterton & Amato - conference on 6 September - Update [SEC=OFFICIAL-Sensitive, ACCESS=Personal-Privacy, ACCESS=Legal-Privilege].
54 Exhibit 4-5437 - CTH.3004.0012.7792_R - MS19-000119 - signed brief.
55 Exhibit 4-5476 - CTH.3009.0017.0170_R - MS19-000119 Sec agreed brief with annot.
56 Exhibit 4-6075 - CTH.0009.0001.2893_R - MS19-000119 MSB.
57 Exhibit 4-5476 - CTH.3009.0017.0170_R - MS19-000119 Sec agreed brief with annot.
58 Exhibit 4-6041 - RLE.9999.0001.0002_R - 20221123 RL Statement FINAL 22006293(46499412.1) [para 101].
59 Exhibit 4-5356 - TFF.9999.0001.0005_R - 3 January 2023 Tim Ffrench Signed Statement [paras 158-159]; Transcript, Tim Ffrench, 22 February 2023, [p 3531-3532, 3538].
60 Transcript, Tim Ffrench, 22 February 2023 [p 3538: lines 19-23].
61 Exhibit 4-5356 - TFF.9999.0001.0005_R - 3 January 2023 Tim Ffrench Signed Statement [para 159].
62 Exhibit 4-6273 - SRO.9999.0001.0002_R - Statement of Stuart Robert in response to notice date 20.12.22 (NTG-0116)® [para 63(b)].
63 Exhibit 4-6273 - SRO.9999.0001.0002_R - Statement of Stuart Robert in response to notice date 20.12.22 (NTG-0116)® [para 58].
64 Exhibit 4-6273 - SRO.9999.0001.0002_R - Statement of Stuart Robert in response to notice date 20.12.22 (NTG-0116)® [para 61]; Transcript, Mr Robert, 2 March 2023 [p 4215: lines 27-37].

65 Transcript, Mr Robert, 2 March 2023 [p 4215: line 40 - p 426: line 5].
66 Transcript, Mr Robert, 2 March 2023 [p 4216: lines 22-35].
67 The Commission's Practice Guideline – Cross-examination of witnesses prescribed the making of an application for leave to cross-examination before the witness' appearance, but also allowed for applications where circumstances did not allow that to occur.
68 Exhibit 10000- CTH.3004.0013.1416 - RE: FOR YOUR ACTION: Discussion with Integrity and Information - Online Compliance [SEC=OFFICIAL:Sensitive]; Exhibit 4-6315 - CTH.3008.0026.2079_R - FW- MS19-000119 Secretary agreed Minister brief with annotations [SEC=OFFICIAL-Sensitive, ACCESS=Legal-Privilege].
69 By this stage AGS had provided, and Services Australia was considering, proposed draft questions for the brief to the Solicitor-General: Exhibit 1-0190 - CTH.3035.0018.5436_R - RE- Draft questions for Solicitor-General [SEC=OFFICIAL-Sensitive, ACCESS=Legal-Privilege].
70 Exhibit 4-6273 - SRO.9999.0001.0002_R - Statement of Stuart Robert in response to notice date 20.12.22 (NTG-0116)® [para 48(c)]; Exhibit 9004 - CTH.3051.0046.4282_R - Stuart Robert Media Release - Handy guide to Labor's record on robodebt [SEC=OFFICIAL].
71 Exhibit 4-6273 - SRO.9999.0001.0002_R - Statement of Stuart Robert in response to notice date 20.12.22 (NTG-0116)® [para 57].
72 Exhibit 4-6273 - SRO.9999.0001.0002_R - Statement of Stuart Robert in response to notice date 20.12.22 (NTG-0116)® [para 57].
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74 Submissions of Stuart Robert, 23 May 2023 [p 7: para 30(b)].
75 Exhibit 4-6285 - SRO.001.001.0136 - 190731 Interview with David Speers Sky News.
76 Exhibit 4-6318 - CTH.3003.0001.1379 - Transcript.
77 Transcript, Stuart Robert, 2 March 2023 [p 4223].
78 Exhibit 1-0848 - CTH.9999.0001.0013 - [FINAL] RRC - Services Australia - Response to NTG-0009 (25 October 2022); Exhibit 8935 - CTH.9999.0001.0145 - [Final] Services Australia - Response to NTG-0096; Exhibit 8538 - CTH.9999.0001.0144 - [Final] Services Australia - Response to NTG-0097 - Revised.
79 Transcript, Mr Robert, 2 March 2023 [p 4218: lines 17-21].
80 Transcript, Mr Robert, 2 March 2023 [p 4218: lines 41-44].
81 Transcript, Mr Robert, 2 March 2023 [p 4220: lines 32-35].
82 Transcript, Mr Robert, 2 March 2023 [p 4220: lines 45-48].
83 Transcript, Mr Robert, 2 March 2023 [p 4218: lines 41-45]
84 Transcript, Mr Robert, 2 March 2023 [p 4220: lines 46-47].
85 Transcript, Mr Robert, 2 March 2023 [p 4218: lines 17-19].
86 Exhibit 4-6064 - CTH.3007.0011.6407_R - Masterton v the Commonwealth - Litigation re OCI - further discussion [DLM=Sensitive-Legal]; Exhibit 4-6065 - CTH.3007.0011.6408_R - Advice on prospects - Masterton - DRAFT.
87 Exhibit 4-6042 - RLE.9999.0001.0004_R - 20230220 R LEON Signed Supplementary Witness Statement(47199927.1) [para 21].
88 Exhibit 3-4997 - CTH.3035.0019.3429_R - FWRequest to brief the Solicitor-General for opinion on questions of law-use and reliance on apportioned ATO PAYG data to assess and raise debts under the SSA 1991; Exhibit 3-4998 - CTH.3035.0019.3436_R - 20190827 Brief to Solicitor-General 19004815.
89 Exhibit 4-5356 - TFF.9999.0001.0005_R - 3 January 2023 Tim Ffrench Signed Statement [p 30-31: paras 174-175].
90 Exhibit 4-6076 - CTH.3009.0025.5755_R - RE- MS19-000119 Secretary agreed Minister brief with annotations [SEC=OFFICIAL-Sensitive, ACCESS=Legal-Privilege].
91 Exhibit 4-6078 - CTH.3003.0001.1123_R - FW- DSS feedback regarding solicitor general questions [SEC=OFFICIAL-Sensitive, ACCESS=Legal-Privilege]; Exhibit 4-5448 - CTH.3821.0001.0001_R - RE- DSS feedback regarding solicitor general questions [SEC=OFFICIAL-Sensitive, ACCESS=Legal-Privilege].
92 Transcript, Renee Leon, 28 February 2023 [p 4039: lines 18-24].
93 Exhibit 1-0001 - CTH.2013.0012.5070_R - Advice prepared by Solicitor General to AGS re use of apportioned ATO PAYG data.
94 Exhibit 4-6079 - CTH.2001.0016.3770_R - Fwd- SG No 15 of 2019 - Use of apportioned ATO PAYG data to assess and raise debts under the Social Security Act 1991 [SEC=OFFICIAL-Sensitive, ACCESS=Legal-Privilege]; Exhibit 4-6080 - CTH.2001.0016.3773_R - SG No 15 of 2019 - use of apportioned ATO PAYG data to assess and raise.
95 Exhibit 4-6081 - RLE.0001.0001.0030_R - RLE Screenshot 2.
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100 Exhibit 4-6082 - CTH.2013.0012.0859_R - Next Steps OCI [SEC=PROTECTED, SH=CABINET]; Exhibit 4-6083 - CTH.2013.0012.0860 - MS19-000365 - Ministerial Letter Minister Robert to PM_V5; Exhibit 4-6084 - CTH.2013.0012.0863_R - MS19-000365 - Minute - Income Compliance Programme Redesign_V16.
101 Transcript, Mr Robert, 2 March 2023 [p 4226: lines 1-10]; Exhibit 4-6273 - SRO.9999.0001.0002_R - Statement of Stuart Robert in response to notice date 20.12.22 (NTG-0116)® [para 83(a)].
102 Exhibit 4-6041 - RLE.9999.0001.0002_R - 20221123 RL Statement FINAL 22006293(46499412.1) [paras 117, 146].
103 Exhibit 4-6041 - RLE.9999.0001.0002_R - 20221123 RL Statement FINAL 22006293(46499412.1) [para 117]; Transcript, Renee Leon, 28 February 2023 [p 4043: lines 32-47].
104 Transcript, Stuart Robert, 2 March 2023 [p 4226: lines 12-30].
105 Exhibit 4-6087 - RLE.0001.0001.0028 - 20221121 Leon note 2 22006293(46486236.1); Transcript, Tim Ffrench, 22 February 2023 [p 3532: lines 19-25].
106 Exhibit 4-5356 - TFF.9999.0001.0005_R - 3 January 2023 Tim Ffrench Signed Statement [paras 207, 224].
107 Exhibit 9559 - RBA.9999.0001.0001_R – 20230331 Statement of Dr Roslyn Baxter (Redacted).pdf [para 21].
108 Transcript, Renee Leon, 28 February 2023 [p 4044: lines 10-32]; Exhibit 4-6088 - CTH.4000.0006.7450_R - Update on timing for next steps brief- income compliance [SEC=PROTECTED, SH=CABINET]; Exhibit 4-6089 - CTH.4000.0006.7451_R - MS19-000365 - Minute - Income Compliance Programme Redesign_V23 ROS [SEC=PROTECTED, SH=CABINET]; Exhibit 4-6090 - CTH.4000.0006.7452 - DSS one pager.
109 Exhibit 4-6041 - RLE.9999.0001.0002_R - 20221123 RL Statement FINAL 22006293(46499412.1) [para 124].
110 Exhibit 4-6041 - RLE.9999.0001.0002_R - 20221123 RL Statement FINAL 22006293(46499412.1) [para 113].
111 Exhibit 4-6041 - RLE.9999.0001.0002_R - 20221123 RL Statement FINAL 22006293(46499412.1) [para 115].
112 Exhibit 3-5010 - CTH.2013.0012.5738_R - Administration of the Income Compliance Programme [SEC=PROTECTED, SH=CABINET].
113 Transcript, Renee Leon, 28 February 2023 [p 4042: lines 20-25].
114 Transcript, Renee Leon, 28 February 2023 [p 4041: lines 37-39].
115 Exhibit 4-6319 - CTH.4700.0001.1072_R - MS19-000365 - Minister signed brief (14 November 2019).
116 Transcript, Renee Leon, 28 February 2023 [p 4041: lines 32-35].
117 Exhibit 4-6082 - CTH.2013.0012.0859_R – Next Steps OCI [SEC=PROTECTED, SH=CABINET]; Exhibit 4-6083 - CTH.2013.0012.0860 - MS19-000365 - Ministerial Letter Minister Robert to PM_V5; Exhibit 4-6084 - CTH.2013.0012.0863_R – MS19-000365 – Minute – Income Compliance Programme Dedesign_V16.
118 Exhibit 4-6319 - CTH.4700.0001.1072_R - MS19-000365 - Minister signed brief (14 November 2019).
119 Exhibit 9031 - CTH.4000.0006.7453 - FW: MS19 000365: new attachment C [SEC=PROTECTED, SH=CABINET].
120 Exhibit 3-4263 - CTH.4000.0070.2611_R - MS19-000372 - Minister signed brief.
121 Exhibit 9032 - CTH.3780.0001.0330 - MS19-000372: Income Compliance Programme - Legal Position [SEC=PROTECTED, SH=CABINET].
122 Exhibit 9033 - CTH.4000.0070.2401 - FW: MS19-000372: Income Compliance Programme - Legal Position [SEC=PROTECTED, SH=CABINET].
123 Exhibit 4-6273 - SRO.9999.0001.0002_R - Statement of Stuart Robert in response to notice date 20.12.22 (NTG-0116)® [para 108].
124 M Exhibit 4-6273 - SRO.9999.0001.0002_R - Statement of Stuart Robert in response to notice date 20.12.22 (NTG-0116)® [para 86].
125 Exhibit 4-6291 - SRO.001.001.0164_R - 2019-11-7 diary entry.
126 Exhibit 4-6292 - SRO.001.001.0165 - 2019-11-8 diary entry.
127 Exhibit 2-2559 - SMO.9999.0001.0009_R2 - 20221125 Statement of Mr Scott Morrison - PII redactions.
128 Transcript, Renee Leon, 28 February 2023 [p 4046: lines 3-13]; Exhibit 4-6041 - RLE.9999.0001.0002_R - 20221123 RL Statement FINAL 22006293(46499412.1) [para 126].
129 Transcript, Stuart Robert, 2 March 2023 [p 4230: lines 25-44].
130 Exhibit 4-5356 - TFF.9999.0001.0005_R - 3 January 2023 Tim Ffrench Signed Statement [para 222].
131 Exhibit 9559 - RBA.9999.0001.0001 - 20230331 Statement of Dr Roslyn Baxter (Redacted).pdf [para 21].
132 Exhibit 9559 - RBA.9999.0001.0001 - 20230331 Statement of Dr Roslyn Baxter (Redacted).pdf [paras 44-45].
133 Exhibit 4-6305 - DSS.5000.0002.2901_R - 191112 Final letter to SECDHS.
134 Transcript, Stuart Robert, 2 March 2023 [p 4231: line 39].
135 Exhibit 9559 - RBA.9999.0001.0001 - 20230331 Statement of Dr Roslyn Baxter (Redacted).pdf [paras 47-49].
136 Exhibit 4-6302 - CTH.4000.0005.8116_R - 191118 MINSUB (signed).
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139 Exhibit 4-6307 - CTH.4750.0013.6762_R - Transcript - Stuart Robert - Doorstop - Sydney [SEC=OFFICIAL].
140 Exhibit 4-6273 - SRO.9999.0001.0002_R - Statement of Stuart Robert in response to notice date 20.12.22 (NTG-0116)® [para 86].

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142 Exhibit 4-6041 - RLE.9999.0001.0002_R - 20221123 RL Statement FINAL 22006293(46499412.1) [paras 131-133]; Transcript, Renee Leon, 28 February 2023 [p 4047: lines 10-15].
143 Exhibit-9032 - CTH.3780.0001.0330 - MS19-000372: Income Compliance Programme - Legal Position [SEC=PROTECTED, SH=CABINET].
144 Exhibit 9031 - CTH.4000.0006.7453 - FW: MS19 000365: new attachment C [SEC=PROTECTED, SH=CABINET].
145 Exhibit 4-6306 - CTH.4750.0013.6758_R - Transcript - Stuart Robert - Doorstop - Sydney [SEC=OFFICIAL].
146 Exhibit 4-6305 - DSS.5000.0002.2901_R - 191112 Final letter to SECDHS.
147 Exhibit 4-6208 - CTH.3009.0020.4499_R - FYI- Update on Income Compliance Programme legal matters [SEC=OFFICIAL-Sensitive, ACCESS=Legal-Privilege].
148 Exhibit 4-6273 - SRO.9999.0001.0002_R - Statement of Stuart Robert in response to notice date 20.12.22 (NTG-0116)® [para 128].
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150 Exhibit 3-5044 - DSS.5015.0001.0048_R - 200522 - AGS opinion - In the matter of Prygodicz & Ors 1.
151 Exhibit 4-6273 - SRO.9999.0001.0002_R - Statement of Stuart Robert in response to notice date 20.12.22 (NTG-0116)® [paras 151, 153].
152 Prygodicz v Commonwealth of Australia (No 2) [2021] FCA 634, [5].



Report

Royal Commission into the Robodebt Scheme

Report
Volume 2

This report talks about some difficult themes, including suicide, self-harm and mental ill-health. Readers may find parts of the report distressing. These are some support services which might be helpful if you or someone you know needs help:·

- Lifeline 13 11 14 (24/7 crisis support line)
- Beyond Blue 1300 224 636 (24/7 telephone, website or email short-term counselling)
- Suicide Call Back Service 1300 659 467 (24/7 counselling for suicide prevention and mental health)

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Section 3: Effects of the Scheme

Chapter 10: Effects of Robodebt on individuals

1 Preface

At the heart of the "massive failure of public administration"[1] which was the Robodebt Scheme were the social security recipients who were targeted by what the former Minister for Social Services, the Hon Alan Tudge described as the "new tool… making a major contribution to the Government's fraud and non-compliance savings goals," a "great example of the Government using technology to strengthen our compliance activities with faster and more effective review systems." [2]

Some social security recipients who were affected by the Scheme gave evidence before the Commission.[3] The Commission is grateful to these witnesses for their account of the trauma they suffered as a result of the Scheme: evidence which was not easy to give.

The Commission is also indebted to the community organisations which, with very limited resources, provided assistance to the Commission in explaining what they heard and did during the Scheme.

This chapter talks about some difficult themes, including suicide, self-harm and mental ill-health. Readers may find it – and other parts of the report – distressing. These are some support services if you or someone you know needs help:

- Lifeline 13 11 14 (24/7 crisis support line)
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2 Introduction

To this day, I feel worried when I check the mail out of a fear that Centrelink will have written to me about further debts or raising the amount that I owe them.[4]

It feels like if you get Centrelink at any point in your life, it stays with you forever. [5]

The Commission's terms of reference required consideration of the "kinds of nonpecuniary impacts the scheme had on individuals, particularly vulnerable individuals, and their families." [6] Advocates and individuals gave evidence about the complex and far-reaching effects of the Scheme on recipients and their families.

The Scheme affected different people in different ways. There is nothing uniform about the people who need income support at different times in their lives, and not all social security recipients can be described as vulnerable. However, social security recipients include some highly vulnerable groups: people who need access to the system at times of crisis[7] because they are experiencing disadvantage, which might be due to physical or mental ill-health, financial distress, homelessness, family and domestic violence, or other forms of trauma.[8]

While DHS made some attempt to exclude or deal differently with people classified as "vulnerable" in the operation of the Scheme, using vulnerability indicators, it was a hopelessly inadequate means of protecting that cohort.[9] More information about vulnerability indicators can be found in the Concept of Vulnerability chapter.

This chapter discusses the effects the Scheme had on recipients, including:

- the barriers to engagement with the Scheme
- the general stigma associated with the receipt of social security payments
- the effect of unfair accusations
- the financial effects of the Scheme
- the effect of withholdings, garnishees and departure prohibition orders
- the Scheme's emotional and psychological effects, including distress, trauma, anxiety, suicidal ideation and suicide, and
- the loss of faith in government which the Scheme generated.

The Commission has received evidence and submissions from recipients and their family members about how they were affected by the Scheme. The following 14 individuals gave evidence in person:

- Ricky Aik
- Deanna Amato
- Amy (pseudonym)
- Sandra Bevan
- Felicity Button
- Rosemary Gay
- Jennifer Goodrick
- Melanie Klieve
- Kathleen Madgwick
- Madeleine Masterton
- Jennifer Miller
- Katherine Prygodicz, and
- Matthew Thompson

The Commission received their evidence as representative of individuals' experiences of the Scheme, while acutely conscious that there were many more stories that could have been told. Many people took the time to communicate their experience through submissions, for which the Commission was grateful. Others had stories which were not within the Commission's terms of reference, but which demonstrated the many problems people using social security encounter.

Also valuable was evidence from representatives of community organisations and bodies, including the Australian Council of Social Services (ACOSS), Economic Justice Australia (EJA) and Welfare Rights and Advocacy Services. Their experiences advocating for and assisting individuals affected by the Scheme are explored in more detail in The Roles of Advocacy Groups and Legal Services chapter.

2.1 Barriers to engagement with Centrelink

The Scheme created many obstacles for income support recipients who tried to meet its demands for information, and dispute the debts it raised. Vulnerable and disadvantaged cohorts were hit the hardest by the legal and policy failings of the Scheme which shaped the way in which recipients could navigate the system. It was designed to make most recipients to go online to respond to the notices they were sent, while limiting access to assistance from Centrelink staff.

Confusing initial letters

Both recipients and staff found the initial discrepancy letter confusing and cryptic.[10] EJA said many of these letters were misunderstood or disregarded by recipients because of their opaque wording.[11]

Colleen Taylor (a former DHS compliance officer) pointed out that the letters contained no information warning recipients that their failure to respond would result in DHS averaging their income from ATO data, or that their social security entitlements could be calculated using income averaging.[12] Research procured by DHS in 2017 confirmed that the letters did not make it clear to recipients what they were required to do in response.[13]

Failure to account for the likelihood that past recipients might have changed their address or might not be monitoring correspondence from Centrelink

DHS failed to consider the likelihood that many people being sent discrepancy letters, especially in respect of income from some years prior, might not receive the letter because they were no longer living at the same address[14] or, because they were no longer receiving payments, had no occasion to monitor their myGov account for Centrelink correspondence. For example:

- Katherine Prygodicz, one of the lead applicants in the Federal Court matter *Prygodicz v Commonwealth of Australia (No 2)*,[15] said that debt letters were being sent to an address she had not resided at for a 'very long time'.[16] Although she kept her address current while receiving Centrelink payments, she did not consider that there was any need to maintain current residential information with Centrelink after she stopped receiving benefits.[17]
- Sarah Harvey did not receive her initial letter because her address had changed a number of times from what was on record for Centrelink, and she had been homeless. She obtained the letter through her myGov account after a call from Centrelink[18].

The onerous requirement to respond

The requirements placed on recipients to resolve the "discrepancy" identified in the initial letter were onerous and designed with little regard to the burden it placed on recipients to procure the necessary

evidence. Payslips were often very difficult to obtain: Sandra Bevan told the Commission that two of her relevant former employers were no longer in business at the time she was required to provide that information. Ms Bevan experienced difficulties uploading material to the online portal and had to reconstruct her records as best she could through her diaries.[19] Later, bank statements were accepted but could be expensive to procure.[20] In some cases, recipients did not respond to the request for evidence because they were overwhelmed and distressed.[21]

Enforcing self-service procedures

Centrelink staff were required to direct recipients seeking help to use the online portal, even if they had difficulties in using it.[22] Many recipients found it difficult to respond online because they lacked access to a computer or smart phone, had poor digital literacy, or a distrust or fear of digital platforms.[23] Lived Experience Australia (LEA), a national representative organisation for Australian mental health consumers and carers, pointed out that the design of the online system had no regard to the abilities or capacities of people accessing Centrelink payments. This affected not only recipients who were attempting to engage with the system, but also service providers who were unable to assist when their clients sought help reporting their income and responding to debt notices using the online system.[24]

DHS employees ill-equipped to help resolve recipient issues

Even when recipients managed to contact a DHS customer service officer in person, they were sometimes given inadequate or incorrect information.[25] In some instances, DHS employees were unable to explain the basis on which a debt had been raised and would refer recipients to the myGov app which contained minimal and difficult to understand information.[26] Recipients found that some Centrelink employees focussed on justifying the debt rather than engaging with them to identify possible waiver grounds or organise an internal review.[27] Some DHS employees[28] also lacked an understanding of the letter's possible consequences.

Difficulties obtaining a review and pursuing freedom of information requests

The Commission heard evidence of reviews being requested but not happening[29] and recipients being told by DHS that they would be denied the right to review unless they provided relevant new information (such as payslips).[30] Advocacy bodies also had difficulties supporting recipients in appealing decisions. Following the introduction of the Scheme, recipients were told they needed to apply for information by making a formal freedom of information request.[31] There were delays in these documents being released to recipients, a factor in the extended review timeframes.[32]

Difficulties understanding how debts were calculated

When documents were received in response to freedom of information requests, they were voluminous: "reams of printouts of Excel spreadsheets with lots and lots of numbers" that were difficult to decipher.[33] These types of documents could be impenetrable to recipients, who sought assistance from advocacy groups to understand why a debt had been raised and how it was calculated on the basis of the documentation they had received. However, in most cases, advocacy groups did not have capacity to assess the documentation from DHS.[34]

Remoteness

Government agencies failed to consider the additional challenges for recipients who lived rurally or remotely when designing and implementing the Scheme.[35]

Ricky Aik lived rurally and gave evidence that he found navigating the Scheme especially difficult given his remote location:

> Because Chetwynd was so remote, I relied significantly on online services and would have to deal with most of my day-to-day issues over the internet. I recall that my internet was slow and unreliable. I could not afford a fast internet service. My phone service was also very poor. These matters made it very difficult for me. I think the isolation of my living situation also made it harder for me to manage the issues relating to the robodebt that I received from the government.[36]

Mr Aik recalled the difficulties in trying to contact Centrelink via phone:

> I recall attempting to telephone Centrelink to provide Centrelink with the amounts recorded on those payslips. I was unable to do so. Again, recall being left on hold for hours and giving up. Because I was often working during the day, I was not in a position to be on the phone for long periods of time.[37]

Having to make repeated and lengthy calls to Centrelink imposed an additional financial burden on recipients in working time lost and the cost of phone charges.

Mr Aik also recalled difficulties in providing payslips:

> The only way that I understood I could provide the [relevant] payslips to Centrelink (other than by giving the information on the payslips to Centrelink by way of telephone) was to physically provide the payslips at a Centrelink office. This option was not practicable for me because there was no Agency office anywhere near my home in Chetwynd. The nearest Centrelink office was around 100 kilometres away.[38]

Mr Aik's evidence of his experience living rurally also manifested in a "very limited" support network.[39]

2.2 Stigma

Australia is a signatory to the International Covenant on Economic, Social and Cultural Rights, which recognises the right of everyone to access social security.[40] That citizens can access government support when it is needed is an accepted characteristic of a civilised society. Despite this, people who receive income support payments can in reality be subject to stigmatisation and social, cultural, and structural stereotypes, producing feelings of shame, oppression, isolation, and dehumanisation.[41] The portrayal of those receiving income support can also be highly politicised.

This type of stigma can affect how people see themselves, as well as how their families, friends and the broader community perceive them.

As said in an anonymous submission: "There is an enduring assumption that all persons on welfare or pension payments are potential or actual cheats."[42]

Stigma surrounding income support recipients can be so deep-seated that it discourages eligible people from seeking support, even in the face of severe economic and personal hardship.

In the context of the Scheme, this stigma was exacerbated by the political narrative.[43] Ministers did not distinguish between fraud cases (which were a miniscule proportion of social security payments, approximately 0.1 per cent of the total debts raised in 2015–16),[44] and inadvertent overpayments which were inevitable in a system where reporting was complicated by the fact that most recipients' income was irregular[45] and employment periods did not align with social security reporting periods. (And, of course, the Scheme created a third category of people who were not overpaid at all but, because of income averaging, were wrongly treated as though they owed debts). Press releases and media interviews which described the various measures making up the Scheme dealt with fraud and overpayment together, as though they were much the same thing.

Dr Cassandra Goldie AO, ACOSS CEO, aptly summarised this attitude:

> …you had a government that was using language about being a welfare cop, using language about, "We will come after you," using language about, "We will find you and track you down. And if you don't pay, you might end up in jail." And so this notion of the Department of Human Services or Centrelink being there to help

> people was the complete opposite of what the government was actually communicating. For people on very low incomes relying on income support, what they heard was, "This is a dangerous place to come. You won't be safe."[46]

Recipients were made to feel like second-class citizens,[47] criminals,[48] and dole cheats.[49] Witnesses gave evidence about how the term 'cheat', often used in the context of debt recovery measures, insinuated that there was an illegitimacy in their reliance on the welfare system.[50] This accusation of dishonesty affected their sense of self-worth.

Melanie Klieve, a recipient forced to pay a debt she did not owe, told the Commission:

> There's a stigma attached to people on Centrelink, and I never felt that way because I always worked while I was on Centrelink. I only ever went on Centrelink because I desperately had to…it wasn't a choice. It was a need. And so I never felt like I was second class when I was on Centrelink because…I had worked since I was 13, and I had worked three jobs at a time.
>
> I had always, you know, done my bit and paid huge amounts of tax. And I thought, well, I've paid for my Centrelink…I have contributed to the tax that pays for Centrelink. So I didn't feel guilty about getting Centrelink when I desperately needed it. With this, it made me feel like I was a criminal. And it made me feel like what I assume a lot of people on Centrelink feel like most of their life.

Similarly, Felicity Button said she questioned her own worth, whether she was a "good mother," and "what happens if I become a public pariah? What happens if I'm labelled as a dole bludger or a system rort or a system cheat, when that couldn't be further from the truth?"[51]

2.3 The effects of unfair accusations

Many recipients experienced severe and long-lasting effects of being wrongly accused of owing a debt under the Scheme. They described feeling vilified and worn-down.[52] That distress compounded the stigma generally experienced by recipients of social welfare.

Recipients were concerned that others would believe that they owed the alleged debts, and experienced a loss of faith in the system and a fear of repeat accusations or of being re-targeted.

Dr Goldie said:

> We heard from people who had health conditions that were aggravated by the mere receipt of a Robodebt and dealing with the issue. People had to take time off work to deal with it. It caused stress within families because of the fact that people had received the debt. People hid it from their partners because they experienced shame...(I)t caused the mental health issues for a lot of people just because…people felt very powerless to try and clear their name because they couldn't get the information that they needed, and they felt helpless.[53]

Ms Prygodicz described feeling "bad and distressed" when her partner's family did not believe the alleged debt raised against her was incorrect: "they suspected that I had done something a little bit dodgy and that I had lied to the government."[54] To the contrary, Ms Prygodicz knew herself to be a "very honest and diligent person."[55] She explained:

> My feelings of anxiety and distress were exacerbated by the fact that in the general community people who are thought to have received social security benefits they are not entitled to are considered to be frauds or to be 'bludging' off the system. This environment contributed to the negative impact that the Asserted Overpayment Debt had on my mental health.
>
> …
>
> [M]y partner's mother said to me that she did not understand why I would have a debt to Centrelink and that if I had been honest and transparent in my dealings with Centrelink no debt would have arisen. I found my partner's mother's suggestions to be humiliating and distressing.[56]

Ms Bevan received a debt notice at a time when she was receiving Newstart Allowance and working casual jobs. She explained how the debt notice affected her:

> I was trying my best to keep my house – the roof over our head. I was working so hard… It was just a really horrible time. And it was just made worse by these constant accusations of me… apparently doing the wrong thing when I went to such lengths to do the right thing.[57]

Although she knew that there had been an error because she had always reported her fortnightly income accurately, Ms Bevan still felt she "had been found guilty of this thing, fraudulently claiming benefits, and I had to prove my innocence."[58]

Another submission to the Commission detailed how the person advocated on her daughter's behalf after her daughter received notice of a debt owing, including writing to various ministers about the shortcomings in the debt review process.[60] The debt was waived in 2018; however, the "stress of false accusations" had a long-lasting effect:

> The impact on her mental and physical health was enormous. The repeated stress of false accusations on her integrity and the threats made eventually lead to her having to leave her employment. She spent 6 months in no state to work. She spent her savings and mine over this time as she was too frightened to engage with Centrelink for financial help. She was prescribed medication for her mental condition. We both spent countless hours and days proving her innocence.[61]

2.4 Financial effects

An inability to meet financial obligations is a stressful experience, emotionally as well as financially. For recipients who rely on income support payments, receiving an unexpected debt notice or being asked to explain a discrepancy in their reporting obligations can compound already existing stress.[62] There is concern about maintaining access to the benefits they are receiving and anxiety about their ability to pay the debt alleged against them. Even a relatively small debt can make a massive difference to the lifestyle and wellbeing of someone who barely makes ends meet.

In response to demands for payment, recipients often felt pressured to use options which exacerbated their financial insecurity. Some took out loans,[63] depleted their superannuation,[64] or used credit cards[65] to repay the debts raised against them.[66]

Ms Button spoke about the financial hardship she experienced as a result of having a debt and regularly being behind on payments:

> [W]e found it impossible to meet our bills and expenses without borrowing money from my parents... we never had anything left over and were always behind…[67]

> I recall repeatedly having to ask my daughter's childcare provider to accept late payments because I did not have the money to pay my bills on time. I have felt anxious and upset at times when I have not had enough money to pay for these sorts of essential expenses. With many thousands of dollars of Centrelink debt hanging over me, I have often felt like my circumstances would not improve. I felt debilitated by financial stress.[68]

Ms Klieve gave evidence about how her financial circumstances were made worse by the debt:

> [A]s a result of my financial stress and the debt being raised against me, I recall asking my parents for a loan. I was finding it difficult to support my daughter who was partially dependent on me at that time.[69]

> …

> I recall that I went to the Salvation Army for assistance in mid-2019 but was only able to obtain $50 food stamps from that organisation. Additionally, I started to sell various possessions including my car so that I could cover my expenses.[70]

The financial effects on recipients were far-reaching, beyond the quantum of the debts themselves. Ms Prygodicz applied for, and was initially refused, a loan to buy a car after her debt had been wiped. She thought this may have been because the "debt" had affected her credit rating,[71] which made her worry about how the debt would continue to affect her life.[72]

2.5 Withholding payments from recipients

One way in which DHS recovered debts from current recipients was to withhold part of their social security payments.[73] Under the Scheme, income support recipients were given 28 days after a notice of their debt was issued to enter into a repayment arrangement before withholdings were automatically applied to their income support payments.[74]

The Commission heard evidence from Rosemary Gay, an aged pension recipient, who received a debt notice from DHS in late 2016. Part of her aged pension was withheld to repay the debt, which was raised under the Scheme. [75]

Ms Gay described her feelings when she learned of the debt:[76]

> It turned my life upside down. It was just sheer terror that (a) I owed a figure that was just such a huge amount that I've never earned that much money. How could I owe that much money? And the fact that I was to come up with that within a matter of three or four weeks - it was just sheer terror to me, and I didn't - I had no idea what to do next. If it hadn't have been for my daughter guiding me through that and suggesting I contact Centrelink - I did know, however, deep down that it just - it was an impossible amount for me to owe. I could not possibly owe that amount of money to Centrelink.

Ms Gay sought two reassessments of the debt and it was eventually cancelled on the basis that the debt was not correct and had been calculated based on income averaging.[77]

In her statement, Ms Gay highlighted how important her access to the aged pension had been to her wellbeing since 2010: [78]

> … (it) help[ed] keep my head above water financially. This benefit has enabled me to live my life with dignity and to pay my living expenses. It has been particularly important given my health issues and inability to work full-time.

2.6 The use and threat of garnishee notices

Services Australia has the power to issue garnishee notices to third parties to recover part or whole of a social security debt. Former recipients' tax refunds and savings, employment income, income from "a less common source such as a property settlement," or compensation which they have received can all be garnished. [79]

Throughout the Scheme, DHS issued garnishee notices to the ATO and to financial institutions. Some of those notices were generated by a manual process, but the vast majority were generated automatically. The scale of automatic generation of garnishee notices during the life of the Scheme is illustrated by the following table based on data provided by Services Australia. [80]

Year	Number of Garnishees Applied (Total)	Repayment Amount ($) (Total)	Number of Garnishees Applied (Manual Process Only)	Repayment Amount ($) (Manual Process Only)	Number of Garnishees Applied (Automated Process Only)	Repayment Amount ($) (Automated Process Only)*
2015	26,927	$427,414.44	96	$150.00	26,831	$427,264,44
2016	35,745	$8,815,398.66	687	$222,874.08	35,058	$8,592,524.58
2017	22,588	$5,356,914.28	351	$476,033.66	22,237	$4,880,880.62
2018	43,857	$25,869,992.47	433	$514,873.53	43,424	$25,355,118.94
2019	54,144	$49,554,633.58	496	$698,302.50	53,648	$48,856,331.02
2020	3,034	$508,479.70	344	$288,687.99	2,690	$219,791.71

The power to garnish has been described by the Federal Court as an "extraordinary" one that carries with it "a special obligation" requiring "advertence to fairness" and "regard to the justice of the particular case."[81]

Catherine Eagle, the principal solicitor at Welfare Rights and Advocacy Services in Perth, told the Commission about their experience with people whose tax refunds had been garnished during the Scheme:[82]

> there is provision in the Act for debts to be recovered by garnishee in circumstances in which a person hasn't entered into a reasonable repayment arrangement… If someone is no longer on a Centrelink payment, then the process should be that they are issued with the debt notice, they have the opportunity to enter into a repayment arrangement, and then it's only in circumstances where they have failed or refused to do that, that their tax refund, for example, will be garnisheed.

Ms Eagle explained there were people who were first learning they had a debt when their tax refund was garnished:[83]

> …because people weren't getting notices if they were no longer on Centrelink payments, because they probably changed address, so the first that they would know is when they had lost their tax refund…they were expecting to get.

Ms Eagle noted the process of having the tax refund garnishing decision reviewed:[84]

> …is a bit hit and miss…even where a debt was disputed or hadn't been provide or the person hadn't had the opportunity or was wanting to get that reviewed, that didn't stop the tax refunds being garnisheed.

The Commission heard evidence from Deanna Amato who received five letters from Centrelink between mid-September 2017 to early September 2018 about her employment income and, later, debt.[85] Ms Amato "did not receive the letters at the times when they were sent because the letters were sent to an address at which…[she] had not lived since 2014."[86]

On 3 September 2018 Ms Amato's entire tax refund of $1,709.87 was garnished[87] to repay a debt of $3,125.38 raised under the Scheme.[88]

Ms Amato told the Commission:

> When I found out that Centrelink had taken my entire tax refund, I was shocked. I had no idea that they could take money from people like this. I remember struggling to understand how this debt could have arisen, because I knew — to the best of my recollection —that I had always reported my income carefully. I was also scared about the size of the debt. I thought that because my whole tax refund had been taken, right down to the cent, there was probably more owing. [89]

> I had been hearing about other people being notified of Centrelink debts like this, and even though I could not think of how I had accrued a debt, I thought that Centrelink must have been correct. It was the only reason I could think of as to why they had taken my tax return. [90]

Similarly, Katherine Prygodicz had her tax refund of $142.54 for the financial year ending 31 July 2018 garnished.[91]

2.7 The use of Departure Prohibition Orders

A Departure Prohibition Order (DPO) is an order which prohibits a person from departing Australia for a foreign country if they have failed to repay a debt to the Commonwealth.[92] The Commission received evidence from persons affected by the Scheme about how the threat of a DPO affected the way they responded to the debt, and how it affected their wellbeing.[93]

The number of DPOs issued throughout the Scheme was relatively small. The Commission received evidence from Services Australia that the "total number of customers involved in the Robodebt Scheme where a DPO was recommended was 23,"[94] and of those only "13 customers had a DPO made where the debt raised as a result of the Robodebt Scheme was included with other outstanding debts from the customer's Services Australia file."[95] What was more significant was the threat of DPOs. They were a source of worry and distress to recipients,[96] some of whom told the Commission that the threat of a DPO made them feel as if they had no choice but to repay their debt, and were not in a position to question or dispute it.[97]

Recipients were made aware of the possibility of DPOs being made through:

- media releases[98]
- letters sent to them by the Department[99]
- letters sent to them by debt collectors, and[100]
- debt collectors[101] (see Debt Recovery and Debt Collectors chapter).

Ms Prygodicz gave evidence that she was "particularly worried" about the impact of a DPO on her plans to travel overseas to visit her family.[102]

> It was mentioned during one of the phone calls with Centrelink that it was best to comply with repaying the debt, even though I wasn't sure…how it was calculated, because a departure prohibition order could be, I guess, instigated against me, I wouldn't be able to leave the country, and that concerned me, that I wouldn't be able to visit friends or family in New Zealand.[103]

Ms Prygodicz had lodged an application for review of the debt, but subsequently made a partial payment towards the debt to show she was "genuine"[104] about repayment so that she was able to travel.

> I felt deeply concerned that Centrelink would continue to take all of the measures against me that they could. I was particularly worried that plans to travel overseas would be halted by Centrelink issuing a Departure Prohibition Order against me...[105]

Ms Prygodicz also described the anxiety caused by the threat of a DPO:

> This made me feel anxious and concerned about how the debt would affect my life. I had plans to travel to Wellington, New Zealand, so that I could visit my uncle for his 60th birthday. I eventually decided against making this trip. One of the reasons behind my decision was that it remained in the back of my mind that I could be prevented from leaving Australia.[106]

A number of submissions described how former recipients were affected by DPOs, or the threat of them.

An example is Ms Cho, who needed to travel overseas to look after a sick family member. When she was told that she could be issued with a DPO if she did not pay her debt, Ms Cho felt "threatened and powerless," with "no choice but to accept the debt."[107]

Another (anonymous) submitter described their reaction, "After saving for multiple years to finally go on my first overseas trip, I was then convinced that I would be stopped at the airport and not allowed to go."[108] This submission also described the impact of the government rhetoric in the media about DPOs, which served to "remind us [debt notice recipients] just how criminal we were."[109]

A third submission detailed the extreme anxiety and significant impacts on the recipient's mental health and ability to maintain full time work that a threatened DPO caused.[110] Another submission described how a threatened DPO was a "major concern," as the recipient feared they would not be able to attend their mother's funeral overseas.[111]

2.8 Distress, trauma, anxiety and mental ill-health

Many social security recipients need income support because they are in situations of vulnerability, distress, trauma or disadvantage. Dr Goldie explained that in the experience of ACOSS, people on income support had a higher incidence of poor mental health or social isolation: the financial stress associated with being on a very low, fixed income with few or no assets and low financial security could itself lead to high levels of stress, anxiety and depression.[112]

For some recipients – for example, a student receiving Austudy – the period of potential vulnerability and associated anxiety is short. Many other recipients, though, have a continuing need for support because of financial pressures, persistent unemployment, disability, physical or mental illness, or broader social disadvantage.[113]

While this is not to suggest that all recipients are subject to vulnerability and disadvantage, the reality is that many are. Circumstances of disadvantage can expose recipients to health problems which can be complex and continuing.[114] Dr Goldie is correct in observing that the incidence of poor mental health is higher among income support recipients than in the broader community.[115] The Scheme had the capacity to intensify pre-existing ill-health conditions and to render recipients more vulnerable to their development.

Some witnesses who gave evidence to the Commission spoke about how the Scheme caused them anxiety, depression, distress and trauma.

Mr Aik, who received a debt letter in 2019, gave evidence that the debt affected his mental health to the point where he found it "hard to sleep, hard to concentrate on work;" he was "always thinking about the debt," and "didn't feel like eating much."[116] He "didn't want to socialise, just didn't want contact with anybody" and his driving was affected because he was distracted with thoughts about the debt.[117] Mr Aik recalled feeling depressed to a point where he just wanted to be left alone, stating that he "didn't see any way out of this – out of the debt or how to talk to anyone about it."[118]

Matthew Thompson, who had experienced mental illness previously, gave evidence that upon receiving a debt notice totalling $11,000 he was in "complete shock,"[119] because it would "set me back years and years and years."[120] He explained that "from a generalised anxiety disorder point of view, it's just… the biggest trigger you can give to somebody."[121]

Ms Gay referred to the emotional trauma her interactions with Centrelink caused:

> …it's had a huge effect on my emotional and mental wellbeing and did for some time following 2016. It was a good 18 months before I could get over that, and I don't think you ever do get over it. And every time I tell my story…you relive that whole trauma. It was a trauma I never want to experience again.[122]

LEA observed that while the Scheme "disempowered people, causing significant long-term emotional trauma, stress and shame,"[123] it was not only people who received a debt notice who were affected:

> We also know that many people with disability receive the majority of support from family and informal carers who themselves may have disabilities, physical or mental health concerns to deal with, or may be caring for more than one family member. Many mental health carers are over the age of 65 years and many have been

> in their caring role for most if not all of the cared for person's adult life. Family carers may or may not be as IT literate as needed to navigate complex automated online processes in order to get their needs met and that of the people who they provide care to…Robodebt not only adversely impacted the person receiving Centrelink payments; it had many adverse impacts for the families and carers of these individuals, placing undue stress and burden on them too.[124]

Ideas of suicide

Some witnesses reported that the stress of a debt demand actually led them to consider suicide.

> I couldn't sleep because I was going to bed at night and racking my brain trying to figure out what had happened…and what was going to happen. How are they going to get this money from me? And it was these threats of taking money directly out of my pay or out of my bank account, from my tax return. And it was just a weight on my shoulders. But I do remember driving home at night just beside myself with worry about this money and thinking I could just drive my car into a tree and make it stop...[125]

Felicity Button told the Commission: [126]

> I felt suicidal for a period of months in 2017 with the "lowest point" being the occasion when ARL (debt collector) debited money from my account.
>
> I felt desperate on that day; it was so upsetting that I could not afford to pay for my daughter's medical expenses and I felt powerless to improve my situation.

2.9 Deaths resulting from the Scheme

The Commission heard evidence from the mothers of two young men caught up in the Scheme. They gave evidence on their sons' behalf, because their boys had died by suicide. Their stories are told in more detail below. The Commission is also aware of another tragic death which appears to have resulted from a discrepancy letter issued under the Scheme in 2017; it is discussed in the chapter – 2017, part A: A Crescendo of Criticism.

The Commission is confident that these were not the only tragedies of the kind. Services Australia could not provide figures for the numbers of people who committed suicide as a result of the Scheme.[127] To be fair, it is difficult to see how such information could be reliably gathered. In any case, it does little for the families of those who have died to speak of their loss in terms of numbers. What is certain is that the Scheme was responsible for heartbreak and harm to family members of those who took their own lives because of the despair the Scheme caused them. It extends from those recipients who felt that their only option was to take their own life, to their family members who must live without them.

Kathryn Campbell, former secretary of DHS, observed in her evidence that "suicide was something that we [at DHS] dealt with frequently."[128] That is no doubt due to the fact that many social security recipients live in situations of disadvantage or vulnerability. Any debt-raising exercise in that context is likely to increase numbers of suicide and self-harm.

That DHS was aware of this likelihood – that it dealt with suicides frequently – makes the implementation of the Scheme all the more egregious, particularly when there was evidence that they were raising inaccurate debts. DHS had a responsibility to deal sensitively with those people relying on its services, and to provide support rather than inflicting distress.

Jennifer Miller

Jennifer Miller gave a profoundly moving account of her son Rhys Cauzzo's experiences with the Scheme, his death, and her advocacy in the years since.

Mr Cauzzo died by suicide on 26 January 2017. His death occurred after debts were raised against him using income averaging in the PAYG Manual Compliance phase of the Scheme. He was 28 years old.

As his mother explained, Mr Cauzzo had suffered from anxiety and depression since he was in high school.[129] Ms Miller had been a constant support to her son in times when he struggled with those conditions.[130]

In May 2016, Mr Cauzzo was sent a letter advising him that DHS was reviewing his employment income for previous financial years, and that he needed to call Centrelink to confirm his income details.[131] He received a phone call about the discrepancy and agreed, when he was asked, with the ATO information.[132] Mr Cauzzo told his mother that Centrelink had not explained how the debt had been raised, and that he was not able to provide historical payslips because he could no longer access them.

Ms Miller told the Commission that she visited her son to provide support to him. He was "extremely stressed and scared of his suicidal thoughts" upon learning about his first Centrelink debt. She went with him to a local Centrelink office to discuss the debt, but they were turned away and told to ring a 1800 number. Mr Cauzzo's partner had previously told Ms Miller "how he had tried to slice his neck when the Centrelink pressures commenced."[133]

On 20 May 2016, Mr Cauzzo was sent four letters from Centrelink about debts totalling $10,876.23 that had been raised against him in respect of four financial years, starting from 2011. Soon after, in June 2016, Centrelink commencing withholding money from his Newstart Allowance, because he had not provided any further information.[134] Ms Miller said that Mr Cauzzo could not provide further information because he did not have the necessary documents.[135]

On 23 June 2016, Mr Cauzzo received a letter from Centrelink advising that his Newstart payments had been suspended because he had missed an appointment with his employment services provider.[136] From 10 August 2016, Mr Cauzzo stopped receiving Newstart payments.[137]

DHS had sent debt letters for each financial year that Mr Cauzzo had been in receipt of income support, with the exception of the 2012–13 financial year. For some reason that year was missed, but in September 2016, to add to Mr Cauzzo's misery, DHS undertook a second review of his income in respect of the 2012-13 financial year.[138] Between May and October 2016, Centrelink sent Mr Cauzzo 12 letters and phoned him at least five times.[139]

On 20 October 2016, Centrelink wrote to Mr Cauzzo, requesting that he enter a repayment arrangement for his outstanding debts within 14 days, failing which any income support payment he was receiving could be reduced, his wages or tax refund could be garnished, the case could be referred for legal action or the debt could be referred to a debt collector.[140]

In November 2016, the last of those threatened steps was taken. Mr Cauzzo's debts were referred to Dun & Bradstreet, a debt collection agency.[141] After the debts were referred to Dun & Bradstreet, Mr Cauzzo received six letters, two text messages and 13 phone calls from that agency between November 2016 and January 2017.[142]

There is more on DHS's use of debt collection agencies in the Debt Recovery and Debt Collectors chapter.

Mr Cauzzo took his own life on 26 January 2017.[143] In the days after Mr Cauzzo's death, Ms Miller went to her son's apartment in Melbourne and found "debt letters hanging on the fridge along with a drawing of a person shooting a gun in their mouth, with dollar signs coming out of the back of their head."[144]

Mr Cauzzo's debts were later reduced to zero and the amounts paid were refunded.[145]

After her son's death, Ms Miller attempted to obtain more information about her son's debts by contacting various government entities and ministers. [146]

During the course of the Commission, Ms Miller was able to review documents from Mr Cauzzo's Centrelink file which showed that he had been assessed in September 2015 as having had a permanent psychiatric disorder, which was identified as anxiety and depression, and that he suffered from anxiety

and panic attacks. [147]That assessment should have meant that a "vulnerability indicator" was placed on his file, which would have meant that Centrelink needed to follow certain processes when engaging with Mr Cauzzo. However, no vulnerability indicator was placed on his file at the time of that assessment.[148]

There is more on vulnerability indicators in the Concept of Vulnerability chapter.

Kathleen Madgwick

Kathleen Madgwick told the Commission about the death of her only child, Jarrad Madgwick.[149] He died by suicide on 30 May 2019. He was 22 years of age. He had received notifications under the CUPI phase of the Scheme.

From the end of 2017 into 2018, Mr Madgwick held a traineeship in Victoria and was receiving Newstart Allowance. Bullying forced him to leave the traineeship in late 2018. He found work in hospitality, which he had difficulty maintaining, and was living in his car. In April 2019, he returned to live with Ms Madgwick in Queensland, but she had lost her job, and both were forced to apply for Newstart Allowance. Mr Madgwick was completely without money, with some traffic fines to pay, and his mother was in no position to support him financially.

Mr Madgwick's initial application for Newstart on 1 May 2019 was rejected after he was said to have missed a telephone call. He re-applied, explaining that his phone was disconnected. His application was again rejected on 30 May 2019 because he had not provided documents. Telephoning DHS that morning, he was told it was because he had not supplied a BSB number, despite DHS already being in possession of all of his bank details. However, with his mother's help, he was able to have the application reinstated. Immediately after the reinstatement, Mr Madgwick was in a better frame of mind. He understood his claim was being processed and he was hopeful of a priority payment the following week.[150]

Ms Madgwick knew her son was struggling, penniless and reliant on her for the most basic things.[151] What she did not know was that on 27 May 2019, DHS had commenced a review in relation to Mr Madgwick for the 2017–2018 financial year and had informed him through his myGov account that there was a discrepancy between his declared earnings and ATO PAYG income amounts, indicating a potential overpayment.

On 28 May, as directed, Mr Madgwick entered payslip information for his traineeship income online.[152] For some reason, although he had already responded, he was sent a letter through his myGov account the following day telling him he had to "check and update" the same ATO information.[153] The online system advised Mr Madgwick that "the review would be processed" and that "a provisional debt outcome" had been determined in the amount of $1,795.85 for the period 28 April 2018 to 22 June 2018.[154]

Services Australia says that the provisional assessment would have been displayed to Mr Madgwick when he finished entering his income information on line, although it cannot say precisely when that was.[155] From what happened later, it seems he either did not see it or did not grasp its contents at that time. Ms Madgwick gave evidence that around 5pm on 30 May 2019, the same day on which they had been in contact with DHS about his Newstart Allowance, Mr Madgwick told her that he would not get paid the allowance, because he owed Centrelink $2,000.

He said, "I will never get out of debt."[156]

He was distressed and angry, and later that evening left the house. When he was not home by morning, Ms Madgwick went looking for him and found his body in a nearby park.

Ms Madgwick was able, after her son's death, to listen to the recording of those parts of the call where her son had been speaking to DHS earlier that day about his Newstart application. It appeared that Mr Madgwick thought the review was in some way part of his Newstart application and had not understood what might follow from the provision of his pay information for 2017 and 2018. The Centrelink officer to whom he spoke, though otherwise helpful, did not address that misunderstanding.[157]

Mr Madgwick's "provisional debt" does not appear to have been raised through income averaging; it seems to have been based on the payslips that he provided. His case exemplifies a different aspect of the Scheme's brutality: the bald online statement to someone in dire financial straits of a "provisional debt outcome" of $1795.85, with no indication of how it might be repaid (for example, through small deductions if and when he was in receipt of an income).

It is apparent from the content of the 30 May 2019 phone call with DHS that Mr Madgwick did not appreciate what the consequence of the review might be and it came as a shock. The debt came without warning: the request for payslips or bank statements gave no clue as to how those documents might be used to raise a debt. The standard letter in the CUPI phase of the Scheme said that if the information were *not* supplied, the recipient might have to pay money back.

From what Mr Madgwick said to his mother, the sum of $1795.85 seemed an impossible amount to him, beyond any hope of repayment, and he thought it meant he would not receive any Newstart Allowance.

Ms Madgwick did not think the events of 30 May 2019 were the only cause of her son's death. There were other difficulties in his life: the severe financial stress he was under, his homelessness, and the break-up of a relationship.[158] What does seem clear, though, is that finding out about the debt in the way he did was a precipitating factor.

Ms Madgwick, like Ms Miller, became an advocate after her son's death and fought to obtain information about his previous contact with DHS. Ms Madgwick wrote to ministers and DHS on many occasions, but received little in reply.[159]

Further comments

Rhys Cauzzo's and Jarrad Madgwick's stories and their mothers' search for answers attracted publicity, drawing attention to the Scheme and its flaws. What happened to Mr Cauzzo and Mr Madgwick lays bare the question of how government should deal with vulnerable people. The harmful effects of the Scheme were not confined to the raising of inaccurate or non-existent debts. The blunt instrument of automation used to identify and communicate the possibility of overpayment was inept at determining vulnerability. Empathy could not be programmed into the Scheme.

> People who are in receipt of government benefits are, by the very nature of the fact that they require social support, a group at a disadvantage. Rhys had struggled with accessing the medical care and support that he needed, struggled to get helpful information about his debt, and struggled with his mental health. When Rhys took his life on 26 January 2017, it was a devastating end to his struggle with a system that is supposed to support its most vulnerable.[160]

It is often difficult to identify vulnerability in recipients. It is also difficult to determine how vulnerabilities, once identified, should be accounted for in the recovery of overpayment. However, this difficulty does not absolve the government of its responsibilities to these recipients. It is clear that there is scope for improvement in the mechanisms used by government to register vulnerability, in administering the social security system, and in the language and information used in communicating with recipients.

2.10 Loss of faith in government

One of the consequences of the Scheme was a loss of trust in the social security system, and in government more broadly. Some recipients resolved not to seek access to social security payments in the future, in reaction to their experiences under the Scheme.[161]

Ms Prygodicz said:

> I will never use Centrelink's services again. I don't trust Centrelink to treat me properly after my experience with Robodebt. I don't trust them to have my information and to use that information in an appropriate way. I am quite adamant about this.[162]

Ms Button echoed those sentiments:

> Each time I considered making an application I have decided against going ahead with it because I fear that if I am a Centrelink recipient again another debt will be raised against me. If I had been able to access income support since the debt was raised, I may not have struggled financially so badly. I no longer trust that Centrelink will treat me fairly.[163]
>
> […]
>
> I will never apply for Centrelink again - and I hope that this is highlighted in the teleprompter - ever. I will live out of my car. I will live on the street. I will sit outside Southern Cross Station if I have to. But I will never, ever apply for Centrelink ever again. And it's not because I might never need to; it's because I never want to be put in that position again, feeling so vulnerable, feeling like a strain on society, feeling like I'm the problem. I'm never going to put myself in that position again. And if my children need Centrelink, I will do everything I can first before they use it. [164]

Ms Bevan's determination never to apply for benefits again similarly extended to her family, with consequences for her son as well as herself:[165]

> I will never access Centrelink benefits ever again. My son, when he left school, was eligible for Newstart allowance. And because of this experience - and this affected my kids as well - we didn't apply. So I then continued to support him until he recently got a job with his brother as a scaffolder, which is a hard job to do…we tried to access some training for him. But in order to access the training, you had to have a Newstart benefit, and we weren't going to be doing that.

Ms Klieve gave evidence that while it was "probably self-destructive," she was fearful of ever engaging with Centrelink again.[166]

Feelings of betrayal and distrust were also common:

> I feel utterly betrayed by the government for this, which sounds dramatic, but it's true. Myself, and everyone else who turned up to every meeting they had to, jumped through every hoop and tried to do the right thing, were treated like criminals and cheats, when all the while it was the department's scheme that was illegal.[167]

Another submission said:

> I didn't eat, couldn't go anywhere except work, my relationship with my girlfriend ended. I was ashamed and didn't tell my family about this. It was a dark time… It was years of stress, harassment and sadness. I can never get those days back. The worst thing is to know I went through all that for nothing…I will not ever trust a government institution or the public service again.[168]

The Scheme's systemic failures, the effects on individuals and the consequences for the broader community have undoubtedly corroded public trust in government and its institutions. The effects of this are lasting; perhaps irreversible.

3 Conclusion

The Scheme was launched in circumstances where little to no regard was had to the individuals and vulnerable cohorts that it would affect. The ill-effects of the Scheme were varied, extensive, devastating and continuing.

Recommendation 10.1: Design policies and processes with emphasis on the people they are meant to serve

Services Australia design its policies and processes with a primary emphasis on the recipients it is meant to serve. That should entail:

- avoiding language and conduct which reinforces feelings of stigma and shame associated with the receipt of government support when it is needed,
- facilitating easy and efficient engagement with options of online, in person and telephone communication which is sensitive to the particular circumstances of the customer cohort, including itinerant lifestyles, lack of access to technology, lack of digital literacy and the particular difficulties rural and remote living,
- explaining processes in clear terms and plain language in communication to customers, and
- acting with sensitivity to financial and other forms of stress experienced by the customer cohort and taking all practicable steps to avoid the possibility that interactions with the government might exacerbate those stresses or introduce new ones.

1 *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634, [5].
2 Exhibit 3-4638 - CTH.3001.0030.3987_R - New technology helps raise $4.5 million in welfare debts a day, [p 1].
3 See for example: Transcript, Ricky Aik, 23 January 2023 [p 2156 – p 2176]; Transcript, 'Amy', 31 October 2022 [p 25 – p 42]; Transcript, Rosemary Gay, 23 January 2023 [p2119 – p 2135]; Transcript, Felicity Button and Katherine Prygodicz, 20 February 2023 [p 3285 – p 3302].
4 Exhibit 4-5192 - FBU.9999.0001.0002_R - NTG-0185 200429 Affidavit of Felicity Button [p 10, para 49].
5 ANON-24KG-9S7X-K, Submission by Anonymous, published 18 May 2023 [p 1: lines 15-16].
6 Terms of Reference (j)(i).
7 Transcript, Cassandra Goldie and Charmaine Crowe, 16 December 2022 [p 2023: lines 1-10].
8 Transcript Ms Eagle, 11 November 2022 [p 992: lines 10-43].
9 Transcript, Genevieve Bolton and Katherine Boyle, 11 November 2022 [p 1010: lines 40-46; p1011: lines 5-10];
10 Transcript, 'Amy', 31 October 2022 [p 32: line 34 – p 33: line 6]; Exhibit 4-8332 - RCW.0009.0001.0001_R - Statement of Sarah Jane Phil Harvey [para 24 - 25].
11 Exhibit 1-1288 - EJA.9999.0001.0002_R - Statement of Genevieve Bolton - NTG-0045 [p 19: para 54].
12 Transcript, Colleen Taylor, 13 December 2022 [p 1740: lines 9-35].
13 Exhibit 4-7486 - CTH.3008.0018.8255 - DHS Population Insights_Final [p 7].
14 Exhibit 4-8540 - CTH.9999.0001.0149 - [Final] Services Australia - Response to NTG-0135 [p 10: para 4.2].
15 *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634.
16 Transcript, Katherine Prygodicz, 20 February 2023 [p 3288: lines 5 – 7].
17 Transcript, Katherine Prygodicz, 20 February 2023 [p 3288: lines 25-37].
18 Exhibit 4-8332 - RCW.0009.0001.0001_R - Statement of Sarah Jane Phil Harvey [para 23].
19 Exhibit 2-2809 - RCW.0004.0001.0001_R - 2022.12.12 - Bevan Statement [para 34 - 37].
20 Exhibit 3-4744 - CTH.3044.0003.7539 - 4.3 Ombudsman Report-Centrelink's automated debt raising and recovery system April 2017 [p 37].
21 Exhibit 1-1288 - EJA.9999.0001.0002_R - Statement of Genevieve Bolton - NTG-0045 [p 19: para 54].
22 Exhibit 2-2841 – ACS.9999.0001.0308_R – Witness statement of Dr Cassandra Goldie (signed 14 December 2022).pdf [p 17: para 80]; Transcript, Catherine Eagle, 11 November 2022 [p 1013: lines 17, 19-22].
23 Transcript, Catherine Eagle, 11 November 2022 [p 1013: line 16-23]; Also see Exhibit 2-2841 – ACS.9999.0001.0308_R – Witness statement of Dr Cassandra Goldie (signed 14 December 2022).pdf [para66]
24 ANON-24KG-9SQ3-8, Submission by Lived Experience Australia, published 1 March 2023 [p 4: para 2].
25 Exhibit 1-0011 - RCW.0002.0001.0001_RW02 - Statement of Ms Madeleine Masterton [p 2 para 12].
26 Exhibit 9027 - EJA.9999.0001.0055_R - Statement of Genevieve Bolton, Economic Justice Australia, NTG-0246.pdf [p 6, para 21-22]; Exhibit 4-5290 – CRS.9999.0001.0001_R - Signed Statement of C Simpson [para 18-22].
27 Exhibit 9027 - EJA.9999.0001.0055_R - Statement of Genevieve Bolton, Economic Justice Australia, NTG-0246.pdf [p 6: para 22].
28 Transcript, Jeannie-Marie Blake, 21 February 2023 [p 3443: line 22 – p 3445: line 26].
29 Transcript, Genevieve Boyle, 11 November 2022 [p 1010: lines 1-6]; Transcript, Miles Browne, 24 February 2023 [p 3807: lines 31 – 38]; Transcript, Catherine Eagle, 11 November 2022 [p 1009: lines 38-43].
30 Exhibit 1-1288 - EJA.9999.0001.0002_R - Statement of Genevieve Bolton - NTG-0045.pdf [p 19: para 56]; Transcript, Miles Browne, 24 February 2023 [p 3807: lines 22 – 29]; Transcript, Rowan McRae, 24 February 2023 [p 3807: lines 6 – 12]; Transcript, Catherine Eagle, 11 November 2022 [p 1009: lines 31-36].
31 Transcript, Catherine Eagle, 11 November 2022 [p 997: line 10 – p 998: line 30].
32 Transcript, Catherine Eagle, 11 November 2022 [p 998: lines 40-46].
33 Transcript, Katherine Boyle, 11 November 2022 [p 999: lines 5-14].
34 Transcript, Katherine Boyle, 11 November 2022 [p 999: lines 10-20].
35 ANO.9999.0001.0010, Submission by National 4Rs Community Legal Network, published 1 March 2023 [p 15].
36 Exhibit 3-3321 - RCW.0006.0001.0001_R - Statement of Ricky Aik, 15 January 2023 [para 8].
37 Exhibit 3-3321 - RCW.0006.0001.0001_R - Statement of Ricky Aik, 15 January 2023 [para 34].
38 Exhibit 3-3321 - RCW.0006.0001.0001_R - Statement of Ricky Aik, 15 January 2023 [para 35].
39 Transcript, Ricky Aik, 23 January 2023 [p 2168: lines 19 – 24].
40 International Covenant on Economic, Social and Cultural Rights [1976] ATS 5.
41 Transcript, Matthew Thompson, 1 March 2023 [p 4116: line 11; line 31]; Transcript, Sandra Bevan, 16 December 2022 [p 2011: lines 2-4; p2019: lines 2-3] Transcript, Felicity Button, 20 February 2023 [p 3301: lines 3-5].
42 ANON-24KG-9BPB-5, Submission by Anonymous, published 19 May 2023 [p 4: lines 4-5].
43 See, for example, Exhibit 2-2522 - RBD.9999.0001.0223 - International Conference on Welfare Reform_ Meeting the Policy Challenges of Change _ Former Ministers and Parliamentary Secretaries [p 4: para 5]; Exhibit 2-2602 - RBD.9999.0001.0227 - Sky News - 'Richo' _ Former Ministers and Parliamentary Secretaries [p 4: para 8]; Exhibit 2-2601 - RBD.9999.0002.0002 - Strong welfare cop'- Scob Morrison's new self-proclaimed title [p 1: para 4];

Exhibit 2-3137 - ACS.9999.0001.0309 - Acoss criticises government's appalling jail threats to welfare recipients _ Centrelink _ The Guardian [p 1: para 4].

44 Transcript, Alan Tudge, 1 February 2023 [p 2916: lines 7-11].

45 See Exhibit 4-8342 - RBD.9999.0001.0505 - Robodebt and social security policy_10 March_clean, 10 March 2023 [p 3]: "The share of these people with earnings who had stable incomes over the course of the financial year is extremely low, ranging from less than 3% of people receiving Youth Payments to around 5% of those receiving Newstart or Austudy, and between 5 and 10% of those receiving Parenting Payments."

46 Transcript, Cassandra Goldie, 16 December 2022 [p 2025: lines 38-44].

47 Transcript, Melanie Klieve, 5 December 2022 [p 1141: lines 23-45]. Royal Commission into the Robodebt Scheme

48 Transcript, Michael Thompson, 1 March 2023 [p 4116: lines 7-12]; Transcript, Melanie Klieve, 5 December 2022 [p 1141: lines 23-45].

49 Transcript, Katherine Prygodicz, 20 February 2023 [p 3296: line 41 – p 3297: line 2].

50 Transcript, Melanie Klieve, 5 December 2022 [p 1141: lines 23-45]; Transcript, Michael Thompson, 1 March 2023 [p 4116: lines 7-12]; Transcript, Katherine Prygodicz, 20 February 2023 [p 3296: line 41 – p 3297: line 2].

51 Transcript, Felicity Button, 20 February 2023 [p 3296: lines lines 12 – 23].

52 Transcript, Cassandra Goldie, 16 December, 2022 [p 2025: line 13]; Exhibit 4-5189 - KPR.9999.0001.0002_R - NTG-0184 200430 Affidavit of Katherine Prygodicz [para 49]; Transcript, Sandra Bevan, 16 December 2022 [p 2018: line 40].

53 Transcript, Cassandra Goldie, 16 December, 2022, [p 2025: lines 13-20].

54 Transcript, Katherine Prygodicz, 20 February 2023 [p 3296: line 41 – p 3297: line 2].

55 Exhibit 4-5189 - KPR.9999.0001.0002_R - NTG-0184 200430 Affidavit of Katherine Prygodicz [para 49].

56 Exhibit 4-5189 - KPR.9999.0001.0002_R - NTG-0184 200430 Affidavit of Katherine Prygodicz [para 49].

57 Transcript, Sandra Bevan, 16 December 2022 [p 2018: line 40].

58 Transcript, Sandra Bevan, 16 December 2022 [p 2015: lines 20-21].

59 ANON-24KG-9SJT-2, Submission by Anonymous, published 20 May 2023.

60 Mr Porter in his capacity as Minister for Social Services, and her local MP Darren Chester.

61 ANON-24KG-9SJT-2, Submission by Anonymous, published 20 May 2023 [p 04: lines 25-31].

62 Transcript, Cassandra Goldie and Charmaine Crowe, 16 December 2022 [p 2023 lines 0-10].

63 Ms Catherine Eagle gave evidence of speaking with a client who had paid the 'Robodebt' debt in full using a payday loan, as instructed by a Centrelink employee. In 2020, when the scheme was declared unlawful, the client noticed deposits into her bank account which was the repayment of the debt and later compensation from the class action. Transcript, Catherine Eagle, 11 November 2022 [p1004: lines 15-42].

64 ANON-24KG-9B4R-S, Submission by Anonymous, published 22 May 2023 [p 1: lines 11-12].

65 Transcript Ms Eagle, 11 November 2022 [p1004: lines 5-25].

66 Exhibit 4-5192 - FBU.9999.0001.0002_R - NTG-0185 200429 Affidavit of Felicity Bubon [p 12: para 53].

67 Exhibit 4-5192 - FBU.9999.0001.0002_R - NTG-0185 200429 Affidavit of Felicity Button [p 12: para 52].

68 Exhibit 4-5192 - FBU.9999.0001.0002_R - NTG-0185 200429 Affidavit of Felicity Button [p 12: para 53].

69 Exhibit 2-1690 - MJK.9999.0001.0002_R - 2022.12.02 Statement of Melanie Jane Klieve [para 31].

70 Exhibit 2-1690 - MJK.9999.0001.0002_R - 2022.12.02 Statement of Melanie Jane Klieve [para 43].

71 Exhibit 4-5189 - KPR.9999.0001.0002_R - NTG-0184 200430 Affidavit of Katherine Prygodicz [para 50-51].

72 Exhibit 4-5189 - KPR.9999.0001.0002_R - NTG-0184 200430 Affidavit of Katherine Prygodicz [para 51].

73 See the *Social Security Act 1991* (Cth) s 1231.

74 Exhibit 1-0712 ;Exhibit 1-0845 - CTH.9999.0001.0004 - [FINAL] RRC - Services Australia - Response to NTG-0005 p3: para 2.5(a)].

75 Transcript, Rosemary Gay, 23 January 2023 [p 2119: line 10 – p 2135: line 25].

76 Transcript Rosemary Gay, 23 January 2023, [p 2126: 3-12].

77 Exhibit 3-3252 - CTH.3801.0001.0105_R - Abachment 9 - Recalculation Outcome leber 07122016.

78 Exhibit 3-3244 - RGA.9999.0001.0001_R - Statement of Rosemary Gay [p 2: para 16].

79 Exhibit 9851 - CTH.9999.0001.0224 -[FINAL] NTG-0258 Services Australia Response (Garnishee Data).PDF

80 Exhibit 9851 - CTH.999.0001.0224 - [FINAL] NTG-0258 Services Australia Response (Garnishee Data).PDF [page 8]

81 *Edelsten v Wilcox* (1998) 83 ALR 99 at 112.

82 Transcript, Catherine Eagle, 11 November 2022 [p 1008: lines 1-9].

83 Transcript, Catherine Eagle, 11 November 2022 [p 1008: lines 11-14].

84 Transcript, Catherine Eagle, 11 November 2022 [p 1008: lines 14-17].

85 Exhibit 4-5757 - VLA.9999.0001.0095_R - 23 190809 Points of Claim – Applicant 19 September 2018, 19 October 2017, 2 March 2018, 4 April 2018, 31 August 2018. [p 2-4: paras 8 -12].

86 Exhibit 4-5757 - VLA.9999.0001.0095_R - 23 190809 Points of Claim – Applicant [p 5: para 15].

87 Exhibit 4-5773 – DAM.9999.0001.0001_R 18 02 2023 – [SIGNED] Statement of Deanna Amato [p 2: para 12-13].
88 Exhibit 4-5757 - VLA.9999.0001.0095_R - 23 190809 Points of Claim – Applicant [p 4: para 14].
89 Exhibit 4-5773 – DAM.9999.0001.0001_R 18 02 2023 – [SIGNED] Statement of Deanna Amato [p 2: para 14].
90 Exhibit 4-5773 – DAM.9999.0001.0001_R 18 02 2023 – [SIGNED] Statement of Deanna Amato [p 2: para 15].
91 Exhibit 4-5189 – KP.9999.0001.0002_R – NTG-0184 2000430 Affidavit of Katherine Prygodicz [p6 para:22].
92 *Social Security Act 1991* (Cth) s 1240.
93 See for example: Transcript, Katherine Prygodicz, 20 February 2023 [p3290: lines 16-2]; ANON-24KG-9BN6-Q, Submission by Monica Pimentel, published 26 April 2023; ANON-24KG-9S7X-K, Submission by Anonymous, published 18 May 2023.
94 Exhibit 4-8310 - CTH.9999.0001.0118_R - [REVISED] Services Australia - Response to NTG-0124 (DPOs) [para 3.1].
95 Exhibit 4-8310 - CTH.9999.0001.0118_R - [REVISED] Services Australia - Response to NTG-0124 (DPOs) [para 3.2(a)].
96 ANON-24KG-9B8G-J, Anonymous Submission, published 27 June 2023; ANON-24KG-9S4J-2, Submission by Whan Hee (Linda) Cho, published on 28 March 2023 [page 1]; ANON-24KG-9S7X-K, Submission by Anonymous, published on 18 May 2023 [p 3].
97 ANON-24KG-9S4J-2, Submission by Whan Hee (Linda) Cho, published on 28 March 2023 [p 1]; Transcript, Kathryn Prygodicz, 20 February 2023 [p 3291: line 40 – p 3292: line 7].
98 Exhibit 4-6155 - MKE.9999.0001.0018 - 79m_Welfare Debt Dodgers to Face Travel Bans
99 See for example: Exhibit 3-3329 - ARL.9999.0001.0033_R -105940561_14857285_17587250_1006415185_20230105_095832 [p 1].
100 See for example: Exhibit 1-0648 - MGR.0004.0001.0339_R - MG Lebers (Consequences) updated 130120; Transcript, Ricky Aik, 23 January 2023 [p 2171: lines 22-46].
101 See for example: Exhibit 1-0573 - MGR.0003.0001.3539_R - Scripts - Centrelink V1 June 2018 [p 9]; Transcript, Mr Wheelan, 4 November 2022 [p 478: line 29 – p 479: line 2; p 482: lines 19-35].
102 Exhibit 4-5189 - KPR.9999.0001.0002_R - NTG-0184 200430 Affidavit of Katherine Prygodicz, 1 May 2020 [para 24]
103 Transcript, Katherine Prygodicz, 20 February 2023 [p3290: lines 16 - 22].
104 Transcript, Katherine Prygodicz, 20 February 2023 [p3291: lines 18 - 30].
105 Exhibit 4-5189 - KPR.9999.0001.0002_R - NTG-0184 200430 Affidavit of Katherine Prygodicz, 1 May 2020 [p10: para 40].
106 Exhibit 4-5189 - KPR.9999.0001.0002_R - NTG-0184 200430 Affidavit of Katherine Prygodicz, 1 May 2020 [p11: para 45].
107 ANON-24KG-9S4J-2, Submission by Whan Hee (Linda) Cho, published on 28 March 2023 [p 1].
108 ANON-24KG-9S7X-K, Submission by Anonymous, published on 18 May 2023 [p 4-5].
109 ANON-24KG-9S7X-K, Submission by Anonymous, published on 18 May 2023 [p 4].
110 ANON-24KG-9B8G-J, Anonymous Submission, published 27 June 2023 [p 1]
111 ANON-24KG-9BN6-Q, Submission by Monica Pimentel, published on 26 April 2023 [p 1].
112 Exhibit 2-2841 - ACS.9999.0001.0308_R - Witness statement of Dr Cassandra Goldie (signed 14 December 2022) [p 4 para 24].
113 Transcript, Taryn Preston, 10 March 2023 [p 4889: lines 30-44].
114 Kim M Kiely and Peter Butterworth, 'Social disadvantage and individual vulnerability: A longitudinal investigation of welfare receipt and mental health in Australia', (2013) 47(7) *Australian & New Zealand Journal of Psychiatry*
p. 654.
115 Kiely, K. M., & Butterworth, P. (2013). Social disadvantage and individual vulnerability: A longitudinal investigation of welfare receipt and mental health in Australia. *Australian & New Zealand Journal of Psychiatry*, *47*(7), 654-666, p. 654.
116 Transcript, Ricky Aik, 23 January 2023 [[p 2167: lines 39 – 41].
117 Transcript, Ricky Aik, 23 January 2023 [p 2167: line 36 – p 2168: line 14].
118 Transcript, Ricky Aik, 23 January 2023 [p 2168: lines 19 – 24].
119 Transcript, Mabhew Thompson, 1 March 2023 [p 4106: line 45].
120 Transcript, Mabhew Thompson, 1 March 2023 [p 4106: lines 37-38].
121 Transcript, Mabhew Thompson, 1 March 2023 [p 4106: lines 45-46].
122 Transcript, Rosemary Gay, 23 January 2023 [p 2134: line 38 - 42].
123 ANON-24KG-9SQ3-8, Submission by Lived Experience Australia, published 1 March 2023 [p 4: para 3].
124 ANON-24KG-9SQ3-8, Submission by Lived Experience Australia, published 1 March 2023, [p 5: para 2].
125 Transcript, Sandra Bevan, 16 December 2022 [p 2018: lines 28 -35].
126 Exhibit 4-5192 - FBU.9999.0001.0002_R - NTG-0185 200429 Affidavit of Felicity Button [p 12: para 54-55].

127 Exhibit 9012 - CTH.9999.0001.0062 - [Final] Services Australia - Response to NTG-0056.pdf.
128 Transcript, Kathryn Campbell, 7 March 2023 [p 4602: lines 16 - 17].
129 Exhibit 4-5108 - RCW.0007.0001.0019_R - 17 02 2023 - SIGNED - Statement of Jennifer Miller [para 2].
130 Exhibit 4-5108 - RCW.0007.0001.0019_R - 17 02 2023 - SIGNED - Statement of Jennifer Miller [para 11].
131 Exhibit 4-5108 - RCW.0007.0001.0019_R - 17 02 2023 - SIGNED - Statement of Jennifer Miller [para 25].
132 Exhibit 4-5108 - RCW.0007.0001.0019_R - 17 02 2023 - SIGNED - Statement of Jennifer Miller [para 26].
133 Exhibit 4-5108 - RCW.0007.0001.0019_R - 17 02 2023 - SIGNED - Statement of Jennifer Miller [para 21].
134 Exhibit 4-5108 - RCW.0007.0001.0019_R - 17 02 2023 - SIGNED - Statement of Jennifer Miller [para 28-29].
135 Exhibit 4-5108 - RCW.0007.0001.0019_R - 17 02 2023 - SIGNED - Statement of Jennifer Miller [para 29].
136 Exhibit 4-5108 - RCW.0007.0001.0019_R - 17 02 2023 - SIGNED - Statement of Jennifer Miller [para 31].
137 Exhibit 4-5108 - RCW.0007.0001.0019_R - 17 02 2023 - SIGNED - Statement of Jennifer Miller [para 35].
138 Exhibit 4-5108 - RCW.0007.0001.0019_R - 17 02 2023 - SIGNED - Statement of Jennifer Miller [para 36-42].
139 Exhibit 4-5108 - RCW.0007.0001.0019_R - 17 02 2023 - SIGNED - Statement of Jennifer Miller [para 68].
140 Exhibit 4-5108 - RCW.0007.0001.0019_R - 17 02 2023 - SIGNED - Statement of Jennifer Miller [para 44].
141 Exhibit 4-5108 - RCW.0007.0001.0019_R - 17 02 2023 - SIGNED - Statement of Jennifer Miller [para 45-46].
142 Exhibit 4-5108 - RCW.0007.0001.0019_R - 17 02 2023 - SIGNED - Statement of Jennifer Miller [para 69].
143 Exhibit 4-5108 - RCW.0007.0001.0019_R - 17 02 2023 - SIGNED - Statement of Jennifer Miller [para 67].
144 Exhibit 4-5108 - RCW.0007.0001.0019_R - 17 02 2023 - SIGNED - Statement of Jennifer Miller [para 76].
145 Transcript, Jenny Miller, 20 February 2023 [p3258: lines 33-42].
146 Ms Miller contacted Minister Tudge, Minister Robert, the Commonwealth Ombudsman, and the OAIC. Exhibit 4-5108 - RCW.0007.0001.0019_R - 17 02 2023 - SIGNED - Statement of Jennifer Miller [para 105, 106, 109, 126].
147 Exhibit 4-5108 - RCW.0007.0001.0019_R - 17 02 2023 - SIGNED - Statement of Jennifer Miller [para 70]; Exhibit 4-5113 - CTH.2001.0005.8785_R - LEX 27963 - Documents – Retrieval [p 31].
148 Exhibit 4-5108 - RCW.0007.0001.0019_R - 17 02 2023 - SIGNED - Statement of Jennifer Miller [para 70].
149 Exhibit 4-8024 - KMA.9999.0001.0014_R - Signed Statement of Kathleen Madgwick, [para 33 – 38]; Transcript, Kathleen Madgwick, 10 March 2023 [p 4919: line 6 – p 4920: line 36].
150 Exhibit 4-8024 - KMA.9999.0001.0014_R - Signed Statement of Kathleen Madgwick, [para 29].
151 Transcript, Kathleen Madgwick, 10 March 2023[p 4911: lines 21-35].
152 Exhibit 4-8026 - CTH.9999.0001.0133_R - Final Services Australia - Response to NTG-0076 (003) [1.2].
153 Exhibit 4-8026 - CTH.9999.0001.0133_R - Final Services Australia - Response to NTG-0076 (003) [1.6].
154 Exhibit 4-8026 - CTH.9999.0001.0133_R - Final Services Australia - Response to NTG-0076 (003) [1.3] – [1.4].
155 Exhibit 4-8027 - CTH.9999.0001.0139_R - Response to requests for additional information (Q3) [1.7].
156 Exhibit 4-8024 - KMA.9999.0001.0014_R - Signed Statement of Kathleen Madgwick, [para 32]; Transcript, Kathleen Madgwick, 10 March 2023 [p 4914: lines 1-8].
157 Exhibit 4-8024 - KMA.9999.0001.0014_R - Signed Statement of Kathleen Madgwick, [para 29].
158 Transcript, Kathleen Madgwick, 10 March 2023 [p 4922: lines 30-39].
159 Exhibit 4-8024 - KMA.9999.0001.0014_R - Signed Statement of Kathleen Madgwick [para 42 - 48].
160 Exhibit 4-5108 - RCW.0007.0001.0019_R - 17 02 2023 - SIGNED - Statement of Jennifer Miller [para 161].
161 Exhibit 4-5188 - KPR.9999.0001.0004_R - NTG-0184 230206 Hearing Block 4 - Response by Katherine Prygodicz (GL) (002) [p 3].
162 Exhibit 4-5192 - FBU.9999.0001.0002_R - NTG-0185 200429 Affidavit of Felicity Button [p 12: para 56].
163 Transcript, Felicity Button, 20 February 2023 [p 3301: lines 1 – 8].
164 Transcript, Sandra Bevan, 16 December 2022 [p 2019: lines 42 - 47].
165 Transcript, Melanie Klieve, 5 December 2022 [p 1141: lines 41 - 45].
166 ANON-24KG-9S7X-K, Submission by Anonymous, published 18 May 2023 [p 5: lines 2 - 5].
167 ANON-24KG-9BTC-A_R, Submission by Anonymous, published 23 June 2023.
168 ANON-24KG-9BTC-A_R, Submission by Anonymous, published 23 June 2023.

Chapter 11: The concept of vulnerability

1 Introduction

The concept of "vulnerability" is important in a social security system. The demographic of Australians who need access to income support payments is wide and varied, including those facing barriers to engagement or experiencing physical, psychological, social or cultural disadvantages. Vulnerable people may struggle with accessing, understanding and navigating the social security system and may require additional support. The identification of vulnerable people in need of additional support is complicated by the fact that vulnerability is not a fixed state of being. For example, a person may go through intermittent periods of homelessness or rare episodes of mental illness, but not need help at other times.

This chapter considers the approach of Department of Human Services (DHS) in identifying and dealing with vulnerability in the context of the Robodebt scheme (the Scheme) and the effect that this had on current and former income support recipients. It will also address changes that should be made to Services Australia's practices in order to ensure that vulnerabilities are properly identified and managed.

2 How vulnerability was dealt with under the Scheme

The documentary evidence before the Commission does not tell a consistent story in relation to the identification and treatment of vulnerable recipients under the Scheme. The Commission has received a number of documents in response to its requests; however, it remains difficult to precisely identify the manner in which vulnerability was dealt with at different times over the life of the Scheme. The records did not always correspond with the reality.

Some mechanisms used by DHS with respect to vulnerability were built into the IT systems themselves, and can be found in the technical specifications of those systems. Those documents (putting aside any technical errors which may have occurred) are a generally reliable indicator of how the system operated, including with respect to vulnerabilities.[1] There were also operational blueprints, which are a record of the policy or procedure at the time, and which the Commission accepts would generally reflect how DHS staff operated with respect to the remit of those documents.

Other documents, however, describe the 'technical requirements' of the Scheme, but are not necessarily a direct reflection of how the system operated. PowerPoint presentations depicting particular filters that were applied to prevent recipients with vulnerabilities from being selected for a compliance review may not be authoritative. IT documents apparently in draft form may not have been finalised. Documents which request a change not apparently confirmed in a final IT specification document may not have been acted on.[2]

An example illustrates these difficulties. The Commonwealth directed the Commission to a series of technical documents, as helping to explain the operation of the program with respect to people with vulnerabilities. However, an analysis of those documents reveals the following:

- In May 2015, a document providing detailed requirements for the build of the IT platform specified that particular cohorts of vulnerable recipients were to be identified as requiring an assisted compliance process.[3]
- A functional specification document dated 11 November 2015 then purported to effect this requirement, and indicated that a letter would be generated for those cohorts of vulnerable recipients.[4] However, that document was only in draft form.
- On 12 July 2016, a Project Change Request document indicated that the business rules of the system were not identifying the correct cohorts of recipients for the assisted compliance process, and sought rectification of this problem.[5]
- The final document is then a table containing the status of outstanding project change requests, which indicates that the changes requested with respect to the identification of recipients for an assisted compliance process were due to be delivered on 30 September 2016.[6]

There is nothing further. What happened next cannot be ascertained from anything provided to the Commission.

The result is that which particular mechanisms may well have been in place with respect to the treatment of vulnerability under the Scheme, it has been difficult to reliably ascertain precisely what those mechanisms were at any given point in time.

Despite these difficulties, the Commission had regard to the documents it does have, including various statements provided by Services Australia and other witnesses, case selection strategies and filters, technical documents, correspondence and briefs to determine how vulnerability was identified and how the Scheme operated with respect to recipients with a range of vulnerabilities.

During the operation of the Scheme, DHS sought to identify and accommodate recipients with vulnerabilities by reference to the following categories:[7]

- recipients who were to be excluded from the Scheme either permanently,[8] indefinitely, or for a defined period of time, and
- recipients who were to be offered a staff-assisted compliance review process.

The selection criteria used to identify recipients within the above categories were adjusted at various points throughout the Scheme.[9]

2.1 Recipients excluded from the Scheme

A case selection document prepared by DHS in July 2017 listed the filters that were in force at the time to exclude certain cohorts of recipients from the Scheme, either permanently, indefinitely, or temporarily.[10]

The vulnerable cohorts who were listed as being permanently excluded from the Scheme (i.e. never targeted for a compliance review) were limited to:

- deceased recipients, and
- legally blind recipients.

The vulnerable cohorts who were to be indefinitely excluded from the Scheme (i.e. not targeted for a compliance review unless their circumstances changed) comprised:

- recipients who lived in remote areas
- recipients with no fixed address
- recipients who were in prison, or who received disability support pension and resided in a psychiatric facility
- recipients outside of Australia, and
- recipients whose files had restricted access (e.g. victims of domestic violence).

The vulnerable cohorts who were to be temporarily excluded from the Scheme (i.e. not targeted for a compliance review for a defined period of time) comprised:

- bereaved recipients, and
- recipients residing in a declared disaster zone.[11]

In addition to these existing filters, the case selection document listed a number of "new" filters that were applicable to vulnerable cohorts, and would be introduced from July 2017:

- the indefinite exclusion of:
  - recipients 65 years old or over
  - recipients in full-time residential care
  - recipients who had been victims of terrorist incidents, and
- the temporary exclusion of:
  - recipients who had received a carer adjustment payment, and
  - recipients who had received a natural disaster relief payment.[12]

In early 2017, in the context of substantial media scrutiny of the Scheme, DHS developed a "Case Selection Strategy" to use in the staged implementation of the Employment Income Confirmation (EIC) program.[13] The Case Selection Strategy identified a number of additional vulnerable cohorts that were to be excluded from the operation of the Scheme for staged periods in the first half of 2017, including:

- culturally or linguistically diverse recipients
- Indigenous recipients

- recipients who lived outside of metropolitan areas
- recipients not currently in receipt of an income support payment
- recipients on a Disability Support Pension, and
- recipients with a "vulnerability indicator."[14]

2.2 Recipients offered a staff-assisted review

As best as can be ascertained on the evidence before the Commission, the cohorts of vulnerable recipients who were to be offered a staff-assisted review during the OCI phase of the Scheme were:[15]

- Recipients with one of the following vulnerability indicators present on their record:
    - psychiatric problem or illness
    - cognitive or neurological impairment
    - illness or injury requiring frequent treatment
    - drug/alcohol dependency
    - homelessness
    - recent traumatic relationship breakdown
    - significant lack of literacy and language skills
    - nationally approved[16] vulnerability
- Recipients who lived in remote areas, and
- Recipients from culturally and linguistically diverse backgrounds.[17]

Noting the limitations already described in relation to the disconnect between requirements and actual implementation, the initial business rules for the OCI identified additional recipient cohorts who would require an assisted review process including:[18]

- over 80
- have no fixed address
- experiencing a major personal crisis
- vulnerability indicators
- in a disaster affected area
- expectant mothers
- those on a Disability Support Pension, Mobility Allowance or Carers Allowance
- some recipients with overseas addresses
- in a bereavement period, and
- deceased records.

The evidence suggests that recipients with vulnerabilities were intended to be excluded from compliance reviews altogether during the first half of 2017,[19] in what appears to have been a direct response to public concern about the targeting of vulnerable recipients.[20] A case selection document suggests that by July 2017, DHS had returned to conducting manual reviews for these recipients, as well as for recipients with certain nominee indicators[21] on their record.[22] However, other documents in evidence before the Commission suggest that recipients with vulnerability indicators continued to be excluded from the Scheme altogether until at least June 2018.[23] Regardless of when this shift in fact occurred, it is clear that for at least some periods in which the Scheme operated, recipients who had particular identified vulnerabilities were subject to staff-assisted compliance reviews.

3 Deficiencies in the indentification and treatment of vulnerable recipients

The evidence before the Commission suggested that there were deficiencies in the identification of vulnerable recipients and the assistance offered to those recipients who were identified as having vulnerabilities.

3.1 Problems arising on the evidence before the Commission

As noted earlier in this chapter, the use of vulnerability indicators by DHS was one means of identifying people who may experience difficulty in the context of compliance reviews. Vulnerability indicators were a tool DHS used to flag particular vulnerabilities that were known to DHS on a recipient's electronic record.[24] The system was not adequate to identify everyone who might fall within a vulnerability category and need help. An example was that of recipients on non-activity payments.[25]

Primarily, DHS used vulnerability indicators to alert staff to the fact that a recipient was experiencing difficulties that might affect their ability to meet mutual obligation requirements.[26] Mutual obligations are activities that job seekers in receipt of certain income support payments are required to complete in order to maintain their entitlements.[27] As was explained in a brief provided to the Minister for Human Services, the Hon Michael Keenan, in 2018:[28]

> The vulnerability indicator is used by [DHS] in the context of customer's [sic] access to Employment Services and their level of vulnerability in accessing employment opportunities and participating in job search and readiness obligations. It has been used as a proxy for customers [sic] needs to approach with sensitivity in the context of a compliance review.

As they were designed to be used in the context of mutual obligation requirements, vulnerability indicators were only recorded for recipients on certain income support payments (e.g. JobSeeker).[29] The result of this, as highlighted in the evidence of Genevieve Bolton, chair of Economic Justice Australia, was that vulnerable people who were on non-activity tested payments and had not undergone an assessment (because the benefit they received did not give rise to mutual obligations) would not have vulnerability indicators applied to their files, and were caught up in the Scheme.[30]

An example is this: vulnerability indicators were not recorded for recipients on sickness allowance, which was a non-activity payment.[31] It is obvious, however, that people in receipt of sickness allowance may have had relevant vulnerabilities.

This was a problem of the way vulnerability indicators were applied for different payment types, rather than a problem with the vulnerability indicators themselves.

DHS changed its approach to recording vulnerability indicators in mid-2018, moving towards the recognition of a wider range of circumstances affecting a recipient's capacity to comply with compulsory requirements.[32] These circumstances included additional vulnerabilities such as physical illness, access to technology, educational limitations and financial, behavioural, cultural or legal issues.[33]

Some vulnerability indicators deemed irrelevant to the Scheme

Although DHS used vulnerability indicators as a method of identifying recipients who might require additional support under the Scheme, not all vulnerability indicators were considered to be relevant for

this purpose. For instance, it was decided within DHS that vulnerability indicators for released prisoners and people with significant caring responsibilities were not relevant in the context of compliance reviews.[34]

It is not clear on what basis those categories of vulnerability were deemed irrelevant to the operation of the Scheme. If a recipient's vulnerability was such as to affect their ability to comply with their mutual obligations (e.g. to look for work or attend appointments), it seems quite probable that their ability to participate in an unassisted compliance review would also be affected.

Deficiencies in the currency of vulnerability indicators

Although a recipient's record displayed historical vulnerability indicators,[35] the evidence suggests that at least during some periods of the Scheme's operation, recipients were only offered a staff-assisted review where they had a current vulnerability indicator.[36]

Because of the typically transient nature of income support receipt, it was common for people at the time they were notified of a potential retrospective debt to have stopped receiving payments for an extended period.[37] As a result, DHS had no current information on the vulnerabilities they were experiencing, and would not have been aware of any vulnerabilities that had arisen since they last received income support. Consequently, no accommodation was likely to be made for vulnerable former recipients.

The currency of vulnerability indicators was also affected by systemic issues associated with the review processes for the indicators. In accordance with internal DHS guidance, when recording a vulnerability indicator on a recipient's file, DHS officers were required to set a review date for the indicator.[38] For instance, a vulnerability indicator for psychiatric problems or mental illness had to be reviewed a maximum of one year after the indicator was recorded.[39] Two weeks before the relevant review date, a review would be triggered in the DHS system.[40] However, if this review were not actioned within those two weeks, the vulnerability indicator expired and was automatically removed from the recipient's record.[41]

It appears that by July 2017, DHS was aware of this problem and had shifted its approach so as to capture vulnerability indicators that had not been properly reviewed.[42] However, before this change, the result of DHS's approach was that some vulnerable people who had not had their vulnerability indicators properly reviewed and renewed were not recognised under the Scheme as requiring additional assistance.

In the case of Rhys Cauzzo, the internal record within DHS indicates that a "psychiatric problem or mental illness" vulnerability indicator was recorded on Mr Cauzzo's file from 5 June 2010 to 1 February 2012 in relation to anxiety and panic attacks he had experienced.[43] The vulnerability indicator on Mr Cauzzo's record was reviewed and ended on 1 February 2012,[44] without any evidence of a further review of his mental health. On 18 September 2015, Mr Cauzzo attended a "Job Capacity Assessment" in connection with his claim for a Disability Support Pension.[45] The Job Capacity Assessment recorded that Mr Cauzzo was diagnosed with anxiety and depression, and that he had reported suicidal ideation. Despite this assessment, no vulnerability indicator was recorded on Mr Cauzzo's file.[46] At the time that Mr Cauzzo was selected for a compliance review in May 2016, there was no current vulnerability indicator on his record.[47] In her evidence to the Commission, Ms Jennifer Miller, Mr Cauzzo's mother, said that she saw this as a "major fault" in the handling of her son's case,[48] and she was right.

Mr Cauzzo's case is discussed in more detail in the chapter - Effects of Robodebt on individuals.

3.2 Inadequacy of the assistance provided to recipients with identified vulnerabilities

During the OCI phase of the Scheme, vulnerable recipients who were offered a staff-assisted review received an initial letter which was different from the standard version issued under the Scheme.[49]

This alternative letter provided a phone number which recipients could use to contact staff for further assistance. If the recipient chose to engage in the staff-assisted process, a DHS officer would complete the review process with the recipient while they were on the phone, and the recipient would be informed of the outcome verbally (as well as by way of a debt letter, if applicable).[50] If the recipient did not make contact with DHS within 21 days, they were channelled back through the automated debt review process.[51]

During the Employment Income Confirmation (EIC) and Check and Update Past Income (CUPI) phases of the Scheme, recipients who had been identified as requiring a staff-assisted review received the same initial letter as other recipients, as the letter had been updated to include a contact phone number.[52] If a recipient did not engage by telephone or complete their review through the online platform, a DHS internal policy required staff to make two attempts to contact the recipient by telephone prior to completing a manual review.[53] Where a recipient had identified vulnerabilities, had made what DHS considered to be "genuine and reasonable" but unsuccessful attempts to obtain employment and banking records and did not agree to their income being averaged, staff were able to contact the recipient's employer and request employment income details on the recipient's behalf.[54]

The staff-assisted review process offered to recipients with identified vulnerabilities was not an adequate method of ensuring that those recipients were properly supported through the compliance process. Particularly in the OCI phase of the Scheme, where there were no active steps taken by DHS to contact vulnerable recipients, the staff-assisted review process relied heavily on recipients taking the initiative to engage with the process. It was unreasonable for DHS to expect that some cohorts of vulnerable recipients, for instance those with a significant lack of literacy or language skills or those with cognitive impairments, would be adequately assisted by the provision of a telephone contact number in an otherwise unaltered letter.

One example of the difficulties encountered by vulnerable recipients in attempting to engage with DHS was the experience of a recipient with mental health issues, including Asperger's syndrome, which was recorded in a decision of the Administrative Appeals Tribunal and circulated within DHS in November 2016.[55] This recipient said that he had been granted a pension in respect of his mental health issues, and that he often had difficulty processing information given to him verbally, causing him to become elevated, distressed and aggressive. He had asked Centrelink staff, during the compliance review process, to write to him and provide details of the matter and any questions that Centrelink wanted him to answer, but his request was ignored. The Commission has received numerous submissions from (or on behalf of) other recipients who experienced similar difficulties in engaging with the staff-assisted compliance review process.[56]

The Commission also heard evidence from Craig Simpson (pseudonym), a DHS employee who had worked as a compliance officer during the course of the Scheme. Mr Simpson noted that, in his experience:[57]

> …I certainly knew from my background and my work experience, working with complex individuals with significant barriers, that those individuals had a much more difficult time navigating our welfare system. Our welfare system is complex for the best of us. It was complex for employees. It was complex for my supervisors. It was complex for subject matter experts. And then when you take a highly disadvantaged individual who may have multiple and compounding vulnerability indicators, which is the term we use – and that may include being a single parent, having substance abuse issues, having significant cognitive or mental health barriers – and you are attempting to persuade and motivate and assist these people to [comply] with those – with these very complex welfare requirements, those are two very incompatible factors.

As is highlighted in Mr Simpson's evidence, engaging with the social security system can be a very complex and challenging process for any recipient, let alone somebody who is suffering severe disadvantages. It is an unfortunate reality that Services Australia must be selective in providing additional assistance to only those recipients who are most in need of it. That makes it all the more important to give careful consideration to determining who will require that additional assistance and what it must entail so that it provides real, practical support.

4 Recommendations

Recommendation 11.1: Clear documentation of exclusion criteria

Services Australia should ensure that for any cohort of recipients that is intended to be excluded from a compliance process or activity, there is clear documentation of the exclusion criteria, and, unless there is a technical reason it cannot be, the mechanism by which that is to occur should be reflected in the relevant technical specification documents.

Recommendation 11.2: Identification of circumstances affecting the capacity to engage with compliance activity

Services Australia should ensure that its processes and policies in relation to the identification of potential vulnerabilities extend to the identification of circumstances affecting a recipient's capacity to engage with any form of compliance activity. To this end, circumstances likely to affect a recipient's capacity to engage with compliance activities should be recorded on their file regardless of whether they are in receipt of a payment that gives rise to mutual obligations.

Recommendation 11.3: Engagement prior to removing a vulnerability indicator from a file

Services Australia should ensure that its processes and policies in relation to the identification of potential vulnerabilities require staff to engage with a recipient prior to the removal of an indicator on their file. For this purpose, Services Australia should remove any feature that would allow for the automatic expiry of a vulnerability indicator (or equivalent flagging tool). An indicator should only be removed where a recipient, or evidence provided to the Agency in relation to the recipient, confirms that they are no longer suffering from the vulnerability to which the indicator relates.

Recommendation 11.4: Consideration of vulnerabilities affected by each compliance program, including consultation with advocacy bodies

Services Australia should incorporate a process in the design of compliance programs to consider and document the categories of vulnerable recipients who may be affected by the program, and how those recipients will be dealt with. Services Australia should consult stakeholders (including peak advocacy bodies) as part of this process to ensure that adequate provision is made to accommodate vulnerable recipients who may encounter particular difficulties engaging with the program.

1 Exhibit 4-7075 – RBD.9999.0001.0451_R – Use of data and automation in the Robodebt Scheme Final Report_20230303 (1), [p 11].
2 See, e.g., Exhibit 4-7111 – CTH.3715.0001.7665 – PAYG-WRICEF-03 - Notification - Customer Advice v0.1_CST, 13 April 2016; Exhibit 1-1120 – CTH.3000.0016.6633 – PAYG-WRICEF-03 - Notification - Customer Advice v0.4; Exhibit 10015 - CTH.3792.0001.0375 – OCI-WRICEF-03 - Notification - Recipient Advice v2.2, 3 August 2017.
3 Exhibit 4-6564 - CTH.3715.0001.4066_R - Online Compliance Intervention - Detailed Requirements Document v1.0 [p 32].
4 Exhibit 4-7111 - Exhibit 4-7111 – CTH.3715.0001.7665 – PAYG-WRICEF-03 - Notification - Customer Advice v0.1_CST, 13 April 2016; [p 5].
5 Exhibit 10126 - CTH.3024.0005.1400 - NM Approved_SIWP ICT EIMPCR016 - Staff Assisted Notification Rules V0.2.pdf, 12 July 2016 [p 2-4].6 Exhibit 10127 - CTH.3030.0023.2821 - Outstanding Project Change Requests [p 3] (Microsoft_Word_Document3.docx)
7 See, e.g., Exhibit 4-7123 – CTH.1000.0008.9227 – Attachment C - Case Selection Filters (PAYG), 3 July 2017.
8 This was done either by way of an initial "case selection filter" or a subsequent "initiation filter" which would remove the recipient's data from the available data pool.
9 See, Exhibit 1-0914 – CTH.3715.0001.8580_R – SIMS - Selection Management Processing v3.0 (NM signed), 9 May 2016; Exhibit 10013 - CTH.3000.0031.5125 – 170602 Current State Filters v0.11, which is an attachment to CTH.3000.0031.5111 – RE: COB 20 JUNE 2017 Additional Evidence required - Ombudsman Report ***Assistance Required*** [DLM=For-Official-Use-Only], 20 June 2017; Exhibit 4-7123 – CTH.1000.0008.9227 – Attachment C - Case Selection Filters (PAYG), 3 July 2017; Exhibit 3-3834 – CTH.3000.0038.1527 – Attachment A 171122 Case Selection Filters - PAYG_v4.0, 22 November 2017.
10 Exhibit 4-7123 – CTH.1000.0008.9227 – Attachment C - Case Selection Filters (PAYG), 3 July 2017; Exhibit 8935 – CTH.9999.0001.0145 – [Final] Services Australia - Response to NTG-0096 [p 9: para 3.17].
11 These recipients were generally excluded from the Scheme for a period of 12 weeks. See Exhibit 4-7123 – CTH.1000.0008.9227 – Attachment C - Case Selection Filters (PAYG), 3 July 2017.
12 These recipients were excluded from the Scheme for a period of 6 months. See Exhibit 4-7123 – CTH.1000.0008.9227 – Attachment C - Case Selection Filters (PAYG), 3 July 2017.
13 Exhibit 10012 - CTH.3000.0031.5113 – Employment Income Confirmation Case Selection Strategy v0 5, 23 February 2017, which is an attachment to Exhibit 10011 - CTH.3000.0031.5111_R – RE: COB 20 JUNE 2017 Additional Evidence required - Ombudsman Report ***Assistance Required*** [DLM=For-Official-Use-Only], 20 June 2017; Exhibit 8935 –CTH.9999.0001.0145 – [Final] Services Australia - Response to NTG-0096 [p 9: para 3.11 – 3.16].
14 Either currently recorded on the recipient's file, or recorded in a period that was the subject of a review.
15 Exhibit 2-1321 – CTH.1000.0007.0205 – Assisted Compliance, which is an attachment to Exhibit 2-1321 – CTH.1000.0007.0203_R – Ombudsman Own Motion – Online Compliance Intervention [DLM=For-Official-Use-Only], 25 January 2017.
16 Internal DHS guidance advised that this category of vulnerability indicator was only to be used when the national business team (Compliance Framework Section – Participation Division) specifically directed its use for a vulnerable cohort not covered by an existing category. See, e.g., Exhibit 10093 - CTH.3908.0001.0001 – 001-10050010-V09-03052016, 3 May 2016.
17 Recipients from a culturally and linguistically diverse background were to be identified by reference to any "interpreter language" or "written language" other than English recorded on their file.
18 Exhibit 4-6564 – CTH.3715.0001.4066_R – Online Compliance Interventions_Detailed Requirements Document_V1.0_FINA_1, 18 August 2015 [p 32].
19 Exhibit 1-0012 - CTH.9999.0001.0012 - Response to NTG-0060; Exhibit 1-0013 - CTH.3728.0001.0282_R - EIC review match data.
20 Exhibit 10082 - CTH.3003.0001.0389 – Robodebt and Vulnerable 2.0 (004)
21 Being a "payment", "court appointed" or "organisation" nominee indicator.
22 Exhibit 4-7123 – CTH.1000.0008.9227 – Attachment C - Case Selection Filters (PAYG), 3 July 2017.
23 Exhibit 10083 - CTH.3004.0008.4784 – Item 7.2 CMP Case selection PAYG Filters; Exhibit 9984 - CTH.3009.0012.7964 – MS18-000325 - Minister signed brief, 7 May 2018 [p 2: para 4].
24 See for example, Exhibit 10094 - CTH.3043.0054.6801_R – 001-10050000_20160919, 19 September 2016 [p 1].
25 Transcript, Genevieve Bolton, 11 November 2022 [p 1010: lines 40 – 46].
26 See for example, Exhibit 10094 - CTH.3043.0054.6801_R – 001-10050000_20160919, 19 September 2016 [p 1].
27 See section 42AC of the Social Security (Administration) Act 1999 (Cth) in relation to the circumstances which a person will be considered to have committed a "mutual obligation failure".
28 Exhibit 9984 - CTH.3009.0012.7964 – MS18-000325 - Minister signed brief, 7 May 2018 [p 2: para 4].

29 Each version of the "Recording a Vulnerability Indicator" Operational Blueprint in effect during the operation of the Scheme specified that a vulnerability indicator was only to be recorded where the recipient was subject to mutual obligation requirements: See Exhibit 10093 - CTH.3908.0001.0001_R – 001-10050010-V09-03052016, 3 May 2016; Exhibit 10096 - CTH.3908.0001.0017 – 001-10050010-V10-19092016, 19 September 2016; Exhibit 10097 - CTH.3908.0001.0030 – 001-10050010-V11-06102016, 6 October 2016; CTH.3908.0001.0043 – 001-10050010-V12-05122017, 5 December 2017; Exhibit 10099 - CTH.3908.0001.0056 – 001-10050010-V13-07022018, 7 February 2018; Exhibit 10100 - CTH.3908.0001.0094 – 001-10050010-V14-23022018, 23 February 2018.
30 Transcript, Genevieve Bolton, 11 November 2022 [p 1010: lines 40 – 46].
31 National Regional, Rural, Remote and Very Remote (4Rs) Community Legal Network, Submission to the Robodebt Royal Commission, (Submission, 3 February 2023) [p 12] <https://eja.audienceware.com.au/wp-content/uploads/2-2023-02-03-4Rs-Robodebt-submission.pdf>.
32 On 13 June 2018, the "Recording a Vulnerability Indicator" Operational Blueprint was decommissioned. Shortly thereafter, on 3 July 2018, the "Vulnerability Indicators" Operational Blueprint was renamed "Circumstances Affecting Capacity to Comply with Compulsory Requirement" and was amended to address a wider range of "circumstances impacting compliance". See Exhibit 9080 - CTH.9999.0001.0202 – [FINAL] NTG-0245 Services Australia Response (Operational Blueprint) [p 5].
33 See for example, Exhibit 10095 - CTH.3043.0054.6854_R – 001-10050000_20180703, 3 July 2018.
34 Exhibit 2-1321 – CTH.1000.0007.0205 – Assisted Compliance, which is an attachment to Exhibit 2-1321 – CTH.1000.0007.0203_R – Ombudsman Own Motion – Online Compliance Intervention [DLM=For-Official-Use-Only], 25 January 2017. For a full list of vulnerability indicators, see, for example, Exhibit 10095 - CTH.3043.0054.6854_R – 001-10050000_20180703, 3 July 2018.
35 See, e.g., Exhibit 10094 - CTH.3043.0054.6801_R – 001-10050000_20160919, 19 September 2016..
36 Exhibit 2-1321 – CTH.1000.0007.0205 – Assisted Compliance, which is an attachment to Exhibit 2-1321 – CTH.1000.0007.0203_R – Ombudsman Own Motion – Online Compliance Intervention [DLM=For-Official-Use-Only], 25 January 2017; Exhibit 10013 - CTH.3000.0031.5125 – 170602 Current State Filters v0.11, which is an attachment to Exhibit 10011 - CTH.3000.0031.5111_R – RE: COB 20 JUNE 2017 Additional Evidence required - Ombudsman Report ***Assistance Required*** [DLM=For-Official-Use-Only], 20 June 2017.
37 This was exemplified in the evidence given by Amy (pseudonym). See Exhibit 1-0004 – RCW.0001.0001.0005_RW01 – Statement of RCW01 ('Amy'), 28 October 2022 [p 1: para 7; p 2: para 13].
38 See, for example, Exhibit 10093 - CTH.3908.0001.0001_R – 001-10050010-V09-03052016, 3 May 2016.
39 See, for example, Exhibit 10093 - CTH.3908.0001.0001_R – 001-10050010-V09-03052016, 3 May 2016.
40 See, for example, Exhibit 10093 - CTH.3908.0001.0001_R – 001-10050010-V09-03052016, 3 May 2016..
41 See Exhibit 4-7123 – CTH.1000.0008.9227 – Attachment C - Case Selection Filters (PAYG), 3 July 2017 [p 4].
42 Exhibit 4-7123 – CTH.1000.0008.9227 – Attachment C - Case Selection Filters (PAYG), 3 July 2017; Exhibit 3-3834 – PWC.1007.0010.0300 - 171122 Case Selection Filters - PAYG_v4.0, 22 November 2017.
43 Exhibit 3-4722 – CTH.3009.0008.0589_R – MB17-000300 Letter at the end of the brief was signed by the Minister, 5 April 2017 [p 6: para 31 – p 7: para 39].
44 Exhibit 3-4722 – CTH.3009.0008.0589_R – MB17-000300 Letter at the end of the brief was signed by the Minister, 5 April 2017 [p 6: para 34].
45 Exhibit 3-4722 – CTH.3009.0008.0589_R – MB17-000300 Letter at the end of the brief was signed by the Minister, 5 April 2017 [p 7: para 39].
46 Exhibit 3-4722 – CTH.3009.0008.0589_R – MB17-000300 Letter at the end of the brief was signed by the Minister, 5 April 2017 [p 7: para 39].
47 Exhibit 3-4722 – CTH.3009.0008.0589_R – MB17-000300 Letter at the end of the brief was signed by the Minister, 5 April 2017.
48 Transcript, Jennifer Miller, 20 February 2023 [p 3272: lines 19-34].
49 Exhibit 8435 – CTH.9999.0001.0165 – Services Australia - Response to NTG-0201 - Q 1 and 3 - 09.03.2023, 9 March 2023 [p 25: para 3.67]; Exhibit 4-7075 – RBD.9999.0001.0451_R – Use of data and automation in the Robodebt Scheme Final Report_20230303 (1), 3 March 2023 [p 20].
50 Exhibit 1-0848 – CTH.9999.0001.0013 – [FINAL] RRC - Services Australia - Response to NTG-0009 (25 October 2022), 25 October 2022 [p 23: para 10.25(b)].
51 Exhibit 4-7075 – RBD.9999.0001.0451_R – Use of data and automation in the Robodebt Scheme Final Report_20230303 (1), 3 March 2023 [p 20].
52 Exhibit 8435 – CTH.9999.0001.0165 – Services Australia - Response to NTG-0201 - Q 1 and 3 - 09.03.2023, 9 March 2023 [p 26: para 3.68].

53 Exhibit 8935 – CTH.9999.0001.0145 – [Final] Services Australia - Response to NTG-0096 [p 11: para 3.27]; Exhibit 10014 - CTH.3500.0003.3804 – 29 - 110-13090010 as at 29092017 – 03102017, 29 September 2017 [p 3] Exhibit 8538 – CTH.9999.0001.0144 – [Final] Services Australia - Response to NTG-0097 - Revised [p 11: para 3.17]; Exhibit 4-7117 – CTH.3500.0003.5300 – Customer support for EIC online compliance interventions 110-13090010, 20 August 2019.
54 Exhibit 4-7075 – RBD.9999.0001.0451_R – Use of data and automation in the Robodebt Scheme Final Report_20230303 (1), 3 March 2023 [p 24].
55 Exhibit 2-2703 – CTH.3008.0015.7237_R2 - RE: PAYG DEBT CASES - AAT Review numbers and update [DLM=Sensitive:Legal], 9 November 2016.
56 See, e.g., ANO.9999.0001.0022, Submission by the Australian Federation of Disability Organisations, published 1 March 2023; ANON-24KG-9S3Z-H, Submission by Anonymous, published 22 May 2023; ANON-24KG-9BRE-A, Submission by Anonymous, published 26 May 2023.
57 Transcript, Craig Simpson, 3 March 2023 [p 4406: lines 2-11].

Chapter 12: The role of advocacy groups and legal services

1 Introduction

We did everything we could to convey to [Minister Tudge] the level of human distress that was being experienced by people…we pleaded with him to suspend the program immediately… – Dr Cassandra Goldie AO, ACOSS

The explicit objective of #NotMyDebt as an advocacy project was always to end the scheme that came to be known as Robodebt. – Lyndsey Jackson, #NotMyDebt

Advocacy groups play an important role in supporting social security recipients to navigate the social security system and providing feedback to the government on behalf of the groups they represent. They were not, however, consulted when the Robodebt Scheme (the Scheme) was designed and implemented.

Once the Scheme was operational, and problems with the Scheme were becoming increasingly apparent, advocacy groups began to direct feedback and complaints about the Scheme to Ministers and senior officers at DHS. Those complaints fell on deaf ears.

The Commission heard from a number of advocacy organisations and groups about how they had tried to be heard and were ignored or dismissed. They included:

- Australian Council of Social Service (ACOSS)
- #NotMyDebt
- Economic Justice Australia (EJA)
- Council of Single Mothers and their Children (CSMC)
- Victoria Legal Aid (VLA)

The submissions and evidence from advocacy groups and organisations provided insight into the experiences of the recipients, and the frustrations felt by the organisations supporting them. The Commission heard that there was a lack of consultation from government regarding the impact of the Scheme and a lack of response from the government when advocates tried to point out the Scheme's systemic failures. To the dismay of advocates, despite their efforts to highlight the mounting problems it was causing, the Scheme marched on.

2 Advocacy by the Australian Council of Social Service

ACOSS is a national independent not-for-profit organisation with expertise in social security policy and a goal of reducing poverty and inequality in Australia. It acts as a national advocate for disadvantaged members of society, undertakes policy advocacy and research, and makes recommendations to government to inform policy that is socially, economically and environmentally responsible.

On 22 May 2015, ACOSS emailed the office of the Hon Scott Morrison MP, the Minister for Social Services, attaching ACOSS's draft detailed budget analysis. The email advised that:

> … the Government's projected revenue savings from new systems to detect and deal with overpayments are unrealistically high since benefit fraud is not widespread and the new systems will reveal underpayments as well.

On 26 November 2015, ACOSS released a media statement, *Government must release modelling on planned cuts to family payments: ACOSS*, which pointed to the implausibility of the government's figure of $1.7 billion as representing the "overpayments" number.

On 28 June 2016, ACOSS received an email from Mr Morrison's office, attaching the Coalition's policy for Better Management of the Social Welfare System. That document stated:

> no one who genuinely needs social welfare support and who is already honestly disclosing their employment and non-employment income will be worse-off under our commitment.

On 21 December 2016, after the Online Compliance Intervention (OCI) phase of the Scheme had been rolled out in full, ACOSS sent a letter directly to the Hon Alan Tudge, the Minister for Human Services, raising issues of "serious and systemic problems with the automated debt detection and notification system." The ACOSS letter cited reports that the system was detecting a debt by averaging out annual income over 26 fortnights and correlating that to receipt of income support, which "would likely be producing large numbers of inaccurate notices."

The letter also raised a further seven issues:

- the routine imposition of a 10% recovery fee ("we are gravely concerned about the 10% recovery fee that is being applied")
- the length of time since the debts were incurred ("the Department may seek to retrieve a debt from up to six years ago")
- the failure to advise people immediately about the process, and the risks of non-engagement and limited engagement options ("there has been a consistent complaint that people cannot use the online system…the first letter people receive from [DHS] provides no phone number to call")
- the refusal of Centrelink offices to discuss the letters face-to-face ("Centrelink offices are refusing to assist people who have received a debt letter and are instead advising people to go online")
- the failure to make personal contact prior to commencing debt collection action ("text messages sent to some people do not indicate that a non-response could result in them having a debt against their name and incur a 10% recovery fee")
- the scale and timing of the automated debt collection process ("It is important to consider the reduced capacity people have to engage with Centrelink at this time of year. There will be limited access available to welfare rights legal centres around the country during this period")
- the use of external debt collectors ("Centrelink is failing to effectively communicate with people when they are engaging debt collectors to retrieve debts").

ACOSS urged Mr Tudge to take action by:

- immediately suspending the issuing of [Robodebt] correspondence
- waiving recovery fees in all cases
- placing on hold matters already commenced, and
- convening a stakeholder roundtable to take place in early 2017.

ACOSS noted that "at the time that these measures were announced by the Coalition during the Federal Election, ACOSS urged that any automated data matching system and subsequent action be conducted in a humane and reasonable fashion. It is clear that at the present time, this is not the case."

ACOSS requested a response from the Minister before Christmas.

Mr Wood, the Mr Tudge's policy advisor, told the Commission that usual practice was for DHS to prepare a response for the minister that he would review and pass on. Regarding the ACOSS letter, Mr Wood did not recall what response – if any – DHS had drafted, but he would have "read that at the time and drawn to [the minister's] attention if I thought [it] necessary." He could not recall the minister being interested in pausing the debt recovery program to permit the stakeholder roundtable to proceed.

On 18 January 2017, ACOSS representatives met with Mr Tudge to express their concerns and again call for the Scheme to be suspended. This was followed by a letter to Mr Tudge on 19 January 2017, in which ACOSS emphasised "the unique power that the Commonwealth Government has over people's lives…As a result, it is essential that the Commonwealth adhere to the highest of standards with respect to the raising of debts against people, and the kind of debt collection action that may follow."

The letter included guidance on engaging with non-government stakeholders:

> In relation to the stakeholder engagement we believe should form part of your process to design a fair and humane system of debt recovery, we propose that you include a diverse representation of civil society organisations representing people directly affected, service providers working with people, and experts in social security.

and included a list of organisations to be consulted.

Mr Tudge sent an undated letter to Dr Cassandra Goldie AO, the Chief Executive Officer of ACOSS, received by ACOSS on 7 February 2017, referring to their meeting on 18 January 2017 and ACOSS's correspondence on 21 December 2016 and 19 January 2017, and providing an outline of the current status of the debt recovery program. The letter emphasised that the OCI system did not change how income was assessed or how debts were calculated, and advised that "the Government…will continue to make refinements based on the ongoing feedback we receive from stakeholders and recipients." It did not otherwise respond to the proposal for stakeholder engagement.

Charmaine Crowe, program director of social security at ACOSS, told the Commission that her understanding from Mr Tudge's letter was that the government proposed these changes to the debt recovery program: that DHS would use registered post to send the notices out; they would refine the language used in the online portal to make it easier to understand; and would enable people to request a stay on debt recovery if they could show they had not received the initial notice. ACOSS had not been consulted about any of those changes.

Dr Goldie considered (correctly) that Mr Tudge's letter did not address the big problems with the Scheme: "the income averaging, the raising of a debt against that process and the reversing of the onus of proof."

After receiving Mr Tudge's letter, in early 2017 ACOSS convened a meeting with key stakeholders concerned by the Scheme in an attempt to act collectively to stop it. Around 30 groups joined this meeting, which was referred to as the Centrelink Debt Strategy Group. Members included Economic Justice Australia, the National Council of Single Mothers and their Children, Victorian Legal Aid, Get Up! and the Community and Public Sector Union.

On 31 January 2017, ACOSS wrote to the Prime Minister, Malcolm Turnbull, calling for an end to the Scheme. Dr Goldie told the Commission that it was "unusual for [ACOSS] to do so in our advocacy" as normally "we would be dealing with the Minister direct." However, due to the "seriousness of what we were confronted with, we felt once we did not get the response from Minister Tudge agreeing to suspend the program, we would go straight to the Prime Minister about it."

It was not until five months later, on 20 June 2017, that ACOSS received a response from the prime minister, which relied on the Ombudsman's report and advised that the government would continue to implement all of the recommendations set out in that report.

> [It showed] no preparedness …to engage with the serious issues that we had raised directly with the Prime Minister, which was affecting hundreds of thousands of people on the lowest incomes in the country.

ACOSS received another letter from Mr Tudge on 13 March 2017. The letter provided an update "on the performance of the Online Compliance system and some of the recent refinements that the Government has made to it."

On 16 August 2017, ACOSS met with Mr Tudge and Kathryn Campbell, the Secretary of DSS. Ms Crowe told the Commission that there were no notes from the meeting, but to her recollection it was a "tense meeting" where they discussed the Scheme and "the use of the AFP logo on taskforce integrity letters." ACOSS's concerns were not resolved in the meeting, and it ended abruptly.

ACOSS told the Commission that historically, when there were social security measures announced, the DSS would convene a meeting with stakeholders to discuss Budget measures in their portfolio, at which meetings ACOSS would provide input. In relation to the Scheme, there was no such consultation.

Dr Goldie's evidence was that the government did not genuinely consider the concerns ACOSS raised about the Scheme with various departments and the Prime Minister: "…it was either, 'Well, we're not doing anything different. That's always been done before,' or, 'We're dealing with the issues that have been raised, including through the Ombudsman's report, and there's no problem now'."

Ultimately,

> …in the face of repeated pleas, bringing through the stories and experiences of people on low incomes, including suicidal ideation…the government proceeded to want to extend Robodebt, not to shut it down.

On 14 October 2019, ACOSS had a meeting with (then) Minister Robert, during which the ACOSS representatives expressed concern about income averaging and the Scheme. ACOSS's chronology of events recorded that Mr Robert "doesn't think there is a need to engage or consult with ACOSS or other experts about Robodebt, or anything else in the DHS area for that matter…the outcome of this meeting was that there was no change to the policy until the Federal Court case reported on 19 November 2019."

3 Advocacy by #NotMyDebt

#NotMyDebt is a community run group that was created between December 2016 and January 2017. Established by volunteers, #NotMyDebt recorded and shared stories from people who were receiving notification from Centrelink about debts which they considered to be incorrect. Over time, #NotMyDebt grew to be a support mechanism for those affected by the Scheme. Lyndsey Jackson, one of the founders of #NotMyDebt, gave evidence to the Commission. The Commission also received a submission from Asher Wolf, another of the first people involved in #NotMyDebt:

> my aim from the very start of the campaign was to have Robodebt declared unlawful…our campaign united a loose gathering of people into a networked collective to oppose the government policy of unlawful and unethical debt collection.

Ms Jackson's evidence was that #NotMyDebt was able to supplement the work of a number of funded non-government organisations and address "a massive unmet need." "The explicit objective of #NotMyDebt as an advocacy project was always to end the scheme that came to be known as Robodebt."

Ms Jackson told the Commission that the Scheme "…was a system and a structural issue that was clearly happening within government… that needs a whole of community collective response." #NotMyDebt engaged with various stakeholder groups, including ACOSS, community legal centres, as well as Legal Aid Victoria.

#NotMyDebt did not deal directly with government. It identified problems in the system and passed the information on to stakeholder groups, who would then communicate the community concerns to government. #NotMyDebt principally communicated with ACOSS:

> [ACOSS] organised a number of meetings…about four or five…every fortnight during that initial response time, as organisations were trying to figure out how they were going to respond.

Ms Jackson explained that the role of #NotMyDebt was to provide general advice. While it could not provide legal advice, but would direct people to organisations such as Victoria Legal Aid, which was involved early on in creating support networks and providing information to people: "but [these organisations] funding capacity was an issue, and the sheer volume of people was an issue as well. So we worked to fill a gap of assisting people to self-navigate through this, because we didn't believe that the legal organisations were going to be able to provide support to everyone affected."

Individuals with debt letters from Centrelink could use the #NotMyDebt website to learn about: their legal rights and obligations; navigation of the Centrelink system and appeals process; the process of identifying and contacting their Member of Parliament; and how to make a freedom of information (FOI) request. #NotMyDebt also had a Twitter presence, where current events with respect to the Scheme were identified, and a public Facebook page, where individuals could obtain access to generalised assistance and informational webinars.

Members of #NotMyDebt provided voluntary peer support to thousands of people through direct messaging on the Facebook page, and by assisting with the collation of documents for proceedings to the Administrative Appeals Tribune (AAT2) and the interpretation of the results of FOI applications. #NotMyDebt considered it important to provide information regarding FOI applications because people were not getting information from the Department: they were not getting documents showing the calculation of the debt. Although the volume of documentation provided as a result of a Freedom of Information request could be overwhelming, generally that documentation contained the information needed for #NotMyDebt to assist in ascertaining how the debt had been calculated.

#NotMyDebt also had a social advocacy goal. "This was a system and a structural issue that was clearly happening within government, and that needs a whole of community collective response…from a broader advocacy point of view, [that was] stopping the Scheme."[67]

4 Advocacy by Economic Justice Australia

Economic Justice Australia describes itself as the peak organisation for community legal centres providing specialist advice to people regarding their social security issues and rights.

In 2018, EJA received grant funding that began its work engaging with DSS, which continues today. EJA's work includes consultation with DSS, Services Australia and the Department of Employment to provide advice and feedback to government.

> [EJA's] role is to utilise the frontline client experience of its member centres to then talk to government in relation to where things are going wrong and where things can be improved, both in terms of…social security policy, but also in relation to the implementation and administration of that policy.

Despite its regular engagement with government in the general consultative process that was in place between EJA and the DHS, EJA had received no advance warning of the introduction of the Scheme. EJA became aware of the Scheme following a general budget briefing, where it was described as a "data-matching measure." The evidence from the chair of EJA, Genevieve Bolton, was that EJA had no understanding of the "mechanics of the scheme" until member centres of EJA began to raise issues.

On 21 December 2016, EJA wrote to the Commonwealth Ombudsman, raising concerns in relation to the Scheme. The first of these concerns was the unreliability of the automated process. EJA also highlighted the difficulties recipients were having with using the online system, particularly the lack of assistance afforded to vulnerable recipients; and the fact that in some circumstances, where Centrelink was using the last known address, recipients were not receiving the letters and were not contacted by the system at all before finding their matter had been referred to debt collectors. EJA also raised concerns in relation to the lawfulness of the system, and the unreliability of averaging in establishing actual income.

On 9 January 2017, EJA met with DHS to raise concerns about averaging and the 10 per cent penalty.

> The purpose of the meeting was to obtain a briefing from the Department in terms of the changes to the system…and also to get more detailed information in relation to the workings of the portal itself.

EJA received a response from the Ombudsman on 11 April 2017, advising that the Ombudsman had published its report into Centrelink's automated debt raising and recovery system, and that, effectively, EJA's complaint was finalised.

EJA found the response from the Ombudsman to be "disappointing" in that it did not address any of EJA's points about legality.

> We were of the view that the recommendations [of the Ombudsman] didn't go far enough. They were very much framed in terms of the problem here is…a service delivery issue, and if there are various changes made in relation to the communications and the letters and making the portal more accessible…that would… improve the scheme…In our view, what was really the problem…was the actual design of the system itself.

EJA considered that the Scheme needed to be tested in court, "because we had consistently raised our concerns in relation to aspects of this scheme which we believed to be unlawful, and that consistently fell on deaf ears."

Throughout the life of the Scheme, EJA provided support to community legal centres, liaised with DHS and other representatives and appeared before Senate inquiries into the Scheme.

In September 2019, EJA met with the Hon Stuart Robert, then Minister for Government Services, and raised its concerns about the Scheme being extended to vulnerable cohorts. Mr Robert advised EJA it was not the government's intention to do so.

Ms Bolton told the Commission that "…clients were very distressed, very frustrated…It caused a significant amount of harm to them."

5 Advocacy by the Council of Single Mothers and their Children

The Council of Single Mothers and their Children (CSMC) is a non-profit organisation that offers telephone support, information and referrals; emotional support; and advocacy for single mothers and their children. CSMC also contributes to policy debate and works with organisations, such as the Victorian Council of Social Services, to offer expert advice relevant to single mothers and their families.

CSMC's submission to the Commission set out the history of its communication with government about the Scheme. On 30 December 2016, CSMC sent a letter to Mr Tudge raising concerns in relation to the Scheme, following an increase in the volume of distressed calls from customers. In the letter, CSMC requested that DHS cease sending letters to customers, undertake manual reviews of those debts already raised to substantiate the debt, and not enter into any debt collection before substantiating debts already raised. CSMC advised that it had also contacted the Ombudsman. According to its submission, CSMC did not receive a response to that letter.

CSMC sent an email on 30 December 2016 to DHS, in which it suggested that DHS take the same steps as those it had outlined in the letter to Mr Tudge.[92] CSMC informed the Commission that it did not receive a substantive response to that letter.[93] CSMC sent a further email to DHS on 11 January 2017, in which it set out a list of questions regarding the debt raising under the Scheme.[94] No response was received to that letter.[95] And finally, like EJA, CSMC asked the Ombudsman to commence an investigation, sending emails for that purpose on 28 December 2016, 3 January 2017 and 20 January 2017.[96]

6 Advocacy by Victoria Legal Aid

Victoria Legal Aid (VLA) is a statutory body, reliant primarily on State and Federal government funding,[97] which provides legal assistance in civil and administrative law matters, criminal law matters and family law matters.[98] In addition to providing legal advice and representation in courts and tribunals, VLA provides assistance through community legal education and the provision of legal information through their website, free legal help phone line and web chat service.[99]

VLA played a significant role in advocating for the discontinuation of the Scheme, most significantly in its representation of Madeleine Masterton and Deanno Amato in the two test cases brought in the Federal Court to challenge the lawfulness of the Scheme.[100]

The Commission heard evidence from two VLA representatives Miles Browne (managing lawyer of the Economic and Social Rights program, Civil Justice) and Rowan McRae (acting chief executive officer).

Ms McRae explained how significantly the Scheme increased the demand for VLA's services:

> I think in January 2017, we saw a 500 per cent increase in the number of people accessing our web page on social security information. And I think in the first seven working days of January, we had as many people coming through for advice on social security matters as in the whole of January the previous year.[101]

Despite the increased demand, VLA received no dedicated funding to provide information and advice to people trying to navigate the Scheme.[102]

VLA wrote to Mr Tudge on 24 January 2017 about the influx of complaints it had received following the introduction of the Scheme and the increased demand for its services.[103] In that letter, VLA also sought access to policy documents. Ms McRae explained that VLA did not have much information about the Scheme, and was trying to get more information from the minister about how the Scheme worked.[104]

Having received no reply, VLA wrote to the secretary of DHS, Kathryn Campbell, on 29 March 2017.[105]

That letter explained the lengths VLA had gone to in an attempt – unsuccessfully – to obtain a copy of a key policy document, the Program Protocol for the Non Employment Income Data Matching Project (NEIDM Project); which document it was requesting as a result of a "Notice of a Data Matching Project between Department of Human Services and Australian Taxation Office" published in the Australian Government Notices Gazette on 19 August 2016, which spoke only of the NEIDM Project.[108]

On 1 May 2017, Mr Tudge responded to VLA, stating that policy and other internal documents relating to the online compliance system were not publicly available and that the publication of this material may prejudice the effectiveness of the compliance practices.[107]

Ms McRae explained that it was challenging for VLA not to have access to those documents in order to properly advise their clients:

> …it's not unusual for Government Departments to share this type of information with Legal Aid. We are part of government. And it certainly enhances our ability to advise clients, but also often it enhances the administration of a scheme for participants in that scheme to receive accurate legal information and advice that will help them to navigate through the scheme.[108]

A large proportion of VLA's clients had characteristics which entitled them to the protection of the social security system:

> A large number of our clients are experiencing a range of forms of disadvantage or marginalisation. So we have a high proportion of clients who are experiencing things like homelessness or mental health issues or family violence. And I think of all of our clients, around half receive some sort of social security benefit and one in three have no income at all.[109]

One of VLA's objectives is to effect systemic change: "to effect law reform or changes to policy through the work that we do."[110] In early 2017, VLA quickly formed the view that the Scheme was unlawful and determined that the best way to challenge the lawfulness of the Scheme would be to identify a test case.[111] A significant amount of work was involved in understanding how the Scheme worked, identifying criteria for a suitable test case and seeking legal advice from an eminent counsel, Peter Hanks KC.[112]

VLA has the capacity to indemnify clients who participate in a test case in litigation against a costs order made against them. Ms McRae explained that this is not something done lightly nor does it happen frequently. However, the indemnity removes the threat of a costs order, which would otherwise be a disincentive for clients to involve themselves in a test case.[113]

Launching a test case involves an element of risk for VLA. VLA took on that risk in bringing Ms Masterton and Ms Amato's cases before the Federal Court: the catalyst for the Scheme's demise in November 2019.

One could have no clearer illustration of the value of legal aid services. The work Victoria Legal Aid did was not only in its clients' interests, it was for the public good. The Robodebt experience convincingly demonstrates the importance, in the public interest, of properly funded legal aid commissions.

Ms McRae emphasised how important it is for government agencies to engage with legal aid organisations and with social security recipients in the design, development and implementation of social security policy.[114]

The Commission also acknowledges the work of other legal aid bodies around the country, which assisted people to navigate the Scheme and advocated for its cessation.[115]

7 Community Legal Centres Australia

Community Legal Centres Australia describes itself as the national representative voice for the community legal sector. It is an independent, non-profit organisation set up to support community legal services to provide high-quality, free and accessible legal and related services to members of the community, particularly those experiencing poverty, disadvantage, discrimination or domestic or family violence. Its members are the eight state and territory community legal sector peak bodies.[116]

In its submission to the Commission, Community Legal Centres Australia endorsed the submissions and recommendations made by EJA. It highlighted the:

> … significant risks and human costs of allowing powerful government entities to develop and use an automated system to make and enforce decisions against individual citizens – many of whom faced poverty and disadvantage – without sufficient human or independent oversight.[117]

The recommendation of Community Legal Centres Australia was that the government increase its investment in specialist social security legal services, and provide increased and ongoing funding to EJA in particular. This increase in funding should ensure equitable access to social security legal services to people in rural, regional, remote, and very remote communities. It recommended that government work to minimise the duplication of administrative burdens and address the communication and other challenges that can arise for organisations required to report to multiple funding bodies.[118]

> In an area of law as complex and specialised as social security, it is critical that the Federal Government directly invests in mechanisms and services, including specialist social security legal services, to help protect individual citizens against the reasonably foreseeable risks and harms inherent in automated decision-making and debt-raising by Centrelink.[119]

The Commission acknowledges the important role of community legal services, and the public service they provided during the Scheme in the provision of advice and support to people affected by the Scheme. Such support is dependent on ongoing and sufficient funding provided by government. The role of these organisations in enabling access to justice for people who may not have the means to otherwise advocate for themselves is integral in a society that champions the concept of equality before the law.

8 Conclusion

The purpose-built mechanisms of the Scheme harmed economically and socially disadvantaged people in receipt of income support payments. It is likely the Scheme would not have run in the same way, for the length of time that it did, or at all, if there had been proper stakeholder consultation and transparency in its design and implementation.

The Scheme undermined trust in government and confidence in the social security system. It affected members of the community who were or had been reliant on social security payments, imposing tight timelines for responses, requiring technological literacy to engage with the process and employing the services of debt collectors if no response was received, even in circumstances where the recipient did not receive the original letter from Centrelink advising them of the debt.[120] Many people against whom debts were raised under the Scheme were vulnerable members of society, ill-equipped to engage with a system that had not been designed with its users in mind.

Jason Ryman (director, Compliance Risk Branch, DHS) told the Commission that DHS did not engage with non-government organisations in the development of the Scheme.[121] The uniform submission to the Commission of advocacy bodies agrees that there was no consultation with them regarding the design and implementation of the Scheme, which could have provided insight into the difficulties social security recipients would face in engaging with the system. Nor were advocacy groups advised of its implementation prior to it being launched.[122]

If DHS had so engaged, it would have heard:

- that many recipients did not have sufficient digital literacy to effectively access and engage with the online system.[123]
- that averaging would not work because most recipients did not work consistent hours or were not in consistent employment.[124]
- that most recipients would have difficulty in retrieving records of employment from years prior,[125] particularly where they were only obliged to keep records for six months,[126] and particularly if they were itinerant or homeless.
- that the notion that there was a massive amount of overpayments to be recovered was misconceived.[127]

Early on, advocacy bodies highlighted to government their concerns about the legality of the Scheme.[128] Some peak advocacy groups who tried to engage with government about the Scheme, after it was implemented, received no response.[129] When advocacy groups were able to meet with representatives of government, they found their concerns were not listened to or acted upon.[130]

The universal experience of advocacy groups and legal centres was one of being overwhelmed. Large numbers of people sought assistance with debt notices and groups did not have specific funding to enable them to effectively engage with the volume of inquiries. The volunteer organisation, #NotMyDebt, sprang from this unmet need.[131]

The lack of consultation with relevant advocacy groups, before and during the Scheme, exemplifies one of many instances in which a possible safeguard against the catastrophic results of the Scheme was rendered ineffective. It evidently suited the government's agenda in pursuing the Scheme to not engage with advocacy groups who might – and did – raise the fundamental failings of the Scheme.

8.1 Current state of engagement with advocacy bodies

Accounts from Social Services and Services Australia

The Commission received a statement from Raymond Griggs AO CSC, the current secretary of DSS.

According to Mr Griggs, DSS regularly engages with key stakeholders, including ACOSS, EJA and the Federation of Ethnic Communities' Councils of Australia (FECCA).[132] The engagement with EJA, Mr Griggs advised, has led to amendments to the Guide to Social Security Law, which provided "more direction for Services Australia and improv[ed] support for victims and survivors of family and domestic violence in social security law."[133]

In a parallel to a recommendation of the Commission, which appears below, Mr Griggs told the Commission that as a result of the engagement with FECCA, a staff member from DSS was seconded to FECCA "to gain a deeper understanding of the issues FECCA deals with so that the needs of [the people they represent] receive the proper recognition in public policy."[134]

Mr Griggs told the Commission that the government has established an Economic Inclusion Advisory Committee, of which he is appointed an ex-officio member. The Committee is tasked with providing advice on policy and the "adequacy, effectiveness and sustainability of income support payments" ahead of every Federal Budget. Mr Griggs characterised this as an opportunity to consider how the social security system is supporting the engagement and participation of individuals in need.[135]

The Commission also received a statement from the Chief Operating Officer of Services Australia, Rebecca Skinner. Ms Skinner assured the Commission that:

> Services Australia has continued to mature its approach to the research and design of our services, embedding the customer voice in the earliest stages of our decision making, working in partnership with our Policy partners and listening to feedback to improve our services.
>
> This means that when we think about changing or improving a service, before any other policy, investment or service delivery decisions are made, we form an evidence based understanding of the needs of our customers, informed by their feedback, and fully explore how the proposed changes may impact them. From this understanding, we implement design standards that guide all decisions relevant to the proposed change… I have put in place an agency Services Design Authority which is embedded into our enterprise governance, establishing strong design standards and also assesses agency initiatives to ensure the needs of our customers are well understood and addressed effectively.[136]

Ms Skinner advised the Commission that prior to any changes in services, Services Australia engages with customers to "form an evidence based understanding of the needs of our customers, informed by their feedback."[137] No clarification is provided on what this entails, and whether it also involves engagement with advocacy bodies who represent many of Services Australia's customers.

The Commission was told that Services Australia has established a range of forums through which it holds engagement with advocacy bodies, including the Civil Society Advisory Group, a national forum for stakeholders to meet and raise issues regarding social security policy. Both ACOSS and EJA are members of the Civil Society Advisory Group. The Group meets biannually, and targeted operational meetings can be held when required.

Services Australia has recently agreed to trial the re-establishment of a dedicated bi-annual forum with EJA.

8.2 Experiences of advocates

EJA and ACOSS provided supplementary statements to the Commission, in which they responded to specific questions put by the Commission regarding changes they had observed post-Robodebt.

Economic Justice Australia

EJA acknowledged the challenges of the 2019 bushfires, the subsequent floods and the COVID-19 pandemic,[138] but noted that:

> … there are ongoing and persistent issues regarding servicing that either cannot be attributed to these challenges; or if they are attributable, require re-direction of resources so as to prioritise equitable access to internal reviews – particularly reviews of decisions to raise and recover debts...[139]

Regarding digitisation, EJA submitted that "it is clear that there have been systemic improvements to Services Australia servicing in terms of digital engagement" and noted that Services Australia's engagement with members of the Civil Society Advisory Group regarding the rollout of the Single Touch Payroll has been "particularly strong." However, EJA emphasised that in its experience "vulnerable cohorts without digital skills/access are being left behind." It said:

> Services Australia's evident commitment to the development and implementation of serving strategies targeting vulnerable cohorts is undermined by overly focusing on digitisation of servicing, and failure to adequately resource specialist servicing.[140]

EJA observed that "it has become increasingly difficult for our member centres to liaise with Centrelink decision-makers"; instead, they are obliged to direct inquiries to local Centrelink teams which do not always have the skills or resources to provide the necessary information.[141] EJA has no direct phone contacts for Centrelink National Office staff, and is required to direct enquiries through the Civil Society Advisory Group: as above, this is a group which meets biannually. A lack of a direct contact option "can frustrate effective engagement."[142]

To this end, EJA said, it has been:

> attempting to engage Services Australia regarding the need to establish a national advocates line, to enable ready access for our workers to relevant Services Australia staff…the advocates line would be a single point of access for EJA advocates nationally. It would go some way toward overcoming the deep-seated engagement problems outlined [by EJA]…to date, EJA has been unable to convince Services Australia of the need for such a line.[143]

EJA did note that it has seen "significant changes in Services Australia's engagement and consultation with EJA at the national level over recent months"[144] but that this improved engagement came as a result of the change of government, and not at the end of the Scheme.[145] EJA reiterated that their member centres continue to face challenges in directing enquiries to appropriate Centrelink officers.[146]

EJA also found engagement with DSS has been stronger since the change of government,[147] involving biannual face to face meetings with senior DSS staff and occasional engagement by email and phone.[148]

Australian Council of Social Service

ACOSS advised that its contact with Services Australia occurs solely through the Civil Society Advisory Group.[149] ACOSS noted that while the group does enable engagement with Services Australia and has led to some beneficial changes -

> …often ACOSS feels like there is a poor understanding of the realities confronting people approaching Services Australia or receiving support from the agency. At times, feedback by [ACOSS] and other stakeholders can often feel obvious but has not been considered by Services Australia.[150]

This reflects, in ACOSS's view, a hollowing out of expertise among Services Australia staff, with fewer staff who understand social security and the realities facing people on very low incomes.[151]

ACOSS's engagement with Services Australia is limited to the Civil Society Advisory Group:

> … any queries we have go to a central Civil Society Advisory Group email (there is no telephone number to call)… In our experience, it at times takes a long time to get responses to straightforward questions from Services Australia staff, hindering engagement.[152]

ACOSS reported that it has regular engagement with DSS, meeting with Mr Griggs at least every two months, with regular informal engagement in between to discuss key issues with legislation, policy development and proposals, the community sector, funding, service delivery, and other matters related to DSS.

ACOSS has observed greater openness by DSS to engagement under Mr Griggs: "there is a willingness by DSS to hear about issues as they arise and engage with ACOSS on policy, as well as encouraging us to provide honest feedback."[153]

9 Where to from here?

The Commission notes ACOSS's statement that engagement with Services Australia remains limited, even with some improvements made since the end of the Scheme. It is plain, however, that had the current level of engagement by government with EJA and ACOSS – two peak advocacy bodies – been in place during the Scheme, it would have provided an extra layer of "check and balance" which could have had an impact on the implementation or longevity of the Scheme. Conversely, the lack of engagement and consultation by the government and the departments during the Scheme inevitably led to a program where the perspective of recipients subject to the Scheme was nowhere to be found in its design and was paid no regard during its continued operation.

Though the Commission acknowledges that regular engagement between Services Australia and peak advocacy bodies, such as EJA and ACOSS, does exist, there is room for improvement in how such consultation is managed: for example, both EJA and ACOSS highlight challenges in dealing with Centrelink directly, with enquiries only able to be filtered through the Civil Society Advisory Group, and then only by email.

The government should consider establishing a customer experience reference group, with membership nominated by national peak bodies representing people in vulnerable cohorts who have had the experience of claiming and receiving social security income support payments.[154] This group could streamline insight to government regarding the experiences of people seeking access to income support.

Peak advocacy bodies should be consulted prior to the implementation of projects involving the modification of the social security system. Such consultation should be standard and provided for in relevant business documents of DSS and Services Australia.

ACOSS describes what would be involved:

> There should be a substantial, well-resourced program of engagement and co-design with key stakeholders before the implementation of any such program of automated decision making. The engagement and co-design should be a collaboration with independent community and expert organisations that represent the interests of people on low incomes or who may need income support. Priority should be given to groups who are most directly affected.[155]

9.1 Recommendations

Recommendation 12.1 Easier engagement with Centrelink

Options for easier engagement with Centrelink by advocacy groups – for example, through the creation of a national advocates line – should be considered.

Recommendation 12.2 Customer experience reference group

The government should consider establishing a customer experience reference group, which would provide streamlined insight to government regarding the experiences of people accessing income support.

Recommendation 12.3 Consultation

Peak advocacy bodies should be consulted prior to the implementation of projects involving the modification of the social security system.

Recommendation 12.4 Regard for funding for legal aid commissions and community legal centres

When it next conducts a review of the National Legal Assistance Partnership, the Commonwealth should have regard, in considering funding for legal aid commissions and community legal centres, to the importance of the public interest role played by those services as exemplified in their work during the Scheme.

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3 Exhibit 2-2841 - ACS.9999.0001.0308_R Witness statement of Dr Cassandra Goldie (signed 14 December 2022) [p 2: para 12].
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13 Exhibit 2-3013 - ACS.9999.0001.0177_R, 161221 Letter to Alan Tudge final [p 1].
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24 Transcript, Mark Wood, 27 February 2023 [p 3983: lines 20-23].
25 Transcript, Mark Wood, 27 February 2023 [p 3984: lines 4-6].
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28 Exhibit 2-3065 - ACS.9999.0001.0230_R Letter from ACOSS to Minister Tudge re meeting [p 1].
29 Exhibit 2-3065 - ACS.9999.0001.0230_R Letter from ACOSS to Minister Tudge re meeting [p 2].
30 Exhibit 2-2873 - ACS.9999.0001.0030_R 2017.02.07 Letter from Minister Tudge to C Goldie in response to letters sent Dec 2016 & Jan 2017 [p 1].
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42 Transcript, Cassandra Goldie and Charmaine Crowe, 16 December 2022 [p 2044: lines 20-24].
43 Transcript, Cassandra Goldie and Charmaine Crowe, 16 December 2022 [p 2044: lines 28-32].
44 Transcript, Dr Cassandra Goldie and Charmaine Crowe, 16 December 2022 [p 2039: lines 39-41].
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60 Transcript, Lyndsey Jackson, 23 January 2023 [p2141: lines 11-14].
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77 Transcript, Genevieve Bolton, 11 November 2022 [p 1000: lines 37-39].
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101 Transcript, Rowan McRae, 24 February 2023 [p 3805: lines 9-12].
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103 Exhibit 4-5742 - VLA.9999.0001.0100_R - 8 170124 VLA to Minister for Human Services.
104 Transcript, Rowan McRae, 24 February 2023 [p 3809: lines 40-44]

105 Exhibit 4-5743 - VLA.9999.0001.0104_R - 9 170329 VLA to Secretary, Department of Human Services.
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Chapter 13: Experiences of Human Services employees

1 Introduction

By early 2017 I had reached the point where I felt the scheme was so wrong and so immoral that I felt I could not stay in the job. I would not otherwise have left as I loved the job, but I felt too sad about the [Robodebt] scheme, and too sorry for the customers and the harm being done to them, for me to stay. – Colleen Taylor[1]

The best way I can think of to describe my experience [working at Centrelink during the operation of the Robodebt Scheme] was that I felt like I suffered a moral injury — doing myself damage by continuing to work within an unfair system of oppression that I thought was designed to get people rather than support them, which was continuing to injure people every day, and which transgressed my own moral and ethical values. – Taren Preston[2]

I was and still am embarrassed by the part of my career that I spent as a Compliance Officer at Services Australia [implementing the Robodebt Scheme]… The job left me psychologically unwell from the tasks we were required to carry out; it was a test of integrity to do it every day to my fullest ability. Each day, I came home feeling depressed. I spent a lot of my time outside of work thinking about how much longer I could do it for, and how I could find another job so I could leave. – Craig Simpson[3]

Employees of the Department of Human Services (DHS) – particularly those who worked in Centrelink – were at the frontline of the Robodebt Scheme (the Scheme), and were uniquely placed to tell a critical part of the story about the Scheme. They witnessed first-hand the individual and collective impact it had.

The Commission received evidence and submissions from DHS employees about employee experiences of the Scheme, providing insight into the pressures staff faced administering a program "which was continuing to injure people every day."[4]

The current and former employees who gave evidence at the Commission are:

- Colleen Taylor (Compliance Officer, DHS)
- Jeannie Blake (Compliance Officer, DHS)
- Luke Baker (Authorised Review Officer, DHS)
- Taren Preston (Social Worker, DHS)
- 'Esther Smith' (pseudonym) (Customer Service Officer, DHS), and
- 'Craig Simpson' (pseudonym) (Compliance Officer, DHS).

The Commission also heard and received evidence from representatives of the Community and Public Sector Union (CPSU), which represents federal public sector workers, about the CPSU's involvement with their members at DHS during the course of the Scheme and the CPSU's advocacy.[5]

This chapter discusses the impacts of the Scheme on DHS employees, including its effects in:

- increasing staff work load,
- imposing a cultural shift which placed pressure on staff,
- elevating the level of welfare recipient distress,
- requiring specific training, which some staff considered was not provided adequately,
- involving an increase in labour hire arrangements, and
- resulting in a deterioration in staff morale.

The chapter also considers the criticisms of the Scheme raised by staff, and the Department's reaction to those criticisms.

The Commission does not assume that the evidence it received from staff is indicative of the universal experience of staff during the Scheme, and the findings in this chapter should be viewed through the lens

of this qualification. However, the Commission must base its findings on the evidence before it. The theme of submissions received by, and evidence given to, the Commission is that staff were impacted by the introduction and sustained implementation of the unlawful Scheme.

2 Increased workload

The introduction of the Scheme brought with it an increase in the level of recipient contact with DHS, and consequently a significant increase in the workload of DHS staff who dealt with recipients on a day-to day basis. The Scheme's massive increase in income reviews and in the number of letters being sent to recipients generated a corresponding increase in requests for support from Centrelink staff. [7]

Staff received calls from recipients who did not understand the letter/s they received;[8] did not understand what they were required to do;[9] were having difficulty uploading information into the online system; were disputing the debt; or were simply distraught. All this placed pressure on staff to manage the large number of reviews and requests for assistance.

Despite the increase in demand for staff intervention, and the significant time required to deal with each recipient's inquiry,[10] there were "fairly limited staff on the program" allocated to deal with reviewing debts [11].

'Esther Smith", an employee in a Centrelink centre, told the Commission:

> Once the OCI process had been introduced, more customers than before started coming into the Centrelink office with problems with their debts. As I had not received adequate training on how to assist customers with their debts, I helped in the only way I knew how to, which was to go to the self-service computer area and try and work through the debt together with the customer, using the knowledge I had previously gained from working in the debt raising team. [12]

The Scheme was designed to decrease the time staff would need to spend on identifying anomalies: "staff no longer need to carry out these reviews manually, and instead can now focus on helping the public resolve discrepancies more quickly." [13]

Luke Baker told the Commission that when he started working at DHS in 2014, he predominantly undertook Disability Support Pension reviews. He described a "drastic change" under the Scheme, where his work became exclusively reviewing debts. [14]

> MS MARSH: And so does that drastic change in your workload reflect business needs?
>
> MR BAKER: Yes.
>
> MS MARSH: And was that drastic change towards doing more debt work under the - what we now call the Robodebt Scheme?
>
> MR BAKER: Yes.
>
> MS MARSH: And when the Robodebt Scheme was in operation, were you doing mostly - would you say you were doing mostly debt work?
>
> MR BAKER: That's all I did for two years. [15]

The CPSU highlighted that the Scheme did not decrease workload:

> Robodebt did not decrease workload. It increased as customers attended CSC [a Centrelink office] first to find out what was happening and then return with pages of bank statements and payslips. SOs [Service Officers] often ran appeal scripts as many felt debts were unfair or incorrect. [16]

Jeannie Blake said that the pressures of reaching productivity goals left her with little time to process documents sent in by recipients. According to another witness, 'Craig Simpson', "[t]he fixation on KPIs came at the expense of service delivery to customers and the welfare of colleagues." [17] In addition to meeting productivity benchmarks, staff were directed to answer additional phone calls once the wait times exceeded a certain level.

Ms Blake summarised the outcome of the program:

> We had become a call centre. There was a big screen banged up in the room, and all of a sudden, we could see calls coming in and coming out. And the focus was on getting the calls, not getting it right. The focus was on getting it done, not getting it right. [19]

The Scheme did not only affect customer service officers. Taren Preston, a DHS social worker prior to and during the Scheme, [20] said that her workload

> …grew with the Robodebt Scheme, requiring me to provide social support, on average, to 10 Centrelink customers per day. It seemed like there was a stream of customers coming through in distress, and a greater proportion of customers seeking social support in relation to debts raised by Centrelink. [21]

Although compliance officers could in theory refer recipients to social workers, like Ms Preston, for support, delays [22] and staff shortages [23] limited the effectiveness of this referral process, placing a greater burden on staff who knew that there was not enough assistance for recipients who presented with thoughts of self-harm or suicide. [24]

DHS sought to meet the increased workload by way of labour hire and temporary employees. That response to resourcing issues is dealt with below.

2.1 Increased levels of recipient distress

The implementation of the Scheme exacerbated the level of distress experienced by some recipients, many of whom were already in situations of vulnerability or disadvantage: [25] inevitably, the scale of the Scheme also led to greater number of distressed recipients, many of whom were angry and frustrated. [26] They brought these frustrations to frontline staff: "[r]ecipients under the Scheme had 'rightful anger because it wasn't clear. They would yell and swear at the team on the phones. It was an immense amount of pressure."[27]

Ms Preston provided social support to recipients face-to-face and over the phone, [28] and ad hoc support to DHS staff who were on the frontline working with recipients. She described a change at DHS on her return from parental leave at the beginning of 2018:

> …when I came back, the change was very stark to the DHS that I had left before mat leave. What I noticed was that there was an increase in customers being referred to me. There was an increase in the level of distress that they were experiencing and an increase in people being in that state due to the Robodebts and the debt notice. [30]

Ms Preston attributed an increase in requests by DHS staff for social worker support to the increase in recipient distress and aggression over issues with debts that staff could not resolve. [31]

A greater proportion of recipients were being referred to social workers as a suicide risk. "Customers would either directly say to me that they were suicidal, [or] would make references…such as 'well I am going to throw myself in front of a truck'."[32]

Despite the increased need, there were not enough social workers to meet the demand. [33] Ms Preston found that there was a move away from providing a local social work service, and she had to deal with customers more by telephone; she could only speak to about a quarter of those needing help in person. "I felt like I was working in a call centre rather than in my local community." [34]

The teams of social workers at DHS were being depleted, with social workers experiencing burn out or leaving the Department: "I thought that our wellbeing and safety were being compromised by the work we were doing." [35]

A number of DHS staff gave evidence to the Commission of particularly disturbing or upsetting recipient interactions in relation to the Scheme: "[I] experienced listening to multiple suicide attempts over the phone and I have been diagnosed with PTSD since I finalised my work with Centrelink." [36]

In a 2020 letter to the Hon Stuart Robert, Minister for Government Services, the CPSU reported receiving similar feedback from DHS employees, and extracted submissions directly from those employees in the letter:

> Robodebt has had a huge impact on fellow co-workers and myself. To read the stories of suicides and customers' distress in the news made a lot of us feel sick. I have had nights where I could not sleep thinking about conversations, I have had with customers regarding their Robodebts. Some have talked about suicide on the call. To hear a grown man crying on the phone, whose wife had died recently, and he is the carer for his young children, is heartbreaking. [37]

2.2 Technical training in relation to the Scheme

The Commission received evidence from staff who found that the technical training they received in respect of the Scheme was brief [38] and inadequate, [39] telling of a lack of training in calculating debts; [40] in identifying problems with debts that had been raised; [41] in reviewing debts; [42] and in responding to general Centrelink payment queries. [43]

One DHS Compliance Officer told the Commission that her training on the OCI system was by PowerPoint presentation, which provided an overview of the new online system but did not address how the debts were calculated. [44]

Mr Simpson immediately identified shortcomings in the training he received as a compliance officer:

> within the context of the Robodebt environment, to have two and a half days where we focused in on very serious obligations under privacy law, under taxation law, under social security law and that we - those are matters that we had to get correct. We also had to appraise ourselves of a wide variety of complex documentary evidence, complex earnings scenarios. And to add on to those policy matters, the consideration of the procedures as to how we actually executed those things accurately in the system. [45]

One consequence was that advice given to recipients was not always correct: "…I can certainly say anecdotally hearing colleagues telling or advising clients that they had no right to appeal those debts because the data was based on verified information from the ATO…as we all appreciate under social security law, you always have a right to appeal those decisions." [46]

The evidence indicated that these staff members felt they were at risk of making incorrect decisions and providing incorrect advice to clients about their rights and obligations. [47]

2.3 Staff training to deal with vulnerable, disadvantaged and at-risk recipients

The experience of some staff was that they felt ill-prepared to support vulnerable, disadvantaged and at-risk recipients, [48] and ill-equipped to deal with recipients who presented with mental health concerns, including the intention to self-harm or suicide. [49]

The Commission was told that training provided to staff did not include an explicit focus on the "extensive human element" [50] that was involved in the role, which was "really alarming because…the matters we were working with were extremely sensitive and in many, many cases causing a great deal of psychological distress:" [51] it did not address how staff should handle difficult conversations, nor did it provide guidance on how to support vulnerable recipients who were having debts raised against them. [52] Both staff and recipients were affected as a result: staff were distressed in not knowing how to respond to distraught recipients, and recipients found no support after receiving determinations that significantly impacted their financial circumstances. [53]

The workplace at DHS during the Scheme was described as stressful:

> Answering the phones was pressure for some people. Knowing that you would have to de-escalate before you could get any sort of understanding to the customer of what was going on was pressure. It was stressful. And then you had this board on the left saying how many was still left in the queue. So you knew that as soon as you got off that one, you had to get back on and take another one. It was an immense amount of pressure. [54]

2.4 Use of labour hire

Following the implementation of the Scheme, and in response to increased demand for compliance services as a result, labour hire staff were brought in by DHS. [55] Renee Leon (secretary, DHS) told the Commission that those staffing arrangements were adopted because "the government didn't want to increase Public Service numbers for this role, so the work was to be undertaken by labour hire;" [56] this was in the context of DHS having experienced significant cuts to its permanent workforce over the previous decade. [57]

The shift in approach to the workforce could be seen to be a factor in the deterioration of the morale of DHS staff. Ms Leon told the Commission that permanent DHS employees felt that their work was being undermined by labour hire: [58]

> Existing staff felt that it was…a bit insulting to their knowledge and experience that the government thought …their job could so easily be done by someone who had just been brought in with a script. They also felt concerned…whenever there was large-scale engagement of contractors, that this was part of a plan to progressively replace more and more of them. So people felt both anxious for their own jobs but also anxious for what that would mean for service delivery…many of the staff had worked in the Department for sometimes decades…they had a long-standing commitment to the work of the Department, and they felt anxious that that…was being undermined. [59]

The Commonwealth has told the Commission that the government has committed to reducing reliance on contractors, consultants and labour hire staff as part of its APS Reform agenda.

2.5 Staff well-being and morale

Many of the frontline staff who worked at DHS during the Scheme were passionate about their jobs, had a strong sense of vocation and were committed to assisting recipients: [60]

> Centrelink's mission and Department of Human Services' mission was absolutely consistent with my values, which was Australia is fortunate to have a very good social security framework where disadvantaged individuals can access support in their time of need. And I really wanted to be a part of that system where you could directly influence the outcomes of someone to support them in that time of need. [61]

A number of committed employees described suffering trauma, anxiety and distress. [62]

> The job left me psychologically unwell from the tasks we were required to carry out. It was a test of integrity to do it every day to my fullest ability. Each day, I came home feeling depressed. I spent a lot of my time outside of work thinking how much longer I could do it for, and how I could find another job so I could leave. [63]

The increasing levels of anxiety described by staff were attributed by some to the knowledge that the work they were doing in relation to the Scheme was wrong, and not fair to recipients. [64] Staff told of feelings of shame in their role in implementing the Scheme. [65]

Some staff left their roles at DHS as a result of their experience with the Scheme; where previously they had found working at Centrelink to be meaningful and fulfilling. [66]

The Commission heard from Colleen Taylor, who had worked at DHS for over thirty years. [67] Ms Taylor said that the work practices imposed during the Scheme challenged her personal beliefs and values as a public servant. She found that she could no longer perform the role and chose to retire. [68]

The CPSU received reports from their members of suffering mental health as a result of increased recipient aggression, an increase in distressed and suicidal recipients, an increased and unsustainable workload, and failure by management to respond to these concerns. CPSU heard from staff that they felt that issues they were raising were being ignored, and that many were fearful of retribution by management if they spoke up. [69] CPSU members reported a drastic decrease in employee well-being. [70]

A compounding factor was the negative press surrounding the Scheme: "staff were feeling that they were under siege." [71] Jason McNamara (general manager, Integrity Modernisation Division, DHS) told the Commission:

> …the staff had a terrible time out of the press…in terms of implementing OCI, the staff were severely damaged by all the negative press…compliance officers are a fairly dedicated bunch and so they took it quite hard, the negative press. [72]

3 Communication and consultation

3.1 Lack of consultation prior to the implementation of the Scheme

There was a lack of consultation with DHS frontline employees and stakeholder groups prior to the implementation of the Scheme. [73] Staff were in a unique position to identify issues with the design of the Scheme: for example, "a discrepancy can often arise from issues such as differing names being used for the one employer, which can be readily resolved by examining the record, talking to the recipient, and sometimes doing some simple searches." [74] Staff found that there were "obvious" flaws in the Scheme. [75] The briefings provided to employees regarding the Scheme were described as "woefully inadequate." [76]

A survey involving CPSU members – which does not disclose the number of members involved in the survey – found that one in ten members, whose work would involve the OCI program, were consulted over its development before it was implemented; [77] and nearly all members who responded to the survey raised concerns within DHS about the legality of the Scheme, but were told that the legal advice was that it could proceed. [78]

3.2 Failure to respond to issues and complaints raised by employees

Employees identified problems with accuracy, legality, fairness and recipient experiences associated with the Scheme, and raised those concerns with management. [79] Concerns ranged from the letters received by recipients being unclear, and vulnerable recipients having less support than was provided previously to comply with Centrelink's requests; [80] to the issues with averaging, and the online system not explaining to recipients the implications of their responses. [81]

Those concerns "fell on deaf ears." [82] The Commission was told that "[m]anagers did not care, did not want to hear about it, didn't want to know about it." [83]

> I raised ongoing concerns within Centrelink regarding the impact and unfairness of the Robodebt Scheme, and said that customers were presenting with an increased risk of suicide. I also raised my concerns that the Scheme was unfair in that people had the burden of proof placed upon them to prove they did not owe a debt, and that the Department had no requirement to prove themselves that the debt was correct. I raised those concerns at Site, Zone and Regional Meetings with my social work colleagues and at Regional Meetings with my customer service colleges, which were attended by Zone Managers and Senior Executives (EL2, SES1)…I was ignored when I raised [this feedback]. [84]

Staff movement and attrition

The Commission received submissions from various employees who said that they were disadvantaged in the workplace as a result of raising problems with the Scheme. These were from people who preferred to remain anonymous, so their accounts have not been tested. The Commission can only record them, and cannot make findings in respect of them.

Some said they were fired or were threatened with being fired as a result of voicing their concerns; [85] some said the nature of the work, and the pressure from management to "follow the new process" and ignore employees' experience led to them leaving their roles, [86] sometimes resigning or retiring early. [87]

"You would be denied opportunities if you spoke up and questioned the process and even if you called the union, there would be payback." [88]

3.3 Advocacy by the Community and Public Sector Union

The Community and Public Sector Union (CPSU) played a vital role in advocating for their members within DHS and Centrelink. [89] From early 2017 onwards, the CPSU were informed by their members of their serious concerns about the Scheme and the treatment of employees in DHS. [90] The CPSU's advocacy involved media releases, [91] open letters, [92] and formal correspondence with ministers [93] and DHS executives, [94] with little meaningful response received. [95]

In January 2017, the CPSU sent an email to its members regarding the "Failures of the Online Compliance System," highlighting the community outcry resulting from the Scheme: concerns which had been raised by employees but ignored by DHS executives. [96] The CPSU advised members that it had written directly to the Secretary, and would share the response with members once it was received. [97]

The CPSU wrote to Kathryn Campbell (secretary, DHS) on 19 January 2017, relaying concerns raised by employees that "debts are being issued where there is no proof that a debt exists."[98] Neither the Commission nor the CPSU have evidence of any response.

The CPSU had the week prior – on 13 January 2017 – written to the Hon Alan Tudge, Minister for Human Services, raising the issues faced by employees in implementing the Scheme. [99] The CPSU received a call from the minister's office on 25 January 2017, and were advised that the letter from CPSU "raised some important issues around staffing" which should be raised with the department. [100]

4 Conclusion

The evidence before the Commission suggests that the Scheme had a deleterious impact on the well-being and morale of some of the employees who were involved in its implementation and operation. There may be a number of factors which could have contributed to this, including an increased workload; an increase in recipient distress as a result of the Scheme; inadequate training (both in respect of the technical aspects of the Scheme and in dealing with vulnerable, disadvantaged and at-risk recipients); and a rise in labour hire arrangements. Staff were not consulted on the proposal prior to the inception of the Scheme, and when they did provide feedback, they felt that their feedback was ignored by DHS.

The Commonwealth has told the Commission that since the conclusion of the Scheme, Services Australia has made some improvements, including by looking to focus on customer-centred design; reducing the use of labour hire staff; improving Agency culture and leadership, including by the implementation of leadership sessions and training on escalating issues; and introducing internal mechanisms for making and resolving complaints.

The Commission notes this response from the Commonwealth. These improvements may go some way to avoiding a repetition of the difficulties and distress that employees experienced under the Scheme. However, given the tenor of the evidence received by the Commission from employees, the Commission makes the following recommendations.

Recommendation 13.1: Consultation process

Services Australia should put in place processes for genuine and receptive consultation with frontline staff when new programs are being designed and implemented.

Recommendation 13.2: Feedback processes

Better feedback processes should be put in place so that frontline staff can communicate their feedback in an open and consultative environment. Management should have constructive processes in place to review and respond to staff feedback.

Recommendation 13.3: "Face-to-face" support

More "face-to-face" customer service support options should be available for vulnerable recipients needing support.

Recommendation 13.4: Increased number of social workers

Increased social worker support (for both recipients and staff), and better referral processes to enable this support, should be implemented.

1 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement – Signed, 8 December 2022 [p 2: para 17].
2 Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 9: para 51].
3 Exhibit 4-5290 – CRS.9999.0001.0001_R - Signed Statement of C Simpson [p 8: para 46 – p 9: para 47].
4 Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 9: para 51].
5 Exhibit 2-2453 - CPU.9999.0001.0003_R - Statement of Melissa Donnelly CPSU for Robodebt Royal Commission, 24 November 2022; ANO.9999.0001.0021 - Submission by Community and Public Sector Union, published 1 March 2023; Exhibit 2-2475 - CPU.9999.0001.0024 - Annexure U - Bulletin to members, 19 January 2017; Transcript, Melissa Donnelly, 12 December 2022 [p 1625: lines 10-38].
6 For example: compliance officers, social workers, and customer service officers.
7 Exhibit 4-5269 - JBL.9999.0001.0006_R - 3444-5272-1440_4_2023 01 23 Final Statement of Jeannie Blake. pdf [p 6-7: para 51]; Transcript, Jeannie-Marie Blake, 21 February 2023 [p 3449: lines 14-19]; Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement – Signed, 8 December 2022 [p 4: para 32]; Transcript, Jason McNamara, 5 December 2022 [p 1105: lines 19-23].
8 See for example: Transcript, 'Amy', 31 October 2022 [p 32: line 34 – p 33: line 6]; Exhibit 4-8332 - RCW.0009.0001.0001_R - Statement of Sarah Jane Phil Harvey [p 4: para 24-27]; Transcript, Jeannie-Marie Blake, 21 February 2023 [p 3443: line 22 – p 3445: line 26].
9 Exhibit 4-7486 - CTH.3008.0018.8255 - DHS Population Insights_Final [p 7].
10 Transcript, Jason McNamara, 5 December 2022 [p 1105: line 4].
11 Transcript, Jason McNamara, 5 December 2022 [p 1065: lines 30-32; p 1105: lines 6-23].
12 Exhibit 4-7990 - EST.9999.0001.0001_R - 2023 03 08 - Signed Statement – Esther, 8 March 2023 [p 4: para 20].
13 Exhibit 3-4638 - CTH.3001.0030.3987_R - 2016-11-23 New technology helps raise $4.5 million in welfare debts a day_FINAL [p 1].
14 Transcript, Luke Baker, 9 March 2023 [p 4876: lines 41-46].
15 Transcript, Luke Baker, 9 March 2023 [p 4877: lines 1-13].
16 ANO.9999.0001.0021 - Submission by Community and Public Sector Union, published 1 March 2023 [p 16].
17 Exhibit 4-5290 – CRS.9999.0001.0001_R - Signed Statement of C Simpson [p 8: para 44]
18 Exhibit 4-5269 - JBL.9999.0001.0006_R - 3444-5272-1440_4_2023 01 23 Final Statement of Jeannie Blake [p 6: para 51 – p 7: para 52].
19 Transcript, Jeannie-Marie Blake, 21 February 2023 [p 3449: lines 9-11].
20 Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 1: para 4].
21 Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 4: para 23].
22 Exhibit 4-5269 - JBL.9999.0001.0006_R - 3444-5272-1440_4_2023 01 23 Final Statement of Jeannie Blake [p 6: para 42]; Exhibit 4-5290 – CRS.9999.0001.0001_R - Signed Statement of C Simpson [p 6: para 32-33].
23 Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 4: para 25; p 5: para 29-30]; Exhibit 4-7990 - EST.9999.0001.0001_R - 2023 03 08 - Signed Statement – Esther, 8 March 2023 [p 13: para 45]; Exhibit 4-5290 – CRS.9999.0001.0001_R - Signed Statement of C Simpson [p 6: para 33].
24 Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 6: para 33].
25 Transcript, Taren Preston, 10 March 2023 [p 4887: lines 26-30]; Exhibit 4-7989 - RCW.0008.0001.0001_R - Statement of Luke Baker signed 23 February 2023, 23 February 2023 [p 3: para 23(a); p 5: para 30-31].
26 Exhibit 4-5269 - JBL.9999.0001.0006_R - 3444-5272-1440_4_2023 01 23 Final Statement of Jeannie Blake [p 5: para 36]; Exhibit 4-5290 – CRS.9999.0001.0001_R - Signed Statement of C Simpson [p 7: para 37].
27 Transcript, Jeannie-Marie Blake, 21 February 2023 [p 3447: lines 1-19].
28 Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 2: para 14].
29 Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 7: para 39].
30 Transcript, Taren Preston, 10 March 2023 [p 4893: lines 27-31].
31 Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 7: para 33].
32 Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 6: para 33].
33 Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 4: para 24]; Exhibit 4-5290 – CRS.9999.0001.0001_R - Signed Statement of C Simpson [p 6: para 33].
34 Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 4: para 24].
35 Transcript, Taren Preston, 10 March 2023 [p 4894: lines 18-19].
36 ANON-24KG-9S64-E_R - Anonymous Submission, published 23 June 2023.
37 Exhibit 2-2466 - CPU.9999.0001.0015_R - Annexure L - Alistair Waters to Stuart Robert, 3 July 2020 [p 2].
38 ANON-24KG-9SVV-G – Anonymous Submission, published 23 June 2023; Exhibit 4-7990 - EST.9999.0001.0001_R - 2023 03 08 - Signed Statement – Esther, 8 March 2023 [p 4: para 20].
39 Exhibit 4-7989 - RCW.0008.0001.0001_R - Statement of Luke Baker signed 23 February 2023, 23 February 2023 [p 2: para 17]; Exhibit 4-5269 - JBL.9999.0001.0006_R - 3444-5272-1440_4_2023 01 23 Final Statement of Jeannie Blake [para 28]; Exhibit 4-7990 - EST.9999.0001.0001_R - 2023 03 08 - Signed Statement – Esther, 8

March 2023 [p 10: para 10]; Exhibit 4-5290 – CRS.9999.0001.0001_R - Signed Statement of C Simpson [p 3: para 19-20].

40 Exhibit 4-5290 – CRS.9999.0001.0001_R - Signed Statement of C Simpson [p 3: para 19-20].

41 Exhibit 4-7990 - EST.9999.0001.0001_R - 2023 03 08 - Signed Statement – Esther, 8 March 2023 [p 2: para 10].

42 Exhibit 4-7989 - RCW.0008.0001.0001_R - Statement of Luke Baker signed 23 February 2023, 23 February 2023 [p 2: para 17].

43 Exhibit 4-5290 – CRS.9999.0001.0001_R - Signed Statement of C Simpson [p 2-3: para 18].

44 Exhibit 4-5271 - JBL.9999.0001.0002_R - Compliance Officer training presentations re Robodebt; Exhibit 4-5269 - JBL.9999.0001.0006_R - 3444-5272-1440_4_2023 01 23 Final Statement of Jeannie Blake [p 4: para 28].

45 Transcript, Craig Simpson, 3 March 2023 [p 4402: lines 36-44].

46 Transcript, Craig Simpson, 3 March 2023 [p 4404: lines 37-40].

47 Transcript, Craig Simpson, 3 March 2023 [p 4403: lines 4-6].

48 Exhibit 4-5290 – CRS.9999.0001.0001_R - Signed Statement of C Simpson [p 3: para 21]; Exhibit 4-5269 - JBL.9999.0001.0006_R - 3444-5272-1440_4_2023 01 23 Final Statement of Jeannie Blake [p 5: para 41]; Exhibit 4-7990 - EST.9999.0001.0001_R - 2023 03 08 - Signed Statement – Esther, 8 March 2023 [p 4: para 21].

49 Transcript, Taren Preston, 10 March 2023 [p 4893: line 10 – 4898: line 45].

50 Transcript, Craig Simpson, 3 March 2023 [p 4405: lines 21-22].

51 Transcript, Craig Simpson, 3 March 2023 [p 4405: lines 22-24].

52 Exhibit 4-5290 – CRS.9999.0001.0001_R - Signed Statement of C Simpson [p 3: para 21]; Exhibit 4-5269 - JBL.9999.0001.0006_R - 3444-5272-1440_4_2023 01 23 Final Statement of Jeannie Blake [p 5: para 41].

53 Exhibit 4-5290 – CRS.9999.0001.0001_R - Signed Statement of C Simpson [p 3: para 21].

54 Transcript, Jeannie-Marie Blake, 21 February 2023 [p 3447: lines 15-19].

55 Transcript, Renee Leon, 28 February 2023 [p 4004: lines 14-24].

56 Transcript, Renee Leon, 28 February 2023 [p 4004: lines 26-3]. See also Transcript, Michael Keenan [p 4062: line 1 – p4063 line 9].

57 ANO.9999.0001.0021 - Submission by Community and Public Sector Union, published 1 March 2023 [p 23]. See for example, DHS' employee numbers declined by 2099 people (5.9 per cent) between December 2013 and June 2022. During the same period, DHS/Services Australia increased its reliance on non-permanent employees: its "ongoing" workforce fell by 5401 people (16 per cent) while its "non-ongoing" workforce increased by 3302 people (169.3 per cent).

58 Transcript, Renee Leon, 28 February 2023 [p 4007: lines 9-23].

59 Transcript, Renee Leon, 28 February 2023 [p 4007: lines 9-23].

60 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement – Signed, 8 December 2022 [p 12: para 96]; Exhibit 4-7989 - RCW.0008.0001.0001_R - Statement of Luke Baker signed 23 February 2023, 23 February 2023 [p 5: para 33-34]; Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 9: para 51].

61 Transcript, Craig Simpson, 3 March 2023 [p 4401: lines 10-14].

62 Exhibit 4-5290 – CRS.9999.0001.0001_R - Signed Statement of C Simpson [p 7: para 37; p 9: para 47]; Exhibit 4-7990 - EST.9999.0001.0001_R - 2023 03 08 - Signed Statement – Esther, 8 March 2023 [p 21: para 83]; Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 9: para 51].

63 Exhibit 4-5290 – CRS.9999.0001.0001_R - Signed Statement of C Simpson [p 9: para 47].

64 Transcript, Taren Preston, 10 March 2023 [p 4897: lines 29-34]; Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 7: para 41].

65 Transcript, Taren Preston, 10 March 2023 [p 4898: lines 8-13]; Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 7: para 41].

66 Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 9: para 51]; Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement – Signed, 8 December 2022 [p 12: para 96]; Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 8: para 51]; Exhibit 4-7990 - EST.9999.0001.0001_R - 2023 03 08 - Signed Statement – Esther, 8 March 2023 [p 21: para 84]; Transcript, Ms Smith, 9 March 2023 [p 4864: line 34 – p 4865: line 30; p 4874: lines 26-42].

67 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement – Signed, 8 December 2022 [p 1: paras 6-9].

68 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement – Signed, 8 December 2022 [p 4: para 17; p 12: para 96].

69 Exhibit 2-2453 - CPU.9999.0001.0003_R - Statement of Melissa Donnelly CPSU for Robodebt Royal Commission, 24 November 2022 [p 8: para 24].

70 ANO.9999.0001.0021 - Submission by Community and Public Sector Union, published 1 March 2023 [p 16].

71 Transcript, Kathryn Campbell, 7 March 2023 [p 4606: lines 20-21].

72 Transcript, Jason McNamara, 5 December 2022 [p 1084: lines 15-18].

73 Exhibit 4-5269 - JBL.9999.0001.0006_R - 3444-5272-1440_4_2023 01 23 Final Statement of Jeannie Blake [p 3: para 21]; Transcript, Genevieve Bolton, 11 November 2022, [p 996: lines 22-40].
74 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement – Signed, 8 December 2022 [p 4: para 33-36].
75 Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 8: para 44]; Exhibit 4-5269 - JBL.9999.0001.0006_R - 3444-5272-1440_4_2023 01 23 Final Statement of Jeannie Blake [p 2 : para 19 – p 3: para 19-23]; Exhibit 4-7990 - EST.9999.0001.0001_R - 2023 03 08 - Signed Statement – Esther, 8 March 2023 [p 20: para 79]; Transcript, Taren Preston, 10 March 2023 [p 4899: line 8-41].
76 Transcript, Lisa Newman, 12 December 2022 [p 1633: lines 27-30].
77 ANO.9999.0001.0021 - Submission by Community and Public Sector Union, published 1 March 2023 [p 6].
78 ANO.9999.0001.0021 - Submission by Community and Public Sector Union, published 1 March 2023 [p 14].
79 Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement – Signed, 8 December 2022; Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 8: para 48-49]; Exhibit 4-5269 - JBL.9999.0001.0006_R - 3444-5272-1440_4_2023 01 23 Final Statement of Jeannie Blake [p 2-3: para 19].
80 Exhibit 4-5269 - JBL.9999.0001.0006_R - 3444-5272-1440_4_2023 01 23 Final Statement of Jeannie Blake [p 2-3: para 19(a); 19(c)].
81 Exhibit 4-5269 - JBL.9999.0001.0006_R - 3444-5272-1440_4_2023 01 23 Final Statement of Jeannie Blake [p 3: para 19(b)]; Exhibit 4-5269 - JBL.9999.0001.0006_R - 3444-5272-1440_4_2023 01 23 Final Statement of Jeannie Blake [p 3: para 19(d)].
82 Transcript, Jeannie-Marie Blake, 21 February 2023 [p 3450: lines 25 – 28; p 3445: lines 24 – 26]; See also examples given by Colleen Taylor: Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement – Signed, 8 December 2022 [pp 4-5: paras 34-45]; Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 8: para 48-49]. See also ANO.9999.0001.0021 - Submission by Community and Public Sector Union, published 1 March 2023 [p 6].
83 Transcript, Jeannie-Marie Blake, 21 February 2023 [p 3447: lines 34 – 45].
Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 8: paras 47-48].
84 ANON-24KG-9SVV-G – Anonymous submission, published 23 June 2023; ANON-24KG-9SNE-Q – Anonymous submission, published 23 June 2023; ANON-24KG-9BRK-G – Anonymous submission, published 23 June 2023;
85 ANON-24KG-9SHR-X – Anonymous submission, published 23 June 2023.
86 ANON-24KG-9BW1-U – Anonymous submission, published 23 June 2023.
87 ANON-24KG-9S9R-F – Anonymous submission, published 23 June 2023; ANON-24KG-9BRK-G – Anonymous submission, published 23 June 2023.
88 ANON-24KG-9SXU-H – Anonymous submission, published 23 June 2023.
89 Some examples have been included in the CPSU's letter to Minister Robert on July 2020. Exhibit 2-2466 - CPU.9999.0001.0015_R - Annexure L - Alistair Waters to Stuart Robert.
90 Transcript, Melissa Donnelly, 12 December 2022 [p 1625: line 10-17]; Exhibit 2-2453 - CPU.9999.0001.0003_R - Statement of Melissa Donnelly CPSU for Robodebt Royal Commission [p 5-7: para 21].
91 Exhibit 2-2488 - CPU.9999.0001.0037 - Annexure G1 - CPSU media releases re Robodebt.
92 Exhibit 2-2477 - CPU.9999.0001.0026 - Annexure W - CPSU Open Letter to DHS Customers.
93 Exhibit 2-2466 - CPU.9999.0001.0015_R - Annexure L - Alistair Waters to Stuart Robert.
94 For example: Exhibit 2-2469 - CPU.9999.0001.0018_R - Annexure O - 20170502 Template letter HSRs to Agency.
95 For example: Transcript, Ms Donnelly and Ms Newman, 12 December 2022 [p 1638: line 22-28].
96 Exhibit 2-2475 - CPU.9999.0001.0024 - Annexure U - Bulletin to members, 19 January 2017.
97 Exhibit 2-2475 - CPU.9999.0001.0024 - Annexure U - Bulletin to members, 19 January 2017.
98 Exhibit 2-1794 - CTH.3001.0034.1319_R, Response to the CPSU re online compliance measures[DLM=ForOfficial-Use-Only].
99 Exhibit 2-2462 - CPU.9999.0001.0011_R, Annexure H - Michael Tull to Alan Tudge.pdf.
100 Exhibit 2-2464 - CPU.9999.0001.0013_R, Annexure J - Email re message from Alan Tudge.pdf.

Chapter 14: Economic costs

1 Introduction

This chapter reviews the economic costs of the Robodebt scheme (the Scheme), as required by the Commission's terms of reference. This encompasses the intended and actual outcomes of the Scheme, including the approximate costs of implementing, administering, suspending and winding back the Scheme, as well as costs incidental to those matters, such as obtaining external advice and legal costs.

The information presented in the chapter is based upon information provided by the Department of Social Services (DSS), Services Australia, the Attorney-General's Department (AGD), the Australian Taxation Office (ATO), the Office of the Commonwealth Ombudsman (OCO), the Office of the Australian Information Commissioner (OAIC), the Department of the Senate (Senate), the Australian National Audit Office (ANAO) and the Administrative Appeals Tribunal (AAT) (collectively, the Commonwealth agencies); and contained in publicly available Budget papers. In a limited number of instances, the Commission has had to adjust the information provided by Commonwealth agencies to remove the impact of elements of Budget measures that are not considered to be relevant to the Scheme and to achieve consistency in presentation.

Net cost of the Scheme

Over the period of 2014-15 to 2021-22 the Scheme was budgeted to generate savings of $4.772 billion, but is estimated to have delivered a saving of $406.196 million. The Commonwealth incurred estimated total costs of $971.391 million in implementing, administering, suspending and winding back the Scheme (including incidental costs).

The net cost of the Scheme is approximately $565.195 million, which represents the net impact of its estimated total costs of $971.391 million offset by the estimated savings of $406.196 million. The Commonwealth accepts that figure as correct, based upon the information and evidence before the Commission.

Total costs of the Scheme

Costs of the scheme include:

- the costs incurred by Commonwealth agencies relating to Budget measures and estimates variations, including funding for this Royal Commission, and
- the costs incurred by Commonwealth agencies that were not directly funded by a Budget measure or estimates variation and thus were incidental to the Scheme, representing the redirection of funds that could otherwise have been used for the delivery of services, where those incidental costs could be identified or estimated.

In these terms:

- for the period of 2014-15 to 2023-24 the estimated actual cost of these Budget measures and estimates variations is approximately $930.110 million, net of $227.058 million in measures that were approved and then later reversed by government.
- for the period of 2014-15 to 2023-24 Commonwealth agencies expect to incur incidental costs, in addition to costs funded through a Budget measure or estimates variation of $41.281 million.

The Scheme's costs include the settlement of $112 million approved by the Federal Court in *Prygodicz v Commonwealth of Australia* (No. 2) FCA 634 (Prygodicz case).[1] This settlement sum included the legal costs for Gordan Legal which amounted to $8,413,795.71 at the date of settlement.[2]

These costs are presented in terms of their effect on the fiscal balance and thus represent both accrued expenditure and the purchase of non-financial assets. Further, as these estimates extend into 2023-24, they represent both actual and forecast estimates.

Savings not achieved

The Scheme was expected to generate significant savings to the Federal Budget, through the recovery of social security payments previously paid and a reduction in future welfare payments. Those savings formed a part of the government's Budget estimates (upon which the decisions of government are premised and new expenditure is approved).

Over the period of 2014-15 to 2021-22 the Scheme was budgeted to generate savings of $4.772 billion, but is estimated to have delivered a saving of $406.196 million.

In relation to the recovery of social security payments previously paid, approximately 794,000 debts were raised under the Scheme[3] across approximately 526,000 recipients.[4] Of the debts raised under the scheme DSS expects to write off a total of $1.751 billion in debts, including the refund of debt payments received of $746 million.[5]

In relation to the reduction in future social security payments attributable to the Scheme measures, despite the significant size of the estimated Budget savings, DSS advised that actual savings were "not tracked through the finance system for Government financial reporting by year and measure in the format requested by the Royal Commission."[6] The estimated savings figures provided rely in-part on ad-hoc Agency Management Information reporting.[7]

Wider economic and social costs

The wider costs of the Scheme on the broader economy and on society also represent a cost of the Scheme. Though real, their measurement is more subjective and has not been attempted in this chapter.

Other costs not included

The costs of implementing any recommendations of the Commission are not included in the estimates.

2 Budget funding

2.1 Budget measures

The Scheme comprised of a series of Budget measures and corresponding elements announced in annual Budgets and Mid-Year Economical Fiscal Outlooks (MYEFOs) from 2015 to 2022. Other Budget elements which did not form part of the Scheme for the purposes of this Commission's terms of reference have been excluded in the calculation of costs. This includes the Non-Employment Income Data Matching (NEIDM) element of the Enhanced Welfare Payment Integrity measure in the 2015-16 MYEFO and its extension in the 2016-17 MYEFO. A chronological map of the income data matching Budget measures and other relevant Budget measures has been captured in the Budget Measures Map in the Appendix.

2015-16 Budget

The Scheme was announced in the 2015-16 Budget as one of a series of proposals under the Strengthening the Integrity of Welfare Payments measure.[8] Debt recovery based on comparing PAYG data obtained from the ATO with employment income fell under the 'Employment Income Matching' element of the measure which was set to run from 1 July 2015 until 30 June 2019.[9] This element was to capture 866,857 income support recipients through the identification of income discrepancies for three financial years: 2010-11, 2011-12 and 2012-13.[10] It was expected to achieve $1.514 billion in savings over five years.[11]

The ATO advised the Commission that it received funding related to this proposal, through an estimates variation.[12]

2015-16 Budget	Costs Budget $m	Savings Budget $m
Strengthening the integrity of Welfare Payments		
Employment Income Matching		
AAT[13]	1.40	
DSS[14]	0.51	(1, 514.35)
Services Australia[15]	172.41	0.00
Estimates variation		
ATO	0.67	
Grand Total	**174.98**	**(1,514.35)**

Negative figures represent a reduction in costs.

2015-16 MYEFO

The government extended the operation of the Scheme through the Enhanced Welfare Payment Integrity - Income Data Matching measure.[16] The measure, which projected activities from 1 July 2016 to 30 June 2019, sought to capture an additional 616,000 individuals by extending the period for identifying income discrepancies to an additional two financial years: 2013-14 and 2014-15.[17] It was expected to achieve $1.303 billion in savings over two years.[18]

Alongside this measure was the Enhanced Welfare Payment Integrity - Expand Debt Recovery measure which increased the number of debt recovery arrangements from March 2016 over a period of four years to cover a wider cohort of individuals, including former income support recipients and recipients on partial support payments due to employment.[19] As part of the initiative to increase debt recovery, the measure also sought to remove the six-year statutory limitation period for debt recovery and introduced sanctions through the use of Departure Prohibition Orders.[20]

2015-16 MYEFO	Costs Budget $m	Savings Budget $m
Enhanced Welfare Payment Integrity - Income Data Matching		
New Policy Proposal		
DSS[21]	0.05	(1,303.01)
Services Australia[22]	50.48	0.00
Enhanced Welfare Payment Integrity - Expand Debt Recovery		
New Policy Proposal		
DSS[23]	0.92	
Services Australia[24]	28.55	
Grand Total	**80.00**	**(1,303.01)**

Negative figures represent a reduction in costs.

2016-17 MYEFO

The Scheme was further extended under the Better Management of the Social Welfare System measure.[25] The first element, Extend Enhanced Welfare Payment Integrity - Income Data Matching, sought to capture a further 924,000 individuals by extending the period for identifying income discrepancies to an additional three financial years: 2015-16, 2016-17 and 2017-18.[26] Commencing from 1 July 2017, the proposal was expected to achieve $1.773 billion in savings over four years.[27] The second element, Expand Tax Garnishee, was designed to enable the recovery of debts by tax garnishing from an estimated 340,000 current and former income support recipients, regardless of whether they were in a repayment arrangement.[28]

2016-17 MYEFO	Costs Budget $m	Savings Budget $m
Better Management of the Social Welfare System		
Extend Enhanced Welfare Payment Integrity - Income Data Matching		
AAT[29]	8.66	
DSS[30]	0.00	(1,772.80)
Services Australia[31]	138.00	0.00
Expand Tax Garnishee		
AAT[32]	1.53	
Services Australia[33]	10.98	
Grand Total	**159.17**	**(1,772.80)**

Negative figures represent a reduction in costs.

2017–18 MYEFO

The government reversed the tax garnishing proposal from the previous MYEFO through Reversal of the Expand Tax Garnishee element, a component of the Strengthening the Integrity of Welfare Payments and Better Management of the Social Welfare System - unlegislated components - not proceeding measure.[34]

2017-18 MYEFO	Costs Budget $m	Savings Budget $m
Strengthening the Integrity of Welfare Payments and Better Management of the Social Welfare System – unlegislated components – not proceeding		
Reversal of the Expand Tax Garnishee component of the Better Management of the Welfare System		
AAT[35]	(1.47)	
Services Australia[36]	(8.49)	0.00
Grand Total	**(9.97)**	**0.00**

Negative figures represent a reduction in costs.

2018-19 Budget

The final extension of the Scheme was the Social Welfare Debt Recovery measure which extended the operation of two existing measures announced in the 2015-16 Budget and 2016-17 MYEFO until 30 June 2022 under the elements: Strengthening the Integrity of Welfare Payments by Extending Income Data Matching and Expanding Social Welfare Debt Recovery.[37]

The Strengthening the Integrity of Welfare Payments by Extending Income Data Matching element extended income data-matching compliance work for PAYG, income tax returns and assets and investment sources by including the 2018-19 financial year.[38] It was expected to achieve $181.39 million in savings over the 2021-22 financial year.[39] Debt recovery activities under this element ultimately did not proceed due to announcements in the 2020-21 Budget winding back the Scheme.[40]

The Expanding Social Welfare Debt Recovery element extended the operation of the existing measure in the 2015-16 MYEFO to recover debts from former income support recipients until 30 June 2022.[41] The proposal sought to recover outstanding debts using two strategies: pursuing debts of high value; and negotiating higher repayments where the former recipient had capacity to repay the debt.[42]

2018-19 Budget	Costs Budget $m	Savings Budget $m
Social Welfare Debt Recovery		
Strengthening the Integrity of Welfare System by Extending Income Data Matching		
AAT[43]	1.72	
DSS[44]	0.00	(181.39)
Services Australia[45]	47.80	0.00
Expanding Social Welfare Debt Recovery		
Services Australia[46]	24.64	
Grand Total	**74.16**	**(181.39)**

Negative figures represent a reduction in costs.

2020-21 Budget

The government outlined the proposal to wind back the Scheme under the Changes to the Income Compliance Program measure.[47] The announcement of the refund of ATO averaged debts element initially estimated that $721 million was in scope for refunds to 428,315 former and current recipients.[48] This was based on a manual review undertaken by Services Australia to identify debts raised under the Income Compliance Programme subject to averaging and fully or partly recovered.[49] Refunds were set to commence from July 2020 and were expected to continue into the 2021-22 financial year, with the bulk of refunds administered within the first three months of commencement.[50] The measure also included a component which provided for the direct cost of providing interest on the refund of debts paid.[51]

The Reversal of PAYG measure elements represented the reversal of the income data-matching measures introduced in the 2015-16 MYEFO, 2016-17 MYEFO and 2018-19 Budget in order to cease the Income Compliance Programme from 30 June 2020.[52]

2020-21 Budget	Costs Budget $m	Savings Budget $m
Changes to the Income Compliance Program		
New Policy Proposal (interest payment)		
Services Australia[53]	88.52	
Refund of ATO averaged debts (including interest)		
Services Australia[54]	15.45	0.00
Reversal of PAYG measures		
Services Australia[55]	(205.72)	0.00
Grand Total	**(101.75)**	**0.00**

Negative figures represent a reduction in costs.

The Commission asked the Commonwealth to confirm that the AAT had used all funding received through the 2015-16 Budget, 2016-17 MYEFO and 2018-19 Budget, to which the Commonwealth advised that $11.38 million in funding had been reversed through various budget variations in unspecified budget rounds.

Unknown Budget Round	Costs Budget $m
Changes to the Income Compliance Program	
Reversal of PAYG measures	
AAT	(11.38)
Grand Total	**(11.38)**

Negative figures represent a reduction in costs.

2020-21 MYEFO

The government reprofiled funding for interest payments on the refund of debts paid and provided further funding to continue its program to refund debts.[56]

2020-21 MYEFO	Costs Budget $m
Changes to the Income Compliance Program*	
New Policy Proposal (interest payment)	
Services Australia[57]	0.00
Income Compliance Program Settlement	
New Policy Proposal	
Services Australia[58]	23.50
Grand Total	**23.50**

Negative figures represent a reduction in costs.

**This figure represents the net sum of funding changes over the budget and forward estimates.*

2022-23 October Budget

The government provided funding of $30 million to establish the Royal Commission into the Robodebt Scheme.[59] This included funding of $22.04 million for the operations of the Commission, with the remaining funding provided to AGD for the Commonwealth's representation, financial assistance to witnesses appearing and for records management.

2022-23 October Budget	Costs Budget $m
Royal Commission into the Robodebt Scheme	
New Policy Proposal	
AGD[60]	7.96
Commission	22.04
Grand Total	**30.00**

Negative figures represent a reduction in costs.

2023-24 Budget

The government announced a further $3.6 million in 2022-23 for AGD to fund Commonwealth representation in regard to the Royal Commission.[61]

Estimates variations

As well as the above measures, the government provided additional funding to Services Australia for income compliance through two estimates variations. These variations adjusted expenditure under previous Budget measures to reflect revised assumptions about the operation of the Scheme.

The first variation was in the 2017-18 MYEFO which provided a net increase in funding of $116.425 million.[62] This reflected revisions in the rate of debt recovery that were being achieved and the need for increased staffing due to the lack of uptake of use of the online portal.[63]

2017-18 MYEFO	Costs Budget $m	Savings Budget $m
Income Compliance Re-Profiling		
Estimates Variation		
Services Australia	116.43	0.00
Grand Total	**116.43**	**0.00**

Negative figures represent a reduction in costs.

A further Estimates variation was made in the 2018-19 MYEFO which provided a net increase in funding of $391.920 million across the forward estimates.[64] This variation accounted for a higher proportion of manual and partially online reviews.[65]

2018-19 MYEFO	Costs Budget $m	Savings Budget $m
Income Compliance Re-Profiling		
Estimates Variation		
Services Australia	391.92	0.00
Grand Total	**391.92**	**0.00**

Negative figures represent a reduction in costs.

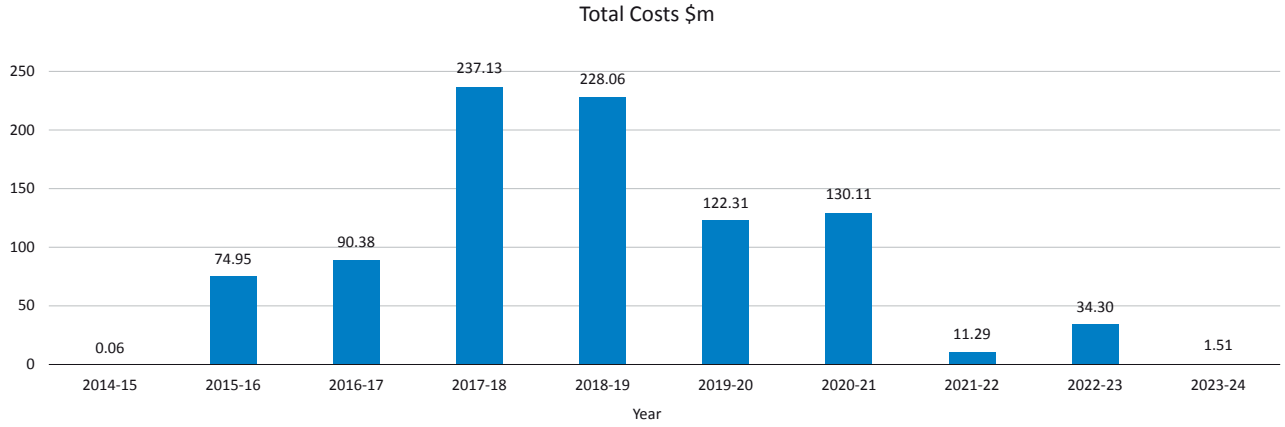
Actual costs of Budget measures and Estimates variations

Over the period of 2014-15 to 2023-24 the estimated total cost of these Budget measures and Estimates variations is approximately $930.110 million.

The estimated costs do not include the write-off of debts raised by Services Australia.

The AAT received Budget funding but it was not able to provide actual costs in relation to the Scheme and thus its actual costs are assumed to be equal to the funding provided.

The pattern of actual costs is set out below.



3 Savings

The Scheme was expected to generate significant savings to the Budget, through the recovery of social security payments previously paid and the reduction in future payments. Over the period of 2014-15 to 2021-22 the Scheme was budgeted to generate savings of $4.772 billion.

The estimated Budget savings were provided by DSS, as agreed with the Department of Finance, and reflect the cumulative Budget savings of all Budget measures related to the Scheme at the time those measures were approved by government.

Services Australia noted that the savings:[66]

> … were calculated by DSS using a DSS-owned methodology, and based on assumptions provided by DHS [Services Australia] in relation to:
>
> a) Anticipated value and rate of debts raised; and
>
> b) Social security payments reduced or cancelled through the delivery of compliance activities within each relevant new policy proposal

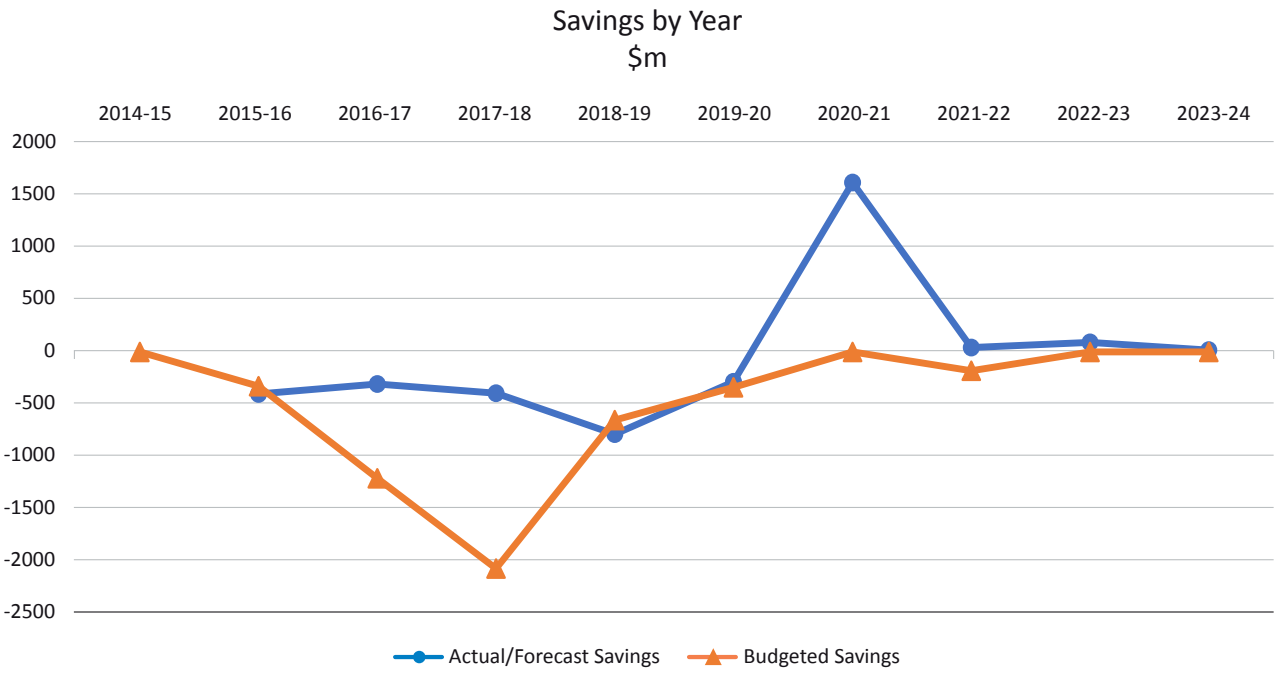
These savings formed a part of the Budget estimates upon which the decisions of government are premised and on which new expenditure is approved.

In relation to the recovery of welfare payments previously paid, approximately 794,000 debts were raised under the Scheme[67] across approximately 526,000 recipients.[68] Of the debts raised under the Scheme, DSS expects to write off a total of $1.751 billion in debts including the refund of $746 million.[69]

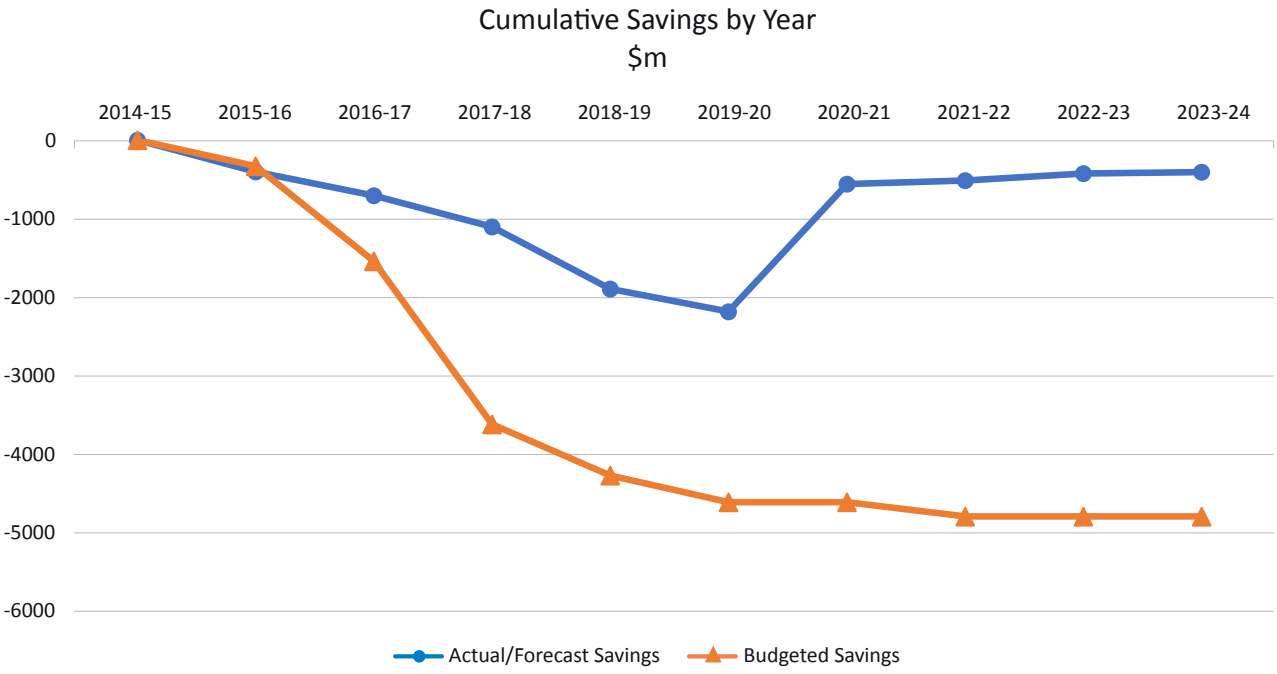
In relation to the reduction in future welfare payments attributable to the Scheme measures, despite the significant size of the estimated Budget savings, DSS advised that actual savings were "not tracked through the finance system for Government financial reporting by year and measure in the format requested by the Royal Commission".[70] DSS did identify that some ad hoc reporting of savings achieved was prepared during the operation of the Scheme. However, no such reporting has been identified that would assist in robustly completing the templates provided by the Commission.[71]

Services Australia provided the Commission with its understanding of the actual savings (including annualised savings and zeroed/refunded debts) achieved for each year of the program, which it advised was sourced from internal Agency Management Information reporting.[72] It noted that the "actual savings are derived from an annualised savings calculation that extrapolates payment reductions and cancellations resulting from compliance interventions over 26 fortnights" and that this "enables indicative reporting against Budgeted Savings targets internally and to Ministers and other agencies, including DSS and [the Department of] Finance".[73] Using this methodology, Services Australia advised that the estimated saving from 2015-16 to 2023-24 is $406.196 million.[74]

The **year-by-year** profile of the budgeted and actual savings is presented below. Savings or reductions in estimated welfare payments are presented as negative figures.



The **cumulative profile** of the budgeted and actual savings is presented below. Savings or reductions in estimated social security payments are presented as negative figures.



4 Incidental costs

For the period of 2014-15 to 2023-24 Commonwealth agencies expect to incur incidental costs of $41.281 million. This represents expenditure that was not directly funded by a Budget measure or estimates variation.

The majority of this expenditure is funded from within an agency's existing annual appropriation and does not represent additional expenditure to the Budget. However, this does represent the redirection of funding that would otherwise be used by agencies to deliver services and thus represents an opportunity cost.

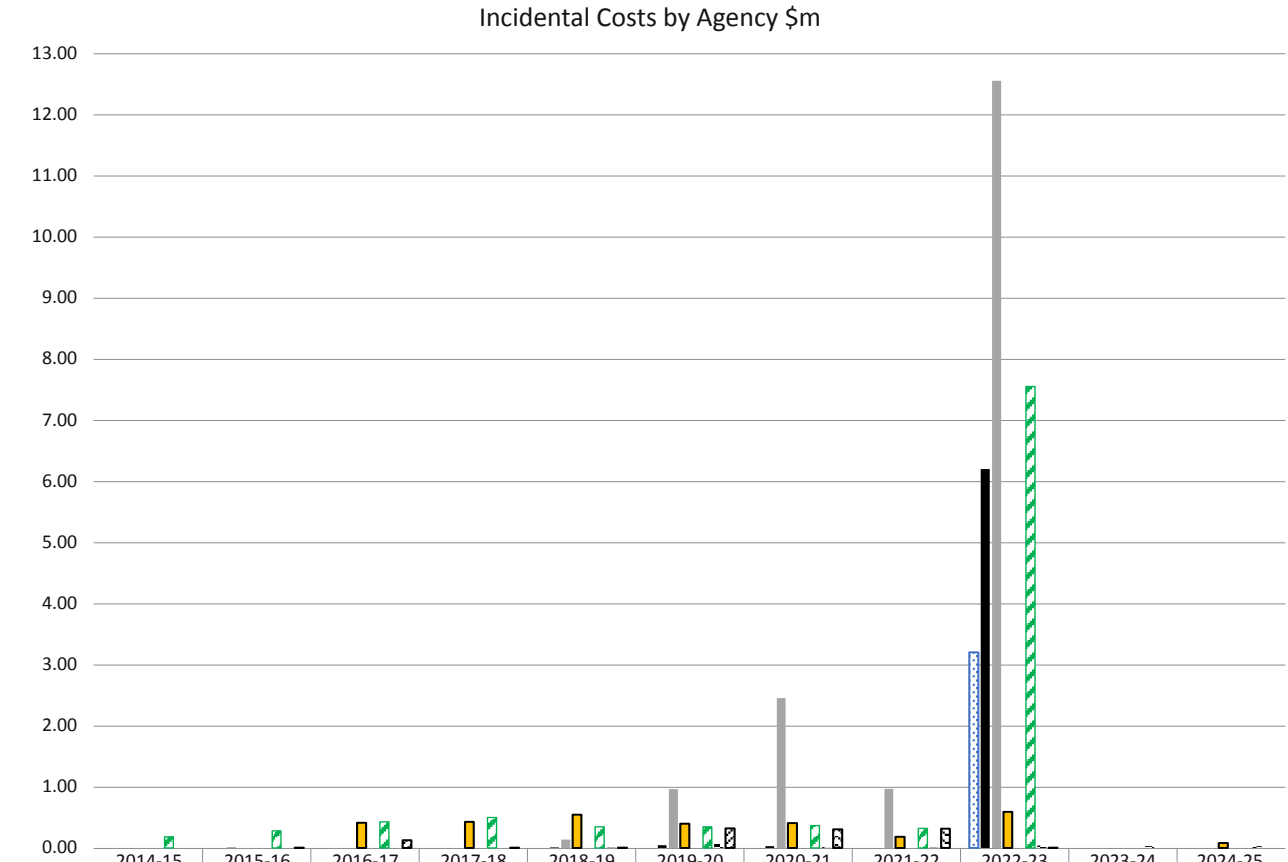
Some agencies have only identified those direct external costs, such as the procurement of services from outside the agency (e.g. legal advice), but some have also identified both the direct and indirect (i.e. allocated) internal costs associated with the Scheme. The identification of incidental costs was not possible in all cases, resulting in the total incidental costs estimate being understated.

The Senate and agencies such as the OCO and ANAO did not receive funding through any Scheme measures so all of their costs are incidental.

The agencies with the largest reported incidental expenditure were Services Australia at $17.11 million,[75] the ATO at $10.35 million,[76] and DSS at $6.30 million. None of these agencies received funding for the Scheme in the 2022-23 Budget. DSS advised that it had set aside funding of $5.8 million in 2022-23 to establish a Robodebt Royal Commission Taskforce and for other staffing costs.[77]

The incidental costs of the OAIC are not included in the table. The OAIC advised that it was unable to "generate a full, complete and accurate account of its expenditure on Robodebt related work."[78]

The incidental expenditure reported by agencies is set out below.



	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22	2022-23	2023-24	2024-25
AGD									3.21		
DSS					0.01	0.05	0.03		6.21		
Services					0.14	0.96	2.46	0.97	12.58		
OCO			0.41	0.42	0.55	0.40	0.41	0.18	0.59		0.08
Robodebt RC											
ATO	0.18	0.28	0.43	0.50	0.35	0.35	0.37	0.32	7.57		
ANAO - fin statements						0.06	0.01		0.04	0.03	0.03
Senate			0.13			0.32	0.31	0.32			

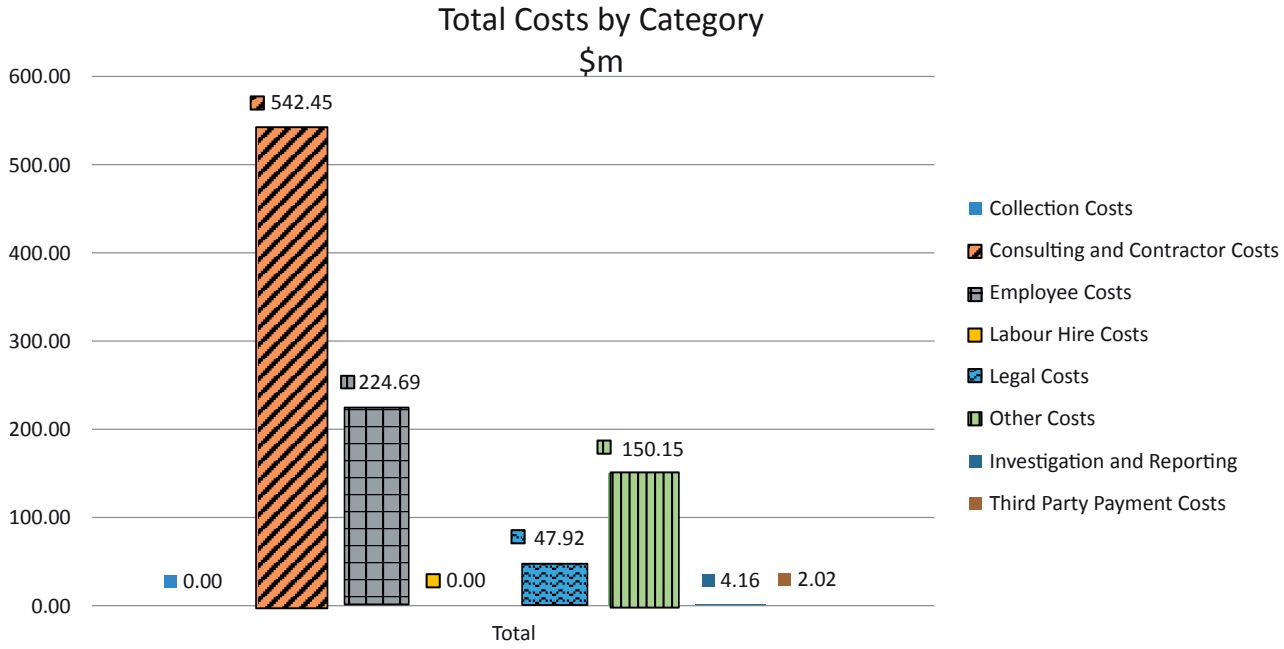
5 Categories of expenditure

This section presents the estimated actual reported expenditure that was either funded from a Budget measure, estimates variation or was reported as incidental expenditure by an agency.

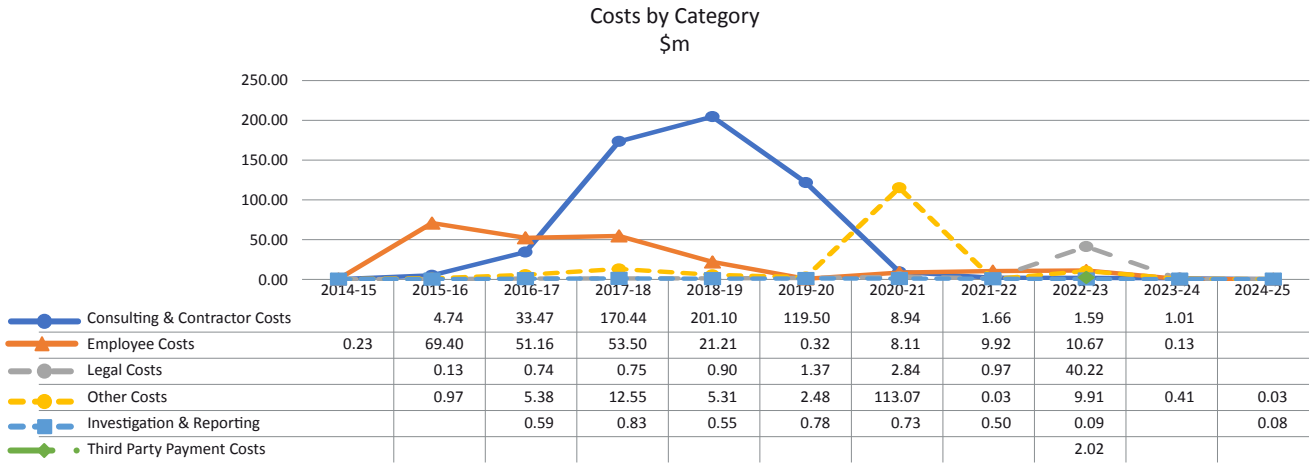
The estimated actual expenditure is broken down into various categories based upon definitions provided by the Commission to the agencies to achieve consistency in the reporting. However, agencies internal reporting systems do not necessarily capture information in this manner and so there remains some inconsistency in reporting, specifically regarding the costs reported against "consulting and contracting costs" and "labour hire costs."

These categories of expenditure do not include the refund of debt payments received and the write-off of debts raised by Services Australia.

The **total costs** reported by agencies were $971.391 million.



Distribution of these costs over the period 2014-15 to 2024-25:



5.1 Collection costs

Collection costs includes costs arising in connection with the engagement of individuals or entities not otherwise employed by the agency to perform debt collection or like services.

No agency reported a cost against this category despite the engagement of debt collection agencies to recover debts raised under the Scheme.

Services Australia noted that they are "unable to distinguish between amounts paid to External Debt Collectors for the purpose of Debt Collection related to social welfare debts and amounts paid to External Debt Collectors for the purpose of Debt Collection related to Robodebt Debts."

DSS noted that it has an internal debt function that had operating costs of $9.9 million from 2014-15 to 2021-22, primarily in staffing costs.[80] Further, it noted that the function existed prior to the Scheme and that it was unable to split the costs between the Scheme and other tasks.[81]

DHS separately provided an estimate of $11.610 million in debt collection costs associated with the Scheme. This cost is not included in the figures presented in this chapter. Further information is provided in the Failures of the budget process chapter.

5.2 Consulting and contracting

Consulting and contracting are all costs in connection with the engagement of professional consultants or contractors not otherwise employed by the agency, including for the purpose of:

- providing advice, guidance or recommendations, or
- undertaking any review, audit, investigation or inquiry.

This represents a significant component of expenditure of the Scheme, representing $542.45 million over the period 2014-15 to 2023-24.

Services Australia makes up the majority of the expenditure against this category, reporting $540.9 million. However, the total expenditure against this category appears to be overstated. Services Australia advised it included labour hire costs within the consulting and contracting cost category because it was unable to separately report this type of expenditure.[82]

5.3 Employee expenses

Employee expenses are all costs in connection with the engagement of individuals employed by the agency.

This represents a significant component of expenditure on the Scheme, representing $224.69 million over the 2014-15 to 2023-24, the major contributor being Services Australia at $210.56 million.[83]

5.4 Labour hire costs

Labour hire costs are all costs in connection with the engagement of individuals employed by a firm which primarily exists to provide labour hire workers.

No agency reported expenditure against this category. Services Australia advised that it had included "labour hire" in the consulting and contractor category, because it was unable to separately report this type of expenditure.[84]

5.5 Legal costs

Legal costs are all costs in connection with the engagement of legal professionals not otherwise employed by the agency, including for the purpose of:

- providing advice, guidance or representation,
- conducting, participating in, responding to, or settling litigation,
- participating in any external review, audit or inquiry, or
- participating in, responding to, or otherwise engaging with this Commission.

Expenditure on legal expenses, including those associated with this Commission, totalled $47.92 million from 2014-15 to 2023-24, the most significant contributor to this cost category being Services Australia at $20.19 million.[85] The majority of legal costs were incurred in 2022-23 by Services Australia.

In addition, there are legal costs incurred by the Commonwealth that are reported under the category of third party costs.

5.6 Investigations and reporting

Investigations and reports costs are all costs directly associated with any investigation, audit, review or report undertaken or prepared by an agency in connection with the Scheme. This represents $4.16 million over the 2014-15 to 2023-24. Expenditure was reported against this category by OCO, ANAO and the Senate.

AAT said its Case Management Systems do not track or link cases to measures and it therefore cannot track the actual case numbers and expenditure incurred in relation to the Scheme. As such, the Commission has assumed the net funding provided to AAT through Budget measures in relation to the Scheme has been fully expensed and is reported against this category.

The OCO accounted for $2.55 million of the cost in this category, which included its own motion investigations into the Scheme and the investigation of 2959 complaints relating to the Scheme.[86] The own motion investigations included:

- the 2017 report, C*entrelink's Automated Debt Raising and Recovery system – A report about the Department of Human Services's Online Compliance Intervention System for Debt Raising and Recovery*
- the 2019 report, Centrelink's Automated Debt Raising and Recovery System – I*mplementation Report*, and
- the 2021 report, *Services Australia's Income Compliance Program: A report about Services Australia's implementation of changes to the program in 2019 and 2020*.

5.7 Third party costs

Third party costs are the legal assistance provided to current and former ministers, as provided by s 42 of the *Parliamentary Business Resources Regulations 2017* (Cth) (the Regulations). Under the Regulations the government can provide financial assistance to applicants for, amongst other things, an inquiry into matters involving the applicant or the conduct of the applicant.

As at 20 April 2022 AGD reported that $2.024 million (GST exclusive) had been expended against 10 approvals granted under the Regulations.[87]

5.8 Other costs

Other costs are costs arising in connection with the engagement of individuals or entities not otherwise employed by the agency, including any costs associated with:

- overheads (for example, corporate services), and
- costs not otherwise specified.

This represents a significant component of expenditure under the Scheme: $150.15 million over the 2014-15 to 2023-24 period. The most significant contributor was Services Australia, which reported $139.93 million. This includes the settlement of $112 million approved by the Federal Court in the Prygodicz case.[88]

1 Exhibit 4-5200 - RBD.9999.0001.0395, Order_P_VID1252_2019_1786986.
2 Exhibit 4-5201 - RBD.9999.0001.0392, 201119-prygodicz-final-settlement-deed and Exhibit 4-5200 - RBD.9999.0001.0395, Order_P_VID1252_2019_1786986.
3 Exhibit 5-9367 – CTH.9999.0001.0148_R, Response NTG-0146 [p 9]
4 Exhibit 9477 - DSS.9999.0001.0054, Attachment E NTG-0232 and Exhibit 9476 - DSS.9999.0001.0051_R, Signed Response NTG -0232 [p 3: para 19].
5 Exhibit 9477 - DSS.9999.0001.0054, Attachment E NTG-0232.
6 Exhibit 9476 - DSS.9999.0001.0051_R, Signed Response NTG -0232 [p 3: para 16].
7 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 [p 6: para 3.2] and Exhibit 9367 – CTH.9999.0001.0148_R, Response NTG-0146.
8 Exhibit 1-1234 – RBD.9999.0001.0001, Budget Measure 2015-16, 12 May 2015 [p116].
9 Exhibit 1-1234 – RBD.9999.0001.0001, BP2_consolidated, 12 May 2015 [p169].
10 Exhibit 2 - 2022 - PMC.001.0002.017_R, PMC-001-0002-017_Redacted [p 22].
11 Exhibit 9477 - DSS.9999.0001.0054, Attachment E NTG-0232, Exhibit 9476 - DSS.9999.0001.0051_R, Signed Response NTG -0232 [p 3: para 19] and Exhibit 9905 - CTH.4000.0075.1048_R - DSS Costing Agreement 11779 Strengthen Integrity PAYG updated.
12 Exhibit 9374 - ATO.9999.0001.0011_R- Signed Statement in response to NTG-0250 and Exhibit 9375 - ATO.9999.0001.0013 – Data Collection Sheet.
13 Exhibit 1-1234 – RBD.9999.0001.0001, BP2_consolidated, 12 May 2015 [p169].
14 Exhibit 9476 - DSS.9999.0001.0051_R, Signed Response NTG -0232 and DSS.9999.0001.0060, Attachment A.
15 Exhibit 10029 - DSS.5151.0001.0016, 2015 - 16 MYEFO (employment income matching) - 12095 DSS Agreement Nov15 and Exhibit 10026 - DSS.9999.0001.0060, Attachment A NTG-0232 [Worksheet B].
16 Exhibit 2-2672 - PMC.001.0003.012, ATTACHMENT B.1 Extension of Employment Income Matching.
17 Exhibit 2-2672 - PMC.001.0003.012, ATTACHMENT B.1 Extension of Employment Income Matching.
18 DSS.5151.0001.0016, 2015 - 16 MYEFO (employment income matching) - 12095 DSS Agreement Nov15 and DSS.9999.0001.0060, Attachment A NTG-0232 [Worksheet B]
19 Exhibit 2-2674 - PMC.001.0007.001_R, ATTACHMENT A.3 EXTEND ENHANCED WELFARE PAYMENT INTEGRITY - INCOME DATA MATCHING [p 1 - 3].
20 Exhibit 10028 - DSS.9999.0001.0057 - Attachment C NTG-0232..
21 Exhibit 9476 - DSS.9999.0001.0051_R, Signed Response NTG -0232 and DSS.9999.0001.0060, Attachment A .
22 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.
23 Exhibit 9476 - DSS.9999.0001.0051_R, Signed Response NTG -0232 and DSS.9999.0001.0060, Attachment A . xhibit 9857 - RBD.9999.0001.0537* – 2018 – 2019 Budget Paper No. 2 [p 178] and Exhibit 2-2677 - PMC.001.0013.004_R - Attachment A1.2 Expanding Social Welfare Debt Recovery.
24 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.
25 Exhibit 2-2577 - SMO.0001.0002.0329 - 2016-17-MYEFO-combined [p 189].
26 Exhibit 2-2674 - PMC.001.0007.001_R, ATTACHMENT A.3 EXTEND ENHANCED WELFARE PAYMENT INTEGRITY - INCOME DATA MATCHING [p 1 - 3].
27 ExDSS.9999.0001.0057 - Attachment C NTG-0232 .
28 Exhibit 2-2674 - PMC.001.0007.001_R, ATTACHMENT A.3 EXTEND ENHANCED WELFARE PAYMENT INTEGRITY - INCOME DATA MATCHING [p 8 - 10].
29 The Commonwealth confirmed these budget figures on 1 July 2023..
30 Exhibit 9476 - DSS.9999.0001.0051_R, Signed Response NTG -0232, Exhibit 10026 - DSS.9999.0001.0060, Attachment A and Exhibit 9477 - DSS.9999.0001.0054, Attachment E NTG-0232 and Exhibit 9476 - DSS.9999.0001.0051_R, Signed Response NTG -0232 [p 3: para 19].
31 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.
32 The Commonwealth confirmed these budget figures on 1 July 2023.
33 Exhibit 10030 - CTH.4000.0074.0757 – Costings Agreement: interest to be assigned to customer.
34 Exhibit 10031 - CTH.4700.0002.1699- Compliance Reversal 008458 008459 and 008460.
35 The Commonwealth confirmed these budget figures on 1 July 2023.
36 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.
37 Exhibit 9857 - RBD.9999.0001.0537* – 2018 – 2019 Budget Paper No. 2 [p 178] and Exhibit 2-2677 - PMC.001.0013.004_R - Attachment A1.2 Expanding Social Welfare Debt Recovery.
38 Exhibit 2-2677 - PMC.001.0013.004_R - Attachment A1.2 Expanding Social Welfare Debt Recovery.
39 Exhibit 9071 - CTH.9999.0001.0205, [Final] Services Australia - Response to NTG-0231 - Data Collection Template [Worksheet B].

40 In the 2020 - 2021 Budget, the Government announced the winding back of the scheme through the budget measure 'Changes to the Income Compliance Program'.
41 Exhibit 2-2677 - PMC.001.0013.004_R - Attachment A1.2 Expanding Social Welfare Debt Recovery.
42 Exhibit 2-2677 - PMC.001.0013.004_R - Attachment A1.2 Expanding Social Welfare Debt Recovery.
43 Exhibit 9857 - RBD.9999.0001.0537 – 2018 – 2019 Budget Paper No. 2 [p 178].
44 Exhibit 9476 - DSS.9999.0001.0051_R, Signed Response NTG -0232, DSS.9999.0001.0060, Attachment A and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.
45 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.
46 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.
47 Exhibit 9854 - RBD.9999.0001.0534* – Budget Paper 2021 – 2022 No. 2 [p 269].
48 Exhibit 2 - 2682, PMC.001.0027.005_R - Attachment A2 Refund of ATO averaged debts.
49 Exhibit 2 - 2682, PMC.001.0027.005_R - Attachment A2 Refund of ATO averaged debts.
50 Exhibit 2 - 2682, PMC.001.0027.005_R - Attachment A2 Refund of ATO averaged debts.
51 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.
52 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.
53 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.
54 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.
55 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet..
56 Exhibit 9854 - RBD.9999.0001.0534*– 2021 – 2022 MYEFO [p 174]; Exhibit 2 - 2682, PMC.001.0027.005_R - Attachment A2 Refund of ATO averaged debts.
57 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.
58 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.
59 Exhibit 9852 - RBD.9999.0001.0532*- 2022 - 2023 October Budget Paper No. 2 [p 54].
60 Exhibit 9073 - AGD.9999.0001.0026 – NTG-0237 Response and Exhibit 9074 - AGD.9999.0001.0028 – NTG-0237 Data Collection Template – AGD Robodebt.
61 Exhibit 9853 - RBD.9999.0001.0533* - 2023 – 2024 Budget [p 60].
62 Exhibit 1-1234 – RBD.9999.0001.0001, BP2_consolidated, 12 May 2015 [p169], Exhibit 10034 - CDF.0001.0004.0643, Costings Agreement - AAT extend enhanced welfare integrity income data matching, Exhibit 10033 - CDF.0001.0004.0627, Costings Agreement - AAT expand tax return garnishee, Exhibit 10032 - DSS.5089.0001.2562, Costings Agreement - AAT return garnishee proposal and Exhibit 10035 - CDF.0001.0004.3780, Costings Agreement: Income data matching compliance to 2021 - 2022.
63 Exhibit 2-2594 - PMC.0001.0010.8957_R, R - UPDATE ON THE IMPLEMENTATION OF THE GOVERNMENT'S WELFARE COMPLIANCE MEASURES and CTH.4700.0002.1298, Costings Agreement 005316 Compliance Reviews – PAYG – Finance agreement .
64 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.
65 Exhibit 2-2588 - PMC.0001.0010.8447_R, MATERIAL ESTIMATES VARIATION.
66 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 [p 6: para 3.5].
67 Exhibit 5-9367 – CTH.9999.0001.0148_R, Response NTG-0146 [p 9].
68 Exhibit 9477 - DSS.9999.0001.0054, Attachment E NTG-0232 and Exhibit 9476 - DSS.9999.0001.0051_R, Signed Response NTG -0232 [p 3: para 19].
69 Exhibit 9477 - DSS.9999.0001.0054, Attachment E NTG-0232.
70 Exhibit 9476 - DSS.9999.0001.0051_R, Signed Response NTG -0232 [p 3: para 16].
71 Exhibit 9476 - DSS.9999.0001.0051_R, Signed Response NTG -0232 [p 3: para 17].
72 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 [p 6: para 3.2] and Exhibit 9367 – CTH.9999.0001.0148_R, Response NTG-0146.
73 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 [p 6: para 3.11].
74 Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet [Worksheet B].
75 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.

76 Exhibit 9374 - ATO.9999.0001.0011_R- Signed Statement in response to NTG-0250 and Exhibit 9375 - ATO.9999.0001.0013 – Data Collection Sheet.
77 Exhibit 9021 - DSS.9999.0001.0069 – Supplementary Statement NTG-0232.
78 Exhibit 9869 – RBD.9999.0001.0530 – Response to draft NTG-0251.
79 Exhibit 9492 - CTH.9999.0001.0221, Response to NTG-0259 [p 3: para 1.3].
80 Exhibit 9476 - DSS.9999.0001.0051_R, Signed Response NTG -0232 [p 4: para 24(a)].
81 Exhibit 9476 - DSS.9999.0001.0051_R, Signed Response NTG -0232 [p 4: para 24(b)].
82 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 [p 7: para 4.3].
83 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.
84 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 [p 7: para 4.3].
85 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.
86 Exhibit 4-7133 - IAN.9999.0001.0002_R - 20230222 _ NTG-0203 - Signed statement of Iain Anderson(47221401.1)_0
87 Exhibit 9073 - AGD.9999.0001.0026 – NTG-0237 Response and Exhibit 9074 - AGD.9999.0001.0028 – NTG-0237 Data Collection Template – AGD Robodebt.
88 Exhibit 4 – 5200 - RBD.9999.0001.0395, Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.

Chapter 15: Failures in the Budget process

1 Overview of the Budget process

The Budget process is the framework through which the Australian Government's spending on policy priorities is considered and authorised by Cabinet and Parliament.[1] As government activities are funded by taxpayers, it is appropriate that there is proper oversight of, and accountability for, spending. [2]

The Budget is the government's annual statement of how it plans to collect and spend public money. [3] During the Budget process, ministers can bring forward new policy proposals (NPPs) for the government's consideration. [4] Each year, the government publishes Budget papers that identify new or amended policies, and how public money will be allocated across the departments involved in the delivery of those policies. [5]

Outside of the preparation and delivery of the annual Budget, there are two other significant budget reporting documents delivered by the government each year:

- The Mid-Year Economic and Fiscal Outlook (MYEFO) – Delivered in around December, MYEFO provides an update on the performance of the Budget and the economic outlook midway through the financial year. [6] Ministers are able to bring forward NPPs for consideration and inclusion in MYEFO, in a similar manner as in the Budget process. [7]
- The Final Budget Outcome (FBO) – Delivered shortly after the end of the financial year, the FBO reports on the fiscal outcomes for the government over the previous financial year. The FBO shows how much the government actually spent or received, as against the amount that was projected in the Budget and MYEFO. [8]

The annual Budget cycle, revolving around the three main annual budget reporting processes (being the Budget, MYEFO and the FBO) is depicted in Figure 1 below.

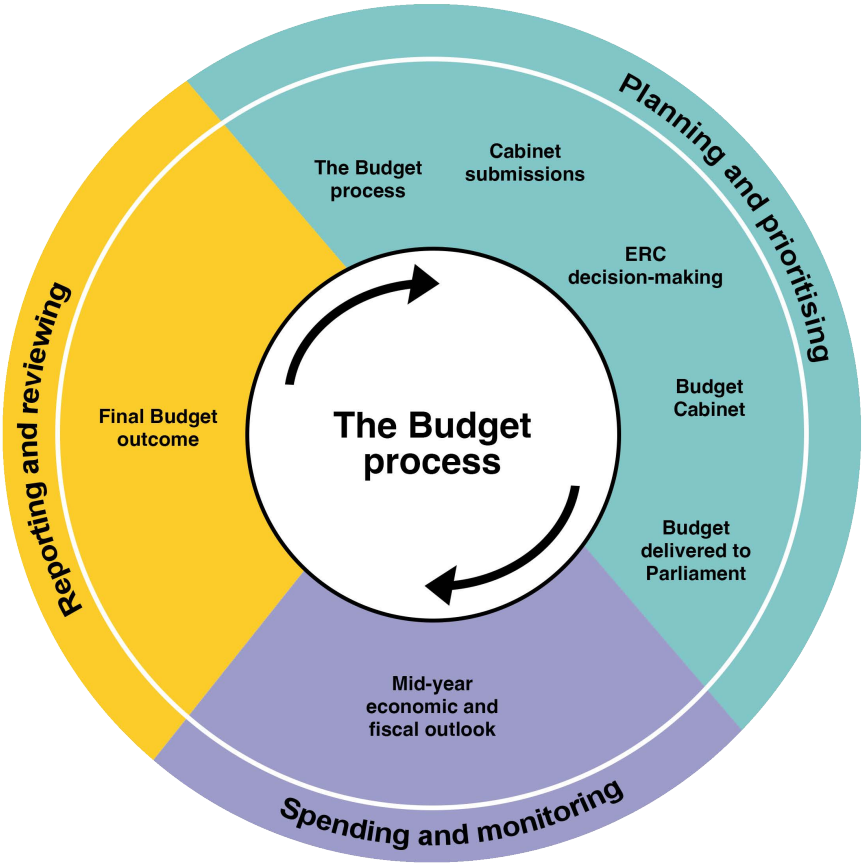


Figure 1: Illustration of the annual Budget cycle [9]

The Budget process is governed by a set of rules endorsed annually by Cabinet, referred to as the Budget Process Operational Rules (BPORs). [10] The BPORs set out the major administrative and operational requirements that underpin the management of the Budget process, including rules relating to the development and costing of NPPs. [11] The Department of Finance (Finance) issues further guidance and instructions in the form of Estimates Memoranda, [12] including a timetable for each Budget cycle. [13]

Although the Budget timetable can vary from year to year, the Budget process typically commences in November or December each year and culminates in May of the following year, with the Treasurer delivering the Budget to the Parliament and the public. [14] The Budget process begins with the Cabinet Minister responsible for each government portfolio sending Budget letters to the Prime Minister outlining the draft policy proposals that they intend to bring forward in the upcoming Budget. [15] The Expenditure Review Committee (ERC), a committee of Cabinet, then considers the Budget letters and any anticipated economic pressures and decides the government's Budget priorities which are communicated to Cabinet ministers. [16]

From around January to March each year, in response to the government's Budget priorities, departments in each portfolio prepare a Portfolio Budget Submission, a collection of NPPs to be considered by the ERC for inclusion in the Budget. [17] The Cabinet Minister for each portfolio is responsible for bringing forward their Portfolio Budget Submission to the ERC. [18] Proposals that involve a significant service delivery component are often prepared by the Department and Minister responsible for the delivering the proposal. However, it is the responsibility of the Cabinet Minister bringing the submission to the ERC to ensure that it provides sufficient detail on risk and implementation challenges, allowing Cabinet to make an informed decision on the proposal. [19] This process can only operate effectively where Portfolio Budget Submissions are subject to and reflect the outcome of appropriate consultation with agencies affected by the proposals (to identify any implementation risks) and Finance (to identify any financial risks). Ministers bringing forward submissions to Cabinet are responsible for ensuring that the consultation necessary to allow Cabinet to make a properly informed decision occurs at both ministerial and departmental levels. [20]

The Budget process incorporates a mandatory two-stage consultation process during the development of Portfolio Budget Submissions. [21] The process comprises: [22]

- The circulation of an exposure draft of the Portfolio Budget Submission to the central agencies (the Department of Prime Minister and Cabinet, Finance and the Treasury), the Attorney-General's Department [23] and any other agencies that will be affected by the proposed policies. In response, each agency provides exposure draft comments, suggesting any amendments to the Portfolio Budget Submission that they consider necessary.
- The circulation of a finalised draft submission to the central agencies and affected agencies for coordination comments which are incorporated into the final version of the submission. The coordination comments advise Cabinet as to whether each agency supports the proposals put forward in the submission.

Finance performs an important function within the Budget process by providing policy and costings advice on expenditure to the ERC. [24] During the preparation of Portfolio Budget Submissions, agencies that will be affected by the proposals are required to consult with Finance in relation to the estimated expenses associated with each NPP. Finance then negotiates with each agency to reach an agreed position on the projected costs or savings expected to result from the proposal. [25] This process is designed to test the parameters of the proposal and the assumptions underlying the calculation of projected costs or savings. Agreement by Finance to a costing does not constitute support for the proposal itself. [26]

Finance communicates its substantive position on each proposal within a Portfolio Budget Submission by providing a Green Brief to be considered by the ERC alongside each Portfolio Budget Submission. The Green Brief summarises the key elements of the proposals contained in the Portfolio Budget Submission, the associated financial implications, and Finance and central agency views on each proposal. [27] The Green Brief is designed to provide a succinct and accurate summary, and independent assessment of, proposals being considered by the ERC. [28]

Equipped with the Green Brief, the ERC meets to consider Portfolio Budget Submissions in around March to April each year. [29] To ensure that the ERC is properly informed as to the details of the proposals under consideration, junior ministers (for instance, the Minister for Human Services) and senior public servants may be co-opted to attend an ERC meeting if they have a particular interest or involvement in a proposal under consideration.[30] Having considered the Portfolio Budget Submission and the Green Brief, the ERC will decide which NPPs will be included in the upcoming Budget. Following the ERC meetings, the Cabinet meets to consider the ERC's approval of particular NPPs for inclusion in the Budget. [31]

The Budget is typically presented to the Parliament and the public in May each year, with the Budget papers [32] setting out the NPPs approved by the ERC and Cabinet and the associated costings for each policy over the coming financial year and the forward estimates (the following three financial years). [33]

1.1 Assessment of legal risks in the Budget process

The BPORs stipulate that certain legal risks should be assessed when developing new government policies. In particular, the Australian Government Solicitor (AGS) is to advise on: [34]

- the Constitutional risk associated with the proposal, and
- the proposed source of legislative authority for the expenditure involved in the proposal.

There is no equivalent requirement under the BPORs for legal advice to be given by AGS or by departmental lawyers on the question of legality more broadly and whether any change to legislation would be required to carry out the proposal.

Kathryn Graham (national leader, Office of General Counsel, AGS) gave evidence as to the role of AGS in the Budget process and the scope of the advice ordinarily given by AGS. As Ms Graham explained, AGS ordinarily considers NPPs at two distinct stages in the Budget process, identified below. [35]

Stage one: Constitutional and legislative authority risk advice

In the first instance, all NPPs involving proposed expenditure are reviewed by AGS for the purpose of providing a constitutional and legislative authority risk assessment in respect of expenditure. [36] Ms Graham describes that assessment as being: [37]

> …a narrow and specific one relating to constitutional risk; it is not directed to broader questions of lawfulness and legal risk.

The assessment provided by AGS at this first stage addresses the following issues:

- whether a court would conclude that the Commonwealth's legislative powers would support legislation authorising the proposed expenditure, or whether it is within the Commonwealth's non-statutory executive power, and
- whether a court would conclude that legislation is required to authorise the expenditure, and if so, whether there is existing legislation which would support the expenditure.

AGS may identify potential legal issues concerning the substance of the proposal if they are "very obvious" on the face of the NPP. [38] However, even the identification of obvious legal issues is rare in practice, given the confined scope of the assessment, the complexity and volume of NPPs presented to AGS and the short timeframes in which the advice is sought. [39]

Stage two: Advice on Portfolio Budget submissions

The second stage of AGS's involvement in the Budget process is the review of Portfolio Budget Submissions that are circulated to the AGD for comment during the exposure draft and coordination comment processes. As a matter of practice, the AGD sends all submissions that involve expenditure to AGS for consideration.[40] When reviewing a Portfolio Budget Submission, AGS will typically: [41]

- identify any previous AGS advice of relevance to the submission and check that the constitutional and legislative authority risk ratings previously given by AGS have been accurately reflected in each NPP
- provide a legislation certificate that states whether legislation will be necessary to implement any of the proposals in the Portfolio Budget Submission, without identifying which particular NPPs would require legislative change, and
- if time permits, identify (without providing advice on) legal or constitutional issues raised by the Portfolio Budget Submission. If time does not permit a thorough consideration of whether these issues arise, this is noted by AGS.

The functions performed by AGS at this stage are necessarily limited by the level of detail contained in the NPPs and the time available to review the Portfolio Budget Submission. [42] Ms Graham explained that the time available for AGS to review a Portfolio Budget Submission is usually around one to two business days, but is regularly shorter than this, and can be as little as one to two hours. [43] Given that Portfolio Budget Submissions, particularly for the Social Services portfolio, often contain dozens of NPPs and run for hundreds of pages, there are obvious practical limitations to the legal issues that can be identified by AGS in this time. As is noted by Ms Graham:

> Practically speaking, when we are reviewing a portfolio budget submission there is rarely time to do more than confirm that our constitutional and legislative authority risk assessment in respect of expenditure has been accurately reflected in each NPP attached to the cabinet submission.

The new policy proposal checklist

Each NPP included in a Portfolio Budget Submission is accompanied by an NPP Due Diligence Checklist (Checklist). The Checklist is a standard form completed by the department preparing the NPP to ensure that certain matters have been dealt with by the time the NPP reaches the ERC. The NPP Checklist includes a section titled Legislation, which comprises the following three questions: [44]

> 2.0 Has the Australian Government Solicitor assessed the constitutional and legislative authority risk?
>
> 2.1 If yes, has the advice been provided to Finance?
>
> 2.2 Is legislation required?

The Commission heard conflicting evidence on the meaning of the question "is legislation required" in the Checklist. The ambiguity of that question and the way in which it was variously understood is further considered later in this chapter.

2 Development of the Robodebt measure

The Robodebt Scheme (the Scheme) was first introduced in the 2015–16 Budget as a component of the Strengthening the Integrity of Welfare Payments Budget measure (the SIWP measure). [45] The operation of the Scheme was extended over the following years through measures introduced in the 2015–16 MYEFO, 2016–17 MYEFO and 2018–19 Budget. This chapter focuses on the development of the SIWP measure within the 2015–16 Budget process, as this was the period in which the Scheme was initially considered and approved by government. The development and costing of the SIWP measure and subsequent measures is detailed in the Economic Costs chapter.

2.1 Tight timeframes

In the context of the 2015–16 Budget timetable, the development of the SIWP measure took place within an accelerated timeframe. The Hon Scott Morrison MP (as Minister for Social Services) instructed the Department of Human Services (DHS) to pursue the proposal on 20 February 2015 and the final NPP was presented to the ERC little more than four weeks later, on 25 March 2015. The standard timetable for the 2015–16 Budget process specified that by 20 February 2015, the costings for all NPPs should have been agreed by Finance and the NPPs should have been circulated to agencies affected by the proposals as part of the exposure draft and coordination comment process. [46]

A number of people involved in the creation of the SIWP measure accepted that the measure was developed within tight timeframes, [47] and email exchanges in the period in which the measure was developed confirm as much. [48] However, the evidence before the Commission also indicates that this was not unusual in the development of new government policies. [49] For instance, Senator the Hon Marise Payne acknowledged that the SIWP proposal was brought forward later than is usual but considered that it was not "extremely late" and noted that she had, in her experience, "seen much later".[50] Catherine Dalton (acting director, Payment Integrity and Debt Strategy Section, DSS) Anthony Barford (policy manager, Debt Policy, Social Security Performance and Analysis Branch, DSS), Kathryn Campbell (secretary, DHS) and Scott Britton (national manager, Compliance Risk Branch, DHS), who all had experience in preparing Budget measures, said they often dealt with quick turnaround periods in the preparation of Budget proposals. [51]

The Commission accepts that constrained timeframes may not be unusual in the Budget process. However, it is clear that the interval during which the SIWP measure was developed and approved was too compressed, given its scale and complexity. Mark Withnell (general manager, Business Integrity, DHS) gave evidence that the SIWP proposal came forward "much later" than was normal and that the progression of the proposal was "very quick" given the size of the measure. [52] On the size of the measure, he said: [53]

> In terms of scale, significantly larger. And the transformative nature of it was significantly larger. We had done another two sort of more transformational Measures that were much smaller than this, and we had much more lead time before we even put the measure forward.

Mr Britton similarly acknowledged that the SIWP measure was a "significant measure" which comprised "a number of complex components." [54] When asked how remarkable the SIWP was as a Budget measure, Mr Britton said that "[i]t was the biggest set of measures I think I've ever seen in my 30-odd years." [55]

2.2 Influence of Human Services in the development of the measure

Ministers ordinarily engage with their own department in the development of new government policies, receiving briefs from and giving direction to their department where necessary. However, this is not always the case and, in some circumstances, ministers may work with other departments in the development of proposals. At the time the SIWP proposal was developed, there was an arrangement in place between DSS

and DHS which contemplated NPPs being developed by DHS within the Budget process. [56] Serena Wilson (deputy secretary, DSS) acknowledged in her evidence that some proposals would come directly from DHS to be included in the overarching Portfolio Budget Submission. [57]

Although the Minister for Social Services took the SIWP measure to the ERC as part of the Social Services Portfolio Budget Submission, the evidence before the Commission indicates that the measure was one of the few designed and developed by DHS. DHS's involvement and influence in the development of the SIWP measure is demonstrated by the following matters:

- DHS drafted the June 2014 Minute in which the PAYG data matching proposal that became the core element of the SIWP measure was first proposed. [58]
- DHS drafted the Executive Minute in which the core elements of the SIWP proposal were first presented to the Social Services Minister as options for strengthening the integrity of the welfare system. [59]
- Ms Campbell accepted it as being one of the proposals that DHS was responsible for drafting.[60]
- The Human Services Minister and DHS Secretary attended the ERC meeting on 25 March 2015 where the SIWP measure was approved for inclusion in the 2015–16 Budget. [61]
- The SIWP measure was one of four expenditure measures listed under the heading Human Services in the 2015-16 Budget papers, as distinct from the 47 other measures listed under the heading Social Services. Ms Campbell acknowledged that another measure listed under Human Services, the Welfare Payment Infrastructure Transformation measure, was a measure that DHS "took forward." [62] The SIWP measure falls under the same category as that measure and should be similarly regarded as having been advanced by DHS.

2.3 Scale and significance of the measure

Not only was the SIWP measure one of the few measures taken forward by DHS in the 2015-16 Budget, it was also, as a matter of historical fact, one of the most significant savings measures in that Budget.

The SIWP measure was expected to achieve overall government savings of $1.7 billion over five years. [63]

The Employment Income Matching element of the measure (also referred to as the PAYG proposal, and the element that introduced the Scheme) accounted for the vast majority of these savings and was projected to save the government approximately $1.5 billion. [64]

Of the four Budget measures under Human Services in the 2015-16 Budget, the SIWP measure was by far the most financially significant. [65] The savings associated with the SIWP measure were more than 30 times greater than those of the only other savings measure put forward by DHS in the 2015-16 Budget. [66] The next largest savings measure listed under the Human Services was projected to achieve savings of $55.1 million over four years.

The savings associated with the SIWP measure were projected to be accrued by DSS by way of a reduction in its administered appropriations, with the majority of the implementation expenses associated with the measure to be incurred by DHS. [68] For DHS, the SIWP measure involved expenses of $204.8 million and related capital of $2.3 million over five years. [69] Although there were approximately 50 other measures in the 2015-16 Budget that affected DHS's net expenditure, the SIWP measure involved the largest expenditure for DHS of all of those measures.[70]

In terms of the magnitude of the projected government savings, the SIWP measure was second in the 2015-16 Budget only to the Social Security Assets Test – Rebalance asset test thresholds and taper rate measure, which involved projected savings of $2.4 billion. [71] The overall impact of the 2015-16 Budget on DSS expenditure was a net saving of $661.8 million. [72] Without the inclusion of the SIWP measure, the overall impact of the 2015-16 Budget on DSS expenditure would have been an increase in expenditure of $1.3 billion.

The "one of many" fallacy

Some DHS employees sought to minimise the significance of the SIWP measure by reference to the breadth of the 2015–16 Budget and the number of other measures that were put forward by the Social Services Portfolio in that Budget. [73]

For instance, when asked if it was obvious to her that there would have to be a legislative change to the basis of social security entitlements in order for the SIWP proposal to work, Ms Campbell responded: [74]

> I don't recall whether or not I focused on that…I accept in hindsight, this should have been a key focal point for me, but there were many other Measures being implemented in [the 2015-16 Budget].

When it was put to Ms Campbell that she was taking a risk as secretary by not satisfying herself of the lawfulness of the implementation of the proposal, she responded: [75]

> So if there are many new policy proposals – and there are some 40 – I didn't have sufficient time to go through every single one and work with every other portfolio we delivered programs for to determine what those issues were.

Similarly, when Ms Campbell was asked whether she noticed the inconsistency between the description of the proposal in the Executive Minute and the NPP, she responded: [76]

> No, because this was one of the 58 measures that were finally agreed in the Budget which DHS was involved in. And I expect there were many more measures which were not finally agreed. So I am concerned, Counsel, that you indicate that this is the only thing we were doing at the time. And so, therefore, I should have – and I wish I had picked up that there were changes. But there were many such proposals at that time, and I necessarily relied on others to run some of these processes.

Ms Campbell gave evidence that, on the face of the 2015–2016 Budget papers, there was "a number of other very big measures with a number of recipients that [she] was probably focused on as well". [77] In the context of her preparation to attend the ERC meeting on 25 March 2015, it was put to Ms Campbell that there was in fact only four DHS Budget measures in the 2015-16 Budget, and approximately 40 DSS Budget measures. [78] In response to this proposition, Ms Campbell argued that there was "a large number of proposals" for which DHS would receive funding in the 2015-16 Budget. [79] As much is clear on the face of Budget Paper No. 2.[80] What this does not recognise, though, is that the SIWP measure was initiated, designed and developed predominantly by DHS, and although DHS received funding for a significant number of measures in the 2015-16 Budget, those measures would not necessarily have required the same level of attention from DHS.

It is true that the development of the SIWP measure was not the only thing that DHS or DSS were doing at the time. However, adopting the "one of many" attitude diluted the true scale and significance of the SIWP measure in comparison to the other measures that DHS and DSS were involved with at the time.

3 Ambiguity and missed opportunities

The Budget process is designed to safeguard Cabinet decision-making by ensuring the rigorous assessment of new government proposals and the identification of associated risks and impacts. Mr Morrison characterised the Cabinet process as being "very exhaustive" and said: [81]

> …the Cabinet process is built to ensure that ministers can have confidence that when submissions come before it that those checks and balances have been applied through the workings of [the APS]…

The Hon Alan Tudge gave comparable evidence in relation to his understanding of the Cabinet process, describing it as "a rigorous process which always has a legal overlay through it." [82]

In the case of the SIWP measure, it is clear that the Cabinet process did not meet these expectations. There were several failures in the process that meant that Cabinet was not in a position to properly understand the nature of the proposal and the legal, financial and policy risks associated with it.

3.1 The identification of legal risks

With respect to the identification of legal risks associated with the SIWP proposal, the Budget process fell down in two interrelated respects.

1. The SIWP proposal was able to proceed to the ERC without the NPP indicating that legislative change would be required to implement the proposal, despite the existence of legal advice to that effect.
2. The question "is legislation required" within the Checklist was relied upon as meaning that legal advice had been obtained and was to the effect that the implementation of the proposal would not require legislative change.

Sidestepping legal advice

The 2014 DSS legal advice concluded that the proposal to use income averaging to determine and raise debts would not be consistent with the existing legislative scheme. [84] Murray Kimber (branch manager, DSS) agreed that the advice "strongly recommended" that the proposal did not fit within the existing legislative framework. [85] Ms Pulford similarly agreed that the "gist of the DSS view [in relation to the proposal the subject of the 2014 DSS legal advice] was a very strong no". [86] The events surrounding the provision of the 2014 DSS legal advice are detailed in chapter 2014: Conceptual Development.

In the process of developing the NPP in early 2015, DSS sought further advice on the extent of the legislative changes required to implement the proposal. [87] The further advice provided by David Hertzberg (principal legal officer, DSS) on 4 March 2015 raised new issues in relation to the legality of the data-matching process, and referred back to the previous legal advice provided by DSS. [88] Mr Hertzberg's advice noted: [89]

> In general, I think it is clear that at least some legislative amendments will be required for the NPP and that there should be a Bill for this. The extent of the amendments will depend on the detail of what is proposed.

This advice did not provide any support for the proposal to proceed without legislative change. However, despite the seriousness of the conclusions reached in the 2014 DSS legal advice and the absence of any countervailing advice, there was no mention of the need for legislative change in the NPP that was ultimately considered by the ERC on 25 March 2015.[90] There was nothing in the Portfolio Budget Submission to alert other agencies (including AGS) and Cabinet to the fact that legal advice had been given that legislative change was required. Further, due to the deficient description of the proposal in the NPP, it was not possible for either AGS or Cabinet to even appreciate that the proposal fundamentally relied upon the use of income averaging. Although NPPs are inherently and necessarily a high-level overview of proposals, they must describe the proposal and changes in procedures in enough detail so as to be meaningfully understood by other agencies and by Cabinet.

Had DSS been required to include the relevant legal advices in the Portfolio Budget Submission alongside the NPP, this may have prompted questions as to whether the advice still applied and if not, what had changed in the mechanics of the proposal. This would have required DSS and DHS to explain the departure from the legal advice, and it may well have become obvious at that time that there had been no material change to what was proposed and legislative change was in fact still required. If DSS had instead procured advice of the quality of the 2017 DSS legal advice and sought to rely on it, it is unlikely that it would have withstood scrutiny by AGS, other agencies and Cabinet.

Evidence given to the Commission suggests that there were reservations within DSS about circulating the 2014 DSS legal advice outside of the Department. [91] It was common practice within DSS not to share legal advice unless it was asked for, which stemmed from a general view about the need to maintain legal professional privilege over the advice. [92] The legal soundness of this position seems doubtful, as the privilege over advice provided to a department is held by the Commonwealth, and advice can therefore be shared between departments without any waiver of privilege. [93] It follows that there is no reason that legal advice given to a department could not be provided to other departments as part of the Budget process.

Ambiguity of the checklist

There was considerable focus in the course of the Commission on the questions which appeared under the heading "Legislation" in the Checklist, and in particular, the third of those questions – "Is legislation required?" The significance of that question and its answer – "No" for the SIWP measure – were ambiguous in at least two respects. First, it was unclear whether the question was directed only to legislation which was required to authorise expenditure for a particular measure or, instead, contemplated whether any legislation whatsoever was required to implement the measure. Second, it was not apparent who had provided the answer, or if it had been independently verified in any way.

That ambiguity was fuelled by several factors, some of which have already been mentioned. For example, the BPORs contained a requirement to obtain legal advice about constitutional and legislative authority for expenditure, but no corresponding requirement for advice on the legality of a measure in general. Similarly, the two questions which preceded the question "Is legislation required?" were interdependent, and all three questions were contained under a single heading, without further explanation.

Mr Morrison described the answer "No" to the question "Is legislation required" as providing "clear advice from the Department…that no legislation was required" [94] The Hon Malcolm Turnbull AC likewise considered that the question and its answer were directed to whether legislation was required to implement the measure in question. However, unlike Mr Morrison, Mr Turnbull believed that the answer represented the advice of AGS, rather than the Department. [95] Like Mr Morrison and Mr Turnbull, Mr Tudge understood the question to be directed to legislation required to implement a measure generally; however, he believed that the advice was that of the Attorney-General's Department. [96]

As explained in chapter 2014: Conceptual Development, the Commission accepts that the question "Is legislation required?" could extend beyond the issue of whether authorisation was needed for expenditure. The evidence demonstrates, at least in some instances, when the question was answered in the affirmative, it related to the need for legislation to implement the proposal, not to authorise expenditure. However, the evidence also demonstrates that such advice was that of the relevant department, and was unlikely to have been checked by AGS. [97]

Notwithstanding the Commission's findings on that point, the ambiguity of the Checklist and seriousness of the matter with which the question is concerned – the legality of a proposal – necessitates that any identifiable uncertainty is resolved. That is particularly so where, as here, subsequent ministers may assume that a high degree of rigor attended the Cabinet process when it otherwise did not. [98] In the circumstances, the language used in Cabinet submissions, especially with respect to the communication of legal risks to Cabinet, ought to be carefully considered.

Recommendation 15.1: Legislative change better defined in New Policy Proposals

The Budget Process Operational Rules should include a requirement that all New Policy Proposals contain a statement as to whether the proposal requires legislative change in order to be lawfully implemented, as distinct from legislative change to authorise expenditure.

Recommendation 15.2: Include legal advices with New Policy Proposals

The Budget Process Operational Rules should include a requirement that any legal advice (either internal or external) relating to whether the proposal requires legislative change in order to be implemented be included with the New Policy Proposal in any versions of the Portfolio Budget Submission circulated to other agencies or Cabinet ministers.

Recommendation 15.3: Australian Government Solicitor statement in New Policy Proposals

The Budget Process Operational Rules should include a requirement that where legal advice has been given in relation to whether the proposal requires legislative change in order to be implemented, the New Policy Proposal includes a statement as to whether the Australian Government Solicitor statement in NPP has reviewed and agreed with the advice.

Recommendation 15.4: Standard, specific language on legal risks in the New Policy Proposals

The Standard, specific language on legal risks in the NPP Checklist should be sufficiently specific to make it obvious on the face of the document what advice is being provided, in respect of what legal risks and by whom it is being provided.

3.2 Flaws in design

The data underlying the Budget assumptions

On 12 December 2014, Tenille Collins (Assistant Director, Customer Compliance Branch, DHS) emailed one of the first drafts of the SIWP NPP to Jason Ryman (Director, Customer Compliance Branch, DHS). [99] Ms Collins also attached to that email a document entitled PAYG High Level Assumptions. [100]

That document was based upon an analysis of recipients' records that had undergone the process of "matching" between the amount of income reported by employers to the ATO and recorded on a PAYG Summary, and the amount of income reported by recipients to DHS. Records that had undergone this matching process were stored in DHS's computer system. The records analysed for the purposes of the high-level assumptions were those relating to the 2010-11, 2011-12 and 2012-13 financial years. In total, there were 866,857 customers with records containing "matches". Some of those customers had matches for more than one year, with the total number of matches recorded as being 1,080,028.

The document stated that "[t]he analysis identified that debts were increased by 13.06% when income smoothing was applied." [101] The methodology for calculating that percentage is not stated on the face of the document. Mr Ryman's understanding of how that figure was derived was that it was based on a review of actual files of welfare recipients. [102] He described a process of comparison between the actual debt that had been raised through a manual compliance review, and a hypothetical debt calculated using income averaging. Debts calculated using income averaging resulted in debts that were, on average, 13 per cent higher than those calculated using a manual compliance review process. [103]

The only debts that had been previously calculated using a manual compliance review process were those that were in the highest risk categories, so this analysis had only been undertaken with respect to those highest risk categories. [104] No manual calculations had been performed with respect to potential debts in the lower risk categories, so there could be no comparison between debts calculated manually and debts

calculated using averaging. [105] Mr Ryman's evidence was that DHS "had not done any previous sort of work on these risk categories". [106]

The document contained tables entitled PAYG file – Volumes and Risk Ratings by financial year. Those tables set out assigned Risk Categories, which were assigned based on two factors:

1. The length of time a person was on a social security payment during the financial year

3. The size of any discrepancy between how much income was reported on a person's PAYG summary and how much income they had reported to DHS.

The exception to this was the 2010-11 financial year, for which the only factor informing the risk category was time on payment. [107] For each of the financial years 2010-11, 2011-12 and 2012-13, the total number of matches contained in each risk category was listed.

The document then set out a Debt Analysis that was undertaken by using a hypothetical debt testing process. This process involved averaging the PAYG income data received from the Australian Taxation Office (ATO). For all risk categories, the hypothetical debt was calculated solely using averaging. [108] A blanket reduction of 13 per cent was applied to the hypothetical debt amounts, to account for the commensurate increase of 13 per cent that was assumed to have resulted by using averaging to calculate the debt. Despite the fact that the 13 per cent increase had only been derived from analysis of a sample of the highest risk debts, it was applied to each of the average debt amounts across all of the risk categories. [109]

A sample of match records from each financial year was subject to this process, from which two pieces of information were derived: firstly, an "average debt value"; and secondly, the "debt percentage" which was the total number of debts, as a percentage of the total number of matches. The average debt value was multiplied by the number of records in each category, and then each result was totalled. Finally, that total was multiplied by the debt percentage, which resulted in the "total estimated debt based on volume."

The PAYG High Level Assumptions document was amended and further developed throughout early 2015. [110]

On 18 February 2015, Mr Ryman received an email indicating that, to date, an analysis of 886 records had been completed. [111] The email stated "Taking into account Debt % 85 and a 13% smoothing allowance for the debts we have only had minor movement on our initial assumptions."

The debt percentage estimate mentioned in this email correspondence was 85 per cent, which was less than the 90 to 95 per cent contained in earlier versions of the assumptions document. The point at which this changed is unclear. There is reference, in the version of the assumptions document later provided to DSS, to the debt percentage having been determined "with consideration to historical outcomes regarding the percentage of cases that result in a debt." [112] However, it is unclear what these "historical outcomes" were or how they impacted the calculation of the estimated debt percentage.

This analysis was the basis upon which the assumptions underlying the NPP were developed, and upon which it was estimated that the measure would return over a billion dollars in savings to the government.

Flaws in the assumptions

There was a number of underlying flaws in these assumptions which can be readily identified.

Firstly, the analysis was conducted on a total of 886 customer records, out of a total of 866,857. The assumptions upon which the levels of recoverable debt were founded were therefore based on a sample representing approximately 0.1 per cent of the total number of records. It could not be said, with any confidence, that this was a representative sample from which data could reliably be extrapolated.

Secondly, the analysis was undertaken by calculating an average hypothetical debt amount for each risk level, which was then reduced by 13 per cent across the entire sample. This was in circumstances where no analysis had been undertaken with respect to the actual detail of any of the cases below the higher risk

levels. As a consequence, it was unknown whether the estimated average debt had any relationship at all to the actual average debt for lower risk categories, or how any inaccuracy in those figures impacted the ultimate calculation of the average debt across the entire population.

Thirdly, the lack of analysis of the lower risk level cases meant that it was unknown whether the estimated percentage of cases that would result in a debt could be ascertained with any degree of accuracy. Despite the reference to the use of "historical outcomes" to inform the calculation, it was unlikely that the use of any such historical data would remedy this defect, because historical data would necessarily be based upon cases previously dealt with by DHS. It would therefore suffer from the same shortcoming as the analysis itself; that is, it would only reflect data based upon cases in the higher risk categories.

There was a further, crucially important assumption that underpinned the PAYG proposal, and the estimation of the savings it could provide to government. That assumption was that once the online platform was operational, the majority of interventions would use an automated process to determine the existence of a debt, and to calculate and raise any such debt. [113]

The assumption of automation also depended upon the automated platform being completed and operational by 1 July 2016.

Although the development of Budget assumptions is a predictive exercise, the development of these assumptions was a flawed process, for the reasons outlined above.

Flawed assumptions go undetected in the costings process

To an extent, the flawed assumptions underlying the SIWP measure were the result of systemic shortcomings in the costings process for compliance Budget measures. A core part of Finance's role in the costings process is to test the assumptions and inputs underlying the costings prepared by each agency. The evidence before the Commission points to a common perception that the agreement of costings with Finance was a "robust process," [114] where the figures would be closely examined and the reliability of savings projections would be tested. [115] However, without access to documentation recording the basis of the assumptions and inputs informing the costings, Finance was unable to meaningfully challenge the assumptions underlying the SIWP proposal. Instead, Finance relied on ad hoc responses from DHS and DSS to questions posed by them in the costings process. [116] In these circumstances, the SIWP proposal made it through the costings process without the deficiencies in the underlying assumptions being exposed.

The failure to expose and resolve the flaws in the underlying assumptions for the SIWP measure contributed to the measure's ultimately failing to deliver the level of savings originally projected. The failure to deliver the savings projected under the SIWP measure and later measures extending the Scheme is considered more extensively in the Economic Costs chapter.

The Budget process, despite its intended function of facilitating the identification of risks associated with policy proposals, failed to bring to the surface the legal, economic and ethical flaws underlying the SIWP measure.

The failure of the Budget process in this respect can be traced back, at least in part, to the broader context in which the SIWP measure was brought forward; in particular, the undercurrent of pressure to deliver savings within the Social Services portfolio at the time, and consequently, the compressed period of time in which the measure moved from inception to implementation.

Pressure to deliver Budget savings

The SIWP measure represented significant savings to government, with the Employment Income Matching component of that measure promising to improve the Budget bottom line by approximately $1.5 billion. What has become clear on the evidence before the Commission is that those projected savings to government were a fundamental driver in the inclusion of the measure in the 2015-16 Budget, although the proposal was in an embryonic stage of development and had not been the subject of adequate testing or consultation.

Finn Pratt, DSS secretary when the measure was introduced, said that one of his core priorities was "supporting the then government's Budget repair agenda." [118] His evidence was that because the Social Services Portfolio accounted for a large proportion of government spending, it was one of the "biggest targets" in the government's efforts to find savings to reduce the deficit and bring the budget into surplus. [119]

The government's emphasis on debt control and balancing the Budget was reflected in the 2015-16 Budget, with a key focus of the Budget being to promote budget repair in accordance with the government's commitment to returning the budget to surplus. [120] One aspect of the repair agenda was a requirement that all spending be offset by appropriate savings. This was highlighted by the Treasurer in the 2015-16 Budget speech:

> Everything we spend in this Budget is being paid for by prudent savings in other areas.

This expectation was formalised under the BPORs, which required that all NPPs which had a negative impact on the Budget were to be fully offset by savings proposals [121]. Ms Campbell said that she considered the SIWP measure to be necessary to realise savings in accordance with the BPORs. [122] The description of the SIWP measure in the 2015-16 Budget stated that: [123]

> The savings from this measure will be redirected by the Government to repair the Budget and fund policy priorities.

The SIWP measure was an attractive measure not only because of the scale of the expenditure offset that it offered, but also because it was a voter-friendly policy that did not involve reducing income support payments across a cohort or cutting government resources. Mr Pratt acknowledged that savings measures typically involved taking money from someone and are generally not popular.[124] The SIWP measure was pitched as a policy that would ensure the integrity of the social security system and protect taxpayer dollars so that the government could continue to support those in genuine need.[125] It was a politically attractive policy option.

Mr Pratt said that the selection of which savings proposals to pursue would involve a degree of "political consideration" as to which measures would be likely to pass the Senate and the extent to which the projected savings from the measure would be "worth the political pain associated with them." [126] These considerations were particularly pertinent where, as in 2015, the government did not hold the balance of power in the Senate [127] and had been unable to pass Social Services savings measures from the previous Budget through the Senate. [128] Mr Pratt recalled that at the time of the 2015-16 Budget, the government was reliant on a number of cross-benchers in the Senate whom he described as "independent-minded" and as having "different agendas to the government." [129] The government required the support of a substantial subset of those cross-benchers in order to get difficult legislation through the Senate. [130]

In this context, it is clear that the SIWP measure would have been less attractive to government if it required legislative change, especially if that change were likely to be controversial (as a retrospective change to the basis of benefit entitlement would be). If the legislative change were unlikely to be supported by the Senate, the SIWP measure could not have been considered a genuine saving and thus the measure could not be considered by Cabinet without specific authority from the Prime Minister. [131]

In the context of the difficulty associated with the need for legislative change, the pressure from Mr Morrison and government more broadly to provide savings in the Social Services portfolio contributed to the failure by the public service to raise the need for legislative change with Mr Morrison in the preparation of the NPP for consideration by the ERC.

Mr Morrison brought forward the SIWP proposal to be considered for inclusion in the 2015-16 Budget [132] despite what Anne Pulford (principal legal officer, social security and families, DSS) agreed was "the clear no from [DSS] on policy and legal grounds." [133] Ms Pulford also agreed, in relation to the provision of further DSS legal advice in relation to the proposal, that "it appeared that the very tight timeframe and the pressure was coming from a clearance by Minister Morrison to have [an NPP] developed to the point where it might be submitted to Finance." [134] Once Mr Morrison signalled an intention to pursue the proposal further, there was a greater impetus for the public service to get the proposal up and running. [135]

The pressure to deliver savings was felt across DHS and DSS. From the DHS perspective, Mr Britton gave evidence that the compliance team was often asked what savings options they had and when they could be delivered. [136] In Mr Britton's words, "the imperative was the dollars, often." [137] In the leadup to the 2015-16 Budget, Mr Britton recalled being pressed by his superiors in relation to savings that could be delivered by the compliance team. [138] In describing the environment within DHS in the years preceding the 2015-16 Budget, Mr Britton said that there was "certainly an increasing level of pressure" and "a significant shift in the expectation around the generation of savings." [139]

The fast-track from idea to implementation

The pressure to deliver savings offsets in the 2015-16 Budget dictated the course of the Budget process in respect of the SIWP measure and ultimately resulted in the measure being brought forward when those involved in its design did not consider it to be ready.

When discussions began around putting the proposal forward as a potential Budget measure, Mr Ryman said, the concept had not progressed much further than the initial ideas set out in the Executive Minute he had prepared for Mr Britton in June 2014, [140] which he described as being "very, very preliminary". [141]

Ms Collins described the way in which the NPP was developed as "highly unusual" and said that in hindsight, it may have been the result of what she described as "a strong push at this time in the department more broadly to find efficiencies." [142] She had been very surprised that the proposal was being developed into an NPP in circumstances where the final process for the proposal had not been decided on or tested with policy, legal or external stakeholders. [143] Ms Collins explained that testing of the proposal with these stakeholders, as well as with social security recipients, would ordinarily take place before a proposal was developed into an NPP. [144]

Mr Ryman recalled there being a stakeholder engagement plan in relation to the SIWP proposal, but he could not recall any engagement with the Digital Transformation Office or non-government stakeholders such as the Australian Council of Social Services (ACOSS) taking place. [145] He acknowledged that the method used to calculate how much debt might be raised by the proposal was not "perfect", but he and his team were working within a tight timeframe. [146] Essentially, shortcuts had to be taken.

When asked about the preliminary work that would ordinarily be done before bringing forward a Budget measure, Mr Ryman said that the SIWP proposal "was such a new idea" and in terms of the online engagement, they only had a broad concept of wanting customers to be able to engage online but had not mapped out what that would look like. [147] The trusted data assessments were "very much in preliminary stages" and they were researching a lot of different data sources, PAYG being one of them.

Mr Ryman agreed that if the measure had not been brought forward as quickly as it was, they would have obtained legal advice in the ordinary course, had they thought there was a need to do so. His team always had regular engagement with DSS; he considered that if the measure had not been brought forward as quickly as it was, DSS would have been informed of the outcome of the researching and testing of concepts.

Although Mr Ryman recognised that it would have been difficult to test the online platform before progressing the proposal through the Budget process, because of the need for funding, he explained that DHS would have done some level of testing and customer engagement and put more thought into how the online engagement would be achieved. Mr Ryman described this as being "many steps further than just saying 'we want a digital solution'." [148]

Mr Ryman and Ms Collins both recalled having reservations about the proposal being taken forward as a Budget measure. [149] Mr Ryman indicated that they had not done the preliminary work they would normally do to be able to "bring together something that we would have significant confidence in."[150] Notwithstanding this, he said, others, including Mr Britton, indicated that the proposal was to be brought forward as a measure. [151]

Mr Britton's evidence was that he also had a perception in late 2014 that the SIWP proposal needed more work before it could be brought forward as a Budget measure. [152] He recalled there being a lot of "early thinking," but the concept had only been "thought through to a point" and he knew that there was more work to be done to validate the proposal, especially given its scale. [153] Mr Britton's evidence was that he had concerns in that period about the pressure that was being applied and the complexity of the proposal. [154] Despite the reservations held by those responsible for the design of the proposal, he recalled the messaging around the development of the measure being to "get on with it"; in response, they "collectively got on with it." [155]

Ms Pulford gave evidence to the effect that the time constraints in the development of the SIWP measure limited the extent of the legal advice that could be provided. Detailed legal advice could not be given on all of the possible legal issues identified with the proposal. [156]

The consequence was that the need to achieve savings and provide Budget offsets was prioritised over the need to ensure accuracy in the design of the proposal and the fair and lawful treatment of social security recipients.

Recommendation 15.5: Documented assumptions for compliance Budget measures

That in developing compliance Budget measures, Services Australia and DSS document the basis for the assumptions and inputs used, including the sources of the data relied on.

Recommendation 15.6: Documentation on the basis for assumptions provided to Finance

That in seeking agreement from Finance for costings of compliance Budget measures, Services Australia and DSS provide Finance with documentation setting out the basis for the assumptions and inputs used, including related data sources, to allow Finance to properly investigate and test those assumptions and inputs.

1 Department of Finance, 'The Budget Process' (Web Page, 10 May 2023) <https://www.finance.gov.au/government/federal-budget/budget-process>.
2 This is reflected in the constitutional requirement that all public spending be authorised by the Parliament through appropriation legislation: see Australian Constitution s 83.
3 Parliamentary Education Office, Budget (Fact Sheet) <https://peo.gov.au/understand-our-parliament/how-parliament-works/parliament-at-work/budget/>.
4 Department of Finance, 'The Budget Process' (Web Page, 10 May 2023) <https://www.finance.gov.au/government/federal-budget/budget-process>.
5 Parliamentary Education Office, Budget (Fact Sheet) <https://peo.gov.au/understand-our-parliament/how-parliament-works/parliament-at-work/budget/>.
6 Department of Finance, 'Mid-Year Economic and Fiscal Outlook' (07 August 2019) <https://www.finance.gov.au/about-us/glossary/pgpa/term-mid-year-economic-and-fiscal-outlook-myefo>.
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9 https://www.finance.gov.au/government/federal-budget/budget-process>.
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12 Exhibit 4-8161; Exhibit 2-2527A – CDF.0001.0001.0001 – 2015-16 Budget Process Operational Rules, 30 September 2014, [p 2].
13 See, e.g., Exhibit 9479– CDF.0001.0007.0086 – EM2014-37 BPORs and Timetable – Att B, 7 October 2014.
14 See, e.g., Exhibit 9479 – CDF.0001.0007.0086 – EM2014-37 BPORs and Timetable – Att B, 7 October 2014; Exhibit 2-2597 – RBD.9999.0001.0033 – 15-03-30_cabinet-handbook_8th-edition, April 2015, [p 17: para 75].
15 See, e.g., Exhibit 9478– CDF.0001.0007.0005_R – EM2014-37 BPORs and Timetable 2015-16 Budget, 7 October 2014 [p 5]; Exhibit 9479 – CDF.0001.0007.0086 – EM2014-37 BPORs and Timetable – Att B, 7 October 2014.
16 See, e.g. Exhibit 2-2597 – RBD.9999.0001.0033, Cabinet Handbook (8th edition) – 2015, April 2015, p 17 [75]; Exhibit 4-6019 – RBD.9999.0001.0431_R, Report to the Royal Commission into the Robodebt Scheme prepared by Andrew Podger AO, 20 February 2023 [p12].
17 See, e.g., Exhibit 9479 – CDF.0001.0007.0086 – EM2014-37 BPORs and Timetable – Att B, 7 October 2014.
18 See, e.g., Exhibit 2-2597 – RBD.9999.0001.0033 – Cabinet Handbook (8th edition) – 2015, April 2015, [p 18: para 79].
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29 See, e.g., Exhibit 9479 – CDF.0001.0007.0086 – EM2014-37 BPORs and Timetable – Att B, 7 October 2014.
30 See, e.g., Exhibit 2-2597 – RBD.9999.0001.0033 – Cabinet Handbook (8th edition) – 2015, April 2015, [p 12: para 19].
31 See, e.g., Exhibit 2-2597 – RBD.9999.0001.0033 – Cabinet Handbook (8th edition) – 2015, April 2015, [p 6: para 4]; Exhibit 9479 – CDF.0001.0007.0086 – EM2014-37 BPORs and Timetable – Att B, 7 October 2014.

32 See, e.g., Exhibit 1-1234 – RBD.9999.0001.0001 – BP2_consolidated, 12 May 2015.
33 See, e.g., Exhibit 1-1234 – RBD.9999.0001.0001 – BP2_consolidated, 12 May 2015; https://www.finance.gov.au/about-us/glossary/pgpa/term-forward-estimates.
34 See e.g. Exhibit 4-8161 – CDF.0001.0001.0001 – 2015-16 Budget Process Operational Rules, 30 September 2014, r 26.
35 Exhibit 4-6720 – AGS.9999.0001.0001_R – Response to NTG-0213, 22 February 2023 [p 2: para 13].
36 Exhibit 4-6720 – AGS.9999.0001.0001_R – Response to NTG-0213, 22 February 2023 [p 2: para 14-16].
37 Exhibit 4-6720 – AGS.9999.0001.0001_R – Response to NTG-0213, 22 February 2023 [p 2: para 14].
38 Exhibit 4-6720 – AGS.9999.0001.0001_R – Response to NTG-0213, 22 February 2023 [p 3: para 19].
39 Exhibit 4-6720 – AGS.9999.0001.0001_R – Response to NTG-0213, 22 February 2023 [p 3: para 19].
40 Exhibit 4-6720 – AGS.9999.0001.0001_R – Response to NTG-0213, 22 February 2023 [p 4: para 23].
41 Exhibit 4-6720 – AGS.9999.0001.0001_R – Response to NTG-0213, 22 February 2023 [p 4: para 26].
42 Exhibit 4-6720 – AGS.9999.0001.0001_R – Response to NTG-0213, 22 February 2023 [p 4: para 26].
43 Exhibit 4-6720 – AGS.9999.0001.0001_R – Response to NTG-0213, 22 February 2023 [p 4: para 26].
44 Exhibit 2-2022 – PMC.001.0002.017_R – PMC-001-0002-017_Redacted, [p 8].
45 Exhibit 1-1234 – RBD.9999.0001.0001 – Budget Measure 2015-16, 12 May 2015 [p 116].
46 Exhibit 9479 – CDF.0001.0007.0086 – EM2014-37 BPORs and Timetable – Att B, 7 October 2014.
47 See, e.g., Transcript, Anne Pulford, 2 November 2022 [p 189: lines 28-32; p 190: lines 1-3]; Transcript, Kathryn Campbell, 7 March 2023 [p 4558: lines 9-12].
48 See e.g. Exhibit 1-0077 – DSS.8002.0001.0002_R2 – FW New version of draft brief on fraud and compliance [DLM=Sensitive], 4 March 2015; Exhibit 2-2234 – CTH.3000.0004.0551_R – CONFIDENTIAL - CCB Direction [DLM=Sensitive], 26 February 2015; Exhibit 4-5223 – CTH.3095.0002.4236_R – Re- Status of Social Services PB Sub [DLM=Sensitive], 25 February 2015.
49 See e.g. Transcript, Catherine Dalton, 16 December 2022 [p 2095: lines 12-15]; Transcript, Anthony Barford, 24 January 2023 [p 2308: lines 44-47]; Transcript, Kathryn Campbell, 11 November 2022 [p 958: lines 42-46]; Transcript, Scott Britton, 23 February 2023 [p 3691: lines 35-43]; Transcript, Marise Payne, 13 December 2022 [p 1667: lines 14-23]; Transcript, Scott Morrison, 14 December 2022 [p 1784: lines 10-15].
50 Transcript, Marise Payne, 13 December 2022 [p 1667: lines 14-23].
51 Transcript, Catherine Dalton, 16 December 2022 [p 2095: lines 12-15]; Transcript, Anthony Barford, 24 January 2023 [p 2308: lines 44-47]; Transcript, Kathryn Campbell, 11 November 2022 [p 958: lines 42-46]; Transcript, Scott Britton, 23 February 2023 [p 3691: lines 35-43].
52 Transcript, Mark Withnell, 24 February 2023 [p 3750: lines 22-33].
53 Transcript, Mark Withnell, 24 February 2023 [p 3750: lines 35-42].
54 Transcript, Scott Britton, 23 February 2023 [p 3691: lines 13-15].
55 Transcript, Scott Britton, 23 February 2023 [p 3706: line 20].
56 Exhibit 9941 – CTH.3729.0001.1678 – Bilateral Management Arrangement New Work and Changed Business Protocol, 22 October 2014 [p 2].
57 Transcript, Serena Wilson, 9 November 2022 [p 769: lines 20-30].
58 Exhibit 1-0850 – CTH.3716.0001.0001_R – NM signed brief Concepts for future compliance activity, 23 June 2014.
59 Exhibit 2-2669 – DSS.5077.0001.0037 – Executive Minute B15/125, 20 February 2015.
60 Transcript, Kathryn Campbell, 7 March 2023 [p 4564: lines 10-40].
61 Exhibit 3-5081 – PMC.0001.0011.0266_R2 – PMC.001.0054.001 - 15-03-25 - ERC - Attendance Sheet - ABBOTT - 2015_Redacted (003), 25 March 2015; Exhibit 2-2507A – PMC.0001.0010.9004_R – 15-03-25 - ERC - Business List [redacted] Exhibit 2305AA.
62 Transcript, Kathryn Campbell, 7 December 2022 [p 1300: lines 11-14].
63 Exhibit 1-1234 – RBD.9999.0001.0001 – BP2_consolidated, 12 May 2015 [p 116].
64 Exhibit 10079 – CDF.0001.0004.1674_R – Costing Agreement 11779 Strengthen Integrity PAYG updated.pdf, 1 May 2015.
65 See Exhibit 1-1234 – RBD.9999.0001.0001 – BP2_consolidated, 12 May 2015 [p 115 – p 117].
66 The next largest savings measure listed under Human Services was the "Department of Human Services Efficiencies" measure, which was projected to achieve savings of $55.1 million over four years. See Exhibit 1-1234 – RBD.9999.0001.0001 – BP2_consolidated, 12 May 2015 [p 115 – p 117].
67 This endnote has been deliberately skipped.
68 Exhibit 10079 – CDF.0001.0004.1674_R – Costing Agreement 11779 Strengthen Integrity PAYG updated.pdf, 1 May 2015; Exhibit 10080 – CTH.4700.0002.0599 – 002359 Strengthening the Integrity of Welfare Payments, 7 May 2015.
69 See Exhibit 1-1234 – RBD.9999.0001.0001 – BP2_consolidated, 12 May 2015 [p 116].
70 The next largest expenditure measure for DHS involved expenses of $142.2 million over five years for the "Families Package – Child Care – Workforce Participation Stream" measure. See Exhibit 1-1234 –

RBD.9999.0001.0001 – BP2_consolidated, 12 May 2015 [p 41 – p 43]
71 Exhibit 1-1234 – RBD.9999.0001.0001 – BP2_consolidated, 12 May 2015 [p 169].
72 Exhibit 1-1234 – RBD.9999.0001.0001 – BP2_consolidated, 12 May 2015 [p 50].
73 See, e.g., Transcript, Kathryn Campbell, 11 November 2022 [p 970: line 36 – p 971: line 13]; Transcript, Kathryn Campbell, 7 December 2022 [p 1317: lines 5-15]; Transcript, Kathryn Campbell, 7 December 2022 [p 1317: line 41 – p 1318: line 2]; Transcript, Kathryn Campbell, 7 December 2022 [p 1318: lines 30-32]; Transcript, Kathryn Campbell, 7 December 2022 [p 1338: lines 18-31]; Transcript, Kathryn Campbell, 11 November 2022 [p 944: lines 11-17]; Transcript, Kathryn Campbell, 7 December 2022 [p 1294: lines 9-16]; Transcript, Kathryn Campbell, 10 November 2022 [p 913: line 43 – p 914: line 3]; Transcript, Kathryn Campbell, 7 March 2023 [p 4559: lines 34-43]; Transcript, Kathryn Campbell, 7 December 2022 [p 1295: lines 9-24]; Exhibit 1-1237 – KCA.9999.0001.0002_R, 2022.10.13 - NTG-0013 Kathryn Campbell – Response, 13 October 2022 [p 15: para 62]; Transcript, Scott Morrison, 14 December 2022 [p 1818: lines 32-36]; Transcript, Marise Payne, 2 March 2023 [p 4294: lines 26-30].
74 Transcript, Kathryn Campbell, 11 November 2022 [p 970: line 36 – p 971: line 13].
75 Transcript, Kathryn Campbell, 7 December 2022 [p 1295: lines 9-24].
76 Transcript, Kathryn Campbell, 7 December 2022 [p 1317: lines 5-15].
77 Transcript, Kathryn Campbell, 7 December 2022 [p 1318: lines 30-32].
78 Transcript, Kathryn Campbell, 7 December 2022 [p 1298: lines 2-9].
79 Transcript, Kathryn Campbell, 7 December 2022 [p 1298: lines 8-27].
80 Exhibit 1-1234 – RBD.9999.0001.0001 – BP2_consolidated, 12 May 2015 [p 41 – p 43].
81 Transcript, Scott Morrison, 14 December 2022 [p 1785: lines 8-10].
82 Transcript, Alan Tudge, 1 February 2023 [p 2899: lines 8-9].
83 Refer to glossary.
84 Exhibit 1-0002 – DSS.5006.0003.1833_R – Email from Jordan Simon to Mark Jones copying Anne Pulford and preceding chain, 18 December 2014.
85 Transcript, Murray Kimber, 8 December 2022 [p 1400: lines 26-32].
86 Transcript, Anne Pulford, 2 November 2022 [p 179: lines 38-41].
87 Exhibit 1-0077 – DSS.8002.0001.0002_R – FW: New version of draft brief on fraud and compliance, 4 March 2015.
88 Exhibit 2-3232 – DSS.5083.0001.0004_R – RE: New version of draft brief on fraud and compliance [DLM=Sensitive], 4 March 2015.
89 Exhibit 2-3232 – DSS.5083.0001.0004_R – RE: New version of draft brief on fraud and compliance [DLM=Sensitive], 4 March 2015.
90 Exhibit 2-2022 – PMC.001.0002.017_R – PMC-001-0002-017_Redacted.
91 Exhibit 2-2114 - MKI.9999.0001.0002_R - 20221111 NTG-0062 Response (Kimber, M)(46393028.1), 11 November 2022 [p 10: para 55].
92 Transcript, Murray Kimber, 8 December 2022 [p 1401: lines 19-36].
93 Australian Government Solicitor, Legal Briefing No. 117 'Legal Professional Privilege and the Government' [iii. Disclosure within the Commonwealth] <https://www.ags.gov.au/legal-briefing-no-117>; Legal Services Directions [10]; Judiciary Act 1903 (Cth) s 55ZH(4).
94 Transcript, Scott Morrison, 14 December 2022 [p 1802: lines 43-46].
95 Transcript, Malcolm Turnbull, 6 March 2023 [p 4426: line 42 – p 4427: line 5].
96 Transcript, Alan Tudge, 1 February 2023 [p 2899: lines 2-13].
97 Exhibit 4-6720 – AGS.9999.0001.0001_R, Response to NTG-0213, 22 February 2023 [page 2: para 14; page 3: para 19].
98 Cf Transcript, Alan Tudge, 1 February 2023 [p 2899: lines 8-9]; Transcript, Michael Keenan, 28 February 2023 [p 4079: lines 12-24]; Transcript, Michael Keenan, 28 February 2023 [p 4091: lines 22-41].
99 Exhibit 4-6596 – CTH.3002.0006.5491_R, PAYG measure [DLM=Sensitive], 12 December 2014.
100 Exhibit 4-5622 – CTH.3030.0010.1327, PAYG High Level Assumptions Savings.
101 Exhibit 4-5622 – CTH.3030.0010.1327, PAYG High Level Assumptions Savings [p 1].
102 Transcript, Jason Ryman, 22 February 2023 [p 3554: lines 11-30].
103 Transcript, Jason Ryman, 22 February 2023 [p 3554: lines 32-45].
104 Transcript, Jason Ryman, 22 February 2023 [p 3553: lines 24-27].
105 Transcript, Jason Ryman, 22 February 2023 [p 3553: lines 24-42; p 3555: lines 18-31].
106 Transcript, Jason Ryman, 22 February 2023 [p 3552: lines 37-39].
107 This was due to a change in systems, prior to which the risk categories were described as less "granular": Exhibit 9002 – CTH.3000.0001.7156_R, PAYG Stats [DLM=For-Official-Use-Only], 20 October 2014.
108 Transcript, Jason Ryman, 22 February 2023 [p 3553: lines 44-47].
109 Transcript, Jason Ryman, 22 February 2023 [p 3556: lines 29-35].
110 See, e.g., Exhibit 4-5619 – CTH.3002.0007.0200, PAYG High Level Assumptions V1 0; Exhibit 4-5621 – CTH.3030.0010.1326_R, FW- Updated Assumptions [DLM=For-Official-Use-Only], 15 January 2015; Exhibit

4-5622 – CTH.3030.0010.1327, PAYG High Level Assumptions V1 0; Exhibit 4-5509 – CTH.3002.0007.1319_R, PAYG High Level Assumptions [DLM=For-Official-Use-Only], 20 January 2015; Exhibit 2-1330 – CTH.3002.0007.1320, PAYG High Level Assumptions V2.0.

111 Exhibit 9005 – CTH.3002.0007.4516_R, RE: PAYG Analysis [DLM=For-Official-Use-Only], 19 February 2015.

112 Exhibit 4-5529 – DSS.5121.0001.0002, PAYG High Level Assumptions.

113 Exhibit 9957 – CTH.3031.0004.5125, FYI: PAYG OCI - Volume Overview [DLM=For-Official-Use-Only], 20 March 2015; Exhibit 9958 – CTH.3031.0004.5127, PAYG Customer Volume Overview v0 1; Exhibit 4-5534 – CTH.3023.0014.0187_R, Deregulation Red Tape Reduction - (Employment Income Matching) v0 8- response to feedback. The expected percentages of recipients who would, or would not, contact the department differs throughout documents provided to the Commission, including in these exhibits.

114 Transcript, Tenille Collins, 3 March 2023 [p 4313: lines 6-14].

115 See, e.g., Transcript, Tenille Collins, 3 March 2023 [p 4313: lines 6-14]; Transcript, Scott Morrison, 14 December 2022 [p 1820: lines 37-42]; Transcript, Jason Ryman, 22 February 2023 [p 3610: lines 42-43].

116 See, e.g., Exhibit 3-5632 - CTH.3023.0014.0534_R – RE: 11779 - Strengthening Integrity of Welfare Payments - Questions from DoF [DLM=Sensitive]; Exhibit 4-6588 – CTH.3034.0033.4089_R – FW: Ombudsman OCI Report Recommendations 6A and B Draft Responses [DLM=Sensitive].

117 Exhibit 10079 – CDF.0001.0004.1674_R – Costing Agreement 11779 Strengthen Integrity PAYG updated.pdf, 1 May 2015.

118 Exhibit 1-1223 – FPR.9999.0001.0001_R – 20221018 Statement of Finn Pratt dated 18 October 2022(46125371.1), 18 October 2022 [p 4: para 18].

119 Transcript, Finn Pratt, 10 November 2022 [p 852: lines 4-9].

120 The Treasury, Budget 2015 Overview, 12 May 2015 [p 4 – p 9] <https://archive.budget.gov.au/2015-16/overview/Budget-2015-Overview.pdf>.

121 Exhibit 4-8161 – CDF.0001.0001.0001 – 2015-16 Budget Process Operational Rules, 30 September 2014, r 15.

122 Exhibit 1-1237 – KCA.9999.0001.0002_R – 2022.10.13 - NTG-0013 Kathryn Campbell - Response, 13 October 2022 [p 14: para 60].

123 Exhibit 1-1234 – RBD.9999.0001.0001 – BP2_consolidated, 12 May 2015 [p 116].

124 Transcript, Finn Pratt, 10 November 2022 [p 852: line 42 – p 853: line 2].

125 See, e.g., Exhibit 2-2524 – RBD.9999.0001.0232 – West Australian fraudster jailed _ Senator Marise Payne; Exhibit 2-2525 – RBD.999.0001.0231 – 4 September 2015 - Jailed for welfare fraud, 4 September 2015; Exhibit 2-2558 – SMO.9999.0001.0002_R – NTG-33 Response, 11 November 2022 [p 9: para 52].

126 Transcript, Finn Pratt, 10 November 2022 [p 852: lines 42-46].

127 Parliamentary Library Research Paper, 44th Parliament in Review, page 4 (24 November 2016) <https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/4955465/upload_binary/4955465.pdf>.

128 Transcript, Finn Pratt, 10 November 2022 [p 852: lines 11-13].

129 Transcript, Finn Pratt, 10 November 2022 [p 853: lines 8-19].

130 Transcript, Finn Pratt, 10 November 2022 [p 853: lines 8-19].

131 Exhibit 2-2527A – CDF.0001.0001.0001 – 2015-16 Budget Process Operational Rules, 30 September 2014 [p 31: par 4; p 8: para 15.4)

132 Exhibit 1-0077 – DSS.8002.0001.0002_R2 – FW New version of draft brief on fraud and compliance [DLM=Sensitive], 4 March 2015.

133 Transcript, Anne Pulford, 2 November 2022 [p 183: lines 5-11].

134 Transcript, Anne Pulford, 2 November 2022 [p 190: lines 1-5].

135 Transcript, Mark Jones, 1 November 2022 [p 153: lines 12-20].

136 Transcript, Scott Britton, 23 February 2023 [p 3691: lines 42-43].

137 Transcript, Scott Britton, 23 February 2023 [p 3691: lines 42-43].

138 Transcript, Scott Britton, 8 November 2022 [p 652: lines 39-47].

139 Transcript, Scott Britton, 8 November 2022 [p 651: line 44 – p 652: line 22].

140 Transcript, Jason Ryman, 22 February 2023 [p 3545: line 44 – p 3546: line 2].

141 Transcript, Jason Ryman, 8 November 2022 [p 726: lines 24-31].

142 Transcript, Tenille Collins, 3 March 2023 [p 4304: lines 6-15].

143 Transcript, Tenille Collins, 3 March 2023 [p 4301: lines 30-35].

144 Transcript, Tenille Collins, 3 March 2023 [p 4301: lines 42-45].

145 Transcript, Jason Ryman, 8 November 2022 [p 734: lines 22-43]; Transcript, Jason Ryman, 8 November 2022 [p 735: lines 21-32].

146 Transcript, Jason Ryman, 22 February 2023 [p 3556: lines 37-41].

147 Transcript, Jason Ryman, 22 February 2023 [p 3547: lines 38-42].

148 Transcript, Jason Ryman, 22 February 2023 [p 3548: lines 12-17].

149 Transcript, Jason Ryman, 22 February 2023 [p 3546: lines 4-7]; Transcript, Tenille Collins, 3 March 2023 [p 4301:

line 29 – p 4303: line 42].
150 Transcript, Jason Ryman, 22 February 2023 [p 3546: line 46 – p 3547: line 2].
151 Transcript, Jason Ryman, 22 February 2023 [p 3547: lines 4-18].
152 Transcript, Scott Britton, 23 February 2023 [p 3691: line 45 – p 3692: line 2].
153 Transcript, Scott Britton, 23 February 2023 [p 3692: lines 5-9].
154 Transcript, Scott Britton, 23 February 2023 [p 3692: lines 11-28].
155 Transcript, Scott Britton, 23 February 2023 [p 3692: lines 15-18].
156 Transcript, Anne Pulford, 2 November 2022 [p 207: lines 10-18].

Section 4: Automation and Data Matching

Chapter 16: Data matching and exchanges

1 Introduction

People expect government agencies to act transparently when handling their personal information, and these expectations are heightened when information has been collected on a compulsory basis, or in exchange for access to essential payments and services [1] *- Timothy Pilgrim, former Privacy Commissioner*

The Robodebt Scheme (the Scheme) was underpinned by a data-matching program involving the Australian Taxation Office (ATO) and the Department of Human Services (DHS). The program was designed to identify former and current income support recipients with alleged discrepancies between their earnings as reported to DHS and their employment income annually reported by employers to the ATO.

In this chapter, the Commission considers the data-matching processes which underpinned the Scheme. The chapter - Automated Decision making, considers the use of automation under the Scheme.

2 The data-matching framework

The following laws, guidelines and other framework documents are relevant to consideration of the data-matching program that was conducted under the Scheme:

- the *Data-matching Program (Assistance and Tax) Act 1990 (Cth)* (DMP Act)
- the Guidelines on data matching in Australian Government administration (voluntary Data-matching Guidelines and associated protocols)
- the arrangements in place between DHS and the ATO
- the secrecy provisions in the *Taxation Administration Act 1953 (Cth)* (TAA53) and the *Social Security (Administration) Act 1999 (Cth)* (SSA Act)
- the Australian Privacy Principles (APPs) in the *Privacy Act 1988* (Cth) (Privacy Act) which regulated the handling of information by the ATO and DHS
- the Privacy (Tax File Number) Rule 2015 (TFN Rule)

2.1 Data-matching under the Data-matching Program Act

It should be noted at the outset that the data-matching that occurred under the Scheme was not undertaken under the DMP Act. However, some consideration of that Act is necessary to contextualise the framework *outside* of which the data-matching under the Scheme was administered.

The Government's legislative data-matching program was announced in the 1990-91 Budget and was enshrined in Commonwealth legislation enacted in 1990.[2] The *Data-matching Program (Assistance and Tax) Act 1990 (Cth)* (DMP Act) established a highly regulated process for the large-scale comparison of data from five Commonwealth agencies for compliance purposes. This included the Department of Social Services (DSS) and the ATO. Data matches which occur under the DMP Act are authorised by law and thus comply with any secrecy provisions, as well as the APPs (see further below).

The data-matching program which occurs under the DMP Act restricts the number of data-matching cycles permitted each year, requires a data-matching cycle to be completed within a period of time after data was received, and requires action to be taken by an agency (on any inconsistencies disclosed by the data-matching program) within three months of the data match. [3] Participating agencies are required to destroy all unused information within a certain period of time. Mandatory guidelines in respect of the DMP Act include a requirement for participating agencies to report to Parliament. [4]

The legislation is still in force today, but the ATO and Services Australia (formerly DHS) no longer conduct any of their data-matching programs under the DMP Act. [5]

Historically, the ATO and DHS participated in a data-matching program authorised under the DMP Act on a bi-annual basis. [6]

However, as noted above, the data-matching that occurred under the Scheme was not undertaken under the DMP Act. Since 2004, the data-matching the ATO and DHS had undertaken with respect to PAYG data had been conducted under a framework including the voluntary Data-matching Guidelines, associated protocols, and heads of agreement between the ATO and DHS.

2.2 The voluntary Data-matching Guidelines

The Voluntary Data-matching Guidelines were developed by the Office of the Australian Information Commissioner (OAIC) to 'assist all Australian Government agencies to use data matching as an

administrative tool in a way that complies with the Australian Privacy Principles (APPs) and the Privacy Act, and is consistent with good privacy practice.' [7]

The Guidelines are issued under the Privacy Act. [8] Compliance with the Guidelines is voluntary, and represent the OAIC's view on best practice with respect to undertaking data-matching activities. [9]

The Australian Information Commissioner and Privacy Commissioner described the role of the voluntary Data-matching Guidelines as follows:

> The voluntary Data Matching Guidelines aim to assist Australian Government agencies who are not conducting statutory data matching, to use data matching as an administrative tool in a way that complies with the APPs and the Privacy Act more broadly, and is consistent with good privacy practice. The voluntary Data Matching Guidelines are not binding but represent the OAIC's view on best practice with respect to agencies undertaking data matching activities. [10]

A failure to comply with the Guidelines does not mean an agency has acted unlawfully, unless the acts or practices of the agency constitute a breach of the Privacy Act. [11] Rather, compliance with the Guidelines supports good privacy practice, reflects a commitment to the protection of individual privacy and promotes an Australian society where privacy is respected. [12] In the context of the consideration, design or implementation of a process such as that used under the Scheme, compliance with the Guidelines represents an additional layer of control to assist agencies to consider, and take into account, privacy related issues.

The Voluntary Data-matching Guidelines were first introduced by the Privacy Commissioner in 1992. [13] The current version of the Guidelines (2014) is relevant to the data-matching program which operated under the Scheme.

Under the Voluntary Data-matching Guidelines, DHS was the 'primary user agency' of the data matching program. [14] As the primary user agency, DHS was required to undertake a number of actions in order to comply with the Guidelines. These relevantly included:

- preparing and distributing a program protocol (Guideline 3) [15]
- ensuring that its participation in the data matching program complied with that protocol (Guideline 3.2) [16]
- destroying or de-identifying personal information (Guideline 7) [17] and
- updating the protocol in particular circumstances (Guideline 9)

The 2004 Protocol

The 2004 Protocol applied to the data-matching under the Scheme up to May 2017. It was prepared by Centrelink in 2003 and was lodged with the Office of the Privacy Commissioner in May 2004. [18]

The 2004 Protocol was designed to comply with the Guidelines. It described, in detail, the PAYG data-matching program which it covered [19] and established standards for the conduct of the program.

This was the description of the data-matching program in the 2004 Protocol:

> As part of an increased focus on the detection of customers failing to declare or underdeclaring income, an initiative has been introduced to match Centrelink customers with those identified by the ATO as having a PAYG Payment Summary. The data used in the project is sourced from the ATO Pay-As-You-Go Data, which is from the PAYG payment summaries electronically lodged by employers with the ATO…
>
> …The customer's Centrelink income details are compared with the income details in their PAYG Payment Summary and, where anomalies are identified between the income declared to Centrelink and ATO, the customer is selected for review… [20]

The "source agencies," who supplied data for the purposes of the program, were Centrelink and the ATO. The "matching agency" was Centrelink, which had responsibility for receiving the data from the ATO, matching the data, ensuring its security, destroying particular data at the end of each matching process,

and distributing the matched cases to the Centrelink system for review. [21]

In particular, the 2004 Protocol provided for:

- destruction, by Centrelink, of personal information collected from the ATO which did not lead to a match [22]
- all remaining ATO data to be destroyed within 12 months [23]
- requests from DHS to the ATO, for the PAYG data, to be authorised by statutory notices issued by DHS [24] and
- manual checks by DHS staff of any discrepancies identified from a comparison of the ATO PAYG and DHS records before any review commenced "to determine if the discrepancy can be explained." [25]

The 2017 Protocol

The 2017 Protocol replaced the 2004 Protocol in May 2017, and applied under the Scheme from that date.

The 2017 Protocol retained the characterisations in the 2004 Protocol of the ATO and DHS as "source agencies," and confirmed that DHS remained the primary user of the data.

Confusingly, the 2017 Protocol described the ATO as the "matching agency," rather than retaining its previous characterisation as the "source agency." However, a subsequent paragraph referred to "DHS, as the matching agency…." [26] The ATO subsequently clarified its role, in correspondence to the OAIC in 2019, as that of a "source agency." [27]

The document retention limits in the 2017 Protocol differed from those in the 2004 Protocol, but the reference to adherence to the voluntary Data-Matching Guidelines remained in both. [28]

The 2017 Protocol also recorded that the ATO was required by law to disclose PAYG data to DHS under the Scheme in response to compulsory statutory notices issued by DHS. [29]

2.3 The Services Schedule and abridged arrangement

A Services Schedule between the ATO and DHS existed from April 2014, [30] as well as an abridged arrangement for the transfer of information between the ATO and DHS. The abridged arrangement was treated as being in effect from April 2014 but was not formally executed until 11 August 2017. The aim of The Schedule and arrangement was to "better document the arrangements in place between the ATO and DHS." [31]

The Services Schedule established the broad principles that applied to all data-sharing arrangements between Services Australia and the ATO. [32]

2.4 Secrecy

The purpose of Commonwealth secrecy laws is to regulate the handling of "sensitive" information collected and used by the Australian Government (confidential information). [33]

Officers working for both the ATO and DHS are subject to secrecy provisions which strictly regulate the collection, use and disclosure of categories of information about a person's "affairs" [34] (in the case of the ATO) and a person's "protected information" [35] (in the case of DHS). [36]

There are additional restrictions in the taxation laws which regulate the conduct of third parties to whom confidential information is disclosed by the ATO (for example DHS).

Secrecy provisions are offence provisions, which means that a breach of a secrecy provision may have serious consequences for an Australian Public Service (APS) employee, including a term of imprisonment.

Consequently, secrecy provisions are "taken extremely seriously." [37] Information which is subject to a secrecy provision cannot be collected, used or disclosed, absent some legislative exception or obligation. [38]

Section 355-25 of TAA53 provides that it is an offence for an ATO officer to disclose information about a taxpayer's affairs unless that disclosure is permitted by one or more of the exceptions in Division 355 of TAA53. Disclosure for the purpose of administering the social security law is one of those exceptions. Section 202(1) of the SSA Act permits access to protected social security information, while sections 192 and 195 of SSA Act permit the Secretary to issue notices requiring information to be provided.

In addition to the offence provisions, a breach of a secrecy provision by a current or former APS employee may constitute a breach of the APS Code of Conduct.

2.5 Privacy

Breaches of secrecy may also constitute interferences with privacy by the relevant agency. A person's right to privacy is regarded as a human right.

The Privacy Act regulates how government agencies handle personal information in records. It codifies Australia's obligations under Article 17 of the International Covenant on Civil and Political Rights and its commitment to enact legislation to enshrine principles adopted by the Organisation for Economic Cooperation and Development (OECD) for the protection of privacy.

Secrecy provisions and the Australian Privacy Principles (APPs) in the Privacy Act are designed to operate in a co-ordinated way. The APPs are designed to apply flexibly; the strict operation of secrecy provisions also protects personal information. In practical terms, where APS employees comply with the secrecy provisions in terms of their use and disclosure of personal information, their agency can normally be assured that the use and disclosure of that information will comply with the Privacy Act.

As the Australian Information Commissioner said in her submission to the Commission:

> The APPs are principles-based law. This provides APP entities with the flexibility to tailor their personal information handling practice to their diverse needs and business models, and to the diverse needs of individuals. Accordingly, the steps entities must take to comply with their obligations under the APPs will depend on their particular circumstances, including size, resources and business model. [39]

A breach by a government agency of an APP in the Privacy Act is actionable by a complaint to the Office of the Privacy Commissioner which sits within the Office of the Australian Information Commissioner (OAIC). A complaint to the Privacy Commissioner about an interference with privacy arising from a breach or breaches of the APPs will be a complaint against the agency concerned. The Privacy Commissioner has the power to investigate complaints and make a determination, and can also award compensation. [40]

Additionally, the Privacy Commissioner may conduct an own motion investigation into an agency's practices. [41] Following such an investigation, the Privacy Commissioner may recommend payment of compensation to a person who has suffered loss or damage, or the taking of action to remediate or reduce any loss or damage suffered. [42]

In the case of a serious or repeated interference with privacy, the Privacy Commissioner may bring an application in the Federal Court for contravention of section 13G of the Privacy Act. [43]

2.6 The Tax File Number Rule

Tax file numbers (TFN) are identifiers and are considered to be extremely sensitive. As the Office of the Australian Information Commissioner (OAIC) observed, TFNs are "unique identifiers" which increases the "risk of serious breaches of personal privacy if data is lost or misused." [44]

The ATO's use and disclosure of TFNs is subject to more restrictive secrecy provisions than other types of confidential information. [45]

The Privacy (Tax File Number) Rule 2025 (TFN Rule) is designed to protect the TFN information of individuals. It works in tandem with the TFN secrecy provision in TAA53. The TFN Rule operates to ensure TFN recipients [46] observe strict requirements in their handling of TFNs. It is administered by the OAIC.

As the Australian Information Commissioner observed:

> The TFN Rule applies to both the use and disclosure of TFN information and provides that an individual's TFN information can only be used or disclosed for the purpose of facilitating the effective administration of taxation law, certain aspects of personal assistance and superannuation law and to assist with the identification of individuals for other purposes. A use of TFN information, without disclosure, may constitute an interference with privacy under the Privacy Act if the TFN information is not used in accordance with the TFN Rule. [47]

The obligations in the TFN Rule are additional to the secrecy provisions and the APPs. [48] A breach of the TFN Rule is an interference with privacy under the Privacy Act. [49]

3 Mapping the Scheme's data-matching program

In order to understand the data-matching process under the Scheme, the Commission engaged Dr Elea Wurth, a partner from Deloitte Risk Advisory Pty Ltd (Deloitte). Dr Wurth was asked to:

- produce for the Commission a detailed process map showing the way data was transmitted between DHS and the ATO as well as the way the data was used by DHS to raise debts under the Scheme, and
- report to the Commission on the adequacy of the technical process supporting the Scheme.

References in this section to Dr Wurth's opinions refer to this report. [50]

Figure 1 outlines the four stages which comprise the data-matching program that operated during the Scheme. Dr Wurth's report [51] and the supporting process maps [52] describe and critique the steps taken both prior to and under each stage of the Scheme. The process outlined in this Chapter is that which occurred at stages 1, 2 and 3 of Figure 1 below. The automated process in stage 4 "Income data verification and debt notification" is addressed in the chapter - Automated Decision Making.



Figure 1. PAYG program stages

Dr Wurth relied on primary records obtained from the ATO and DHS but also considered statements and other records which were relevant to the data-matching program to create the process maps.

The draft process maps were shared with both DHS and the ATO and both agencies were afforded an opportunity to advise the Commission of any omissions and errors in the maps before they were finalised. [53] Dr Wurth made changes to the process maps following feedback from DHS and the ATO. [54]

3.1 Stage 1 – Population identification

Each year, DHS created a file that contained details of all DHS recipients who, in a specified year, had received a welfare payment, had an outstanding debt to DHS, or were the partner of a recipient that met one of those two criteria. [55]

That file contained details of each recipient's Customer Reference Number (a unique DHS identifier) (CRN), and personal information including their name, date of birth, address and gender. [56]

3.2 Stage 2 – Identity and PAYG data matching

The file was provided to the ATO, which would then match each DHS recipient with their corresponding PAYG data held by the ATO. [57] That process involved finding potential identity matches between DHS recipients and ATO taxpayers using their name, address details and date of birth. Only the highest confidence match was retained for the next step. As further detailed below, until 2019, the highest confidence match included matches with either "high" or "medium" confidence levels. After mid-2019, the highest confidence matches only included those with "high" confidence levels.

A file was then created for each DHS recipient which contained the highest confidence identity match, their CRN and their TFN. The PAYG data associated with that TFN was appended on to the record, and the TFN was then removed.

The matched records were then returned to DHS.

Upon receipt of the files, DHS validated the ATO identity match. From the OCI iteration of the Scheme onwards, this was a three-step process. Firstly, the validity of the CRN was checked against DHS records. Secondly, the ATO identity match was checked through "fuzzy matching" of information linked with each of the PAYG and CRN data. This is discussed further below at 6.4. Thirdly, if the ATO identity match did not pass the fuzzy matching step, it was then tested against all other DHS records to see if a match could be found against "tight matching" criteria.

A file was then created which contained PAYG data for all of the matched records that had been successfully validated.

3.3 Stage 3 – Income data matching

This stage was where the ATO PAYG data and the employment income reported to DHS was matched, and any potential income discrepancy identified.

From the OCI iteration of the Scheme onwards, the technical documents demonstrate the following: [58]

a the name of the application in which PAYG data was matched was changed under the Scheme from the "Business Integrity Compliance Engine" to an application called "Fraud Management."

b. the processes that occurred in the Fraud Management application were known as "Fraud Management processes," and

c. one such Fraud Management process was the PAYG Customer Risk (Mass Detection) strategy, which operated to identify the risk of a possible incorrect payment on a person's Centrelink record.

Therefore, for each person subject to the Scheme, the process of identifying discrepancies that resulted in their being selected for a review under the Scheme involved a "Fraud Management process" known as the PAYG Customer Risk Mass Detection Strategy, which occurred in the "Fraud Management" application.

(Perhaps reflecting a certain perspective, this nomenclature was adopted despite the fact that the overwhelming majority of discrepancy cases had nothing to do with fraud, and there was no evidence to suggest otherwise.)

Under this process, a recipient's matched PAYG record was excluded if they satisfied certain criteria, including being legally blind, deceased or having received less than a minimum DHS payment amount.

If the records were not excluded, a compliance risk rating was calculated based on the discrepancy between DHS employment income and the ATO PAYG income data. A series of risk identification criteria was then applied, and a "case" was raised for each recipient who had a discrepancy and met a risk identification threshold.

A final check was then conducted to determine if there had been any new ATO or DHS data which needed to be incorporated into a recipient's data. If there was not, the case was passed through to stage 4 of the process, the income data verification and debt notification stage, which is dealt with further in Chapter x Automated Decision Making.

The best source of information provided to the Commission as to the number of records included in the PAYG program over the time in which the Scheme operated is contained in an extract of count of records located in ATO footer files, produced to the Commission by the ATO and examined by Dr Elea Wurth. Dr Wurth noted that in the years 2014–16 almost nine million unique records per year were disclosed by DHS to the ATO for the purposes of data matching. [59] This number increased to just over 16 million per year for 2017–19. [60]

Although the exact timing is unclear, at some point in late 2016, DHS and the ATO engaged in a data-match round which saw a one-off bulk transfer of five years of data from the ATO's PAYG database to DHS, covering the years 2011-15.[61]

4 Data-matching and data exchanges under the Scheme

4.1 The ATO seeks better information from DHS about the Scheme

In late 2016, following a spike in media stories and complaints about the Scheme, the ATO started asking for information about how DHS was handling the data that the ATO had disclosed to it under the Scheme. [62]

The ATO met with DHS on 14 December 2016 to discuss its concerns about the use of the data, and then wrote to DHS on 22 December 2016 seeking confirmation that requested changes had been implemented. The ATO did not receive a response to this correspondence. [63]

The ATO met again with DHS on 9 January 2017 and sought a "briefing pack" from DHS on the Scheme. [64] The requested information was never provided. [65]

The ATO sought a further meeting with DHS in an attempt to better understand how DHS was using the data disclosed by the ATO under the Scheme. [66]At a meeting on 7 February 2017, an ATO officer's notes record that Malisa Golightly, DHS Deputy Secretary, made the following assertions about the way DHS was using the ATO data under the Scheme: [67]

- nothing had changed in terms of the way data-matching was done,
- how DHS is using the information had not changed, there was just an increase in numbers,
- averaging was not being routinely used, it was only where the customer did not provide a response, and
- the "system" was not fully automated.

Toward the end of February 2017, the ATO sent an email to DHS urgently seeking clarification as to whether information provided to DHS was to be "on-disclosed" and what was DHS's legal authority for such disclosures. [68] The email sought a "catch up" with DHS to discuss "a way forward on this." [69]

On 10 July 2017, Tyson Fawcett, ATO Senior Director Smarter Data Group, wrote to an officer in Data Strategy and Analytics at DHS in these terms:

> Secondly the ATO is seeking an assurance on the use of its exchanged data provided to DHS, on how it is being used, with any future bulk compliance approaches (lessons well documented). I am seeking an urgent discussion (next week at the latest) on this, otherwise I ask that you cease and desist, the usage of the data, until we have your assurance around the data use. [70]

The DHS response did not directly address Mr Fawcett's query, and instead referred him to a range of measures being undertaken by DHS. Mr Fawcett responded, "the Australian Taxation Office continues to support the DHS initiatives, but does so ensuring that the data that is shared is done so in accordance to the law." That seems to be a reference to the ATO's provision of the information pursuant to section 355-65.

Despite these events and the concerns raised by the ATO, the data-matching program continued.

Open and transparent communication between Commonwealth entities engaging in data-matching programs is necessary to ensure that each participating entity understands, and undertakes proper scrutiny and evaluation of, the legal and administrative framework in which is operating with respect to data-matching activities. There were, as Services Australia acknowledged, limitations to the inter-agency

collaboration in relation to the data-matching under the Scheme; and, as it also accepted, better lines of communication and transparency between DSS, DHS and the ATO would have aided DHS's understanding of its legislative obligations in relation to its processes. [71]

4.2 The 2017 Protocol is prepared

In late 2016 and early 2017, DHS received repeated media requests to disclose or publish the 2004 Protocol. [72] This prompted DHS officers to review the 2004 Protocol, at which point it was realised that it had not been updated to reflect the OCI program and consequently was not compliant with the Information Commissioner's Guidelines. [70]

By way of example, the 2004 Protocol contained an out of date and inaccurate description of the data-matching program being conducted under the Scheme, [74] suggesting that DHS was required, before commencing any review, to "check the customer's record to determine if the discrepancy can be explained." This was not happening under the OCI phase of the Scheme. [75]

The 2017 Protocol was drafted by DHS, as the primary user of the data-matching program under the Scheme. [76] DHS received internal legal advice to the effect that there was no legal obligation to publish the 2004 or the 2017 protocols, but it would be appropriate to publish both. [77]

The ATO was not consulted about or informed of the publication of the 2017 Protocol. [78]

Similarly to the 2004 Protocol, the 2017 Protocol said that information would be disclosed by the ATO to DHS in response to formal notices issued under the SSA Act. [79]

A brief to the Minister for Human Services, the Hon Alan Tudge, seeking endorsement of the 2017 Protocol did not refer to any prior lack of compliance with the 2004 Protocol. Instead, it stated:

> Given the length of time since the introduction of PAYG matching the department has revised the 2004 protocol to reflect the changes in names of the various agencies, updated the technological aspects of the process, reflected the current approach to actions the department now takes and tidies the document up more generally. This does not change the data matching process. [80]

In May 2017, the 2017 Protocol was approved by the Minister and was published on the DHS website.

5 Key issues associated with the data-matching program under the Scheme

5.1 Destruction of historic PAYG matched data

DHS employee, Ben Lumley, said in evidence that in 2012 DHS changed its view on document retention, and from that point forward did not destroy PAYG matched data it received from the ATO. He referred to an email which explained the reason for this change: [81]

> As discussed, we reviewed the "Guidelines on Data Matching in Australian Government Administration" as part of the ENHANCED CAPABILITY FOR CENTRELINK TO DETECT AND RESPOND TO EMERGING FRAUD RISKS budget measure announced in the 2010-11 Budget. This measure included an Intelligence Store capability which provided the capability to store much larger volumes of data than previously possible for the purposes of enhanced analytics.
>
> This review determined that data could be retained while there was an intent to use it.
>
> I believe that this measure led to the department changing its view on the destruction of PAYG data, however the Program Protocol was not updated.

Mr Lumley conceded that this meant that DHS had in its possession "gold mines" of data from years prior to the Scheme which were available to be used under the Scheme: [82]

> MR LUMLEY: Yes, there was - yes, there was, I guess, information that showed the amount of potential cases and over those years, yes. It was used as a source to inform the measures.
>
> COMMISSIONER: But if you had complied with the protocol, you wouldn't have had them the first place.
>
> MR LUMLEY: Correct.

Mr Lumley was unable to say precisely how much ATO data was warehoused by DHS but did note that when the online part of the measure was to commence "the Department went and re-requested data for those years again from the ATO." [83] Nonetheless, the warehoused data was available to inform DHS' plans and to support the proposal for the Scheme, on the basis that there were over a million historical matches, relating to approximately 860,000 recipients. [84]

Dr Wurth found that historical data was migrated by DHS. [85] A detailed Requirements Document for the process states: [86]

> This project aims to migrate the PAYG data holdings, selection business rules and data refinement processing from the Business Integrity Intelligence Store and Compliance Engine into SAP HANA (HANA) and Fraud Management System (FMS). These changes support the Employment Income Matching initiative announced as part of the May 2015 budget measure 'Strengthening the Integrity of Welfare Payments' (SIWP).

Dr Wurth also identified the following instruction for all existing PAYG match data to be retained: [87]

> Migrate existing PAYG match data into HANA for the following financial years: 2009/10, 2010/11, 2011/12, 2012/13, 2013/14. [88]

DHS also used historic data (or at least a subset of the original matched data) which, according to the 2004 Protocol, it should have destroyed, to form the basis of its proposal to "clean up" 860,000 discrepancies under the Scheme. [89]

> ...the legacy system was migrated to System Application Products (SAP) Data Services and HANA Stored Procedures were used for data extraction. It became known as the Annual Compliance Extract (ACE) process. [90]

The Commission accepts Dr Wurth's findings and infers from this evidence that DHS warehoused the PAYG matched data it collected from the ATO to use under the Scheme instead of destroying it.

5.2 DHS failure to comply with the 2004 Protocol

Section 7 of the 2004 Protocol required PAYG matched data collected from the ATO to be destroyed in a timely manner if not used: [91]

> Data is destroyed in accordance with the Privacy Commissioner's guidelines on The Use of the Data-matching in Commonwealth Administration. ATO data deemed unsuitable for matching is destroyed within 14 days of receipt from the ATO. ATO data used in the matching run but not matched is destroyed within 90 days; and all remaining ATO data is destroyed within 12 months.

A change in the data storage capacity measures used by DHS from 2012, prior to the commencement of the Scheme, meant that PAYG matched data was no longer destroyed as the 2004 Protocol required.

Services Australia told the Commission that with improved technology options, DHS was able to store greater volumes of data and consider how a greater volume of discrepancies could be addressed. Because DHS had made no decision to take action on the available data matches, and as such, it continued to hold the data pending action. [92]

As the Commonwealth conceded, as a matter of best practice, the 2004 Protocol should have been revisited and updated in 2012, to account for the development in storage capability in or around 2012, and at any later points in time where the data match and exchange process were altered. [93]

DHS was also not complying with the 2004 Protocol because under the Scheme, it was no longer undertaking manual review of discrepancies resulting from the data-matches. [94]

5.3 DHS failure to comply with the 2017 Protocol

The 2017 Protocol amended the document retention clause to read:

> All external data received from the ATO that is no longer required is destroyed in line with Guideline 7 of the Information Commissioner's Guidelines on Data-matching in Australian Government Administration. [95]

The Voluntary Data-matching Guidelines do not permit retention and storage of data for undefined periods of time on the basis that no decision has made to take further action. Guideline 7.5 provides that where a match occurs in the data matching cycle, a decision as to further action should be taken within 90 days of the data matching cycle. [96] That makes it clear that an entity cannot, consistently with that Guideline, hold data "awaiting action." [97]

5.4 Mistaken identity matches

The Commission has evidence before it of cases of mistaken identity that occurred during the Scheme, where the system mixed up people with some of the same Personal Identifiable Information. Dr Wurth identified two features of the processes in place under the Scheme which could provide some explanation for an error of that sort.

The first was DHS's use of "fuzzy" and "tight" matching rules, [98] in addition to recipient CRNs to identify recipients of interest under the Scheme. [99] The introduction of these rules was intended as an "uplift": the previous process only used CRNs as the method of identification with no checking or confirmation against the matches that had been provided by the ATO beyond the CRN. The fuzzy and tight matching rules were an improvement on the previous system. [100]

However, these rules were ineffective in preventing mistaken identity matches. The risk of mistaken identity matches was referred to as the "twins problem": two people with the same last name and date of birth but different first names would still have passed through the top sets of the "fuzzy" rules with a tight match on surname, a tight match on date of birth and a fuzzy match on first name. As a result the wrong

sibling could have received a debt notice. Because medium confidence codes (explained below) were being passed to DHS, even when the fuzzy and tight matching rules were introduced, the "twins problem" would not have been prevented. [101]

The second issue was the ATO's passing of matches with medium confidence match codes to DHS under the Scheme.[102]

Mr Hirschhorn described the levels of confidence which attached to each ratings level under the Scheme:[103]

Confidence ratings in identify matching in the provision of income data

10.1 The ATO's identity matching process for the purposes of income data during the Robodebt Period (referred to in quesions 2, 3 and 5 above) generated five confidence levels, namely [ATO.002.075.0038]:

(a) high - Indicates a high quality match with a low chance of mismatch

(b) medium - Indicates a medium quality of match with a moderate chance of mismatch

(c) low - Indicates a low quality of match with a fair chance of mismatch

(d) unresolved - Indicates a non useable match outcome was generated

(e) multimatches - where more than one client registration matches with a single transaction.

(The ATO generated the above confidence levels for all identity matching processes that used the CIDC system).

The evidence before the Commission established that although the system was intended to operate such that only identity matches of a "high" confidence rating were provided to DHS,[104] for a period, some medium confidence matches had been inadvertently provided under the Scheme.[105] Those matches should have been excluded from the data extraction process. It should be noted that this problem pre-dated the Scheme, in that it appeared to have been occurring since at least 2013.

The passing of medium confidence identity match data carried "a moderate chance of mismatch." [106] That had obvious application in the case of twins, and it appears that the potential for mismatch manifested itself in some examples of persons receiving correspondence in relation to an "Earnings Intervention Review," in circumstances where it was actually their twin who was the subject of the information upon which the review was commenced. [107]

The passing of medium confidence matches continued until the problem was identified in mid-2019, in circumstances where it was realised that the ATO had disclosed two sets of match data, one high confidence and one medium confidence, for a single CRN.

The specific coding of this particular match involved a 100 per cent match on surname and birth date (day, month and year). [108] This meant that in order for a mismatch to occur with respect to this particular match code, the two persons involved had to have the same surname and the same date of birth. At this point, the defect was rectified, and no further medium confidence matches were passed between the agencies. [109]

5.5 Lack of governance and controls

Dr Wurth reported that there was a lack of proper governance, controls and risk management measures in place under the Scheme. She found the governance, controls and risk management instruments were inadequate to ensure PAYG program compliance with the Framework Documents: [110]

> The governance, risk management and controls of the PAYG program's data matching did not appear to be sufficient to ensure compliance with the Framework Documents. This includes insufficient policies and procedures to protect the integrity of the PAYG program and the customers that were involved. Further, policies that were in place, such as issues resolution, were not effectively implemented by the responsible governing bodies. [111]

In addition, Dr Wurth found:

- there were inadequate governance documents to support the processes in place under the Scheme (including the failure to review and update the 2004 Protocol until 2017 and DHS's failure to consult the ATO on the 2017 Protocol), [112] and
- there were failures in process and problem resolution through the Forums which had been established to identify and resolve problems with the Scheme. [113]

The OAIC also reported on shortcomings in this area in its report in 2019:

> The two agencies have a number of high-level arrangements in place, including a general head agreement to manage their relationship, as well as a specific data exchange service schedule and a related arrangement to manage the exchange of data between the two agencies, which include references to the data exchanged for the PAYG program. These written agreements are complemented by a governance committee and a data management forum.
>
> However, when asked about any specific arrangements in place to manage the PAYG data matching program, DHS advised that the program operates on an implied level of trust between the two agencies.
>
> During fieldwork, DHS staff advised that in situations where DHS identifies an error in the ATO data, the error is corrected for DHS's purposes, but is not communicated to the ATO. Data errors are only communicated to the ATO in situations where an individual alerts DHS to a potential error and DHS is unable to resolve it. [114]

There was insufficient governance associated with the Scheme. Proper governance, controls and risk measures would have increased the level of scrutiny and oversight of the data-matching component of the Scheme. In circumstances where both DHS and the ATO were dealing with recipients' personal information, it was important to have an effective level of checks and balances in place to monitor what was occurring. The difficulties with inter-agency collaboration, outlined above, may have been somewhat improved had there been an effective governance framework between the two agencies.

The Commission was advised that since the Scheme, the ATO has introduced an operational risk management framework for data sharing, including a data ethics framework. The Commission has not received that framework into evidence and makes no findings as to its adequacy. However, given that Services Australia and the ATO continue to engage in a data exchange programs (see below), the Commission considers that it is incumbent on Services Australia and the ATO to ensure that that program has in place adequate governance, risk management and controls.

5.6 Possible non-compliances with secrecy law

Section 355-25 of TAA53 provides that it is an offence for an ATO officer to disclose information about a taxpayer's affairs unless that disclosure is permitted by one or more of the exceptions in Division 355 of TAA53. Consequently, an ATO officer responsible for a disclosure is required to assure themselves that a proposed disclosure is lawful (i.e. supported by an exception in Division 355 of TAA53).

The ATO has argued that its use of the data collected from DHS, the matching and disclosure of matched data back to DHS under the Scheme were all lawful because of the general exception in section 355-65 of TAA53. [115] That section permits disclosure to an Agency Head dealing with matters relating to the social security law "for the purposes of administering…the social security law." In submissions, the Commonwealth's approach in relation to this provision was that:

> The ATO was not obliged to be certain as to the precise manner in which DHS subsequently used data provided by the ATO and whether all the activities conducted by DHS with the data were compliant with social security law (being legislation which DSS administers, not the ATO). [116]

The Commission has doubts as to the correctness of that proposition. Given the protective object of section 355-25 of TAA53, it seems strongly arguable that an ATO officer could not be lawfully satisfied that the use of the information disclosed to DHS was "for the purposes of administering…the social security law" without being informed by DHS of how the information was to be used. It is open to doubt that the ATO was so informed with respect to the Scheme. Mr Hirschhorn of the ATO told the Commission that: [117]

> …the ATO had not taken any specific steps to assure itself that every use of the information was lawful under social security law…

And, as already detailed, the ATO's attempts to better inform itself about the Scheme were frustrated by a lack of transparency from DHS, and the 2004 Protocol did not, at that time, accurately describe the use by DHS of the information disclosed by ATO.

In these circumstances, the Commission considers that there is a serious question as to whether information was lawfully disclosed by the ATO to DHS for the purpose of data matching under the Scheme.

5.7 Possible privacy breaches

The evidence before the Commission also suggests that there may have been breaches of the APPs under the Privacy Act, in relation to disclosures/collections by the ATO and DHS for the purpose of data matching in the Scheme.

APPs 3 and 6 prohibit unlawful collection and disclosure of personal information. In circumstances where the collection and disclosure of that information may not have been authorised by law, the provisions of those APPs require the consent of the person to whom the information relates in order to collect or disclose the information. An agency would need to demonstrate it either had such consent, or that it was unreasonable or impracticable to collect the required information directly from individuals. If, as seems possible, the various disclosures and collections of information between the ATO and DHS contravened TAA53, those APPs may have also been breached.

APP 5 requires reasonable steps to be taken to notify persons of the collection of their personal information. Given that neither the 2004 Protocol, nor the letters that were provided to recipients, accurately described the use of the information disclosed by the ATO to DHS under the Scheme, there appears to be a real question as to whether DHS took reasonable steps to notify recipients of the collection of their personal information from the ATO.

APP 10 requires an agency to take reasonable steps to ensure that the personal information it collects is accurate, up-to-date and complete.

The OAIC investigation into the Scheme considered DHS's compliance with APP 10. The report noted in particular that: [118]

> Before the introduction of the OCI system, only customers with the highest risk rating were selected for compliance action. The OCI/EIC system has expanded the compliance program to include customers with lower risk ratings.

The OAIC found that: [119]

> DHS's current practices in relation to the ATO's personal information raise concerns about the steps DHS is taking to ensure the personal information is accurate and fit for purpose, as well as the processes DHS employs to correct personal information.

The OAIC's report on DHS's management of the Scheme identified a "medium risk" that:

personal information quality issues are not being identified, or if they are, that mechanisms do not exist to ensure personal information quality issues are being addressed in a timely and comprehensive manner. [120]

APP 13 requires an agency to take reasonable steps to correct "incorrect" personal information it holds to ensure it is accurate, up to date, complete, relevant and not misleading having regard to the purpose for which it is held. The APP Guidelines state:

The requirement to take reasonable steps applies in two circumstances:

- where an APP entity is satisfied, independently of any request, that personal information it holds is incorrect, or
- where an individual requests an APP entity to correct their personal information. [121]

The OAIC's investigation into DHS's handling of personal information under the Scheme [122] considered DHS's compliance with APP 13.

The OAIC identified a possible problem with the fact that DHS held approximately 250,000 duplicate CRNs, increasing the risk (identified as medium risk) that "DHS is conducting compliance activities against customers with duplicate or multiple CRNs, and in doing so, could be using inaccurate, out of date, or incomplete information to determine possible debts." [123]

5.8 The current process for receiving ATO PAYG information

PAYG data matching between the ATO and Services Australia no longer occurs as it did under the Scheme. In July 2019, the STP (Single Touch Payroll) Interim Solution commenced.

The STP process enables the provision of data to the ATO at the point where an employer pays their employee, replacing the annual [124] reporting requirement under the Payment Summary Annual Report system that was in place during the Scheme (and under which the PAYG reporting was received from payers). [125] The STP proposal commenced in 2018 and was implemented in stages. [126]

Further information on the STP process can be found in the chapter - Automated Decision Making.

6 Conclusion

The Commission notes the Commonwealth's submissions accepting the importance of taking steps to ensure that identity matching, data-matching and data exchange processes comply with applicable privacy and secrecy laws .

The Robodebt Scheme manifested many flaws across the period in which it operated, and the examples outlined above demonstrate that the data-matching process was no exception. Some of those problems were confined to processes which were in place at the time of the operation of the Scheme. Some of those processes still operate today. In that context, the Commission makes the following recommendations.

Recommendation 16.1: Legal advice on end-to-end data exchanges

The Commonwealth should seek legal advice on the end-to-end data exchange processes which are currently operating between Services Australia and the ATO to ensure they are lawful.

Recommendation 16.2: Review and strengthen governance of data-matching programs

The ATO and DHS should take immediate steps to review and strengthen their operational governance practices as applied to jointly conducted data-matching programs. This should include:

- reviews to ensure that all steps and operations relating to existing or proposed data-matching programs are properly documented
- a review of all existing framework documents for existing or proposed data-matching programs
- a review of the operations of the ATO/DHS Consultative Forum and the ATO/DHS Data Management Forum
- a review of the existing Head Agreement/s, Memoranda of Understanding and Services Schedule
- a joint review of any existing or proposed data-matching program protocols to ensure they are legally compliant in respect of their provision for the data exchanges contemplated for the relevant data-matching program.

1 Exhibit 3-4958 - CPO.9999.0001.0005 - Henry Belot and Ashlynne McGhee, 'Centrelink debt recovery- FOI documents show lack of communication between Social Services Minister and key agencies' (ABC News) (CP013).22 Refer to the chapter - Legal and Historical Context of the Scheme.
2 Refer to the chapter - Legal and Historical Context of the Scheme.
3 Data-matching Program (Assistance and Tax) Act 1990 (Cth) (DMP Act), s 10.
4 Data-Matching Program (Assistance and Tax) Act 1990 - Guidelines 1994 ('the DMP Guidelines') [cl 12].
5 Exhibit 4-6719 - RBD.9999.0001.0454, Response to request for information from AIC to Royal Commission - 16 January 2023 [p 16: para 2.65]: "The OAIC found that only DVA continued to conduct statutory data matching activities under the Data-matching Act."
6 Exhibit 2398 - MBR.9999.0001.0001_R - MKB Witness Statement Final [paras 3.3-3.5].
7 Exhibit 505 – ATO.9999.0001.0003 – Office of the Australian Information Commissioner, Guidelines on data matching in Australian Government administration [para 1].
8 Privacy Act 1988 (Cth) s 28(1)(a).
9 Exhibit 505 - ATO.9999.0001.0003 - Office of the Australian Information Commissioner, Guidelines on data matching in Australian Government administration [p 7-8].
10 Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [para 2.7].
11 Exhibit 505 - ATO.9999.0001.0003 - Office of the Australian Information Commissioner, Guidelines on data matching in Australian Government administration [p 2: para 8].
12 Exhibit 505 - ATO.9999.0001.0003 - Office of the Australian Information Commissioner, Guidelines on data matching in Australian Government administration [p 2: para 11].
13 The Guidelines were revised and reissued in 1995 and 1998 and then were substantively revised and reissued by the OAIC in 2014.
14 Exhibit 505 - ATO.9999.0001.0003 - Office of the Australian Information Commissioner, Guidelines on data matching in Australian Government administration [p 1].
15 Exhibit 505 - ATO.9999.0001.0003 - Office of the Australian Information Commissioner, Guidelines on data matching in Australian Government administration [p 4-5].
16 Exhibit 505 - ATO.9999.0001.0003 - Office of the Australian Information Commissioner, Guidelines on data matching in Australian Government administration [p 4].
17 Exhibit 505 - ATO.9999.0001.0003 - Office of the Australian Information Commissioner, Guidelines on data matching in Australian Government administration [p 8].
18 Exhibit 4754 - CTH.0009.0001.1995_R - MS17-000504 MSB [p 7: para 2.1].
19 Exhibit 4754 - CTH.0009.0001.1995_R - MS17-000504 MSB,[p 26 onwards].
20 Exhibit 4754 - CTH.0009.0001.1995_R - MS17-000504 MSB.
21 Exhibit 4754 - CTH.0009.0001.1995_R - MS17-000504 MSB [p 33-34: section 5 and 6].
22 Exhibit 4754 - CTH.0009.0001.1995_R - MS17-000504 MSB [p 35: section 7].
23 Exhibit 4754 - CTH.0009.0001.1995_R - MS17-000504 MSB [p 35: section 7].
24 Exhibit 4754 - CTH.0009.0001.1995_R - MS17-000504 MSB [p 37: section 10].
25 Exhibit 4754 - CTH.0009.0001.1995_R - MS17-000504 MSB [pp 34-35: section 6.1].
26 Exhibit 4754 - CTH.0009.0001.1995_R - MS17-000504 MSB [p 58: section 3.2].
27 Exhibit 293 - ATO.001.933.6001_R - OAIC Review Response [p 1].
28 Exhibit 4754 - CTH.0009.0001.1995_R - MS17-000504 MSB [p 11:section 7; p 35: section 7].
29 Exhibit 4754 - CTH.0009.0001.1995_R - MS17-000504 MSB [p 12: section 10]; Exhibit 2-2764 CTH.3000.0029.8333 - Attachment A PAYG Protocol NEW VERSION as at 11 May 2017 [section 7].
30 Exhibit 1-0459 - ATO.001.957.4068_R - Data Services Schedule.
31 Exhibit 2398 - MBR.9999.0001.0001_R - MKB Witness Statement Final [p 5:para 1.25].
32 Exhibit 1-0459 - ATO.001.957.4068_R - Data Services Schedule.
33 The Attorney-General's Department is undertaking a review of secrecy provisions and is due to report by 30 June - Review of Secrecy Laws, Australian Law Reform Commission Discussion Paper 74 at Attachment A – Terms of Reference.
34 Clause 355-30 in Schedule 1 to the Taxation Administration Act 1953 (TAA53) defines 'protected information'. See also s 8XA TAA53 (which prohibits unauthorised access to taxation records and s 8WB which prohibits the unauthorised use or disclosure of TFNs).
35 Section 23 of the Social Security Act 1991 (Cth).
36 SSA Act pt 5 div 3.
37 Transcript, Jeremy Hirschhorn, 3 November 2022 [p 358: line 12].
38 Transcript, Jeremy Hirschhorn, 3 November 2022 [p 355: line 39-42].
39 Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [para 1.10].

40 Privacy Act, s 52. For further information about the role of the Privacy Commissioner see the chapter - Office of the Australian Information Commissioner.
41 Privacy Act, s 30.
42 Privacy Act, s 30(3).
43 Privacy Act, s 13G.
44 Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [para 2.87].
45 TAA53 pt 3 div 2 sub-div BA and most relevantly s 8WB(1A). See also Exhibit 1-0228 – ATO.9999.0001.0001_R, Response to NTG-0016 - Statement of Jeremy Hirschhorn, 19 October 2022 and Transcript, Jeremy Hirschhorn, 3 November 2022 [p 355: lines 29-31].
46 Only specified people, agencies or organisations are authorised to collect a person's TFN. Services Australia is an authorised TFN recipient.
47 Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [para 2.90].
48 Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [para 2.86].
49 Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [para 2.85].
50 Exhibit 4-7075 - RBD.9999.0001.0451 - Deloitte Final Report 'The use of data and automation in the Robodebt scheme', dated 3 March 2023.
51 Exhibit 4-7075 - RBD.9999.0001.0451 - Deloitte Final Report 'The use of data and automation in the Robodebt scheme', dated 3 March 2023.
52 Deloitte – Robodebt Process Maps, Deloitte, published 8 March 2023, https://robodebt.royalcommission.gov.au/publications.
53 Exhibit 4-7075 - RBD.9999.0001.0451 - Deloitte Final Report 'The use of data and automation in the Robodebt scheme', dated 3 March 2023, [section 2.6]. See Exhibit 8469 - ATO.9999.0001.0008_R - NTG-0199 - issued to the Proper Officer of the ATO - signed witness statement of M Hay dated 17 February 2023 [para 1.10 and following].
54 Exhibit 8468 - ATO.9999.0001.0009_R - 2023 02 14 - NTG-0199; Exhibit 8469 - ATO.9999.0001.0008_R - NTG-0199 - issued to the Proper Officer of the ATO - signed witness statement of M Hay dated 17 February 2023; Exhibit 8434 - CTH.9999.0001.0166_R - 2023 02 14 - NTG-0201 (1); Exhibit 8435 - CTH.9999.0001.0165 - Services Australia - Response to NTG-0201 - Q 1 and 3 - 09.03.2023; Exhibit 7075 - RBD.9999.0001.0451 - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 12: para 6.3].
55 Exhibit 7075 - RBD.9999.0001.0451 - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 12-14: para 6.3.2].
56 Exhibit 7075 - RBD.9999.0001.0451 - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 13-14: para 6.3.2.2].
57 Exhibit 7075 - RBD.9999.0001.0451 - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 15-17: para 6.3.3].
58 Exhibit 4-7075 - RBD.9999.0001.0451 - Deloitte Final Report 'The use of data and automation in the Robodebt scheme', dated 3 March 2023 [para 6.3.4].
59 Exhibit 4-7075 - RBD.9999.0001.0451 - Deloitte Final Report 'The use of data and automation in the Robodebt scheme', dated 3 March 2023, Table 5, p 33; Exhibit 4-7095 - ATO.005.308.0013 – Footer Files 2014-2019.
60 Exhibit 4-7075 - RBD.9999.0001.0451 - Deloitte Final Report 'The use of data and automation in the Robodebt scheme', dated 3 March 2023, Table 5: p 33; Exhibit 4-7095 - ATO.005.308.0013 – Footer Files 2014-2019.
61 Exhibit 2-2398 - MBR.9999.0001.0001_R - MKB Witness Statement Final [para 3.7];
62 Exhibit 1-0255 - ATO.001.957.1411_R - Email from Michael Brown (ATO) to Ben Lumley (DHS) re Customer complaint to ATO about Centrelink.; Exhibit 1-0260 - ATO.001.635.2663_R, Email from Michael Brown (ATO) to Ben Lumley (DHS) re Update on DHS Compliance Letters, 22 December 2016.
63 Exhibit 1-0497 - ATO.001.940.6771_R - FW- Formal response- Annualised information to DHS.
64 Exhibit 1-0497 - ATO.001.940.6771_R - FW- Formal response- Annualised information to DHS. Exhibit 2-2439 -ATO.001.635.5855_R - FW- -Centrelink compliance and taxable income - crikey article.
65 Exhibit 1-0497 - ATO.001.940.6771_R - FW- Formal response- Annualised information to DHS. Exhibit 2-2439 - ATO.001.635.5855_R - FW- -Centrelink compliance and taxable income - crikey article.
66 Exhibit 2-2438 - ATO.001.636.4245_R - FW- Things DHS.
67 Exhibit 1-0272 - ATO.001.572.3540_R - Email from Michael Brown (ATO) to George Holton (ATO) and Greg Williams (ATO) re OCI debrief.
68 Exhibit 2-2432 - ATO.001.573.0148_R - FW- Media Article This Morning.
69 Exhibit 2-2433 - ATO.001.644.3070_R - FW- Copy of documents as discussed during PHU on 21 June 2017.

70 Exhibit 1-0283 - ATO.001.644.8921_R - Email from Tyson Fawcett (ATO) to Ali McRae (DHS) re DHS-ATO Optimisation Working Group.
71 Exhibit 8435 - CTH.9999.0001.0165 - Services Australia - Response to NTG-0201 - Q 1 and 3 - 09.03.2023 [p 20:para 3.49].
72 Exhibit 2-2749 - BLU.9999.0001.0005_R - NTG-0085 - Ben Lumley – Statement at [60]. Transcript, Ben Lumley, 15 December 2022 [p 1990:12-28].
73 Transcript, Ben Lumley, 15 December 2022 [p 1995:1-2 and 6-9].
74 Exhibit 1-1108 - CTH.3000.0030.0386 - 2004 Pay As You Go PAYG v1.0 [para 6.1].
75 Transcript, Chris Birrer, 7 November 2022 [p 608:11-35].
76 Exhibit 2-2749 - BLU.9999.0001.0005_R - NTG-0085 - Ben Lumley – Statement [para 58].
77 Exhibit 2-2773 - CTH.3000.0028.6813_R - RE- Draft email for Malisa re the Protocols.
78 Exhibit 2-2302 - TFA.9999.0001.0002_R, statement of Tyson Fawcett in response to NTG-0087 at 3.22. Exhibit 2-2398 - MBR.9999.0001.0001_R - MKB Witness Statement Final [para 3.24].
79 Exhibit 1-0487 - ATO.9999.0001.0004 - Program Protocol - Pay-As-You-Go (PAYG) Data Matching May 2017 [section 10].
80 Exhibit 3-4754 – CTH.0009.0001.1995_R – MS17-000504 MSB [p 2:para 6].
81 Exhibit 2-2749 - BLU.9999.0001.0005_R - NTG-0085 - Ben Lumley – Statement at [85]-[91]. Exhibit 2-2771 - CTH.3000.0026.0383_R - PAYG Program Protocol [DLM=For-Official-Use-Only].
82 Transcript, Ben Lumley, 15 December 2022 [p 1997:1-20].
83 Transcript, Ben Lumley, 15 December 2022 [p 1997:41-42].
84 Transcript, Chris Birrer, 7 November 2022 [p 596:7-13]; Exhibit 9003 - CTH.3002.0006.5508 - PAYG High Level Assumptions.
85 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme', dated 3 March 2023 [para 6.3.2.1].
86 Exhibit 4-7093 - CTH.3023.0002.4971_R - PAYG transition to HANA Detailed Requirements Document - Signed by All_1.
87 Exhibit 4-7093 - CTH.3023.0002.4971_R - PAYG transition to HANA Detailed Requirements Document - Signed by All_1. Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme', dated 3 March 2023 at 7.3. These exhibits support the view that records were retained for use.
88 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme', dated 3 March 2023 [para 6.3.2.1].
89 Transcript, Chris Birrer, 7 November 2022 [p 596:7-13].
90 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme', dated 3 March 2023 [para 6.3.2.1].
91 Exhibit 1-1109 - CTH.3000.0028.6814 - PAYG Protocol 2004 [section 7]. Guideline 9 of the voluntary Data-matching Guidelines.
92 Exhibit 3459 - RBD.9999.0001.0364 - 20221111 Letter to OSA re Birrer information incl annexures(46388325.1) (002) [p 2-3].
93 Guideline 9 of the voluntary Data-matching Guidelines.
94 Exhibit 8738 - CTH.3500.0008.3081 - MS17-000506 Att A - PAYG Protocol 2004 [para 2.1].
95 Exhibit 1-0487 - ATO.9999.0001.0004 - Program Protocol - Pay-As-You-Go (PAYG) Data Matching May 2017.
96 Exhibit 505 - ATO.9999.0001.0003 - Office of the Australian Information Commissioner, Guidelines on data matching in Australian Government administration [p 8: para 7.5].
97 Exhibit 505 - ATO.9999.0001.0003 - Office of the Australian Information Commissioner, Guidelines on data matching in Australian Government administration [p 8: para 7.4].
98 Exhibit 4-5547 - CTH.3000.0009.5841_R - RE- For clearance please - LEXID 9721 - Privacy incident - Further information required. [DLM=Sensitive-Personal] (though note that in this specific example, the fuzzy and tight matching confirmation was not in place within DHS: Transcript, Dr Elea Wurth, 8 March 2023 [p4650: line 36 – p 4653: line 19].
99 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme', dated 3 March 2023 [para 6.3.3.1].
100 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme', dated 3 March 2023, [para 6.3.3.1]; Transcript, Dr Wurth, 8 March 2023 [p 4653: lines 21-27].
101 Transcript, Dr Elea Wurth, 8 March 2023 [p 4653: lines 3-13].
102 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme', dated 3 March 2023 [para 6.3.3.1].
103 Exhibit 1-0228 - ATO.9999.0001.0001_R - Response to Notice NTG-0016 - Statement of Jeremy Hirschhorn [para 10.1]. Exhibit 4754 - CTH.0009.0001.1995_R - MS17-000504 MSB [p 8: para 4.1].

104 Exhibit 8469 - ATO.9999.0001.0008_R - NTG-0199 - issued to the Proper Officer of the ATO - signed witness statement of M Hay dated 17 February 2023, [para 4.1-4.3]; Transcript Michael Kerr-Brown, 9 March 2023 [p 4863: line 3-5].
105 Exhibit 228 - ATO.9999.0001.0001_R - Response to Notice NTG-0016 – Statement of Jeremy Hirschhorn [p 4: para 10.5].
106 Exhibit 4-5547 - CTH.3000.0009.5841_R - RE- For clearance please - LEXID 9721 - Privacy incident - Further information required.
107 Exhibit 1-0228 - ATO.9999.0001.0001_R - Response to Notice NTG-0016 - Statement of Jeremy Hirschhorn, [para 10.8].
108 Exhibit 8469 - ATO.9999.0001.0008_R - NTG-0199 - issued to the Proper Officer of the ATO - signed witness statement of M Hay dated 17 February 2023 [para 4.7-4.9].
109 Exhibit 4-7075 - RBD.9999.0001.0451_R – Deloitte Final Report 'The use of data and automation in the Robodebt scheme', dated 3 March 2023 [para 8.3].
110 Exhibit 4-7075 – RBD.9999.0001.0451 – Deloitte Final Report 'The use of data and automation in the Robodebt scheme', dated 3 March 2023 [p 8 (3)].
111 Exhibit 4-7075 – RBD.9999.0001.0451 – Deloitte Final Report 'The use of data and automation in the Robodebt scheme', dated 3 March 2023, section, figure 1, [section 8.3.2].
112 Exhibit 4-7075 – RBD.9999.0001.0451 – Deloitte Final Report 'The use of data and automation in the Robodebt scheme', dated 3 March 2023, section, figure 1, [section 8.3.2].
113 OAIC Report 'Handling of personal information: Department of Human Services PAYG data matching program' (30 September 2019) [paras 3.16 to 3.18].
114 witness statement of M Hay dated 17 February 2023 [paras 3.7-3.10].
115 Commonwealth submission dated in response to NAF-COM3 [para 16]. Transcript, Jeremy Hirschhorn, 4 November 2022 [p 442:line 31-39].
116 OAIC Report 'Handling of personal information: Department of Human Services PAYG data matching program' (30 September 2019) [para 3.15].
117 OAIC Report 'Handling of personal information: Department of Human Services PAYG data matching program' (30 September 2019) [para 3.22].
118 OAIC Report 'Handling of personal information: Department of Human Services PAYG data matching program' (30 September 2019) [para 3.26].
119 Australian Privacy Principle Guidelines, [chapter 13: para 13.2].
120 OAIC Report 'Handling of personal information: Department of Human Services PAYG data matching program' (30 September 2019).
121 OAIC Report 'Handling of personal information: Department of Human Services PAYG data matching program' (30 September 2019) [para 3.38].
122 Sometimes biannual: Exhibit 1-0228 - ATO.9999.0001.0001_R - Response to Notice NTG-0016 - Statement of Jeremy Hirschhorn, [p 3: para 2.3].
123 The PSAR system continues for payments that are outside the scope of STP: Exhibit 1-0228 - ATO.9999.0001.0001_R - Response to Notice NTG-0016 - Statement of Jeremy Hirschhorn, [p 2:para 2.2(a)].
124 Transcript, Jeremy Hirschhorn, 3 November 2022 [p 353: lines 38-47; p 354: lines 1-4].

Chapter 17: Automated decision making

1 Introduction

In the past, staff manually checked recipient records against data provided by other government agencies such as the Australian Taxation Office. Discrepancies were then followed up with recipients via letter and phone, taking considerable time to identify anomalies.

The new online compliance system automates part of this process, and encourages people to take part in correcting their records.[1] – Hon Alan Tudge MP, Minister for Human Services

Within six months of the Robodebt scheme (the Scheme) being launched, it was being heralded as a technological triumph. The Hon Alan Tudge MP, Minister for Human Services, issued a media release on 23 November 2016 titled *New technology helps raise $4.5 million in welfare debts a day*. The release praised a "new online system" that "is now initiating 20,000 compliance interventions a week – a jump from 20,000 a year… this is a great example of the Government using technology to strengthen our compliance activities with faster and more effective review systems."[2]

The Strengthening the Integrity of Welfare Payments Budget measure, from which the Scheme was created, was originally designed to create savings of $1.7 billion over its first five years of operation.[3] It did the opposite, costing the government almost half a billion dollars and causing distress to hundreds of thousands of income support recipients.

Over the life of the Scheme, different activities were automated.

The Commission engaged Dr Elea Wurth, a partner from Deloitte Risk Advisory Pty Ltd (Deloitte), to provide expert analysis on the technical structure of the Scheme. Dr Wurth based her findings on documents provided by the Commonwealth at the request of the Commission.

Dr Wurth's process maps were provided to the Commonwealth for comment, and updated where appropriate.[4] Accordingly, they represent the best achievable understanding of how the Scheme operated on a technical level. The Commission acknowledges that the process maps and report are based on the technical documentation the Commission received in response to a number of specific requests made to the Commonwealth. There may be inaccuracies in the process maps and report leading to the possibility of inaccurate conclusions. If so, they are likely to be the product of DHS's haphazard and inconsistent documentation of its processes.

Dr Wurth told the Commission that automation has the potential to increase productivity, efficiency, accuracy, and the cost-effectiveness of service delivery.[5] A trustworthy automated system is a system containing automation that is ethical, lawful and technically robust, coupled with good goverance and risk management.[6] To achieve trustworthiness, the system must be designed with human agency at its centre.[7]

2 Automation under the Scheme

The terms ”automated decision making” (or “automation”) and “artificial intelligence” (AI) are often used interchangeably, and certainly have been in commentary about the Scheme, though they are distinct concepts.

AI describes systems that are self learning and have a level of autonomy.[8]

Data61 was engaged by DHS, at the request of Mr Tudge in or around January 2017 to “undertake an assessment of the data-matching functionality [in the Scheme] to determine if further refinements can be made.”[9] An Executive Minute to Minister Tudge dated 23 March 2017 noted that Data61 recommended the introduction of a “complex machine learning methodology” which would “take some months to build” and that “there are some risks that such a methodology may not be possible given the data quality.”[10] This type of AI was not, in the event, developed for or used in the Scheme.

While the Scheme did not use AI, it did use automation. It involved a system of business rules with no ability to move outside of specific and defined action on the basis of the data received.[11] It was extremely rigid; once the rules had been coded and set in place, the system itself would stay in place until the rules were changed by way of human intervention.[12]

Dr Wurth produced process maps and a report to the Commission, which were based on the following stages comprising the end-to-end Scheme:



Figure 1. PAYG program stages [13]

The first three of these stages are discussed in the Data-matching and Exchanges chapter.

Regarding automation, Dr Wurth was asked to identify the steps in the Scheme which were automated.

Dr Wurth’s report found that automation was present in the Income data verification and debt notification stage of the Scheme (see figure later in this chapter). In this stage, once the income support recipient had either verified their income, or failed to respond so that averaged data was used, a calculation was automatically made of any debt and the recipient was notified. It was at this point that the recipient’s interaction with DHS was automated in the Scheme.[14]

Any amendments made in the **Online Compliance Intervention (OCI)** phase are considered to have carried through for the **Employment Income Confirmation (EIC)** and **Check and Update Past Income (CUPI)** phases, except where noted otherwise.

The Income data verification and debt notification stage during the OCI phase consisted of the following key stages:

Initiation[15]

Recipient records which were identified with an income discrepancy through Income data matching[16] were created as a case for compliance intervention.

The case was assessed against criteria to determine a recipient’s eligibility for an offer of staff assisted intervention.

Notification[17]

An intervention activity was created in Centrelink’s Online Services for the income support recipient.

Recipients that met the threshold for assistance were sent a notice which offered assistance and a phone number to call. If they did not call within 21 days, they were moved onto the "standard pathway."

Recipients on the standard pathway – that is, not qualifying for assistance – were sent a notice advising them that they needed to log on to Centrelink Online Services within 21 days to provide evidence of income to resolve the income discrepancy.

Response pathways[18]

Recipients on the standard pathway either:

- accessed Centrelink Online Services within 21 days and:
    - updated their employment data, or
    - did not update their employment data (and were then treated as if they accepted the PAYG information provided by Centrelink regarding their employment); or
    - indicated that they did not work for the matched employer, in which case the matter was referred to a staff member to further investigate the mismatch or anomaly.
- did not access the Centrelink Online Services within 21 days.

Risk assessment[19]

If the recipient updated their employment data in Centrelink's Online Services, the system applied risk rules to validate the updated data (further explanation of risk rules is provided under Updating recipient records at below). This produced one of two outcomes:

- the recipient's update of employment data passed the risk rules, and the recipient record was updated with the new data, or
- the recipient's update of employment data did not pass the risk rules, and a request was made for additional supporting documents.

Further supporting documents could be requested at this stage by DHS, and the case could be referred to a compliance officer for manual assessment.

Finalisation[20]

The recipient pathways converged to an automated entitlement and debt calculation process (except for those who received a manual assessment).

The automated entitlement calculation was based on the most up-to-date data DHS had available as a result of the previous steps (that is, the information the recipient had entered, or the PAYG data).

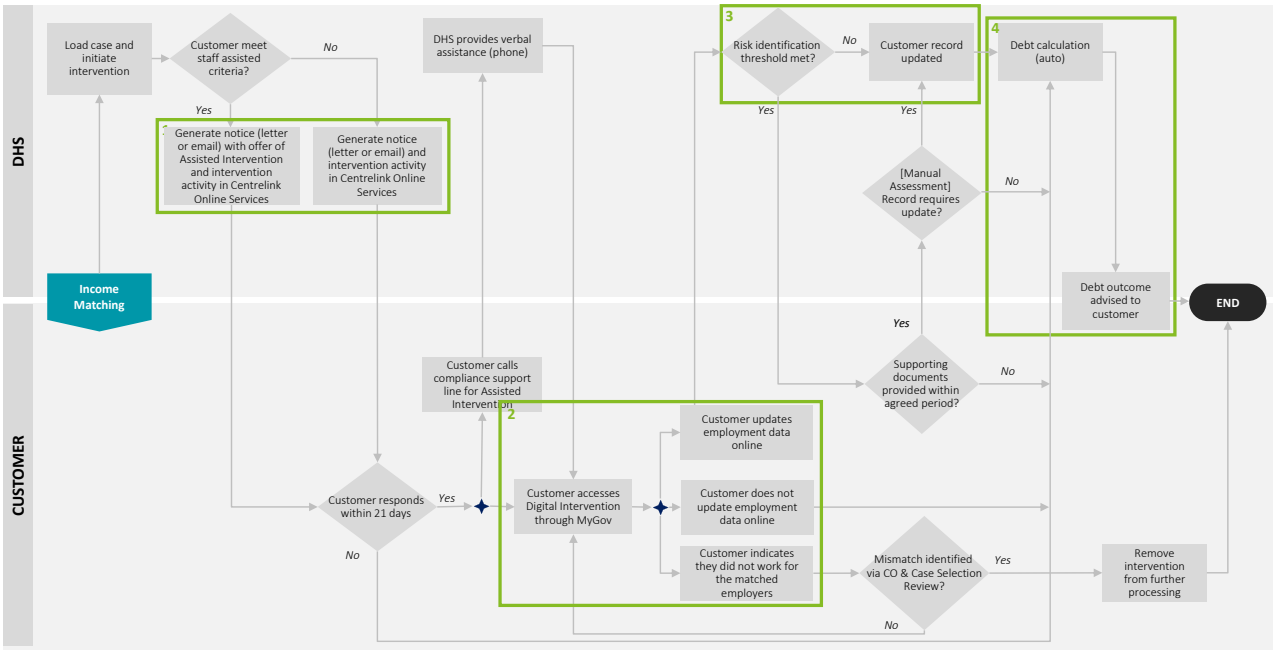
Based on the automated entitlement calculation, debt was automatically calculated and raised (this could include a no debt result).

A 10 per cent penalty was automatically applied for those customers who did not make contact or who indicated that there were no personal factors that affected their ability to correctly declare their income.[21]

A debt notice was automatically generated and issued to the recipient.

The following figure represents the steps that were automated under the Scheme.[22]

Figure7: PAYG program steps that were automated under the Scheme



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2.1 Changes during the Scheme

Deloitte produced process maps for each of the pre-Robodebt,[23] PAYG Manual,[24] OCI,[25] and EIC and CUPI[26] programs under the Income data verification and debt notification stage of the Scheme. The pilot program (April – June 2015) was not included in Deloitte's review.

The process maps include notations that indicate where the Scheme changed between each of these programs.

Notification of a compliance intervention

Prior to the Scheme

Before the Scheme,[27] when a discrepancy between the income reported to DHS and the ATO data arose, prior to commencing a review, a compliance officer would check a recipient's record to determine if the discrepancy could be explained.[28] For example, a recipient might have declared their employer as Big W where the PAYG data matched from the ATO listed their employer as Woolworths, so a discrepancy was raised; but this discrepancy could be rectified by a compliance officer who was aware that the entity name for Big W is Woolworths, and that it was one and the same employer.[29]

If the discrepancy could be explained, the compliance officer would manually update the information.

If the discrepancy was not easily explicable, the compliance officer would attempt to contact the recipient and request that they explain the discrepancy.

If the recipient did not respond, the compliance officer would contact the recipient's listed employer/s to request information, including pay slips:[30] "we had normally looked to try and get the information from employers, and [the Scheme] had removed that layer at all where that was our first process prior."[31]

The compliance officer would manually update the recipient's record with new information if provided.

PAYG Manual

In the PAYG Manual phase of the Scheme, all recipients, including some vulnerable recipients, automatically received a letter when a discrepancy was identified, requesting that they contact DHS.[32] In this phase, the initial intervention by the compliance officer was removed – that is, the assessment of the debt to see if it could be explained – but the compliance officer still contacted the recipient and, if necessary, the recipient's employer, to request further information.[33]

OCI phase

From the OCI phase of the Scheme, and on, there was no intervention by a compliance officer prior to the discrepancy being raised with the recipient:[34] "there was no investigation role."[35]

In the OCI phase of the Scheme, the automatic issuing of letters when a discrepancy arose continued,[36] but some recipients with vulnerabilities were identified for a "staff assisted process," which meant that they received an initial letter with a telephone number to call and request assistance (see 'The concept of vulnerability' chapter). That assistance involved a compliance officer assisting the recipient to use the online portal, or using the portal on the recipient's behalf to make updates.[37]

EIC and CUPI phases

In the EIC phase of the Scheme, the initiation letters were updated to advise recipients that there was a possibility of a debt and that they could request an extension of time to respond, and included the phone number for a helpline.[38] All online letters were sent through Centrelink Online Services.[39] The standard response time became 28 days,[40] up from 21 days.[41]

There was no further change under the CUPI phase of the Scheme.

Updating recipient records

Prior to the Scheme and the PAYG Manual phase

Before the Scheme and during the PAYG Manual phase, a compliance officer manually assessed any new information provided by the recipient, and could request clarification or more information from the recipient.

OCI phase

Automated validation risk rules were applied to any new information provided by the recipient.[42] There was no intervention by a compliance officer.[43]

> An automated assessment will be made based on the match data and/or the customer input including any documentary evidence. The system will auto assess the match data, the projected outcome as well as any updates from the customer. **Validation rules will determine if any changes made by the customer to the data is within acceptable tolerances** …This proposal implements a self-assessment model for compliance interventions. Customers will be able to self-assess many aspects of their entitlement online and only when this has occurred have to go through the more intensive intervention where the risk level indicates the need.[44]
>
> [emphasis added]

An example of where a risk was identified was where the recipient's changes to their income information resulted in its not being within one per cent of the ATO total provided. Where they did not make any updates to the income details recorded, and indicated that they were correct, a risk was identified.[45] Where a risk was triggered, the recipient was notified, and advised how to complete the intervention, including whether they would need evidence such as bank account details.[46]

It is worth noting that despite the 'Online Compliance Intervention: Detailed Requirements Document' specifying that the notification must include "what information the customer may need to assist in [sic] them to completing [sic] the intervention e.g. bank account details,"[47] the Commission heard that at the start of the OCI program, recipients could not use bank statements as evidence.[48]

EIC phase

There were no changes under the EIC phase.

CUPI phase

Enhancements were made to the validation risk rules.[49] This included an increase to 5 per cent of the allowable variance between the recipient's total income as indicated by them and the data from the ATO,[50] up from a 1 per cent allowable variance.[51]

Calculation and notification of a debt

Prior to the Scheme and the PAYG Manual phase

A compliance officer manually calculated debt. Averaged data was used only where "every possible means of obtaining the actual income information has been attempted': where this was the case, "it is possible to use any evidence you have to raise a debt including an annual figure."[52] In the PAYG Manual phase, averaging could be used where there was no contact from the recipient,[53] or where the recipient consented to the use of averaging.[54]

The application of a 10 per cent penalty was at the discretion of the compliance officer.

OCI phase

During the Scheme, debt was automatically calculated via the online system and recipients were automatically issued a debt notification.[55]

In the OCI period, a 10 per cent penalty was automatically applied for those recipients who did not make contact or who indicated that there were no personal factors that affected their ability to correctly declare their income.[56]

The Commonwealth Ombudsman, in his 2017 investigation into Centrelink's automated debt raising and recovery system, highlighted that in the Administrative Review Council's (ARC's) report *Automated Assistance in Administrative Decision Making*, "a key question in the design of automated decision-making systems in administrative law is whether the system is designed 'so that the decision-maker is not fettered in the exercise of any discretion or judgement they may have'."[57] The Ombudsman's observation was that a recipient may have indicated that there were no personal factors that affected their ability to correctly declare their income, and so the penalty was automatically applied "in situations where a human decision maker, able to review the person's Centrelink record, ask relevant questions and consider all the relevant circumstances of the case, may have decided the penalty fee should not apply, or the discretion not to apply the fee should be exercised."[58]

The Ombudsman made no further comment on the ramifications of the automatic imposition of the 10 per cent penalty.

EIC phase

The automatic application of averaged ATO data to finalise reviews, where the due date for response by the recipient had passed, was removed:[59] where the recipient failed to contact in response to the notification of a compliance intervention, the compliance officer was to make two "genuine" attempts

to contact the recipient on all available numbers for five consecutive days. If the contact was successful, the compliance officer would undertake the intervention with the recipient over the telephone. If the contact was unsuccessful, the compliance officer would finalise the review using the averaged ATO income information.[60]

The Commission was told that by the end of 2017, virtually all social security recipients who received a notification completed the review process manually.

> It's not until CUPI comes along the year after that we start to see an uptick in people completing online… EIC hadn't been built with an ability to put [recipients] back [on]line…every time someone had an issue, we essentially stopped the online process and essentially forced them to ring us instead…we had to do more coding, more changes, to be able to allow people to go back online.[61]

Also in the EIC phase, an update was made to allow specific intervention by a compliance officer if a recipient was 'vulnerable' (due to their personal circumstances, they are especially susceptible to disadvantage) and was:

- unable to contact their employer to obtain payslips;
- unable to go online or contact their bank to obtain bank statements; and
- not agreeable to the averaging of the ATO data.

If the recipient met all three of these criteria, the compliance officer could contact the employer and request employment income details on the recipient's behalf. This intervention was only permitted in "extenuating circumstances."[62] It is unclear, in this circumstance, how it was determined whether a recipient was "vulnerable." The concept of vulnerability chapter speaks further on vulnerability.

The automated debt calculation step was updated to apply a 10 per cent penalty only where the recipient had received the initial letter but failed to make contact regarding their debt.[63]

CUPI phase

There were no changes under the CUPI phase.

2.2 The effects of automation

Colleen Taylor, a former employee of DHS, who worked for a period in the Online Compliance team, told the Commission that the first three cases she reviewed when she was employed by that team involved an inadvertent duplication of employer details, so that the same income was counted twice. Ms Taylor said that when her team raised the fact that the debts were incorrect, they were told that their job was to just check that the way the system calculated the debt was correct, not whether the existence of the debt was correct.[64]

There was no meaningful human intervention in the calculation and notification of debts under the OCI phase of the Scheme. This meant that debts being raised on incorrect data – or incorrectly applied data – were issued with no review.

Evidence before the Commission shows the degree to which income support recipients found themselves bewildered by, and unable to navigate, DHS processes relating to debt raising.[65] At times it was impenetrable. One of the lead applicants in the Federal Court class action *Prygodicz v Commonwealth of Australia (No 2)*,[66] Felicity Button, told the Commission that,

> I knew that there was a possibility that I had a debt. So I never wanted to dispute the fact that it existed. I did want to kind of - I wanted them to answer how they came to that amount. Because the original amount was $11,000. And when I asked - when I called up to, one, set up a payment plan and, two, ask for a review… the person on the other end just basically told me it is what it is. And when I asked how did they come to that, they said, "We averaged out - we looked at your income." And I'm like, "Okay." … but when I asked for a review, they came back with a figure that was then higher than the initial one. And I asked why that was the case, and they didn't give me an answer to

that either. They just said that they recalculated it. And at no point in that process did I feel like I had the right to fight them about that because they were the professionals, and I was the civilian who has incurred a debt. So - yes, I - I basically - I knew that there was a debt. I don't know how it got calculated. I don't know how they came up with whatever figures they did. However, it was recalculated three times to three different figures. And I just wanted to cooperate as much as I could to repay it.[67]

3 AI and automation frameworks

In Australia, the principles governing automated systems are the Australian AI Ethics principles. These were published in 2019 and, on a macro level, dictate the ways in which AI systems (encompassing automation) should operate to meet ethical standards.[68]

Australian AI Ethics Principles

Human, societal and environmental wellbeing: AI systems should benefit individuals, society and the environment.

Human-centred values: AI systems should respect human rights, diversity, and the autonomy of individuals.

Fairness: AI systems should be inclusive and accessible, and should not involve or result in unfair discrimination against individuals, communities or groups.

Privacy protection and security: AI systems should respect and uphold privacy rights and data protection, and ensure the security of data.

Reliability and safety: AI systems should reliably operate in accordance with their intended purpose.

Transparency and explainability: There should be transparency and responsible disclosure so people can understand when they are being significantly impacted by AI, and can find out when an AI system is engaging with them.

Contestability: When an AI system significantly impacts a person, community, group or environment, there should be a timely process to allow people to challenge the use or outcomes of the AI system.

Accountability: People responsible for the different phases of the AI system lifecycle should be identifiable and accountable for the outcomes of the AI systems, and human oversight of AI systems should be enabled.

These principles are part of Australia's Artificial Intelligence Ethics Framework, which was adopted in 2019: making Australia one of the first countries to endorse such principles.[69]

The Commonwealth Ombudsman published the *Automated Decision-making Better Practice Guide* (the Guide) in 2007,[70] which was later updated in 2019 and again in 2020, and which built on the 2004 report from the ARC *Automated Assistance in Administrative Decision-making*,[71] the insights in which "remain fresh because they are grounded on a clear conception of good government."[72]

The five values identified by the ARC that should be observed in the design and operation of administrative decision-making processes – lawfulness; fairness; rationality; openness or transparency; and efficiency[73]

– were in turn informed by "concepts of administrative justice which include the 'four basic requirements for just decision making in a society governed by the rule of law' identified by French J (as he then was) in 2001: lawfulness, fairness, rationality and intelligibility."[74]

The Scheme fell short of Principles 7 and 10 outlined in the ARC report:[75]

Principle 7 is that the construction of an expert system must comply with the administrative law standards if decisions made in accordance with the rule base are to be lawful, while decisions made by or with the assistance of expert systems must comply with administrative law standards in order to be legally valid.[76]

Principle 10 is that expert systems should be designed, used and maintained in such a way that they accurately and consistently reflect the relevant law and policy.[77]

The ARC Report defined "expert systems" as follows:

> computing systems that, when provided with basic information and a general set of rules for reasoning and drawing conclusions, can mimic the thought processes of a human expert…expert systems are distinct from decision-support systems, which provide information to enable a human to make a decision without actually indicating what the outcome should be…Rule-based systems are the main type of legal expert system that use constructed knowledge. They involve the modelling of rules accompanied by an 'engine' that automates the process of investigating those rules by interacting with users to establish client details.[78]

On this definition, the system underpinning the Scheme was an expert system.

The Guide is the most current set of principles on best practice in automated decision making.

It provides that administrative law, privacy requirements and human rights obligations should be integrated into the design of an automated system through appropriate planning and assessment.[79]

In May 2019, the Australian Government became an adherent to the Organisation for Economic Co-Operation and Development Principles on Artificial Intelligence (the OECD AI principles). The current Australian industry standard defines automated decision making as an application of AI;[80] consequently, in an Australian context, the OECD AI principles should be applied to systems using automation and automated decision making.

Those principles posit that AI systems (and, per the Australian definition, systems using automated decision making) should be designed in a way that respects the rule of law, human rights, democratic values and diversity, and include appropriate safeguards; for example, enabling human intervention where necessary. Transparency and responsible disclosure should be features of AI systems; people should be informed when they are the subject of automated decision making and told how they can challenge its outcomes. AI and automated decision-making systems should function in a robust, secure and safe way, with potential risks continually assessed and managed. The principles call for accountability for organisations and individuals developing, deploying or operating AI systems for their proper functioning.[81]

The Guide highlights the OECD AI principles as the "guiding principles for automated systems."[82] It concludes that automation of any part of a process is not suitable where it would:

- Contravene administrative law requirements of legality, fairness, rationality and transparency.
- Contravene privacy, data security or other legal requirements (including human rights obligations).
- Compromise accuracy in decision making.
- Significantly undermine public confidence in government administration.[83]

The Commonwealth Ombudsman, in his 2017 Investigation Report into Centrelink's automated debt raising and recovery system, highlighted the principles from the ARC's 2004 Report *Automated*

Assistance in Administrative Decision-Making: "good public administration requires that administrative decision making is consistent with the administrative law values of lawfulness, fairness, rationality, transparency and efficiency."[84] He found that, in the context of the Scheme, "risks could have been mitigated through better planning and risk management arrangements at the outset"[85] and that "DHS did not clearly communicate aspects of the system to its recipients and staff which led to confusion and misunderstanding."[86]

The landscape of regulation and principles which inform current thinking on AI and automation provides the basis upon which future reform should be contemplated.

4 Where to now?

The digital welfare state is either already a reality or emerging in many countries across the globe. In these states, systems of social protection and assistance are increasingly driven by digital data and technologies that are used to automate, predict, identify, surveil, detect, target and punish. There are irresistible attractions for Governments to move in this direction, which must be balanced against the grave risk of stumbling, zombie-like, into a digital welfare dystopia.[87]

4.1 Questions of legality

Single touch payroll and the advice from the Australian Government Solicitor

> *The use of emerging technologies is rarely unproblematic. The utilisation of automated decision-making raises a range of rule of law issues, in particular regarding procedural fairness, the transparency of decision-making, the protection of personal privacy, and the right to equality.*[88] – Yee-Fui Ng

On 19 July 2019 Services Australia, DSS and the ATO received draft advice from AGS concerning the use of Single Touch Payroll (STP) data.[89] A final advice was provided on 24 October 2019.[90]

The STP process enables the provision of data to the ATO at the point where an employer pays their employee, replacing the annual[91] reporting requirement under the Payment Summary Annual Report system that was in place during the Scheme (and under which the PAYG reporting was received from payers).[92] The STP proposal commenced in 2018 and was implemented in stages.[93]

AGS considered whether legislative authority would be needed to facilitate a "near real-time, automated transactional process that automatically applies STP data to a customer record":[94]

> There is at least an argument that s 6A [of the *Social Security (Administration) Act 1999*] (SSA Act) is capable of underpinning the automation of actions taken by Services Australia for the Data Exchange Process. The word 'decision' in s 6A includes doing or refusing to do any act or thing…On its terms, this definition would seem capable of encompassing actions involved in assessing and disclosing information under s 202 of the SS (Admin) Act, where taken by the Secretary.[95]

The advice defined the Data Exchange Process as involving five steps:[96]

1. Step 1 – ATO to collect STP data
2. Step 2 – Services Australia to disclose customer data to the ATO
3. Step 3 – ATO to match STP data and customer data
4. Step 4 – ATO to disclose matched STP data to Services Australia
5. Step 5 – Services Australia to apply matched STP data against a customer record for customer verification.

The Commission has not undertaken a comparative analysis of the STP process as compared to the process that existed under the Scheme, and accordingly draws no conclusions as to the extent of the applicability of the findings in the AGS STP advice to that process. However, there are similarities in the data exchange process under the Scheme, and the data exchange process as defined above, that raise the possibility that the issues identified in the AGS STP advice may have been present prior to the introduction of the STP. The Commission makes no findings on this point.

Section 6A of the SSA Act, pre-2020, provided that:

> (1) The Secretary may arrange for the use, under the Secretary's control, of computer programs for any purposes for which the Secretary or any other officer may make decisions under the social security law.
>
> (2) A decision made by the operation of a computer program under an arrangement made under subsection (1) is taken to be a decision made by the Secretary.

The AGS advice acknowledged that there were "several deficiencies" with the view that s 6A was capable of underpinning the automation of actions taken by Services Australia for the Data Exchange Process. These concerns centred around potential issues with the legislation as drafted at the time as authority for an automated 'decision' being made by a computer program:[97]

> These deficiencies indicate that s 6A of the SS (Admin) Act may not be well adapted to an automated, near real-time Data Exchange Process. It seems to us that in the absence of alternative legislative underpinning, this could lead to uncertainty about how other provisions of the social security law (eg, confidentiality provisions) apply in the context of automation.[98]

AGS recommended that consideration be given to expressly legislating Service Australia's use of computer programs to automate a process such as the Data Exchange Process.[99]

The draft STP advice highlighted uncertainty about whether the confidentiality provisions in Division 355 of Schedule 1 to the *Taxation (Administration) Act 1953* would apply in relation to an automated Data Exchange Process.[100] The instructions for the 2019 final STP advice only request advice regarding Service Australia's involvement: reference to the confidentiality provisions in the *Taxation (Administration) Act 1953* no longer appears.[101]

In 2020, s 6A of the SSA Act was amended[102] to include the following:

> Note: The definition of ***decision*** in the 1991 Act [the *Social Security Act 1991*] applies for the purposes of this section: see subsection 3(2) of this Act. That definition covers the doing of any act or thing. This means, for example, that the doing of things under subsection 202(1) or (2) of this Act are decisions for the purposes of this section.

Section 202A of the SSA Act was introduced at the same time through the same Bill. It provides for the obtaining of, making a record of, disclosure of or use of protected information relating to taxation information. The section specifically addresses collection of protected information from the ATO, but it is not retrospective; it did not apply to the disclosures and collections of this information under the Scheme.

The Explanatory Memorandum to the *Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Bill 2020* provides that:

> The Australian Government will use taxation information (primarily Single Touch Payroll data) to administer the social security law, including for the purpose of assessing employment income when it is paid, rather than when it is earned…To engage in these information exchanges, Services Australia will obtain, make a record of, disclose and use protected information, as that term is defined in subsection 23(1) of the Social Security Act (referred to in this Explanatory Memorandum as 'protected social security information'). These information exchanges may be automated using computer programs. The amendments to the Social Security Administration Act in this Part remove any doubt that these things can be done.[103]

Notably, the Explanatory Memorandum also provides that "the amendments made by these items also do not provide for the automation of debt recovery under the social security law."[104]

However, uncertainty may still exist as to whether a fully automated decision under the SSA Act would be a "decision" for the purposes of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) or even s 75(v) of the *Constitution*[105] on the basis of the majority decision in *Pintarich v Deputy Commissioner of Taxation* (Pintarich).[106]

Pintarich v Deputy Commissioner of Taxation

In the Pintarich case[107] a majority of the Full Court of the Federal Court held that an automatically generated letter sent out by the ATO, which purported to accept that the amount of a tax debt to be repaid to the ATO was inclusive of a general interest charge, was not a "decision" for the purposes of the ADJR Act, because the letter did not demonstrate that a mental process of deliberation had occurred.[108]

The majority framed their judgment as narrowly addressing what constitutes a decision under section 8AAG of the *Taxation Administration Act 1953*.[109] The court applied the test in *Semunigus v Minister for Immigration and Multicultural Affairs*[110] where it was held that a valid decision requires two elements to be satisfied: (1) a mental process of reaching a conclusion; and (2) an objective manifestation of that conclusion.[111] In applying that test to a situation involving an automated system, the majority set a precedent with possible implications beyond the circumstances in Pintarich.[112]

In dissent, Kerr J argued that the legal conception of what constitutes a decision should not remain static:[113]

> the hitherto expectation that a 'decision' will usually involve human mental processes of reaching a conclusion prior to an outcome being expressed by an overt act is being challenged by automated 'intelligent' decision-making systems that rely on algorithms to process applications and make decisions.[114]

Commentators have made the point that Pintarich is premised on an expectation of human input into decision making, which disregards the reality of automated decision making;[115] and that it also makes uncertain whether government determinations made using automated decision making are decisions for the purposes of the ADJR Act; if not, they could not be challenged by application for judicial review under that Act.[116]

Conclusions

The Australian legislature has introduced deeming provisions into a number of statutes to enable automated decision making, such as the amendment to s 6A of the SSA Act. However, the piecemeal nature of the approach has produced a legislative framework which lacks cohesion: "Ad hoc judicial consideration of individual cases is arguably unsuited to addressing systemic issues, underlining the need for regulatory reform."[117]

Justice Perry of the Federal Court of Australia, in extrajudicial writing, pointed out that

> deeming provisions [such as that in s 6A of the *Social Security (Administration) Act 1999*] require acceptance of highly artificial constructs of decision-making processes. More sophisticated approaches may need to be developed as these issues come to be litigated in the courts and these provisions fall to be construed and applied.[118]

4.2 The need for oversight

The complexity and incohesiveness of the legislative landscape in respect of automated decision making indicates that oversight is warranted, and the Robodebt experience demonstrates the need beyond argument. This was a massive systemic failure, on which the availability of individual recourse to review could make no impression.

One possibility to fill the void is the re-activation of the ARC. Professor Terry Carney has written that "the most effective initial extra-legal measure [to ensure accountability in automated decision making] may well be to revive the operation of the Administrative Review Council."[119]

The ARC's reinstatement is recommended in the Administrative Appeals Tribunal chapter] because of the ARC's statutory capacity to inquire into departmental administrative decision-making procedures and the administrative law system more generally: which could have played an important role in exposing the deficiencies of the Scheme. The ARC could also have a significant role in monitoring automated decision making. It has experience in the field; as outlined above, its report, *Automated Assistance in*

Administrative Decision Making, contained best practice principles for the development and operation of expert computer systems used to make or assist in the making of administrative decisions. It reminded government agencies and system designers of the need to be mindful of administrative law values and to ensure that the process by which a system is constructed, and its continuing operation, reflect those values.[120] The ARC's functions under section 51 of the *Administrative Appeals Tribunal Act 1975* would appear sufficiently broad to encompass the continuing oversight of automated decision making from a justice and equity perspective.

It is unlikely that the ARC would wish or be equipped to have any role in auditing the technical aspects of automated decision making. A different body, more generally focused on automation, and possibly AI, outside of an administrative law lens, could complement the work of the ARC. One possibility is an expansion of the assessment and investigative role of the Office of the Australian Information Commissioner (OAIC), with a corresponding increase in resources.

Another, suggested by the Australian Human Rights Commission, is the creation of an AI Safety Commissioner; a recommendation which was echoed in submissions to the Commission.[121] It was suggested that this role would involve improving "the use of automation and information technology (including artificial intelligence) in public administration."[122] The evidence before the Commission about the development and implementation of Robodebt, it was submitted, indicates the need for an office with broad remit to improve the use of automation and AI in public administration.[123]

The Commission considers that there should be an independent oversight entity capable of reviewing both the technical aspects and human impacts of government automated decision making. That might involve expansion of the role of the OAIC; it might entail the creation of a new role, because of the broader need for oversight of AI processes generally, commentary on which is beyond the remit of the Commission.

4.3 Legislative reform

It is possible for an automated system to make decisions by using pre-programmed decision-making criteria without the use of human judgment at the point of decision. The authority for making such decisions will only be beyond doubt if specifically enabled by legislation.[124] – Commonwealth Ombudsman, 2020

Many of the submissions received by the Commission on the topic of automation urged legislative reform. To date, there has been inconsistency in the legal status of automated decision making in Australian government agencies. Numerous Commonwealth laws have been amended to establish a basis for automated decision making, but these amendments have been piecemeal, across a wide body of legislation, and without the necessary further amendments establishing standards for which decisions should be automated and which should not; and appropriately designed systems for transparency, review and appeal.[125]

A cohesive and accessible legislative legal framework, aimed at ensuring that algorithms and automated critical decision systems are fit for purpose, lawful, fair, and do not adversely affect human and legal rights, is particularly important where the interests of vulnerable people are concerned.[126] Such legislative reform would involve amendment to existing legislation, and could involve the introduction of new legislation. For example, government could look to amending the *Freedom of Information Act 1982* and the *Privacy Act 1988* to enhance the ability of the OAIC to provide transparency in relation to automated decision making; and to provide specific protections in light of automated decision making.

Aspects of the Australian AI Ethics principles could be included in legislative reform by way of a requirement that where automated decision making is used by a government agency, this is documented in a publicly-accessible format (for example, on the agency's website).

In the United Kingdom, the *Data Protection Act 2018* provides that where a controller[127] makes a significant decision (that is, a decision that produces legal effects upon a person) based solely on automated processing, they must as soon as reasonably practicable notify that person of this fact. The affected person may request the controller to reconsider the decision or make a new decision not based

solely on automated processing.[128] The proposal considered by the Commission is less onerous than the requirements under the UK legislation.

The Commission does consider that the availability of review pathways should be communicated to the person affected by the decision.[129] The Commission considers that transparency regarding the use of automation in decision making, and the ability of affected persons to review such decisions, are vital safeguards in the use of automated decision making.

As discussed above, the availability of review based on the majority verdict in Pintarich may be uncertain. Government must consider Pintarich when considering legislative reform concerning automated decision making. The Monash University Faculty of Law submission pointed to the need for amendment to major pieces of legislation giving access to review processes,[130] which amendment should confirm that a decision is made where a statutory power is exercised or purportedly exercised by way of a wholly or partly automated process.[131]

Section 23 of New Zealand's *Official Information Act 1982* provides a person with a right of access to reasons for a decision made by a public service agency or Minister, including a written statement of the findings on material issues of fact; a reference to the information on which the findings were based; and the reasons for the decision or recommendation.[132] The introduction of a legal "right to an explanation" in Australian law, in similar terms to s 23 of the *Official Information Act 1982* (NZ), could facilitate the creation of a legislative requirement to design explainable systems.[133] Consideration of such legislation should be in concert with consideration of possible amendments to the *Freedom of Information Act 1982* and the *Privacy Act 1988*, discussed above.

The Commission notes that the government is currently seeking comment on governance and regulatory review in relation to AI and, as an incident of that, automated decision making.[134] Uniform regulation would certainly be desirable in the interests of consistency in the design and implementation of systems using AI and automation.[135]

Regulation and supervision of automated decision making and algorithm use would not necessarily have prevented or curtailed the Scheme, which involved numerous systemic and process failures. However, administrative law reform and implementation of a regulatory framework would provide a level of protection against a similar disaster.[136]

4.4 System design

It is outside the purview of this Commission to propose a set of "rules" to be followed when designing systems using automation and AI, and there are various bodies and decision-makers better placed to make such proposals. The Commonwealth Ombudsman has identified a number of considerations which should be applied when undertaking the design of an automated system.[137] The Commission does propose, however, to make some comments regarding the design of such systems, and general recommendations regarding system design that incorporate best practice principles discussed in this chapter.

The software used in any such system must not only ensure accuracy, but also ensure that persons subject to decisions made by an automated process can know or understand the reasons behind those decisions.[138] A clear path for review of decisions is important in designing a system which adheres to the OECD AI principles: "a person affected by a decision should understand why the decision was made, and there should be pathways for review of these decisions that are accessible to them."[139] This goes hand in hand with aspects of possible legislative reform discussed above.

Consultation with a variety of stakeholders – including relevant advocacy organisations, administrative law experts, social security lawyers, human rights experts and academics – where programs involving decision making are being considered for automation should be standard and provided for in business documents of the relevant government entities.[140]

In the social security context, human oversight of the system is needed to mitigate the risk of error:[141] "in some cases partial automation with the final decision made by a human arbiter is the ideal outcome."[142] It is a context in which human discretion and judgment is a vital component. As systems containing automation, and artificial intelligence, become more common, it is still the case that human intervention appears to be one of the most effective safeguards against the system failing. "Human decision-makers, for all their faults, can reason from a rule to deal with new, unusual or nuanced circumstances."[143] And one way to preserve accountability is to ensure a human is responsible for independently justifying the decision produced by an automated system.[144] As discussed above, the legal status of automated decisions made without human input may be unclear.

In the design of an automated system, regard should be had to the most current version of best practice principles regarding automation in government decision making. By adhering to these principles, an agency will ensure that decisions made using automation – and indeed, the design of the systems enabling such automation – are defensible, and that the systems being deployed to ease the burden on government through automation are not in turn creating further barriers for marginalised people to access help.

Government should act with transparency in automating systems which have the ability to affect people's rights.

People should know how decisions are made, periodic independent audits should supplement the accountability of decision making, and safeguards ought be entrenched in the architecture of decision making. The use of algorithms needs to be consistent with these principles and the rule of law.[145]

Information should be readily available on departmental websites to advise that automated decision making is used and also to explain in plain language how the process works. In the absence of compelling reasons against, business rules and algorithms should also be made available, to enable independent expert scrutiny.

5 Conclusions

'Good government' is not an empty slogan. The reality and perception of good government is a key to civic order and prosperity. Automated decision-making processes have a role to play in enhancing good government, but they need to be watched carefully to ensure they are wrought for the public good. The stakes are high: every serious misadventure in the implementation of automated decision-making processes will diminish the credit society extends to government.[146] – Bernard McCabe

The automation used in the Scheme at its outset, removing the human element, was a key factor in the harm it did. The Scheme serves as an example of what can go wrong when adequate care and skill are not employed in the design of a project; where frameworks for design are missing or not followed; where concerns are suppressed;[147] and where the ramifications of the use of the technology are ignored.

The current practice of amending individual pieces of legislation when needs arise – when a new program is implemented, for example[148] – is an exercise in patching over problems rather than addressing the fundamental need for a consistent approach. Government is currently considering questions of regulation and governance to mitigate potential risks from AI and automated decision-making[149] and enable trust in AI and automation;[150] which is in turn "needed for our economy and society to reap the full benefits of these productivity-enhancing technologies."[151]

A strong theme in submissions received by the Commission – more explicitly put by some submitters, and implicit in the submission of others – is that the rule of law must not be derogated from in the pursuit of efficacy through automation.[152] In designing and operating systems using automation, government must conform with the legal framework in place at the time. The not very startling proposition is that government programs must be lawful and lawfully administered.

While the fallout from the Robodebt scheme was described as a "massive failure of public administration,"[153] the prospect of future programs, using increasingly complex and more sophisticated AI and automation, having even more disastrous effects will be magnified by the "speed and scale at which AI can be deployed"[154] and the increased difficulty of understanding where and how the failures have arisen.[155] It is not all doom and gloom: when done well, AI and automation can enable government to provide services in a way that is "faster, cheaper, quicker and more accessible."[156] Automated systems can provide improved consistency, accuracy and transparency of administrative decision-making.[157] The concept of "when done well" is what government must grapple with as increasingly powerful technology becomes more ubiquitous.

Recommendation 17.1: Reform of legislation and implementation of regulation

The Commonwealth should consider legislative reform to introduce a consistent legal framework in which automation in government services can operate.

Where automated decision-making is implemented:

- there should be a clear path for those affected by decisions to seek review
- departmental websites should contain information advising that automated decision-making is used and explaining in plain language how the process works
- business rules and algorithms should be made available, to enable independent expert scrutiny.

Recommendation 17.2: Establishment of a body to monitor and audit automated decision-making

The Commonwealth should consider establishing a body, or expanding an existing body, with the power to monitor and audit automate decision-making processes with regard to their technical aspects and their impact in respect of fairness, the avoiding of bias, and client usability.

1 Exhibit 3-4638 - CTH.3001.0030.3987_R - 2016-11-23 New technology helps raise $4.5 million in welfare debts a day_FINAL.pdf [p 1].
2 Exhibit 3-4638 - CTH.3001.0030.3987_R - 2016-11-23 New technology helps raise $4.5 million in welfare debts a day_FINAL.pdf [p 1-2].
3 Exhibit 1-1234 - RBD.9999.0001.0001 - Budget Measure 2015-16 [p 116].
4 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 12, para 6.3].
5 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 40 para 10.1.2].
6 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 40 para 10.1.2].
7 Transcript, Dr Elea Wurth, 8 March 2023 [p 4665: lines 15-22].
8 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 40 para 10.1.2].
9 Exhibit 2-1796 - CTH.3001.0034.2245_R - E: Data61 [DLM=For-Official-Use-Only].
10 Exhibit 2-1688 - CTH.0019.0001.0073 - brief 286 – signed [p 1].
11 Transcript, Dr Elea Wurth, 8 March 2023 [p 4665: lines 43-46].
12 Transcript, Dr Elea Wurth, 8 March 2023 [p 4666: lines 9-13].
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14 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 19].
15 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 20].
16 See discussion of stage 3 in the Data matching and exchanges chapter of this Report.
17 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 20].
18 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 20-21].
19 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 21].
20 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 21].
21 Exhibit 4-7087 - CTH.3715.0002.0872 - Business Integrity Systems Branch Centrelink Online Services - User Specifications v1.0 [p 61].
22 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 37].
23 Exhibit 4-7109 - RBD.9999.0001.0485 - Debt Calculation and Notification Process Map – Pre Robodebt.
24 Exhibit 4-7118 - RBD.9999.0001.0475 - Debt Calculation and Notification Process Map – PAYG Manual.
25 Exhibit 4-7110 - RBD.9999.0001.0486 - Debt Calculation and Notification Process Map – OCI.
26 Exhibit 4-7116 - RBD.9999.0001.0487 - Debt Calculation and Notification Process Map – EIC and CUPI.
27 Exhibit 4-7109 - RBD.9999.0001.0485 - Debt Calculation and Notification Process Map – Pre Robodebt.
28 Exhibit 2-2528 - RCW.0005.0001.0001_R - Statement of Colleen Taylor [p 2 para 19].
29 Transcript, Colleen Taylor, 13 December 2022 [p 1734: lines 5-11].
30 Transcript, Colleen Taylor, 13 December 2022 [p 1729: lines 22-45; p 1734: lines 32-46; p 1734 lines 44-45 – p 1735: lines 1-20].
31 Transcript, Jeannie Blake, 21 February 2023 [p 3445: lines 44-46].
32 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 22]; Exhibit 4-7118 - RBD.9999.0001.0475 - Debt Calculation and Notification Process Map – PAYG Manual.
33 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 22: para 1].
34 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 23, 37].
35 Transcript, Jeannie Blake, 21 February 2023 [p 3446: lines 1-4].
36 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 23, 37].

37 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 22]; Exhibit 4-7110 - RBD.9999.0001.0486 - Debt Calculation and Notification Process Map – OCI.
38 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 23].
39 Exhibit 7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 23].
40 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 23].
41 Exhibit 4-7110 - RBD.9999.0001.0486 - Debt Calculation and Notification Process Map – OCI; Exhibit 4-6564 - CTH.3715.0001.4066_R - Online Compliance Interventions_Detailed Requirements Document_V1.0_FINA.... docx [p 28, 72, 142].
42 Exhibit 4-6564 - CTH.3715.0001.4066_R - Online Compliance Interventions_Detailed Requirements Document_ V1.0_FINA....docx [p 16].
43 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 23, 38].
44 Exhibit 4-6564 - CTH.3715.0001.4066_R - Online Compliance Interventions_Detailed Requirements Document_ V1.0_FINA....docx [p 16].
45 Exhibit 4-6564 - CTH.3715.0001.4066_R - Online Compliance Interventions_Detailed Requirements Document_ V1.0_FINA....docx [p 155].
46 Exhibit 4-6564 - CTH.3715.0001.4066_R - Online Compliance Interventions_Detailed Requirements Document_ V1.0_FINA....docx [p 32].
47 Exhibit 4-6564 - CTH.3715.0001.4066_R - Online Compliance Interventions_Detailed Requirements Document_ V1.0_FINA....docx [p 32].
48 Transcript, Jason McNamara, 5 December 2022 [p 1062: lines 18-36].
49 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 24].
50 Exhibit 4-7092 - CTH.3091.0094.4378 - Systems Requirements Specification v1.2 [p 44].
51 Exhibit 4-6564 - CTH.3715.0001.4066_R - Online Compliance Interventions_Detailed Requirements Document_ V1.0_FINA....docx [p 155].
52 Exhibit 4-7088 – CTH.3708.0001.5838 - 11003110-December-2012 [p 17].
53 Exhibit 4-7089 - CTH.3002.0009.4465 - PAYG Manual Compliance Intervention - Compliance Rapid Response Team Model [p 21: para 4.7.1].
54 Exhibit 4-7089 - CTH.3002.0009.4465 - PAYG Manual Compliance Intervention - Compliance Rapid Response Team Model [p 12: para 4.3, 4.3.1].
55 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 23, 38].
56 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 23].
57 Exhibit 3-4744 - CTH.3044.0003.7539 - Ombudsman Report – Centrelink's automated debt raising and recovery system containing letters [p 43: para 2.36].
58 Exhibit 3-4744 - CTH.3044.0003.7539 - Ombudsman Report – Centrelink's automated debt raising and recovery system containing letters [p 44: para 2.43].
59 Exhibit 3-4802 – CTH.0009.0001.2661_R – MS17-000740 MSB [p 1, para 1]; Exhibit 8935 - CTH.9999.0001.0145 - [Final] Services Australia - Response to NTG-0096 [p 17: para 3.47].
60 Exhibit 10014 - CTH.3500.0003.3804 – 29 - 110-13090010 as at 29092017 – 03102017, 29 September 2017 [p 3; p 36-40].
61 Transcript, Jason McNamara, 5 December 2022 [p 1104: lines 2-3; 22-23; 27-28; 43-44].
62 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 24]; Exhibit 4-7091 - CTH.3500.0008.2498 - Unable to access payslips or bank statements pilot version.
63 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme' [p 23]; Exhibit 10014 - CTH.3500.0003.3804 - 29 - 110-13090010 as at 29092017 – 03102017, 29 September 2017 [pp 32-33]. This change was noted in the Commonwealth Ombudsman's 2019 Report: Exhibit 4-7328 - CTH.3005.0010.3076_R - Attachment A - Centrelink's Automated Debt Raising and Recovery System - Implementation Report.pdf [p 9: para 2.11-2.13].
64 Transcript, Colleen Taylor, 13 December 2022 [p1741: lines 37-47; p1742: lines 1-5].

65 ANON-24KG-9BNS-M, Submission by Monash University Faculty of Law, published 1 March 2023 [p 18]; see also Exhibit 1-1288 - EJA.9999.0001.0002_R - Statement of Genevieve Bolton (Economic Justice Australia) [p 19: para 54]; Exhibit 2-2841 - ACS.9999.0001.0308_R - Witness statement of Dr Cassandra Goldie (signed 14 December 2022).PDF [p 6, para 29(e)]; Transcript, Genevieve Bolton, 11 November 2022 [p 1011: lines 41-47].
66 [2021] FCA 634.
67 Transcript, Felicity Button, 20 February 2023 [p 3294: lines 20-37].
68 Exhibit 4-7075 - RBD.9999.0001.0451_R - Deloitte Final Report 'The use of data and automation in the Robodebt scheme', dated 3 March 2023 [p 41].
69 Australian Government Department of Industry, Science and Resources, 'Responsible AI in Australia: have your say' (Web Page) < https://www.industry.gov.au/news/responsible-ai-australia-have-your-say>.
70 Commonwealth Ombudsman, Automated Decision-Making: Better Practice Guide (2020) p 3.
71 Administrative Review Council, Automated Assistance in Administrative Decision Making (Report No 46, 2004).
72 Bernard McCabe, 'Automated decision-making in (good) government' (2020) 100 Australian Institute of Administrative Law Forum 106, p 107.
73 Administrative Review Council, Automated Assistance in Administrative Decision Making (Report No 46, 2004) p 3.
74 Bernard McCabe, 'Automated decision-making in (good) government' (2020) 100 Australian Institute of Administrative Law Forum 106, p 109.
75 Bernard McCabe, 'Automated decision-making in (good) government' (2020) 100 Australian Institute of Administrative Law Forum 106, p 120.
76 Administrative Review Council, Automated Assistance in Administrative Decision Making (Report No 46, 2004) p viii.
77 Administrative Review Council, Automated Assistance in Administrative Decision Making (Report No 46, 2004) p ix.
78 Administrative Review Council, Automated Assistance in Administrative Decision Making (Report No 46, 2004) pp 5-6.
79 Commonwealth Ombudsman, Automated Decision-Making: Better Practice Guide (2020) p 6.
80 Australian Government Department of Industry, Science and Resources, Safe and Responsible AI in Australia (Discussion paper, June 2023) p 5, 6.
81 Organisation for Economic Co-operation and Development, 'Forty-two countries adopt new OECD Principles on Artificial Intelligence', OECD – Better Policies for Better Lives (Web page) <https://www.oecd.org/science/forty-two-countries-adopt-new-oecd-principles-on-artificial-intelligence.htm#:~:text=22%2F05%2F2019%20%2D%20OECD,%2C%20safe%2C%20fair%20and%20trustworthy>.
82 Commonwealth Ombudsman, Automated Decision-Making: Better Practice Guide (2020) p 6.
83 Commonwealth Ombudsman, Automated Decision-Making: Better Practice Guide (2020) p 8.
84 Exhibit 3-4744 - CTH.3044.0003.7539 - Ombudsman Report – Centrelink's automated debt raising and recovery system containing letters [p 39: para 2.10].
85 Exhibit 3-4744 - CTH.3044.0003.7539 - Ombudsman Report – Centrelink's automated debt raising and recovery system containing letters [p 26: para 4.1].
86 Exhibit 3-4744 - CTH.3044.0003.7539 - Ombudsman Report – Centrelink's automated debt raising and recovery system containing letters [p 26: para 4.2].
87 Philip Alston, Report of the Special Rapporteur on Extreme Poverty and Human Rights, UN Doc A/74/493 (11 October 2019) p 2.
88 Yee-Fui Ng, 'Institutional Adaptation and the Administrative State' (2021) 44(3) Melbourne University Law Review 889, p 916-917.
89 Exhibit 4-6211 - DSS.5102.0001.0857_R - ADVC 19004087 STP and income reporting.DOCX.
90 Exhibit 4-6212 - DSS.5102.0001.4168_R - ADVC 19004087 STP and income reporting.pdf.
91 Sometimes biannual: Exhibit 1-0228 - ATO.9999.0001.0001_R - Response to Notice NTG-0016 - Statement of Jeremy Hirschhorn [p 3: para 2.3].
92 The PSAR system continues for payments that are outside the scope of STP: Exhibit 1-0228 - ATO.9999.0001.0001_R - Response to Notice NTG-0016 - Statement of Jeremy Hirschhorn [p 2: para 2.2(a)].
93 Transcript, Jeremy Hirschhorn, 3 November 2022 [p353: lines 38-47; p354: lines 1-4].
94 Exhibit 4-6212 - DSS.5102.0001.4168_R - ADVC 19004087 STP and income reporting.pdf [p 18].
95 Exhibit 4-6212 - DSS.5102.0001.4168_R - ADVC 19004087 STP and income reporting.pdf [p 19: para 79].
96 Exhibit 4-6212 - DSS.5102.0001.4168_R - ADVC 19004087 STP and income reporting.pdf [p 10: para 38].
97 Exhibit 4-6212 - DSS.5102.0001.4168_R - ADVC 19004087 STP and income reporting.pdf [p 19: para 80-81 – p 20: para 82].
98 Exhibit 4-6212 - DSS.5102.0001.4168_R - ADVC 19004087 STP and income reporting.pdf [p 20: para 83].
99 Exhibit 4-6212 - DSS.5102.0001.4168_R - ADVC 19004087 STP and income reporting.pdf [p 20: para 83].

100 Exhibit 4-6211 - DSS.5102.0001.0857_R - ADVC 19004087 STP and income reporting.DOCX [p 18-20: para 82-87].
101 Exhibit 4-6212 - DSS.5102.0001.4168_R - ADVC 19004087 STP and income reporting.pdf [p 18].
102 By way of the Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Bill 2020 (Cth).
103 Explanatory Memorandum, Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Bill 2020 (Cth) p 32-33.
104 Explanatory Memorandum, Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Bill 2020 (Cth) p 33.
105 See discussion in Yee-Fui Ng, 'Institutional Adaptation and the Administrative State' (2021) 44(3) Melbourne University Law Review 889, p 919.
106 (2018) 262 FCR 41.
107 (2018) 262 FCR 41.
108 ANON-24KG-9BNS-M, Submission by Monash University Faculty of Law, published 1 March 2023 [p 8].
109 Pintarich v Federal Commissioner of Taxation (2018) 262 FCR 41, 67.
110 (2000) FCR 533.
111 Pintarich v Federal Commissioner of Taxation (2018) 262 FCR 41, 67.
112 Anna Huggins, 'Addressing Disconnection: Automated Decision-Making, Administrative Law and Regulatory Reform' (2021) 44(3) University of New South Wales Law Journal 1048, p 1063.
113 Pintarich v Federal Commissioner of Taxation (2018) 262 FCR 41, 48-9.
114 Pintarich v Federal Commissioner of Taxation (2018) 262 FCR 41, 49.
115 Anna Huggins, 'Addressing Disconnection: Automated Decision-Making, Administrative Law and Regulatory Reform' (2021) 44(3) University of New South Wales Law Journal 1048, p 1063.
116 Yee-Fui Ng and Maria O'Sullivan, 'Deliberation and Automation – When is a Decision a "Decision"?' (2019) 26(1) Australian Journal of Administrative Law 21, p 30.
117 Anna Huggins, 'Addressing Disconnection: Automated Decision-Making, Administrative Law and Regulatory Reform' (2021) 44(3) University of New South Wales Law Journal 1048, p 1052.
118 Melissa Perry, 'iDecide: Administrative Decision-making in the Digital World' (2017) 91 Australian Law Journal 29, p 31.
119 Terry Carney, 'Artificial Intelligence in Welfare: Striking the Vulnerability Balance?' [2020] Monash University Law Review 10, p 47.
120 Administrative Review Council, Automated Assistance in Administrative Decision Making (Issues Paper, 2003) p 66.
121 Australian Human Rights Commission, Human Rights and Technology (Final Report, March 2021) p 8, 128; See also ANON-24KG-9BNS-M, Submission by Monash University Faculty of Law, published 1 March 2023 [p 5-6], and ANON-24KG-9BTN-N, Submission by Economic Justice Australia, published 1 March 2023 [p 29, 36-37].
122 ANON-24KG-9BNS-M, Submission by Monash University Faculty of Law, published 1 March 2023 [p 6].
123 ANON-24KG-9BNS-M, Submission by Monash University Faculty of Law, published 1 March 2023 [p 6]; see also recommendation in ANON-24KG-9SA8-W and ANO.9999.0001.0097, Submission by Dr Nicholas Fisher, Dennis Trewin AO and Professor Noel Cressie, published 16 May 2023 [p 6-8], which recommended the creation of the position of Chief Data Scientist: "the Chief Data Scientist would perform two vital functions, advisory and proactive, and would have broad current knowledge of the discipline of Statistics within Data Science."
124 Commonwealth Ombudsman, Automated Decision-Making: Better Practice Guide (2020) p 9.
125 ANO.9999.0001.0028, Submission by Australian Research Council Centre of Excellence for Automated Decision-Making and Society, published 1 March 2023 [p 11]; see also ANON-24KG-9SYX-N, Submission by Dr Yee-Fui Ng, published 1 March 2023 [p _0010-_0014], and ANON-24KG-9BTN-N, Submission by Economic Justice Australia, published 1 March 2023 [p 40-41].
126 ANON-24KG-9S2N-4 and ANO.9999.0001.0089, Submission by Dr Mark Brogan and Mark Arratoon, published 1 March 2023 [p 21-23]; see also ANO.9999.0001.0021, Submission by the Community and Pubic Sector Union, published 1 March 2023 [p 5-6]; ANON-24KG-9BR4-S, Submission by Victoria Legal Aid, published 1 March 2023 [p 29-30]; ANON-24KG-9BRC-8, Submission by the Australasian Society for Computers and Law, UNSW Allens Hub for Technology, Law and Innovation, and the Gradient Institute, published 1 March 2023 [p 2-3]; ANON-24KG-9B1V-T, Submission by Australian Council of Social Service, published 1 March 2023 [p 2]; ANON-24KG-9BTN-N, Submission by Economic Justice Australia, published 1 March 2023 [p 22]; Commonwealth Ombudsman, Automated Decision-Making: Better Practice Guide (Report, 2020) p 9.
127 The person on whom the obligation to process the data is imposed by the enactment is the controller: Data Protection Act 2018 (UK) s 6.
128 Data Protection Act 2018 (UK) s 14.
129 Commonwealth Ombudsman, Automated Decision-Making: Better Practice Guide (Report, 2020) p 10.

130 The submission lists the Administrative Decisions (Judicial Review) Act 1977, the Administrative Appeals Act 1975 and the Judiciary Act 1903.
131 ANON-24KG-9BNS-M, Submission by Monash University Faculty of Law, published 1 March 2023 [p 8].
132 Official Information Act 1982 (NZ) s 23(1).
133 ANON-24KG-9BRC-8, Submission by the Australasian Society for Computers and Law, UNSW Allens Hub for Technology, Law and Innovation, and the Gradient Institute, published 1 March 2023 [p 4-5].
134 Australian Government Department of Industry, Science and Resources, Safe and Responsible AI in Australia (Discussion paper, June 2023).
135 See, for example, Canada's Algorithmic Impact Assessment Tool – a mandatory risk assessment tool intended to support the Treasury Board's Directive on Automated Decision-Making – which is used to determine the impact level of an automated decision-system: Canadian Government, 'Algorithmic Impact Assessment tool' (Web page) < https://www.canada.ca/en/government/system/digital-government/digital-government-innovations/responsible-use-ai/algorithmic-impact-assessment.html>.
136 ANON-24KG-9S2N-4 and ANO.9999.0001.0089, Submission by Dr Mark Brogan and Mark Arratoon, published 1 March 2023 [p 22].
137 Cth Ombudsman, Automated Decision-Making: Better Practice Guide (Report, 2020) p 17-24.
138 Yee-Fui Ng and Maria O'Sullivan, 'Deliberation and Automation – When is a Decision a "Decision"?' (2019) 26(1) Australian Journal of Administrative Law 21, p 33.
139 ANON-24KG-9BTN-N, Submission by Economic Justice Australia, published 1 March 2023 [p 23].
140 ANON-24KG-9B1V-T, Submission by Australian Council of Social Service, published 1 March 2023 [p 2]. See also Transcript, Jason Ryman, 8 November 2022 [p734: lines 40-43]; ANO.9999.0001.0028, Submission by Australian Research Council Centre of Excellence for Automated Decision-Making and Society, published 1 March 2023 [p 12-13], and Transcript, Cassandra Goldie and Charmaine Crowe, 16 December 2022 [p 2041: lines 35-46], which evidence discusses the lack of consultation of stakeholders external to government before and during the implementation of the Scheme.
141 ANON-24KG-9BY4-Z, Submission by Anglicare Australia, published 1 March 2023 [p 5]; ANON-24KG-9BR4-S, Submission by Victoria Legal Aid, published 1 March 2023 [p 29-30]; ANON-24KG-9BTN-N, Submission by Economic Justice Australia, published 1 March 2023 [p 37-40]; see also Monika Zalnieriute, Lyria Bennett Moses and George Williams, 'The Rule of Law and Automation of Government Decision-Making' (2019) 82(3) Modern Law Review 425, p 446.
142 ANON-24KG-9BRC-8, Submission by the Australasian Society for Computers and Law, UNSW Allens Hub for Technology, Law and Innovation, and the Gradient Institute, published 1 March 2023 [p 3].
143 Bernard McCabe, 'Automated decision-making in (good) government' (2020) 100 Australian Institute of Administrative Law Forum 106, p 118.
144 Monika Zalnieriute, Lyria Bennett Moses and George Williams, 'The Rule of Law and Automation of Government Decision-Making' (2019) 82(3) Modern Law Review 425, p 445; see also p 438-439.
145 Professor Penny Crofts and Dr Honni van Rijswijk, Technology: New trajectories in Law (Taylor & Francis Group, 2021) p 62; see also ANON-24KG-9BTN-N, Submission by Economic Justice Australia, published 1 March 2023 [p 36-37].
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147 Exhibit 2-2730 - CTH.3023.0004.6161_R - FW: DMR | 67972 - EIM | Independent System Integration Testing (SIT) | Final Sign-Off Report || Release Recommendation = Negative [SEC=UNOFFICIAL]; Exhibit 2-2731 - CTH.3023.0004.6162_R - Test Summary Report EIM - DMR 67972 - System Integration Testing.docx [p 2, 4]; Exhibit 2-2734 - CTH.3023.0019.8741_R - RE: EIM SIT conditional sign off [DLM=For-Official-Use-Only]; Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement - Signed.pdf [p 4: para 34-37; p 5, para 38-45]; Exhibit 2-2529, CTH.3001.0035.3159_R - In-Confidence emails from Jan 2016 re concerns.docx; Transcript, Colleen Taylor, 13 December 2022 [p 1738: lines 27-37].
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149 Australian Government Department of Industry, Science and Resources, Safe and Responsible AI in Australia (Discussion paper, June 2023) p 26.
150 Australian Government Department of Industry, Science and Resources, Safe and Responsible AI in Australia (Discussion paper, June 2023) p 3.
151 Australian Government Department of Industry, Science and Resources, Safe and Responsible AI in Australia (Discussion paper, June 2023) p 4.

152 See e.g. ANON-24KG-9BNS-M, Submission by Monash University Faculty of Law, published 1 March 2023 [p 5]; ANO.9999.0001.0020, Submission by AustLII, published 1 March 2023 [p 3-5]; ANON-24KG-9SRG-W and ANO.9999.0001.0085, Submission by Professor Penny Crofts and Dr Honni van Rijswijk, published 1 March 2023; ANON-24KG-9BRC-8, Submission by the Australasian Society for Computers and Law, UNSW Allens Hub for Technology, Law and Innovation, and the Gradient Institute, published 1 March 2023 [p 4-5]; ANON-24KG-9BTN-N, Submission by Economic Justice Australia, published 1 March 2023 [p 22-23]; Monika Zalnieriute, Lyria Bennett Moses and George Williams, 'The Rule of Law and Automation of Government Decision-Making' (2019) 82(3) Modern Law Review 425, p 444.
153 Prygodicz v Commonwealth of Australia (No 2) [2021] FCA 634 [5].
154 Australian Government Department of Industry, Science and Resources, Safe and Responsible AI in Australia (Discussion paper, June 2023) p 8.
155 See further discussion in ANON-24KG-9SRU-B, Submission by Dr David Lloyd Brown, published 1 March 2023 [p 8].
156 Bernard McCabe, 'Automated decision-making in (good) government' (2020) 100 Australian Institute of Administrative Law Forum 106, p 106.
157 Commonwealth Ombudsman, Automated Decision-Making: Better Practice Guide (Report, 2020) p 2.

Section 5: Debts

Chapter 18: Debt recovery and debt collectors

1 Introduction

[T]he first time people knew that there was any problem was when they had a debt collector pursuing them [1]*- Dr Cassandra Goldie AO*

Without telling me Centrelink sent my debt to debt collectors where I was intimidated into making a payment plan. I was worried about this impacting my credit score, and the debt collectors said they could not send the debt back to Centrelink, so I agreed to a payment plan. I continued to pay in total approximately $1000 to these debt collectors.[2] - Anonymous submission

The Commission's terms of reference require it to inquire into the use of third party debt collectors under the Robodebt scheme (the Scheme).[3] DHS routinely engaged the services of the external debt collectors to recover debts raised under the Scheme.

The Australian Government recently announcement that it would cease using external debt collectors following lessons learned from the Scheme.[4] This is a welcome announcement. For any person, contact from a debt collector can be stressful. When DHS engaged external debt collectors under the Online Compliance Intervention (OCI) phase of the Scheme, debts were referred to debt collectors without DHS having first confirmed that they had received prior notice of the debt. The result of this was that many people found out about their debt for the first time from a debt collector without first having the opportunity to engage with DHS and to seek a review of their debt.

The Commission acknowledges that where a debt has been properly raised against an individual, outsourcing its recovery to a debt collection agency may sometimes be necessary and appropriate. Indeed, DHS has used debt collection agencies to manage recovery of social security debts since 1996.[5] External debt collectors are required to operate lawfully, and perform in accordance with their contractual obligations to the creditors. The Commission does not suggest they did otherwise. However, DHS was closely involved with the external debt collectors that it engaged, and some of the practices that it encouraged were insensitive and ill considered (for example, mandating that recipients be warned of the severe measures that could be taken against them if they failed to pay), particularly for the cohort of people that it affected.

Debt recovery and debt collectors

2 Referrals to debt collectors

Over the course of the Scheme, DHS engaged the services of the following debt collectors under deeds of agreement:[6]

- Illion Australia Pty Ltd trading as Milton Graham, formerly trading as Dun and Bradstreet (Milton Graham)[7]
- Probe Operations, formerly trading as Probe Group (Probe),[8] and
- Australian Receivables Limited (ARL).[9]

Under the Scheme, referred debts were not "sold" to the debt collectors.[10] Debts would be assessed by a rules engine within the Debt Management and Information System for referral to a debt collection agency 42 days after an account payable notice was sent.[11]

The debt collectors were contracted under the deeds to manage the debt on behalf of DHS by providing the following services:[12]

- recovery of outstanding debts with a value of $20.00 or more
- provision of a service management operation
- business management reporting
- quarterly performance management review meetings
- money management of recovered debts in accordance with all applicable legislation, guidelines and regulations
- meeting of security and privacy requirements.

Only debts owed by former recipients were referred to debt collectors. Current recipients might instead have the amount owing withheld from their social security payment.[13]

Prior to February 2017, debts raised under the Scheme could be referred to a debt collection agency even where a person was seeking review or challenging their debt.[14] This meant that debts moved quickly into the debt recovery phase.

Once a debt was referred, the collection agencies were given six months to recover it.[15] If the debt were not repaid within six months and the collection agency was not granted an extension, the debt would be returned to DHS where recovery action would continue.[16] Where a debt collector managed to secure a partial repayment of the debt, it would be allowed additional time to attempt further recovery.[17]

The debt collectors' recovery actions were taken on behalf of DHS and the deeds stated the expectation that the debt collectors would "have the same values in providing exceptional service customers."[18] The deeds specifically required the collection agencies to comply with:[19]

- their obligations to operate in accordance with the *Competition and Consumer Act 2010* (which include those mandating that service suppliers must not engage in misleading or deceptive conduct, unconscionable conduct or engage in undue harassment or coercion)[20]
- the Guideline for Collectors and Creditors' issued by the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC) (which gives practical advice debt collectors on what creditors and collectors should and should not do to minimise their risk of breaching the Commonwealth consumer protection laws).[21]

Under the deeds, debt collectors were required to engage with people sensitively and have regard to their individual circumstances, specifically noting:

> The Department's customers come from a diverse range of backgrounds. The customers' employment situation, age, cultural and education backgrounds are treated with respect and sensitivity when they are contacted. The Department expects all its customers will be treated in this way.[22]

The deeds provided that the debt collectors may be required to use different techniques to respectfully and sensitively manage and deal with a diverse range of people and their needs.[23] The debt collection agencies were required to develop training packages approved by DHS.[24]

3 Human Services involvement

DHS were closely involved in the debt collectors' practices.[25] For example:

- DHS approved the training packages for call operators,[26] the debt collectors' internal workflows, the letters sent to alleged debtors,[27] and the call scripts call operators used when they telephoned people.[28] This material addressed the need to establish the circumstances of an individual and whether any financial or other hardship indicators existed by asking basic expense questions, and actively listening for trigger words which might indicate vulnerability. [29]
- The debt collectors and DHS had quarterly performance management review meetings,[30] as well as quarterly operational meetings.[31]
- The debt collectors were required to provide regular reports on a range of topics to DHS, including:[32]
    - a monthly report about complaints
    - a quarterly report about complaints and escalations
    - a quarterly report about staff training and confidentiality agreement compliance.
- Some debt collectors' calls were also reviewed by DHS for quality assurance.[33]

Debt collectors operated under a number of internal procedures which were approved and managed by DHS. Probe's debt collection practices were guided by standard operating procedures containing conversation task cards concerning the approach to people in discussing a debt, and scripting prompts to explain dispute and review rights, including allowing for hardship and vulnerability factors.[34] ARL and Milton Graham were guided by a number of internal workbooks, training guides and policy documents. [35]

In 2018, DHS started to measure the performance of each collection agency against a "balanced scorecard."[36] Despite these controls, DHS said it could only identify one instance where a contractual penalty was applied to a collection agency and that was for not meeting its collection performance targets for two consecutive quarters.[37] This is despite DHS acknowledging that it had identified other non-compliance issues during the Scheme's operation. [38]

Debt collectors could contact people in writing, by phone or by electronic communication (e.g. SMS).[39] Mr Kagan (Probe) told the Commission they were generally permitted up to two contacts or attempted contacts with a debtor each week.[40] This meant that a person could potentially receive up to 48 contacts or attempted contacts from a debt collector over a six -month period.

3.1 Consequences for non-payment

One of the ways debt collectors attempted to convince people to pay their debts was by telling them of the consequences that might arise if they did not pay. These included that DHS could issue a departure prohibition order (DPO), take legal action, charge interest on their debt or have the ATO garnish their tax return. The effects of departure prohibition orders and garnishees orders are discussed further in chapter Effects of Robodebt on individuals.

These potential "consequences" were relayed to recipients by the debt collectors on instruction from DHS. The call scripts, which DHS approved,[41] directed the debt collectors to walk the person through the consequences of non-payment. For example, ARL listed the following as possible consequences for non-payment:[42]

- Collections activity such as continued phone calls or letters
- DHS may undertake further recovery actions such as garnishee action where money can be withheld from wages, or other assets and income
- DHS may refer your case for possible legal action for the recovery of the debt

- DHS may issue a Departure Prohibition Order, which will prevent customers from travelling overseas — **only use in the case when triggers have been identified the customer intends to travel overseas**
- DHS may also apply an interest charge if you do not repay the amount in full or make an acceptable payment arrangement. [emphasis in original]

They were also listed in written correspondence. Ricky Aik received a letter from ARL in respect of a debt (which was later wiped) that stated:[43]

> We have been appointed to assist with the recovery of your outstanding debt of $5254.53 owed to the Australian Government arising from Centrelink payments. We would like to work with you to resolve this matter.
>
> Fail to Act
>
> You should be aware that the Department of Human Services may **garnishee** your wages, tax refund or other assets and income (including bank account) or refer this matter to their solicitors for **Legal Action**. They may also issue a **Departure Prohibition Order**, which will prevent you from travelling overseas. An interest charge may also be applied to your debt if you do not repay the amount in full or make an acceptable payment arrangement. [emphasis in original]

Mr Aik told the Commission that this letter upset him and that he was worried about having his wages or tax refund garnisheed because he relied on that money to survive in between seasons of work.[44]

4 Effects on recipients

4.1 Learning about the debt for the first time

The Commission heard evidence about people who had debts raised against them under the OCI phase of the Scheme and learned about their alleged debt for the first time from a debt collector.[45] Dr Cassandra Goldie AO and Melanie Crowe from the Australian Council for Social Service (ACOSS) told the Commission about these sorts of incidents:

> MS BERRY: So you - did you have reports of people who hadn't even received their initial letters or debt letters?
>
> DR GOLDIE: Yes, we did. It was – the first time people knew that there was any problem was when they had a debt collector pursuing them. I mean, of course, because this Scheme was going back so far, you could really safely assume that many people would not - would have moved, would have changed address. And so the need to make personal contact was even more important. And, of course, if a debt collector can locate you, then surely the Department could have instead.
>
> MS CROWE: It was absurd that Centrelink was using the last-known address of people no longer in the income support system as the sole means of sending them a letter. And obviously a lot of people would have moved address in that time. And so that's why many people first found out about the Robodebt was via a debt collector.[46]

Ms Prygodicz recalls a debt collector telling her in this initial call that it was very serious, that she had "been a bit naughty" that she hadn't reported her information correctly.[47]

Many people targeted during the Scheme, and all those referred to collection agencies, were no longer in receipt of social security benefits.[48] It was reasonable that they would not regularly access their myGov accounts to read correspondence from DHS and many people had since changed address and so did not receive correspondence through the post.[49]

By early 2017, complaints from ACOSS, the Community and Public Sector Union (CPSU), community groups and the media focussed attention on a range of problems associated with the Scheme, including people's experiences with debt collection agencies.[50] Changes to the Scheme in February 2017 provided for initial letters to be sent by registered mail, and DHS started to use third party sources (for example, an electoral roll) to find a recipient's current address.[51] DHS told the Ombudsman that "it will now not refer OCI debts to a debt collector where the person has not responded until it is satisfied the person has received the notice but is ignoring it."[52]

4.2 Continuing recovery while review under way

Prior to February 2017, debt collectors would continue to contact recipients whose debts had been referred to them, and attempt to recover the debts or enter in a repayment plan, while DHS was in the process of investigating the accuracy of those debts.[53] Recipients who wished to question or challenge their debt were required to engage with both DHS and the debt collector at the same time about the same debt. As Victoria Legal Aid submitted:

> While [debt collection agencies] had been used previously by Centrelink, the pressure and intimidating contact from these private debt collectors for unexplained debts, including during periods when people were seeking review, was a clear systemic flaw in the Robodebt scheme that contributed to the distress experienced by individuals with robodebts.[54]

In February 2017 changes were brought in for debt recovery action to be paused while a debt was under review.[55] In circumstances where the debt was already referred, the collection agency was to cease or pause collection activities if the person advised them that the debt was being reassessed or reviewed by

DHS. A new dispute resolution process was also introduced, where debt collectors would put a recipient wishing to dispute a debt in contact with the DHS Support team, or, if the recipient did not want to contact DHS, the debt collector would communicate the dispute to DHS through an online register.[56]

4.3 Unauthorised debit of a recipient's account

Felicity Button, who was one of the lead applicants in the Federal Court class action, gave evidence about how the entirety of her alleged debt ($11,571.16) was debited from her bank account in a single transaction by a debt collection agency, in circumstances where she had already entered into a repayment plan with that same collection agency.[57] This was done without warning and without her authority, leaving her account overdrawn.[58] She had given verbal agreement to a direct debit arrangement for an amount of $20 per fortnight, but the full amount of the debt was mistakenly entered when the debt collector gave the instruction to the bank. When Ms Button contacted the debt collection agency, ARL admitted it had made a manual error, apologised to Ms Button and recredited her account with the full amount of the funds that had been mistakenly withdrawn.[59]

What is particularly concerning about this incident is not only the proportions of the error but the fact that that amount could be taken without Ms Button's written authority.[60] DHS was informed of this incident in 2019,[61] and on the evidence received, DHS never penalised ARL or issued an apology or other correspondence to Ms Button.

5 Fees and value of debts

5.1 Fees earned by debt collectors

DHS engaged each debt collector on a commission basis under the deeds.[62] This meant that they earned more money the more debt they recovered. DHS also afforded the collection agencies additional time to try to recover the balance of a referred debt in circumstances where they managed to secure partial recovery.[63] Mr Kagan gave evidence to the Commission on the remuneration of the Probe Group for debt collection services by DHS.[64]

The collection agencies' recruitment and renumeration processes for their own staff were not prescribed by the deeds. Milton Graham and Probe told the Commission their operators were remunerated based on a mix of base salary and incentive which was based on meeting performance indicators, one of which, not surprisingly, was a target amount for collections.[65] A call operator's eligibility for additional remuneration was dependent on their compliance with the internal procedures applicable to DHS debt collection.[66] For example, Milton Graham's call operators would be ineligible for a commission if they committed a breach, such as one identified by a complaint or by a quality assurance review undertaken internally by Milton Graham team leaders or by DHS.

The Commission is satisfied that DHS engaged collection agencies on a commission fee basis with the intention of giving a them strong financial incentive to recover as much of each referred debt as possible. This incentive conflicted with the obligation under the deeds to "have the same values in providing exceptional service to customers, which achieve positive outcomes,"[67] given the potential revenue to be earned on a commissioned basis.

> THE COMMSSIONER: 'So the financial imperative, presumably, is to recover as much as possible as fast as possible?'.
>
> MR ROSS (Milton Graham) 'Yes, but doing so in a compliant manner.'[68]

In submissions, Probe took issue with the proposition that there was a conflict, pointing out that the arrangements between DHS and debt collectors contained requirements to meet non-financial metrics, ensuring a balance between those considerations and incentives to earn commissions. This submission, however, does not deal with whether there was a conflict. On the contrary, it points to a conflict between incentives to earn commissions and other "non-financial metrics" such as customer service requirements.

5.2 Value of debts referred to collection agencies

In a response to a notice to the Commission, Services Australia said it "…is unable to distinguish between amounts paid to External Debt Collectors for the purpose of Debt Collection related to social welfare debts and amounts paid to External Debt Collectors for the purpose related to Robodebt Debts."[69] However, the Commonwealth estimated that debt collection agencies were paid approximately $11,609,795 between 2015 and 2021 for the recovery of debts raised under the Scheme.

DHS supplied data about the social security debts referred to collection agencies, which is reproduced in the tables below.

Table 1

The total number of Robodebts referred to collection agencies by DHS, amounts recovered by collection agencies, and amounts paid by DHS to collection agencies for collections related to the Scheme.

Financial Year	Total number of Robodebts referred to External Debt Collectors	Total amount of Robodents referred to External Debt Collectors	Total amount of Robodebts recovered by External Debt Collectors
2014 - 2015	4	$11,099.76	$0
2015 - 2016	38,105	$156,343,252.49	$11,487,284.86
2016 - 2017	79,839	$208,756,089.28	$16,280,595.39
2017 - 2018	47,750	$140,282,953.82	$15,973,698.12
2018 - 2019	105,186	$330,562,965.04	$36,485,066.06
2019 - 2020	35,000	$119,563,151.83	$25,414,543.01
2020 - 2021	93	$228,495.18	$1,582,025.89

Table 2

The total number of debts referred to collection agencies by DHS, amounts recovered by collection agencies and amounts paid by DHS to collection agencies for related debt collection for the financial years covering the Scheme's operation, including the years before and after.

Financial Year	Total number of social security debts referred to External Debt Collectors	Total number of social security debts referred to External Debt Collectors	Total number of social security debts recovered by External Debt Collectors	Total amount paid by Agency to the External Debt Collector (GST Inc)
2012 - 2013	145,038	$192,671,909.24	$38,478,059.32	$13,867,510
2013 - 2014	177,332	$230,355,331.71	$48,332,005.43	$14,996,959
2014 - 2015	172,041	$257,874,863.80	$53,960,358.93	$15,706,363
2015 - 2016	210,235	$451,127,692.19	$63,013,788.64	$17,199,488
2017 - 2018	223,816	$444,228,502.42	$54,419,928.90	$14,803,896
2018 - 2019	227,119	$534,325,146.11	$66,204,801.78	$14,920,142
2019 - 2020	101,750	$231,299,755.47	$47,111,719.74	$12,281,415
2020 - 2021	55,795	$48,924,397.35	$9,875,046.88	$3,954,408

DHS data shows that a large volume of debts was referred to the collection agencies in the years spanning 2015–2016 and 2017–2018 (Table 2). These periods partially overlap the initial OCI phase of the Scheme. The collection agencies were not informed which of the referred debts were raised under the Scheme and they had no way of distinguishing them from other debts.[70]

6 Where to from here?

Private collection agencies are primarily motivated by the desire to maximise their revenue. The attributes of social security recipients and the circumstances in which their debts arise are not the same as those of commercial debtors. It is appropriate that debt recovery of social security payments be handled by properly trained government officers.

On 13 April 2023, the government announced that from 1 July 2023, all debt recovery work will be managed in house at Services Australia, and that engagement with external debt collection services will cease.[71] The Commission welcomes this announcement, with reservations.

The Commission has found that it was DHS which designed and managed the Scheme's debt recovery process and it was DHS which closely managed every aspect of the collection agencies' engagement with people under the Scheme.

It is now proposed that the same agency conduct that process in house. It would be understandable, given what transpired under the Scheme, if people found it difficult to trust that Services Australia will sensitively and lawfully manage its debt recovery processes.

The Commission expects that Services Australia will deliver training to its debt recovery staff which is appropriately adapted to the circumstances and vulnerabilities of the population it serves, and which will not use training material and call scripts that place too much emphasis on the consequences for non-compliance.

Recommendation 18.1: Comprehensive debt recovery policy for Services Australia

Services Australia develop a comprehensive debt recovery management policy which among other things should incorporate the Guideline for Collectors and Creditors' issued by the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC). Examples of such documents already exist at both federal and state levels. Any such policy should also prescribe how Services Australia undertakes to engage with debtors, including that staff must:

- ensure any debt recovery action is always ethical, proportionate, consistent and transparent
- treat all recipients fairly and with dignity, taking each person's circumstances into account before commencing recovery action
- subject to any express legal authority to do so, refrain from commencing or continuing recovery action while a debt is being reviewed or disputed, and
- in accordance with legal authority, consider and respond appropriately and proportionately to cases of hardship.

Services Australia should ensure that recipients are given ample and appropriate opportunities to challenge, review and seek guidance on any proposed debts before they are referred for debt recovery.

6.1 Removal of 6-year limit on debt recovery

From 1 January 2017, legislative amendments to the *Social Security Act 1991* (Cth) (Social Security Act) commenced. These amendments permitted interest charges to be applied to social security debts, allowed departure prohibition orders (DPO) to be issued, and removed the limitation period for debt recovery of social security debts.[72]

On 2 March 2016, the Hon Christian Porter (then Minister for Social Services), and the Hon Alan Tudge (then Minister for Human Services) issued a joint media release signalling the government's intention to remove the previous limitation on the recovery of debt where recovery action had not been undertaken

in the preceding six years.[73] Their media release identified no pressing need for the change. It seemed to stem from the Government's broader approach to social security recipients:

One percent of Australia's population has received money they are not entitled to and owe a debt to the other 99% of Australians, a debt that in too many instances they are making no effort to pay back.

The new provision, which commenced on 1 January 2017,[74] removed the previous six-year time limit for the recovery of a debt or overpayment.[75] Debt recovery was subsequently able to commence at any time.[76]

There is no obvious reason that social security recipients with debts to the Commonwealth should be on any different footing from other debtors. To the contrary, as a cohort more likely to be in financial difficulty, there is every reason not to pursue ancient debts against them.

Recommendation 18.2: Reinstate the limitation of six years on debt recovery

The Commonwealth should repeal s 1234B of the Social Security Act and reinstate the effective limitation period of six years for the bringing of proceedings to recover debts under Part 5.2 of the Act formerly contained in s 1232 and s 1236 of that Act,[77] before repeal of the relevant sub-sections by the Budget Savings (Omnibus) Act (No 55) 2016 (Cth). There is no reason that current and former social security recipients should be on any different footing from other debtors.

1 Transcript, Cassandra Goldie and Charmaine Crowe, 16 December 2022 [p 2033: line 16-17].
2 ANON-24KG-9SJR-Z, Submission by anonymous, published 10 March 2023.
3 Letters Patent –Royal Commission into the Robodebt Scheme dated 18 August 2022.
4 Ministers for the Department of Social Services, 'Minister Shorten Doorstop interview to discuss the Robodebt Royal Commission and the end of the Government's engagement with external debt collection services,' The Hon Bill Shorten MP - Transcripts (transcript, 13 April 2023) <https://ministers.dss.gov.au/transcripts/10881>.
5 Australian National Audit Office, Recovery of Centrelink Payments Debts by External Collection Agencies: Department of Human Services, (Audit Report No. 40 2012-13, 30 May 2013) [p 12: para 10] <anao.gov.au/sites/default/files/201213 Audit Report No 40.pdf>.
6 DHS also engaged the services of Recoveries Corporation Pty Ltd from 1 February 2015 to 1 July 2016 prior to the roll out of OCI - Exhibit 1-0712; Exhibit 1-0845 - CTH.9999.0001.0004 - [FINAL] RRC - Services Australia - Response to NTG-0005, 7 November 2022 [p 18: para 14.1].
7 Exhibit 1-0525 - MGR.0001.0001.0052_R - Signed Contract 2016, 9 February 2016.
8 Exhibit 1-0801 - CTH.3721.0001.0860_R - 23. RC16 - Probe Deed (D261017618) – signed, 5 February 2016; Exhibit 1-0799 - CTH.3721.0001.0853_R - 23. RC16 - Deed of Novation signed.
9 Exhibit 1-0797 - CTH.3721.0001.0753_R - 23. RC16 - Australian Receivables Ltd Deed of Agreement – signed, 8 February 2016.
10 Exhibit 1-0712; Exhibit 1-0845 - CTH.9999.0001.0004 - [FINAL] RRC - Services Australia - Response to NTG-0005 [p 4: para 2.12].; Transcript, Jarrod Kagan, 16 December 2022 [p 2064: lines 30-37].
11 Exhibit 1-0712; Exhibit 1-0845 - CTH.9999.0001.0004 - [FINAL] RRC - Services Australia - Response to NTG-0005 [p.4: para 2.13].
12 Exhibit 1-0801 - CTH.3721.0001.0860_R - 23. RC16 - Probe Deed (D261017618) – signed 5 February 2016 [p 14: cl 3.1]; Exhibit 1-0525 - MGR.0001.0001.0052_R - Signed Contract 2016, 9 February 2016 [p 0013: cl 3.1)]. Exhibit 1-0797 - CTH.3721.0001.0753_R - 23. RC16 - Australian Receivables Ltd Deed of Agreement – signed, 8 February 2016 [p 13: cl 3.1.]
13 Exhibit 1-0712; Exhibit 1-0845 - CTH.9999.0001.0004 - [FINAL] RRC - Services Australia - Response to NTG-0005 [p 4: para 2.13].
14 Exhibit 4-7147 - LMA.1000.0001.2996_R - Report - Centrelink's automated debt raising and recovery system - April 2017 copy [p 38]; Exhibit 1-0712; Exhibit 1-0845 - CTH.9999.0001.0004 - [FINAL] RRC - Services Australia - Response to NTG-0005 [p 6: para 2.24].
15 Transcript Jarrod Kagan, 16 December 2022 [p 2065: lines 6-8]; Exhibit 1-0712; Exhibit 1-0845 - CTH.9999.0001.0004 - [FINAL] RRC - Services Australia - Response to NTG-0005 [p 5: cl 2.14(d)]
16 Exhibit 1-0712; Exhibit 1-0845 - CTH.9999.0001.0004 - [FINAL] RRC - Services Australia - Response to NTG-0005 [p2: para 2.18]
17 Exhibit 1-0525 - MGR.0001.0001.0052_R - Signed Contract 2016, 9 February 2016 [p 0015: para 7.1(e)]; Exhibit 1-0801 - CTH.3721.0001.0860_R - 23. RC16 - Probe Deed (D261017618) – signed, 5 February 2016 [p 0016: para 7.1(e)]; Exhibit 1-0797 - CTH.3721.0001.0753_R - 23. RC16 - Australian Receivables Ltd Deed of Agreement – signed, 8 February 2016 [p 0015: para 7.1(e)].
18 Exhibit 1-0525 - MGR.0001.0001.0052_R - Signed Contract 2016, 9 February 2016 [p 13: cl 2.4]; Exhibit 1-0801 - CTH.3721.0001.0860_R - 23. RC16 - Probe Deed (D261017618) – signed, 5 February 2016 [p 14: cl 2.4] 1-0797 - CTH.3721.0001.0753_R - 23. RC16 - Australian Receivables Ltd Deed of Agreement – signed, 8 February 2016 [p 13 – cl 2.4].
19 Exhibit 1-0525 - MGR.0001.0001.0052_R - Signed Contract 2016, 9 February 2016 [p 15: cl 7.2(a),(b)]; Exhibit 1-0801 - CTH.3721.0001.0860_R - 23. RC16 - Probe Deed (D261017618) – signed, 5 February 2016 [p 16: cl 7.2(a),(b)]; Exhibit 1-0797 - CTH.3721.0001.0753_R - 23. RC16 - Australian Receivables Ltd Deed of Agreement – signed, 8 February 2016 [p 15: cl 7.2(a) and (b)].
20 Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law') s 18, s 20, s 21, s 22, s 50.
21 Exhibit 1-0825 - CTH.3721.0001.1047 - 16. Debt collection guideline for collectors and creditors - April 2021 [p 3].
22 Exhibit 1-0525 - MGR.0001.0001.0052_R - Signed Contract 2016, 9 February 2016 [p 13: cl 1.5]; Exhibit 1-0801 - CTH.3721.0001.0860_R - 23. RC16 - Probe Deed (D261017618) – signed, 5 February 2016 [p 14: cl 1.5]; Exhibit 1-0797 - CTH.3721.0001.0753_R - 23. RC16 - Australian Receivables Ltd Deed of Agreement – signed, 8 February 2016 [p 13: cl 1.5].
23 Exhibit 1-0525 - MGR.0001.0001.0052_R - Signed Contract 2016, 9 February 2016 [p 13: cl 2.4]; Exhibit 1-0801 - CTH.3721.0001.0860_R - 23. RC16 - Probe Deed (D261017618) - signed 5 February 2016 [p 14: cl 2.4]; Exhibit 1-0797 - CTH.3721.0001.0753_R - 23. RC16 - Australian Receivables Ltd Deed of Agreement – signed, 8 February 2016 [p 13: cl 2.4]
24 Exhibit 1-0525 - MGR.0001.0001.0052_R - Signed Contract 2016, 9 February 2016 [p 8: cl 11.4]; Exhibit 1-0801 - CTH.3721.0001.0860_R - 23. RC16 - Probe Deed (D261017618) - signed 5 February 2016 [p 18: para 11.4];

Exhibit 1-0797 - CTH.3721.0001.0753_R - 23. RC16 - Australian Receivables Ltd Deed of Agreement – signed, 8 February 2016 [p 17: cl 11.4].

25 Transcript, Jarrod Kagan, 16 December 2022 [p 2061: lines 5 – 16]; Exhibit 2-3176 - POP.9999.0002.0025_R - 20221020 - Statement of Jarrod Nicholas Kagan (Probe Group) [p 011: para 66] Transcript, Robert Whelan, 4 November 2022 [p 471: line 9 – p 472: line 37]; Transcript, Christopher Ross, 4 November 2022 [p 490: lines 44-47].

26 Exhibit 1-0525 - MGR.0001.0001.0052_R - Signed Contract 2016, 9 February 2016 [p 17: cl 11.4]; Exhibit 1-0801 - CTH.3721.0001.0860_R - 23. RC16 - Probe Deed (D261017618) - signed 5 February 2016 [p 18: cl 11.4]; Exhibit 1-0797 - CTH.3721.0001.0753_R - 23. RC16 - Australian Receivables Ltd Deed of Agreement – signed, 8 February 2016 [p 17: cl 11.4]; Exhibit 2-3176 - POP.9999.0002.0025_R - 20221020 - Statement of Jarrod Nicholas Kagan (Probe Group) [p 7: 41]; Exhibit 1-0507 - ARL.9999.0001.0018_R - Royal Commission ARL Statement Robert Ashton Whelan 13 Oct 2022 [p 5: para 28]; Exhibit 1-0520 - MGR.9999.0001.0002_R - 2022.10.13 - NTG-0004 Milton Graham – Response [p 23: para 2].

27 Transcript, Christopher Ross, 4 November 2022 [p 491: lines 27-47]; Exhibit 2-3176 - POP.9999.0002.0025_R - 20221020 - Statement of Jarrod Nicholas Kagan (Probe Group) [p 6: para 31], [p 8: 41]; Exhibit 1-0520 - MGR.9999.0001.0002_R - 2022.10.13 - NTG-0004 Milton Graham – Response [p 9].

28 Exhibit 1-0507 - ARL.9999.0001.0018_R - Royal Commission ARL Statement Robert Ashton Whelan 13 Oct 2022 [p 4: para 20]; Exhibit 1-0514 - ARL.9999.0001.0009_R - Services Australia - Royal Commission Robodebt - Appendix 1 & 2 [p 170 -175]; Exhibit 2-3176 - POP.9999.0002.0025_R - 20221020 - Statement of Jarrod Nicholas Kagan (Probe Group) [p 7: para 41].

29 Exhibit 1-0514 - ARL.9999.0001.0009_R - Services Australia - Royal Commission Robodebt - Appendix 1 & 2, 21 July 2017 [p 161 - 163]; Exhibit 2-3155 - POP.0001.0001.0009_R - SOP - DHS Customer Motivation and Consequences [p 6-9]; Exhibit 1-0551 – MGR.0003.0001.2947 – Scripts – Centrelink V2 March 2018 [p 10].

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34 Exhibit 2-3176 - POP.9999.0002.0025_R - 20221020 - Statement of Jarrod Nicholas Kagan (Probe Group) [p 7: para 40]; Exhibit 2-3177 - POP.0001.0005.0016_R - SOP - DHS Review Hold, 23 February 2017; Exhibit 2-3155 - POP.0001.0001.0009_R - SOP - DHS Customer Motivation and Consequences.

35 Exhibit 1-0514 - ARL.9999.0001.0009_R - Services Australia - Royal Commission Robodebt - Appendix 1 & 2; Exhibit 1-0513 - ARL.9999.0001.0008_R - Services Australia - Royal Commission Robodebt - Appendix 3; Exhibit 1-0508 - ARL.9999.0001.0001_R - Services Australia - Royal Commission Robodebt - Appendix 4 & 5; Exhibit 1-0553 - MGR.0003.0001.2959 - Centrelink Training Guide January 2017 V1; Exhibit 1-0551 - MGR.0003.0001.2947_R - Scripts - Centrelink V2 March 2017; Exhibit 1-0573 - MGR.0003.0001.3539_R - Scripts - Centrelink V1 June 2018.

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38 Exhibit 1-0712; Exhibit 1-0845 - CTH.9999.0001.0004 - [FINAL] RRC - Services Australia - Response to NTG-0005 [p 21: para 17.9]; Exhibit 1-0520 - MGR.9999.0001.0002_R - 2022.10.13 - NTG-0004 Milton Graham – Response [p 0018].
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Section 6:
Checks & balances

Chapter 19: Lawyers and legal services

1 Introduction

Upholding the principles and values of a government lawyer in a time of crisis requires courage and conviction – The Hon Justice Stephen Gageler[1]

Often the advice of the government lawyer defines the law as understood by the government and, in many instances will determine the rights of citizens dealing with the government. – The Hon Justice Bradley Selway QC[2]

…there's a tension in the in-house legal space of an independent legal adviser but also an advocate once a position has been accepted. – Annette Musolino, former DHS chief counsel[3]

It is trite but true to say that the government should, in all its legal endeavours, be seen to uphold the law.

One of the fundamental ethical duties owed by a lawyer is the avoidance of any compromise to their integrity and professional independence.[4] A lawyer must not act as the mere mouthpiece of their client.[5] The actions of government lawyers take on extra significance because the government is a client which has powers and obligations that far exceed those of the normal citizen.[6]

In-house legal areas should have structures and systems in place to support the professional independence of in-house lawyers.[7] This is also important for the maintenance of legal professional privilege. A lawyer will lack the necessary independence to claim privilege if it is found that their personal loyalties, duties and interests have influenced the professional legal advice given to their clients.[8]

Both the Department of Human Services (DHS) and the Department of Social Services (DSS) had large in-house legal teams throughout the duration of the Robodebt scheme (the Scheme), led by a general counsel or chief counsel. The Commission heard evidence about structure and culture of those legal teams. It is apparent that the professional independence of both agencies in-house lawyers was compromised in relation to the Scheme.

The *Report of the Review of Commonwealth Legal Services Procurement 2009* (the Blunn Kreiger Report) commented that:[9]

> The lack of a clear role and purpose for in-house lawyers in some agencies has hampered the development of a professional ethos. By professional ethos we mean a recognition on the part of in-house lawyers that, in addition to being employees of an agency and owing the agency loyalty, they are also professionals. Professionalism brings with it obligations to be objective and independent, and to recognise obligations to uphold the rule of law and the interests of the Commonwealth as a whole.

In 2017, in a review of Commonwealth legal services, secretary of the Attorney-General's Department (AGD), Chris Moraitis PSM, observed that despite the recommendations of the Blunn Krieger Report:[10]

> … little progress has been made to develop a single unifying professional ethos and this has undermined the efforts that in-house legal areas have taken to support their lawyers.

The Commission agrees with that assessment in relation to DHS and DSS. The in-house lawyers involved in the provision of advice in relation to the Scheme did not uniformly display a professional ethos.

This chapter also considers the many failures of DSS and DHS to disclose significant legal advices to each other and to report the question of the legality of income averaging in the Scheme as a "significant issue" to the Office of Legal Services Coordination (OLSC) in 2017.

These are requirements set out in the *Legal Services Directions 2017* (Cth) (the Directions) - a set of binding rules issued by the Attorney-General under s 55ZF of the *Judiciary Act 1903* (Cth) providing obligations that non-corporate Commonwealth entities (departments and agencies) must comply with in the performance of legal work.[11]

The OLSC plays an important role in administering the Directions. It engaged with DHS about reporting the legality issue arising from the Scheme as a significant issue in January 2017. That engagement did not result in the Scheme issue being reported which meant that the OLSC, and, in consequence, the Attorney-General, had no oversight of the legal aspects of the Scheme and the controversies associated with it for much of its duration.

2 The culture at Human Services

DHS lawyers gave evidence of their perception that, even where they sought to act independently, they were constrained by the culture of the department which discouraged this behaviour.

Anna Fredericks (former lawyer, DHS) gave evidence that she felt there was an imperative to stick to the DHS talking points, which was prohibitive of lawyers forming any independent views about the accuracy of the talking points as a matter of law or fact,[12] and that it could be difficult for lawyers to gain access to the leadership team at DHS. Ms Fredericks did not feel there was an open-door policy.[13] This fostered a "culture that was more devolved" in terms of giving advice contrary to a program area's objectives.[14]

Tim Ffrench (former acting chief counsel, DHS) said that in 2017 the culture and leadership at DHS: [15]

> … were not conducive to a proper examination of issues relating to this particular program … many people were determined to achieve a particular outcome for government, once they had reached that state of mind, I think that the inquiry – the honest inquiry into issues like the ones you are raising was not something that … was fostered by that culture.

The position that income averaging was a long-standing lawful practice was so entrenched within DHS that lawyers at all levels were unable to question it in accordance with their professional obligations. This is evidenced by the following examples:

Failure to advise of the weak legal position in January 2017

Annette Musolino, in her role as chief counsel, DHS, failed to advise DHS executives of the weakness of the DHS position on averaging and the extent of the legal risk that it faced. The evidence to support that finding is detailed in chapter 2017, part A: A crescendo of criticism.

Australian Institute of Administrative Law conference

A number of DHS lawyers were at the presentation of Peter Hanks KC at the AIAL conference on 20 July 2017, at which Mr Hanks clearly identified an issue of consequence as to whether or not it was lawful to raise debts using income averaging on the basis that doing so was not consistent with the social security law.[16] The failure of the chief counsel of DHS to genuinely assess the merits of Mr Hanks' arguments and to recommend that independent legal advice be obtained is detailed in chapter 2017, part B: Inquiries and Investigations. The Commission's view is that this was because the chief counsel knew that the secretary of DHS did not want such advice.

Carney article

On 18 May 2018, Maris Stipnieks (general counsel, Program Advice and Privacy, DHS) forwarded a document to Ms Musolino providing a summary of an article by Professor Terry Carney called *The New Digital Future for Welfare: Debts Without Legal Proofs or Moral Authority.*[17] That summary document expressed disagreement with Professor Carney's view that income averaging provided insufficient evidence of income to raise a debt but made no attempt at analysis of his argument. Instead it recited the standard (and specious) DHS view that it was entitled to make a decision based on the best evidence available to it. Mr Stipnieks did not form his own view as to the correctness of what was said in the document, which expressed a level of confidence in the lawfulness of the use of income averaging which he did not himself hold.[18] See chapter 2018: The Scheme rolls on.

Advice to the secretary in 2018

On 6 March 2018, the DHS chief counsel provided advice to the secretary, Renée Leon, about whether DHS had made an error in relation to a matter that the Administrative Appeals Tribunal (AAT) decided on

7 September 2017 and whether the decision to raise a debt on the basis of averaging was defensible and reasonable.[19] That advice is best characterised as advocacy for DHS's position rather than objective advice as to whether the its position had a proper foundation in law. (See chapter 2018: The Scheme rolls on).

The Commission agrees with Andrew Podger AO that the strict hierarchical control in DHS seems to have presented serious obstacles to the provision of independent legal advice.[20]

2.2 The role of chief counsel

As the chief counsel of DHS, Ms Musolino, who was involved in each of the examples above, demonstrated a tendency to accommodate DHS's policy position in the face of conflicting advice and to advocate for the department's position rather than independently considering it.

In describing her role as chief counsel, Ms Musolino said: [21]

> … I would describe my role more as a manager of the legal team, managing the resources and the training and the systems and the processes, rather than the day-to-day supervision. So it would have been about having systems in place to make sure that they were conducted ethically and appropriately - systems and training and escalation where required.

Ms Musolino described her role as chief counsel as:

> …actually very, very broad. So there were some areas that I had more experience in than others.[22]
>
> But the role of chief counsel was not to be the… eminent silk in the room; it was actually to rely on the services provided by very, very experienced lawyers across the practice areas."[23]

Ms Musolino's own description of her role downplays her professional obligation to be independent and the need to independently form her own view about matters where she was providing advice.

In a submission, Ms Musolino referred to the role of the chief counsel as entailing acting on instructions, which she offered as a reason for her not giving DHS senior executives advice as to the weakness of DHS's legal position. She pointed out that Mr Ffrench had also referred in his evidence to the need for instructions (although, in fact, he was speaking of needing instructions in order to obtain external legal advice).[24]

Any attempt to limit or downplay the role of chief counsel is, in the Commission's view, problematic. It is the Commission's view – which Mr Ffrench who subsequently held the position also agreed – that the role of chief counsel includes the capacity to recommend the department obtain legal advice, particularly if a significant legal issue has been identified.[25] There is no need for instruction to make that recommendation. This is consistent with Ms Leon's evidence that the chief counsel's role included advising her about legal risk or emerging legal issues that were of sufficient significance that the secretary should be aware of them.[26]

3 The culture at Social Services

There was some evidence about the culture of DSS.

Anna Fredericks (former principal legal officer, DSS) said the DSS legal team was:[27]

> …a very siloed …. type of culture. You were responsible for what you were responsible for and stayed within those bounds. There was a strong view that…our role as legal, as a service provider to the Department was to provide advice on specific statutory interpretation, not to comment on - or not to necessarily explicitly not comment on, but perhaps not - it wasn't our role to turn our mind to broader risks than what was being explicitly asked.

Melanie Metz (former principal government lawyer, DSS) said she found the culture at DSS to be a very difficult one where some senior officers were favoured by the leadership over others, which affected who was appointed to the role of chief counsel. [28]

This culture as perceived by lawyers at DSS had an effect on the ability of those in-house lawyers to maintain their professional independence when advising on the Scheme.

The most significant manifestation of this was the provision of the 2017 DSS legal advice.[29] The 2017 DSS legal advice was sought in order to provide a justification for income averaging as it was being used in the Scheme, in circumstances where its lawfulness was being questioned.[30] That advice positively asserted the legality of using income averaging "as a last resort" without citing any legislative provisions or case law to support that position[31] and was obviously inconsistent with a previous advice given in 2014 on the same question.[32]

The Commission had found (in chapter 2017, part B: Inquiries and Investigations) that the conduct of the principal legal officer who provided that advice was influenced by pressure to meet "the departmental business need" for a legal justification for what it was doing,[33] placed upon her by Ms McGuirk (acting group manager, Payments Policy Group, DSS).[34]

The 2017 DSS legal advice was relied upon in representations to the Ombudsman that the Scheme was lawful.[35] Having received that advice, the Ombudsman chose not to deal with the lawfulness of income averaging in its April 2017 report into "Centrelink's automated debt raising and recovery system"(the 2017 Investigation Report).[36] The subsequent reliance on this advice by ministers and departmental officers to justify income averaging as used in the Scheme demonstrates the significant consequences that can result from the advice of an in-house lawyer.

4 Achieving the necessary independence

In 2017, the Secretary's Review considered how legal services could be delivered most effectively and efficiently to the Commonwealth to support government action and manage Commonwealth legal risk and made a number of relevant recommendations.[37]

Part of the solution recommended by the Secretary's Review was to establish an overarching Australian Government Legal Service (AGLS) – a formal professional network that would provide information sharing, collaboration, guidance, professional standards and training.[38] The AGLS has since been established.

In the Commission's view, the AGLS is an encouraging development. Since its establishment, the AGLS has published a *Statement of expectations of Australian Government lawyers*.[39] The statement includes the following expectations:

- We conduct ourselves with integrity, objectivity and independence
- Recognising that generally our client is the Commonwealth, when we provide our advice to, or identify and manage legal risk for, our agency we do so with a whole-of-government focus
- We understand that our role requires us to balance managing legal risk with assisting our agency to achieve the government's objectives
- Because we are part of one Australian Government Legal Service, we collaborate and consult with each other to provide high quality work
- We recognise that sometimes government lawyers have competing obligations (such as when working for corporate Commonwealth entities). However, as much as possible, we work together with a whole-of-government focus.

The AGLS has also published a General Counsel Charter which establishes a set of common expectations for Commonwealth officers who are responsible for the delivery of legal services and the management of legal risk in their respective entity.[40] According to that charter, the role includes sharing information and legal knowledge across teams and between entities, identifying legal risks and issues that might require or benefit from a whole-of-government approach, taking steps to engage relevant stakeholders, and actively engaging with clients to incorporate the identification and management of legal risk into all stages of policy and program decision making.

Notably, the General Counsel Charter says nothing about professional independence.

At Services Australia, the chief counsel is now included as a member of the Executive Committee, thus reinforcing the office holder's role as the legal adviser to the Executive.[41] Rebecca Skinner, Services Australia CEO, said that this ensured that the chief counsel had an equal and direct voice at the Executive table and that she had "made clear that the chief counsel is aware that they have direct access to me if they feel they should exercise that avenue to escalate any issues for my attention."[42]

At DSS, the chief counsel has been upgraded to an SES Band 2, supported by two deputy chief counsels. Ray Griggs, DSS secretary, said:[43]

> Experienced senior government lawyers who have direct access to policy and program SES, Deputy Secretaries and me are now leading the legal team. This arrangement creates capacity to have greater technical oversight of legal work and more timely escalation of legal risk.

The Commission is concerned that these developments do not guarantee there is sufficient separation between the head of the agency and the chief counsel to ensure there is no expectation of loyalty by the chief counsel to the agency head.

It is important that the chief counsel of an agency is appointed by an independent and robust process, to guard against the possibility that the secretary favours the appointment of someone who will be compliant and protect their (the secretary's) position.

The Commission recognises that the chief counsel for both of the agencies is currently appointed by a merit-based process which includes a selection process involving the Australian Public Service Commissioner or their representative (who must be from a different portfolio agency).[44] In the Commission's view, further expertise is required throughout the selection process to ensure the candidate for chief counsel has the right skills and attributes for the job and will staunchly display the professional independence required of the role. Currently, where an agency is recruiting to SES roles that require Human Resources, Digital, Data or Accounting and Finance expertise, agencies should include a specialist panellist as a member of the selection panel.[45] The Commission recommends that a similar specialist panel member should be enlisted for the selection panel choosing chief counsel; in this case, the specialist panel member being the Australian Government Solicitor.

Recommendation 19.1: Selection of chief counsel

The selection panel for the appointment of chief counsel of Services Australia or DSS (chief counsel being the head of the entity's legal practice) should include as a member of the panel, the Australian Government Solicitor.

5 Legal advice

The advice of government lawyers "in many instances will determine the rights of citizens dealing with the government."[46]

In-house lawyers took a remarkably passive approach to the provision of legal advice in relation to the Scheme.[47] What is truly striking about the advices and legal commentary the Commission has seen is that for all the many DHS and DSS lawyers involved, so little attention was paid to the provisions of the social security legislation which actually governs entitlement, payment, authority to require information, debt recovery and imposition of penalties.

Another alarming feature is the practice of leaving advices in draft form rather than finalising them and ensuring that senior departmental officers saw them. As agencies with the high volume of intersecting work, you would think that advice prepared by DSS and DHS on common topics would be disclosed between the two agencies, at the very least to avoid duplication of work. Indeed, it was required to be disclosed under the Directions. The multiple failures are discussed later in this chapter.

5.1 Failure of legal advices

Legal advices and commentary prepared by in-house lawyers in DHS and DSS throughout the Scheme seldom referred to legislative and judicial authority in support of positions and arguments and generally failed to undertake the critical analysis that would be expected of a qualified lawyer. Resort was often had to the assertion "the department is entitled to make a decision based on the best evidence available to it at the time," which ignored the fundamental requirement that administrative decisions be based on probative evidence, and its converse, that a decision not based on probative evidence is illogical and liable to be set aside (the "no evidence" principle).

The lack of proper legal analysis is demonstrated in the following advices that had significance for the Scheme:

- The 2017 DSS legal advice which disregarded the "no evidence" principle and relied on irrelevant legal provisions.[48]
- The advice to the secretary, following Mr Hanks' presentation and paper at the AIAL conference, which conveyed that there were no legal issues of concern and did not genuinely assess the merits of Mr Hanks' arguments.[49]
- The document analysing AAT decisions in relation to the Scheme which did not refer to relevant social security legislative provisions.[50]
- The advice about a decision of the AAT made on 8 March 2017 which did not properly consider whether there was a legitimate basis to disagree with the conclusion reached in the AAT decision that income averaging without more could not be used to calculate debts against social security recipients.[51]
- The advice to the secretary regarding the 7 September 2017 AAT decision which did not contain any analysis of the reasoning of the 7 September 2017 decision, or attempt any explanation of why the use of income averaging did not contravene the "no evidence" principle.[52]
- The advice following the publication of the commentary prepared on Professor Carney's paper, called *The New Digital Future for Welfare: Debts Without Legal Proofs or Moral Authority*, which, again, did not attempt any explanation of why the use of income averaging did not contravene the no evidence principle.[53]

Further detail about these legal advices is in chapter 2017, part A: A crescendo of criticism, chapter 2017, part B: Inquiries and Investigations and chapter 2018: The Scheme rolls on.

Ms Skinner pointed to recent steps taken by Services Australia to update its Legal Practice Standards, which set out the core duties and responsibilities of all legal officers working at Services Australia.[54]

Legal Practice Standard 1 – Core Duties of Legal Officers sets out minimum requirements for lawyers in fulfilling these duties, including to avoid any compromise to their integrity and professional independence.[55] It provides that litigated matters will be conducted in accordance with written instructions and instructions should be documented appropriately at all times.[56]

Recommendation 19.2: Training for lawyers – Services Australia

Services Australia should provide regular training to its in-house lawyers on the core duties and responsibilities set out in the Legal Practice Standards, including:

* an emphasis on the duty to avoid any compromise to their integrity and professional independence and the challenges that may be presented to a government lawyer in fulfilling that obligation.
- appropriate statutory and case authority references in advice writing

Recommendation 19.3: Legal practice standards – Social Services

DSS should develop Legal Practice Standards which set out the core duties and responsibilities of all legal officers working at DSS.

Recommendation 19.4: Training for lawyers – Social Services

DSS should provide regular training on the core duties and responsibilities to be set out in the Legal Practice Standards which should include:

- an emphasis on the duty to avoid any compromise to their integrity and professional independence and the challenges that may be presented to a government lawyer in fulfilling that obligation
- appropriate statutory and case authority references in advice writing

Advices provided and left in draft

Throughout the Scheme, there were instances where legal advice from AGS or an external law firm was provided in draft form and not finalised. The Commission heard that it was common practice in both DHS and DSS in respect of external legal advice,[57] although two witnesses said that while it was not uncommon to obtain advice in draft, failing to finalise the advice was not common and should not occur.[58]

The most prominent example of this was the Clayton Utz advice, which was provided as a draft advice to DSS and never finalised.[59] Nor was it provided to DSS secretary, Kathryn Campbell (who did not become aware the advice existed until November 2019).[60] Despite the advice never being finalised, the invoice was approved and paid for by the DSS legal team.[61] There is no record of how the decision to pay the invoice without finalising the advice was made.

The Commission recognises that there may be circumstances where it is reasonable to obtain advice in draft to allow further clarification of facts, issues and instructions. However, unless there is very good reason, the advice should always be finalised, and if it is not, that very good reason should be documented.

After hearing the evidence presented at the Commission about the treatment of draft legal advice, Mr Griggs issued a direction to DSS about when to seek legal advice, how staff must act on that legal advice once received, and the finalisation of advice.[62] The direction provides that legal advice will be left in draft form only to the extent that the administrative step of finalising it has not yet been undertaken by lawyers or there are remaining questions to be answered in relation to the issues under consideration.[63] Services Australia should issue a similar direction.

Recommendation 19.5: Draft advice – Social Services

DSS should issue a further direction providing that, if the administering agency decides that a draft advice need not be provided in final form, that decision and the reasons for it must be documented. One of those steps – finalisation, or a documented decision against finalisation – should have been taken within three months of the receipt of the draft advice.

Recomendation 19.6: Draft advice – Services Australia

Services Australia should issue a direction that legal advice is to be left in draft form only to the extent that the administrative step of finalising it has not yet been undertaken by lawyers or there are remaining questions to be answered in relation to the issues under consideration and that, if the administering agency decides that a draft advice need not be provided in final form, that decision and the reasons for it must be documented. One of those steps – finalisation, or a documented decision against finalisation – should have been taken within three months of the receipt of the draft advice.

6 The role of the Office of Legal Services Coordination

The Attorney-General has overarching responsibility for all Commonwealth legal work as First Law Officer. The Office of Legal Services Coordination (OLSC) sits within the Attorney-General's Department (AGD) and supports the Attorney-General to discharge this function, including by administering the Legal Services Directions.[64] The OLSC is responsible for:

- monitoring and supporting compliance with the Directions
- advising the Attorney-General on the delivery of legal services to and by government
- providing policy guidance to agencies and their legal service providers on the operation of the Directions, and
- advising the Attorney-General on the operation of the Directions.[65]

Michael Johnson, assistant secretary of the OLSC, said that the OLSC's core function was to:[66]

> '…[work] closely with entities to gain an understanding of the key aspects of their legal work, convey to entities the expectations of the Attorney-General regarding management of that legal work, support entities to comply with those expectations, and advise the Attorney-General of key developments as and when necessary.

The establishment of the OLSC and the creation of the Directions stemmed from recommendations made by Basil Logan in the Review of the Attorney-General's Legal Practice in March 1997 (the Logan Review).[67]

The Logan Review recommended that the OLSC:

- have responsibility for the assurance of quality in the provision of legal services to the Commonwealth and have oversight of the implementation of, and compliance with, the Directions.[68]
- be fully accountable for any decisions regulating the provision of legal services[69]
- be required to develop a range of mechanisms to manage consistency, co-ordination and whole-of-government and public interest issues, and the mechanisms give effect to this should reflect the risk involved.[70]

The OLSC monitors agency compliance with the Directions in order to address emerging, systemic or significant issues across the Commonwealth.[71] It takes a facilitative approach which aims to encourage and support compliance with the Directions through education and by publishing guidance notes, rather than find non-compliance and punish agencies.[72]

The evidence before the Commission demonstrated a number of failures by DSS and DHS to comply with the requirements set out in the Directions, particularly in relation to:

- The requirement for agencies to report as soon as possible significant issues that arise in the provision of legal services, especially in conducting litigation, to the Attorney-General or the OLSC and to regularly update the OLSC on any developments involving that significant issue.[73]
- The requirement for agencies in particular circumstances to consult with each other on advice, and disclose it once received.[74]

Much of the conduct described in this chapter is governed by the earlier version of the Directions, the *Legal Services Directions 2005* (Cth).

The OLSC has other tools available to discharge its functions such as other legislative instruments, the publication of key guidance notes,[75] and the use of forums and networks, including the Significant Legal Issues Committee (SLIC), the Legal Risk Committee and the Australian Government Legal Service.[76]

SLIC is a forum of five of the most senior government lawyers and supporting advisers, whose functions are to consider significant legal issues involving the Commonwealth, discuss high profile and complex legal issues, and make recommendations to ensure a coordinated, whole-of-government approach is taken to manage the significant legal issues involving the Commonwealth. [77]

6.1 Significant issue reporting

The purpose of significant issues reporting is to ensure that the Attorney-General is appropriately informed of the most important legal issues affecting the Commonwealth.[78] An issue that arises in the provision of legal services will be considered 'significant' in a range of circumstances, including any one of the following:

- it has, or potentially has, whole-of-government implications, or may have future implications for another agency and/or the Commonwealth
- it raises legal, political or policy issues that receive or are likely to receive media attention or cause a significant adverse reaction in the community
- it involves a test case or requires the Commonwealth to intervene in private litigation
- it affects more than one Commonwealth agency, requiring a significant level of coordination or high-level consultation between Commonwealth agencies, or
- it has the potential to establish a significant precedent for the Commonwealth or other Commonwealth agencies, either on a point of law, or because of its potential significance for the Commonwealth or other Commonwealth agencies.[79]

The information collected through significant issues reporting is valued by the Attorney-General in order to discharge his or her responsibility for litigation as the First Law Officer.[80] To support the Attorney-General, the OLSC relies on accurate and timely reporting by agencies, who are best placed to identify and explain the significance of the legal matters of which they have conduct.[81] According to Mr Michael Johnson, Assistant Secretary, OLSC, early identification of significant issues is desirable in order to maximise the ability of the OLSC and the Attorney General to discharge their functions.[82]

6.2 Consulting on and disclosing advice between Commonwealth agencies

In accordance with clause 10.1 of the Directions, if an agency wishes to obtain legal advice on the interpretation of legislation administered by another agency, it must provide the administering agency with:

- a reasonable opportunity to consult on the proposal to seek advice
- a copy of the request for advice
- a reasonable opportunity to consult on the matter prior to the advice being finalised, and
- a copy of the advice.[83]

DSS was at all relevant times the agency which administered the *Social Security Act 1991* (Cth) and *Social Security (Administration) Act 1999* (Cth).[84] Under the Directions, if DHS wished to obtain legal advice on the interpretation of that legislation, it was required to consult with DSS. [85]

Paragraph 10.8 of the Directions requires an agency which receives legal advice that it considers likely to be significant to another agency to take reasonable steps to make that legal advice available to that agency.[86]

The purpose of the requirements in the Directions to disclose and consult on advice is to promote consultation between Commonwealth agencies on the interpretation of legislation with the aim of reaching consistency in statutory interpretation across the Commonwealth,[87] and to facilitate a whole-of-government approach.[88]

There is no published guidance on these obligations. The Secretary's Review described the requirements for the sharing of advice within Government as one of the most common areas for non-compliance[89] and noted that agencies obtain legal advice on the basis that they need that information for their own purposes and there is no particular imperative to share the advice.[90] According to the Secretary's Review, this entity-focused approach undermines the fact that the information pertains to the Commonwealth. When it comes to sharing information, government lawyers should share a common understanding of their obligations and should have regard to protecting the Commonwealth's interests.[91]

This is not a new problem. The Blunn Kreiger Report also noted that there is evidence of agencies withholding information and advice from other agencies, regardless of any wider Commonwealth interest, where they perceive sharing it may not be in the particular interest of the agency.[92]

This kind of disconnect persisted between DHS and DSS throughout the Scheme. The Commission heard that there had been historic difficulties about which agency had control or ownership of information that was shared between DHS and DSS[93] and that there was frequently tension between the two departments around advice concerning the social security law.[94] This lack of cooperation had significant consequences for the Scheme.

7 Failure to comply with the Directions

7.1 The 2014 Social Services legal advice

In the period June 2014 to December 2014, DHS had developed a proposed compliance intervention measure for the 2015-16 Budget which involved automated debt calculation based upon apportioning or averaging a social security recipient's employer-reported PAYG income data over the reported period of employment, without further verification (the DHS proposal).[95]

On Friday, 31 October 2014, Mark Jones (assistant director, Payment Review and Debt Strategy Team, Social Security Performance and Analysis Branch, DSS), in consultation with Cameron Brown (director, Payment Integrity and Debt Management, DSS), sought policy advice and legal advice in respect of the DHS proposal.[96] On 18 December 2014, Simon Jordon (senior legal officer, DSS) provided legal advice in response to that request (the 2014 DSS legal advice).[97]

The 2014 DSS legal advice concluded that a debt amount, derived from annual averaging or averaging over a defined period of time, may not be derived consistently with the legislative framework.[98]

In January 2015, briefs were prepared for the Minister for Human Services, Senator the Hon Marise Payne, and the Minister for Social Services, the Hon Scott Morrison MP, on the DHS proposal.

DSS informed DHS of its view that the suggested calculation method did not accord with social security legislation.[99] Drafts of the Executive Minute to Ms Payne and Mr Morrison prepared by DHS contained comments consistent with the 2014 DSS legal advice that legislative change would be required.[100] These references were later removed from the final New Policy Proposal which was considered and approved by Cabinet.[101]

The 2014 DSS legal advice was clearly significant to DHS because:

- it related to the DHS proposal which was to be delivered by DHS, a description of which was provided in the instructions for the preparation of the advice[102]
- the instructions provided with the advice included the policy advice provided by David Mason (acting director, Rates and Means Testing Policy Branch, DSS) which did not support the proposal for the reason that averaging employment income over an extended period did not accord with legislation,[103] and
- it concluded that the way DHS proposed to use ATO information was not lawful and was likely to produce inaccurate debts.[104]

Given the significance of the 2014 DSS legal advice to DHS and to the DHS proposal, it was imperative that DSS took reasonable steps to promptly make the 2014 DSS legal advice available to DHS in accordance with para 10.8 of the Directions.[105] It did not do so.[106]

Had the full 2014 DSS legal advice been disclosed to DHS in January 2015 in accordance with the Directions it would have been more difficult for DHS to justify the removal of any reference to the need for legislative change to allow the use of averaging and correspondingly less likely that Cabinet would be misled about the legitimacy of the DHS proposal.

Instead, the measure was introduced and the Scheme was implemented.

The 2014 DSS legal advice resurfaced within DSS in 2017 when the Commonwealth Ombudsman commenced its own-motion investigation. The legal advice was circulated among DSS staff in advance of a meeting with DHS in January 2017 to discuss the investigation.[107] Again, the advice was not provided to DHS at this time.

A full copy of the 2014 DSS legal advice, including the instructions for it, was first provided to DHS five years later, in November 2019.[108]

The Commission heard that it was "common practice" between agencies not to share legal advice in order to maintain confidentiality and legal privilege.[109] That reflects a misconception among Commonwealth officers. Legal advice provided within the Commonwealth in accordance with the obligations under the Directions does not involve the waiver of legal professional privilege.[110]

7.2 Failure to report a significant issue

DSS was obliged to "report as soon as possible to the Attorney-General or OLSC on significant issues that [arose] in the provision of legal services, especially in handling claims and conducting litigation."[111] For the purposes of para. 3.1, "significant issues" were said to include matters where "the size of the claim, the identity of the parties or the nature of the matter raises sensitive legal, political or policy issues."[112]

The language of para. 3.1 of the Directions makes clear that the "provision of legal services" is not confined to services provided in the conduct of litigation; it is also expressed to include the handling of "claims." The OLSC's Guidance material makes clear that reporting should not be confined to litigated matters and should include the early reporting of significant legal issues and trends.[113] Entities should report significant legal issues as soon as they emerge, even if a claim has not yet been made.[114] The provision of advice, despite the absence of litigation, could raise a significant issue that requires reporting.[115]

From December 2016, the Scheme was the subject of sustained public and political criticism.[116] This included questioning in the media of the accuracy of, and legal basis for, the use of averaging to determine social security entitlement.

In January 2017, several DSS staff understood that income averaging was being used by DHS and that the law did not allow income averaging to allege a debt.[117]

DSS was engaged in "the provision of legal services" by procuring internal advice (the DSS 2017 legal advice) which supported the lawfulness of income averaging as a last resort. DHS was also in the process of obtaining internal advice.

The controversy about the accuracy of, and legal basis for, the use of averaging to determine social security entitlement under the Scheme constituted a "significant issue" in the provision of the aforementioned legal services for the purposes of para. 3.1 of the Legal Services Directions. The Commonwealth agreed in its submissions that DHS and DSS should have collaborated in or about January 2017 to ensure that a significant issue report was submitted to OLSC about the Scheme.

7.3 Failure to consult and disclose

On 6 January 2017, Barry Jackson (acting secretary, DHS) sought advice about the legality of using income averaging to determine social security entitlement.[118] Ms Golightly responded that the DHS legal branch had advised that "it is a very complex job to get the answer to."[119] On the same date, this request for advice was communicated by Sue Kruse (acting deputy Secretary, DHS) to Paul Menzies-McVey (acting chief counsel) for his consideration.

In an email on 6 January 2017, Mr Menzies-McVey asked Mark Gladman (deputy general counsel) to prepare advice in response to Mr Jackson's request.[120] He stated:

> Sue Kruse would like us to develop, as a top priority next week, a paper on the department's current practice of averaging income for the purposes of calculating payments under the social security law. This paper should look at the legislative basis for this practice for each payment, and identify the circumstances where it is permissible for the department to assume (in the absence of other evidence) that income over a period has been earned pro rata over the period. If, in some or all cases, the department should use its information

> gathering powers to obtain detailed information about when income has been earned (i.e. by compelling detailed information from an employer), rather than relying upon averaging, this should be identified. Any guidance in the Guide should also be identified.

This email shows that there was an understanding within DHS on that date that a real controversy existed as to the lawfulness of the use of averaging to determine social security entitlement. Additionally, the tone of Mr Menzies-McVey's email and his description of the procurement of the advice as "a top priority" reflected his understanding that the resolution of this controversy was of significant importance to DHS.

A draft advice was subsequently prepared by DHS lawyers about whether it was open to DHS to rely on information received from the ATO about annual income amounts to calculate a customer's entitlement to income support, and whether the department should use its information gathering powers to obtain detailed information about when income was earned, rather than relying upon averaging (the DHS draft advice).[121]

The DHS draft advice noted that there were reasonable arguments that could be made to support the use of information received from the ATO about annual income amounts to calculate a customer's entitlement to income support but noted that the *Social Security Act 1991* (Cth) was complex. The advice recommended that external legal advice be sought on whether it was open to DHS to rely on information received from the ATO to calculate a customer's entitlement to income support.[122]

Draft instructions to AGS were prepared.[123] An AGS lawyer was contacted about the advice and DHS confirmed internally that he was available, and had the appropriate expertise, to advise on averaging.[124]

The draft advice was never finalised and AGS was not retained to provide advice on the lawfulness of income averaging as proposed.

The documentary evidence suggests that it was decided that the work Mr Jackson had requested about the legality of averaging to determine social security entitlement was not to proceed. There is no record of this decision.

Another advice was prepared on 11 January 2017 by Glyn Fiveash (deputy general counsel, DHS).[125] That advice (the Fiveash advice) explained that where no income averaging mechanism was provided for in determining the rate of payment of a person's social security entitlement in the first place, it could not later be used to calculate and raise a debt. [126] The department was not entitled to use income averaged over a longer period for that purpose; instead it was necessary to apportion the earnings between fortnights at the rate they were actually earned derived or received.

Under the Directions, consultation and disclosure are not required for advice on a routine matter which does no more than advise on the application of the law to particular facts by relying on the settled interpretation of the legislation.[127] However, consultation and disclosure would be required where:

- advice relates to legislative provisions that have not been considered by the courts and is contrary to existing policy or could raise new policy issues in respect of the legislation
- the matter could create a precedent, or
- the requesting entity has identified a potential weakness in the legislation.[128]

The requirement to consult on obtaining legal advice applies whether it is from an in-house or external source.[129]

The advice requested by Mr Jackson on 6 January 2017, and the advice prepared by Mr Fiveash on 11 January 2017 clearly related to the interpretation of legislation administered by DSS. The requested advice was not routine. Indeed, as noted above, the DHS legal branch considered the answer to Mr Jackson's question to be "complex." [130] It was evident that there existed a real controversy as to the lawfulness of the use of averaging to determine social security entitlement. The requested advice related to legislative provisions that had not been considered by the courts.

When the advice was requested by Mr Jackson, pursuant to para 10.1 of the Directions, DHS was required to provide DSS with:

- a reasonable opportunity to consult on the proposal to seek advice;
- a copy of the request for advice;
- a reasonable opportunity to consult on the matter prior to the advice being finalised; and
- a copy of the advice.[131]

There is no evidence of DSS being provided a copy of or consulted on these advices prepared by DHS in January 2017. Had this occurred, DSS might have identified an inconsistency between the Fiveash advice and the advice that would be eventually prepared by DSS later in January 2017 namely, the 2017 DSS legal advice, and/or one of the departments might have obtained external legal advice at this stage.

It follows that the Fiveash advice and the DHS draft advice should have been considered by DHS to be significant to DSS. Both advices related to legislation administered by DSS (which it noted was "complex") and the DHS draft advice recommended seeking external legal advice on that legislation and questioned the legality of the Scheme. The Fiveash advice and the DHS draft advice were required to be disclosed to DSS in accordance with para 10.8 of the Directions.[132]

7.4 Human Services and the Office of Legal Services Coordination

In January 2017, OLSC contacted DHS and requested an initial discussion regarding the Scheme and the public criticism it had sustained. Mr Menzies-McVey (acting chief counsel, DHS) was notified of OLSC's contact on 5 January 2017.[133] On the same day, Mr Menzies-McVey notified Ms Kruse and Malisa Golightly (deputy secretary, DHS) of this matter.[134] There is evidence that Mr Menzies-McVey subsequently had a conversation with Ms Kruse and Ms Golightly about the OLSC's contact.[135]

On 6 January 2017, Mr Menzies-McVey had a telephone conversation with Rebecca Vonthethoff, an officer at the OLSC. By email dated 6 January 2017, Ms Vonthethoff provided an account of the conversation to Sara Samios (acting assistant secretary, OLSC).[136] That account was framed as follows:

- Mr Menzies-McVey conveyed that there was some concern as to why OLSC had made contact with DHS "given OLSC's regulatory role" and that any "initial/general discussion" between OLSC and DHS regarding the Scheme would be difficult "without briefing up to the a/g Secretary."
- Ms Vonthethoff explained that OLSC had contacted DHS to, amongst other things, "speak about whether OLSC should expect/request significant issues reporting on this matter, ie. is DHS Legal of the view that any significant legal issues arise at this stage."
- Mr Menzies-McVey replied:

> DHS Legal is of the view that no significant legal (as opposed to business/operational) issues arise at this stage, hence significant issues reporting is not required. There have been a number of FOI requests, but those do not raise any particular legal issues. DHS is very aware of its obligations under the Directions and will inform OLSC as soon as any significant legal issues do emerge.

Human Services failure to report the Scheme

In the Commission's view, the controversy about the accuracy of, and legal basis for, the use of averaging to determine social security entitlement under the Scheme constituted "significant issue" in the provision of the aforementioned legal services for the purposes of para. 3.1 of the Directions. That controversy had crystallised at the following points in time:

- when Mr Jackson made his request for advice on 6 January 2017
- when the DHS draft advice was prepared, and
- when the Fiveash advice was prepared.

DHS was engaged in "the provision of legal services" at the time by:

- its involvement in responding to questions from the Ombudsman about adherence of the Scheme to legislative requirements,[137]
- its involvement in AAT proceedings concerning debts raised under the Scheme, and
- its procurement of internal advice regarding the lawfulness of the use of averaging to determine society security entitlement; and
- the preparation of instructions to AGS for advice on the use of averaging to determine social security entitlement.

The obligation to report significant issues is a continuing one and requires the agency to regularly update the Attorney-General or OLSC on any developments involving the significant issue.[138] The fact that the controversy crystallised after the OLSC made its initial contact with DHS did not obviate the need to report once it became aware of these issues.

Under the Scheme, income averaging had been used to determine social security entitlement and overpayment in the absence of other evidence. This was a practice that affected hundreds of thousands of income support recipients.

That controversy was manifest in the public scrutiny of the Scheme. Resolution of the controversy had the potential to have a significant impact on the operations of DHS, DSS and the Government at large. On any view, it raised "sensitive legal, political and policy issues" in the sense contemplated by para. 3.1(a) of the Directions.

Consequently, DHS was required to report that issue to the OLSC. Contrary to that obligation, DHS failed to report a significant issue to OLSC in relation to the use of income averaging. The effect of this failure was that the OLSC was unable to properly provide oversight of the legal aspects of the Scheme and the controversies associated with it.

Extent of engagement with Human Services

Ms Samios was not involved in the call to Mr Menzies-McVey on 6 January 2017, but noted in an internal email that she was concerned by DHS's analysis of whether there was a significant legal issue and that she got "the impression…that DHS was focusing on whether any specific legal issues that have crystallised in this space are significant from a technical perspective, which is, of course, too narrow."[139]

On 10 January 2017 OLSC staff including Ms Samios became aware of:

- an article in the *Canberra Times* titled 'Commonwealth Ombudsman launches Centrelink investigation;' and
- an article in *The Guardian* titled 'Centrelink crisis people targeted with inaccurate debts may be able to sue.' The article identified a potential cause of action deriving from obligations under the *Public Governance, Performance and Accountability Act* 2013.[140]

On 13 January 2017, staff at the OLSC drafted an email for Ms Samios to send to DHS requesting that DHS submit a draft 'significant issues' report, based on a preliminary view that the Scheme may be significant under clause 3.1 of the Directions, because:[141]

1. Emerging issues associated with automated decision-making may have implications for other departments and agencies.
2. The matter raises sensitive legal, political and policy issues and is receiving significant attention from parliamentary representatives, the media and the general public.
3. The matter appears to give rise to the possibility of a number of emerging significant legal issues, including in light of the inquiries being conducted by the Information Commissioner and the Commonwealth Ombudsman, and public comments from legal professionals about possible causes of action against the Commonwealth.

The draft email noted that OLSC was of the view that the draft significant issue report should focus on the "high-level emerging issues associated with the automated debt recovery system."[142]

On 20 January 2017, an OLSC staff member sent another media article about the Scheme to Ms Samios and noted "Get-Up is looking at legal options (my paraphrasing)."[143] Ms Samios noted that she was planning to send DHS the email request for the draft significant issues report that day[144], but the email was ultimately not sent.[145] Instead, Ms Samios had a telephone conversation with Ms Musolino at some time after 20 January 2017.

Ms Samios told the Commission that she had instigated this call with Ms Musolino due to her continuing concern about the issues and awareness that there was "significant nervousness" within DHS about the issues, as indicated by the fact that the acting secretary had been notified that the OLSC had made inquiries.[146] She had a very specific memory of Ms Musolino telling her that there were no legal issues and, as such, nothing to report to the OLSC.[147] She was surprised by this and pressed Ms Musolino on the question of whether any advice existed or any report ought to be sent.[148]

Ms Musolino's response made it clear to Ms Samios that sending a request for a draft report would not lead to provision of specific material, but rather an advice in the form that there were no legal issues.[149] Ms Samios did not make a contemporaneous record of this call.[150]

The OLSC did not pursue DHS for a significant issue report and instead undertook to keep a "watching brief" to "monitor the media coverage".[151] The OLSC did not engage with DHS again about the Scheme for more than two years, when the application filed by Ms Masterton was reported as a significant issue.

Ms Samios, in her submissions to the Commission, contended that the OLSC was "concerned" in January 2017 that there might be a significant issue but there was not enough to form a conclusive preliminary view that the matter involved any legal issue, or that any legal issue was "significant" as that term is used in the Directions.

However, the Commission's view is that there was a preliminary view formed within the OLSC that the Scheme involved a relevant significant issue. That was despite the fact that the OLSC had not been informed of any specific provision of legal services. There was ample basis for such a view because of:

- media articles concerning the Scheme which identified possible causes of action from legal professionals and advocacy groups
- inquiries being conducted by the Information Commissioner and the Commonwealth Ombudsman into the Scheme
- emerging issues associated with automated decision-making, with potential implications for other Commonwealth departments and agencies.

Given those circumstances, it was likely that legal advice was being sought on the lawfulness of the Scheme – and indeed it was. The Fiveash advice and the draft DHS legal advice and instructions to AGS had been prepared in early January 2017.

In light of this, there was cause for alarm within OLSC that DHS considered there were no legal issues and that there was no legal advice pertaining to the Scheme.

This was a major missed opportunity. Both DHS and DSS had taken steps to obtain legal advice about the lawfulness of averaging in January 2017. Work done in relation to those advices was certainly done in the provision of legal services and the question of the lawfulness of income averaging was a significant issue at the time.

At the very least, DHS's response warranted further inquiry by OLSC of DHS, particularly given OLSC had previously recorded a concern that DHS' analysis of whether there was a significant issue had too narrow a focus.

However, the Commission acknowledges that had the OLSC pursued the matter further, the answer may have remained the same. In any event, the OLSC is not a regulator with investigative functions or the power to compel the production of a significant issues report.[152]

The decision not to pursue DHS for a significant issues report was made following a conversation Ms Samios recalls having with Ms Musolino. This was in keeping with OLSC's facilitative approach to supporting agency compliance.[153] The conversation was not recorded in an email or file note. As Ms Samios agreed when asked, it would have taken two minutes to type an email to confirm what was discussed.[154] Such an email would at least have required Ms Musolino to confirm her view in writing.

Ultimately, the secretary of an agency has responsibility for ensuring compliance with the Legal Services Directions,[155] yet the chief counsel of an agency is the person with oversight of the legal practice and more knowledge of the legal issues the agency is dealing with. Services Australia have put in place a Legal Practice Standard, which sets out that all legal officers are to be aware of and assist in ensuring that Services Australia complies with the Directions, and places additional responsibility on senior legal officers to identify and assess continuing compliance with the Directions.[156]

The Commission considers a further obligation should be imposed on the chief counsel to ensure the Directions are complied with and to document significant interactions with OLSC about inquiries made, and responses given, concerning reporting obligations under the Directions.

The General Counsel Charter, published by the AGLS, provides that general counsel are accountable, including through the *Legal Services Directions 2017*, to the AGD secretary, who is the head of the profession for the AGLS.[157] The Charter should be amended to provide for the imposition of an obligation on the chief counsel to ensure compliance with the Directions and to document interactions with the OLSC.

7.5 Lack of questions for Social Services

The OLSC did not seek to ask questions of DSS as the agency responsible for social security policy and legislation. Had DSS been engaged, it would have been difficult for lawyers from that department to assert that 'there were no legal issues' and no legal advice, given the existence of the 2014 DSS legal advice and the understanding of some DSS staff that income averaging as it was being used in the Scheme, was unlawful.[158] The Commission appreciates, however, that the OLSC may not have been familiar with the relationship between the agencies and the division of responsibility between them.[159]

7.6 Consequences of not reporting a significant issue

Had the high-level emerging issues associated with the Scheme been reported to the OLSC as a significant issue in early 2017, further obligations under the Directions may have been engaged, which may have led to:

- the reporting of subsequent litigation relating to the Scheme to the OLSC, including Administrative Appeals Tribunal (AAT) proceedings [160]
- the agencies' being required to seek approval from the Attorney-General or a delegate of the OLSC to resolve any future proceedings involving the Scheme, including AAT proceedings[161]
- OLSC oversight of the legal aspects of the Scheme and the controversies associated with it
- the OLSC being informed about the questions being raised by various AAT members about the legality of the Scheme, and
- the OLSC considering whether to put the issue on the agenda of the Significant Legal Issues Committee (SLIC) for consideration by the most senior government lawyers in the Commonwealth. [162]

Had that occurred, the Scheme may have ended earlier than it did. Unfortunately, nothing happened.The ability of the Attorney-General to discharge the responsibility for litigation involving the Commonwealth effectively depends on reliable notification systems. The Blunn Kreiger Report noted that in-house lawyers do not invariably recognise this special role.[163] The evidence before the Commission supports this view. It is apparent that lawyers within DHS and DSS did not sufficiently understand when an issue was required to be reported to the OLSC as significant.

One explanation for the failure to understand when an issue requires reporting is that the obligations set out under the Directions are not clear enough. There has been previous recognition that the Directions would benefit from more direct language.[164]

The Secretary's Review recommended that the Directions be reviewed and simplified,[165] and noted that there is an opportunity to provide greater certainty of the OLSC's authority to enforce compliance with the Directions, with clearer consequences for non-compliance.[166]

The Secretary's Review recommended that the OLSC focus on the following priorities:

- facilitating collaboration between entities in order to deliver high quality and joined-up legal services across the Commonwealth
- promoting and coordinating information sharing to make effective use of the combined legal knowledge held by the Commonwealth
- supporting the Attorney-General and Solicitor-General in dealing with high priority and whole-of-government legal issues

In the context of these priorities, the Secretary's Review recommended that the OLSC's key functions should include assisting agencies with the significant legal issues processes and administering the Directions with comprehensive guidance material and a risk-management based approach to compliance.[167] To the extent the secretary envisaged that this would involve the OLSC providing more extensive information and feedback to assist agencies with the significant legal issues process, the Commission endorses that recommendation.

Recommendation 19.7: The Directions 1

The Legal Services Directions 2017 should be reviewed and simplified.

Recommendation 19.8: Office of Legal Services Coordination to assist agencies with significant issues reporting

The OLSC should provide more extensive information and feedback to assist agencies with the significant legal issues process.

Recommendation 19.9: Recording of reporting obligations

The OLSC should ensure a documentary record is made of substantive inquiries made with and responses given by agencies concerning their obligations to report significant issues pursuant to para 3.1 of the Directions.

Recommendation 19.10: The Directions 2

The OLSC should issue guidance material on the obligations to consult on and disclose advice in clause 10 of the Legal Services Directions 2017.

Recommendation 19.11: Resourcing the Office of Legal Services Coordination

The OLSC should be properly resourced to deliver these functions.

Recommendation 19.12: Chief counsel

The Australian Government Legal Service's General Counsel Charter be amended to place a positive obligation on chief counsel to ensure that the Legal Services Directions 2017 (Cth) are complied with and to document interactions with OLSC about inquiries made, and responses given, concerning reporting obligations under those Directions.

8 More significant advices not disclosed

8.1 The Clayton Utz advice

In May 2018 DHS referred an AAT decision to DSS that concluded that the legislation "did not authorise the calculation of youth allowance by reference to averaging of income in this case."[168] The AAT member had placed reliance on an article by Professor Carney, a former AAT member, raising a number of legally-based criticisms of averaging. The combination of the case and article prompted DSS to obtain an advice from solicitors, Clayton Utz, to provide legal advice on the lawfulness of using income averaging as a method to determine a person's social security debt.[169]

On 14 August 2018, Clayton Utz provided a draft advice to DSS (the Clayton Utz advice).[170] The Clayton Utz advice was consistent with the 2014 DSS legal advice and stated that the Social Security Act did not allow determination of a youth allowance or Newstart recipient's fortnightly income by taking an amount reported to the ATO and averaging that amount fortnightly.[171]

There is no evidence that the Clayton Utz advice was at any time disclosed to DHS.

The Clayton Utz advice was significant to DHS because:

- DHS had responsibility for administering the Scheme.
- It was clear that the Clayton Utz advice had broader application to the Scheme and if the advice were correct, the Commonwealth was unlawfully taking money from social security recipients on a massive scale.[172]
- DHS had responsibility for social security litigation and was not appealing AAT decisions that found income averaging to be unlawful.

The Commonwealth agreed that DSS should have made the Clayton Utz advice available to DHS as soon as practicable after its receipt, pursuant to para 10.8 of the Directions.[173]

Had DSS disclosed the Clayton Utz advice with DHS in August 2018, given the significance of the advice to the Scheme, it should have caused DHS to seek advice from the Solicitor-General earlier.

8.2 The draft AGS advice

On 4 February 2019, proceedings in *Masterton v the Commonwealth* commenced in the Federal Court.[174] DHS reported the matter as significant to OLSC in accordance with paragraph 3.1 of the Directions on 13 March 2019.[175]

On 27 March 2019, AGS provided DHS with a detailed prospects advice in draft in relation to Ms Masterton's proceedings (the draft AGS advice) which concluded that Ms Masterton had good prospects of succeeding in a challenge to the debts based on apportionment.[176] It pointed to the limitations of using income averaging, including that there was no statutory basis for it and that it provided weak evidence of the existence of a debt.[177] The advice noted that these conclusions had wider implications and recommended that consideration be given to seeking further advice from senior counsel, and possibly the Solicitor-General.[178]

The draft AGS advice was not at all a routine matter such that consultation with and disclosure to DSS would not be required. The advice was clearly significant to DSS as the administering agency of the legislation because it noted that there was no statutory basis in the *Social Security Act 1991* (Cth) or related legislation for deeming income averaging to be accurate or sufficient basis on which to raise and pursue a debt,[179] and recommended that further advice be sought on the issue.[180]

When the advice was sought from AGS, pursuant to para 10.1 of the Directions, DHS was required to provide DSS with:

- a reasonable opportunity to consult on the proposal to seek advice,
- a copy of the request for advice, and
- a reasonable opportunity to consult on the matter prior to the advice being finalised.

Once the advice was received, 10.8 of the Directions[181] required DHS to disclose it to DSS as soon as practicable.

There is no evidence that DHS consulted with DSS on the proposal to seek advice from AGS and the advice itself was not provided to DSS until three months later, in late June 2019.[182] The advice was also not provided to the OLSC.

8.3 The Solicitor-General's Opinion

On 27 August 2019, DHS briefed the Solicitor-General to advise.[183] DSS was consulted on that brief and was involved in the development of the questions for the Solicitor-General.[184]

On 24 September 2019, DHS received the Solicitor-General's Opinion.[185] The Solicitor-General's Opinion constituted an authoritative opinion that the Commonwealth did not have a proper legal basis to raise, demand or recover asserted debts solely on the basis of income averaging, a practice fundamental to the Scheme. The effect of the Opinion was to make clear that, over the life of the Scheme in its various iterations, the Commonwealth had unlawfully been raising asserted debts against current and former income support recipients.

The Solicitor-General's Opinion was not disclosed to DSS until 7 November 2019, more than six weeks after it was received.[186] In the Commission's view, DHS was required to disclose that advice to DSS as a matter of urgency. It did not do so.

9 Conclusion

Mr Griggs has acknowledged that the work arrangements between the legal areas in DHS and DSS during the Scheme were not functioning properly.[187] Both DSS and Services Australia drew the Commission's attention to changes under way following the recommendations of a review conducted by the Australian Government Solicitor (AGS) into the legal functions of DSS and Services Australia.[188] That review made 38 recommendations, the implementation of which is continuing.

The AGS Review noted that given the interdependence of the two agencies in relation to social security advice, the aspiration should be higher than mere compliance with the Directions.[189] The Commission agrees.

The AGS Review recommended that DSS and Services Australia work together to adopt a model of operational integration between their legal practices involving close coordination in areas of intersection in social security advice and litigation, cooperation in areas or overlap and investment in the institutional relationship.[190] This would include lawyers in common areas operating in a more connected way, the provision of joint training and sharing of information through access to a joint advice database.[191] The extent of any changes made in this regard are unclear. The Commission endorses increased collaboration between the agencies.

The Commission was also informed of the introduction of a chief counsel's forum, a regular forum led by the chief counsel in which legal issues between Services Australia and DSS are discussed:

> to encourage a professional collegiate approach to the development and implementation of sound legal advice on matters that impact on both agencies and to improve the agencies' understanding of each other's perspectives.[192]

The Bilateral Management Agreement, between DSS and Services Australia, which sets out oversight and reporting functions, is currently being renewed.[193] The Commission recommends that any amendments embed the aspiration to consult and disclose advice between the two agencies.

Recommendation 19.13: Review of the Bilateral Management Agreement

The revised Bilateral Management Agreement should set out the requirement to consult on and disclose legal advices between the two agencies where any intersection of work is identified.

1 Stephen Gageler, 'What it is to be a government lawyer' (Speech, Attorney-General's Department and AGS, April 2016) 6.
2 Bradley Selway, 'The Duties of Lawyers Acting for Government' (1999) 10 Public Lawyer Review 1, 1.
3 Transcript, Annette Musolino, 1 March 2023 [p 4166: lines 5-7].
4 Law Society of the Australian Capital Territory, ACT Legal Profession (Solicitors) Conduct Rules 2015 r 4.1.4.
5 Law Society of the Australian Capital Territory, ACT Legal Profession (Solicitors) Conduct Rules 2015 r 17.1.
6 Bradley Selway, 'The Duties of Lawyers Acting for Government' (1999) 10 Public Lawyer Review 1, 1. See also Andrew Dillon, 'Ethical Obligations of the Government Lawyer' (2012) 226 Ethos: Official Publication of the Law Society of the Australian Capital Territory 20, 21; James Allsop, 'Law, Power and Government Responsibility' (Speech, Australian Government Legal Services Conference, 14 October 2021) 2-3.
7 Chris Moraitis PSM, Secretary's Review of Commonwealth Legal Services (Report, 2016) 91.
8 Esso Australia Resources Ltd v Commissioner of Taxation (1999) 201 CLR 49, 64-65 [35]; Seven Network Ltd v News Ltd (2005) 225 ALR 672 [15]; Australian Government Solicitor, 'Fact sheet 31: Legal professional privilege in an in-house Environment (Fact sheet, June 2013) <https://www.ags.gov.au/publications/fact-sheets/fact-sheet-31>.
9 Anthony S Blunn and Sibylle Kreiger, Report of the Review of Commonwealth Legal Services Procurement (Report, 2009) 44 [127].
10 Chris Moraitis PSM, Secretary's Review of Commonwealth Legal Services (Report, 2016) 103.
11 Much of the conduct described in this chapter is governed by the earlier version of the Directions, the Legal Services Directions 2005 (Cth).
12 Transcript, Anna Fredericks, 27 January 2023 [p 2509: lines 14-41].
13 Transcript, Anna Fredericks, 27 January 2023 [p 2527: line 45 – p 2528: line 20].
14 Transcript, Anna Fredericks, 27 January 2023 [p 2527: line 45 – p 2528: line 20].
15 Transcript, Tim Ffrench, 22 February 2023 [p 3498: line 43 – p 3499: line 33].
16 Attendees at the AIAL conference from DHS' legal team included Mr Maris Stipnieks, Mr Matthew Roser, Mr Mark Gladman, Mr Tim Ffrench, and Ms Anna Fredericks amongst others. See Exhibit 3-4830 – CTH.3005.0005.6029_R - RE:- RESPONSE REQ'DREQ'D BY 4PM TODAY - AIAL conference [DLM=For-Official- Use-Only], 10 July 2017; Exhibit 3-4832 - CTH.3007.0006.7199_R - AIAL Conference - OCI sessions [DLM=For- Official-Use-Only].pdf.
17 Exhibit 3-5100 - MAS.0001.0013.2263_R - RE- Ombo, 18 May 2018; Exhibit 3-5101 - MAS.0001.0013.2264 - Note re Terry Carney article
18 Exhibit 3-5100 - MAS.0001.0013.2263_R - RE- Ombo, 18 May 2018; Exhibit 3-5101 - MAS.0001.0013.2264 - Note re Terry Carney article; Transcript, Maris Stipnieks, 3 February 2023 [p 3240: line 13 – p 3241: line 16].
19 Exhibit 3-4254 - CTH.2001.0009.3942_R - Secretary Question - [REDACTED] - Earned Income Intervention program debt and claim for compensation - potential media interest [DLM=Sensitive-Legal].
20 Exhibit 4-6019 - RBD.9999.0001.0431_R - REPORT TO THE ROBODEBT ROYAL COMMISSION [p 23].
21 Transcript, Annette Musolino, 30 January 2023 [p 2624: lines 25-39].
22 Transcript, Annette Musolino, 30 January 2023 [p 2631: lines 26-27].
23 Transcript, Annette Musolino, 30 January 2023 [p 2632: lines 11-13].
24 Transcript, Tim Ffrench, 22 February 2023 [p 3498: lines 1-2].
25 Transcript, Tim Ffrench, 22 February 2023 [p 3498: lines 12-25].
26 Transcript, Renee Leon, 28 February 2023 [p 4013: lines 36-44].
27 Transcript, Anna Fredericks, 27 January 2023 [p 2524: lines 10-16].
28 Transcript, Melanie Metz, 10 March 2023 [p 4982: lines 22-31].
29 Exhibit 1-0084 – DSS.8001.0001.1736_R - FW- Advice please [DLM=Sensitive-Legal].
30 Exhibit 1-0084 – DSS.8001.0001.1736_R - FW- Advice please [DLM=Sensitive-Legal].
31 Exhibit 1-0084 – DSS.8001.0001.1736_R - FW- Advice please [DLM=Sensitive-Legal].
32 Exhibit 1-0084 – DSS.8001.0001.1736_R, FW- Advice please [DLM=Sensitive-Legal].
33 Exhibit 1-0067 - APU.9999.0001.0001_R - 1002411563_1_20221021 Statement of Anne Pulford re NTG-028 [p 6, para 57].
34 Exhibit 1-0084 - DSS.8001.0001.1736_R - FW- Advice please [DLM=Sensitive-Legal].
35 Exhibit 2-1395 - DSS.5005.0001.0534_R - Request for information-documents [SEC=UNCLASSIFIED].
36 Exhibit 4-7147 - LMA.1000.0001.2996_R - Report - Centrelink's automated debt raising and recovery system - April 2017 copy, April 2017.

37 Chris Moraitis PSM, Secretary's Review of Commonwealth Legal Services (Report, 2016) 6.
38 Chris Moraitis PSM, Secretary's Review of Commonwealth Legal Services (Report, 2016) 6.
39 Australian Government Legal Service, Statement of expectations of Australian Government lawyers (Statement of expectations, February 2022) < https://www.governmentlawyers.gov.au/sites/default/files/2022-02/agls--statement-of-expectations-of-australian-government-lawyers.PDF>.
40 Australian Government Legal Service, General Counsel Charter (Charter, January 2022) < https://www.governmentlawyers.gov.au/publications/general-counsel-charter>.
41 Exhibit 4-8202A - CTH.9999.0001.0155_R - Response to NTG-0177 (Rebecca Skinner)_Redacted, page 25 [para 3.33].
42 Exhibit 4-8202A - CTH.9999.0001.0155_R - Response to NTG-0177 (Rebecca Skinner)_Redacted, page 25 [para 3.33].
43 Exhibit 4-8202B - DSS.9999.0001.0042_R - 20230220 NTG-0176 Secretary Griggs signed statement 47202363., [p 19: para 115].
44 As set out in the Commonwealth's submissions dated 14 June 2023; Australian Public Service Commissioner's Directions 2022 (Cth), s 26.
45 Australian Public Services Commission, Senior Executive Service (SES) Recruitment (Web Page, 7 November 2022) <https://www.apsc.gov.au/working-aps/aps-employees-and-managers/senior-executive-service-ses/senior-executive-service-ses-recruitment>.
46 Bradley Selway, 'The Duties of Lawyers Acting for Government' (1999) 10 Public Lawyer Review 1, 1.
47 Exhibit 4-6019 - RBD.9999.0001.0431_R - REPORT TO THE ROBODEBT ROYAL COMMISSION [p 23].
48 Exhibit 1-0084 – DSS.8001.0001.1736_R - FW- Advice please [DLM=Sensitive-Legal].
49 Exhibit 2-1742 - CTH.3007.0006.8430_R - RE- Australian Institute of Administrative Law Conference - OCI sessions
50 Exhibit 4-6714 - CTH.4750.0026.0018_R - PAYG PROJECT - APPEAL PROCESS AND TRIBUNAL FEEDBACK
51 Exhibit 3-3485 - CTH.0010.0002.0234_R - FW- LEX 30656 [REDACTED] DSS Youth allowance debt response to AAT implementation query; Exhibit 3-3483 - CTH.0010.0001.0020_R - 17.03.23-[REDACTED]-AAT1GeneralAFAR
52 Exhibit 3-4254 - CTH.2001.0009.3942_R - Secretary Question - [REDACTED] - Earned Income Intervention program debt and claim for compensation - potential media interest
53 Exhibit 4-6252 - CTH.3005.0008.6235_R - EC18-000840 Sec noted brief with annot
54 Exhibit 4-8202A - CTH.9999.0001.0155_R - Response to NTG-0177 (Rebecca Skinner)_Redacted [p 26: para 3.38].
55 Exhibit 8572 - CTH.3857.0001.0011 - legal-practice-standard-legal-officer-duties [p 2: para 4].
56 Exhibit 8572 - CTH.3857.0001.0011 - legal-practice-standard-legal-officer-duties [p 2: para 5].
57 Transcript, Anne Pulford, 2 November 2022 [p239: lines 36-44]; Transcript, Lisa Keeling, 3 November 2022 [p 342: lines 22-46].
58 Transcript, Janean Richards, 2 February 2023 [p 3120: lines 13-27]; Transcript, Melanie Metz, 10 March 2023 [p 4975: lines 10-18].
59 Exhibit 3-4147 - DSS.5044.0001.0176_R - W- Request for legal advice- Department of Social Services - Income Smoothing Advice [CU-Legal fID2448483] [DLM=Sensitive-Legal]; Exhibit 2-1928 - DSS.5000.0002.2744_R - NOL4DMFD6_2019-10-31_16-03-07--106.
60 Transcript, Kathryn Campbell, 7 March 2023 [p 4615: line 35 – p 4616: line 16].
61 Transcript, Melanie Metz, 10 March 2023 [p 4974: line 5 – p 4975: line 18].
62 Exhibit 4-8202B - DSS.9999.0001.0042_R - 20230220 NTG-0176 Secretary Griggs signed statement 47202363.1 [p 19-20: para 117].
63 Exhibit 8564 - DSS.5125.0001.0064_R - A message from the Secretary- Obtaining Legal Advice [SEC=OFFICIAL].
64 'Legal Services Directions 2017 – Compliance Framework', Attorney-General's Department (Web Page) <Legal Services Directions 2017 - Compliance Framework (ag.gov.au)> [2: para 10]; Exhibit 5300, Statement of Michael Johnson, 27 October 2022, OLS.9999.0001.0001 [p3: para 17].
65 'Legal Services Directions 2017 – Compliance Framework', Attorney-General's Department (Web Page) <Legal Services Directions 2017 - Compliance Framework (ag.gov.au)> [2].
66 Exhibit 5300, Statement of Michael Johnson, 27 October 2022, OLS.9999.0001.0001 [p4: para 19].
67 Basil Logan, Report of the Review of the Attorney-General's Legal Practice (Australian Government Public Service, 1997)
68 Basil Logan, Report of the Review of the Attorney-General's Legal Practice (Australian Government Public Service, 1997) 152 [10.57].
69 Basil Logan, Report of the Review of the Attorney-General's Legal Practice (Australian Government Public Service, 1997) 156 [10.67]

70 Basil Logan, Report of the Review of the Attorney-General's Legal Practice (Australian Government Public Service, 1997) 153 [10.58]
71 'Guidance Note 3', Attorney-General's Department (Web Page) <Guidance-note-3-compliance-with-legal-services-directions.pdf (ag.gov.au)> [5].
72 'Guidance Note 3', Attorney-General's Department (Web Page) <Guidance-note-3-compliance-with-legal-services-directions.pdf (ag.gov.au)> [p1: para 2]; Transcript, Michael Johnson, 21 February 2023 [p3437: 30-37]
73 Legal Services Directions 2017 (Cth) cl 3.1, note 2; Legal Services Directions 2005 (Cth) sch cl 3.1, note 2
74 Legal Services Directions 2017 (Cth) cl 10; Legal Services Directions 2005 (Cth) sch cl 10.
75 Guidance Note 1', Attorney-General's Department (Web Page) <Guidance Note 1 - Administrative Appeals Tribual Act 1975 Obligation to Assit the Tribunal (ag.gov.au)>; 'Guidance Note 7', Attorney-General's Department (Web Page) <Guidance note 7 - Reporting and settlement of significant issues (ag.gov.au)> 'Guidance Note 10', Attorney-General's Department (Web Page) <10.Advice on constitutional law matters (paragraph 10A of the Legal Services Directions 2017)>.
76 Exhibit 4-5300, Statement of Michael Johnson, 27 October 2022, OLS.9999.0001.0001 [p3: para 18].
77 Statement of Michael Johnson, 27 October 2022, OLS.9999.0001.0001 [18]; Chris Moriatis, Secretary's Review of Commonwealth Legal Services (Report, 2016) 69.
78 'Guidance Note 7', Attorney-General's Department (Web Page) <Guidance note 7 - Reporting and settlement of significant issues (ag.gov.au)> [7].
79 'Guidance Note 7', Attorney-General's Department (Web Page) <Guidance note 7 - Reporting and settlement of significant issues (ag.gov.au)> [9]-[10].
80 Chris Moriatis, Secretary's Review of Commonwealth Legal Services (Report, 2016) 70; Anthony S Blunn and Sibylle Kreiger, Report of the Review of Commonwealth Legal Services Procurement (Report, 2009) 39 [108]
81 Guidance Note 7', Attorney-General's Department (Web Page) <Guidance note 7 - Reporting and settlement of significant issues (ag.gov.au)> [8].
82 Transcript, Michael Johnson, 21 February 2023, [page 3423: line 15-22].
83 Legal Services Directions 2017 (Cth) cl 10.1; Legal Services Directions 2005 (Cth) cl 10.1.
84 Exhibit 2-1985 - RBD.9999.0001.0045, 1. Administrative Arrangements Order made on 23 December 2014; Exhibit 2-1986 - RBD.9999.0001.0047, 2. Administrative Arrangements Order on 1 September 2016; Exhibit 2-1987 - RBD.9999.0001.0049, 3. Administrative Arrangements Order - summary of changes 1 September 2016; Exhibit 2-1990 - RBD.9999.0001.0046, 6. Administrative Arrangements Order - amendment made 20 December 2017 (Signed).
85 Legal Services Directions 2017 (Cth) cl 10.1; Legal Services Directions 2005 (Cth) cl 10.1.
86 Legal Services Directions 2017 (Cth) cl 10.8; Legal Services Directions 2005 (Cth) cl 10.8
87 Legal Services Directions 2017 (Cth) cl 10.8 note 1; Legal Services Directions 2005 (Cth) cl 10.8 note 1.
88 Chris Moriatis, Secretary's Review of Commonwealth Legal Services (Report, 2016) 53.
89 Chris Moriatis, Secretary's Review of Commonwealth Legal Services (Report, 2016) 53.
90 Chris Moriatis, Secretary's Review of Commonwealth Legal Services (Report, 2016) 54.
91 Chris Moriatis, Secretary's Review of Commonwealth Legal Services (Report, 2016) 54.
92 Anthony S Blunn and Sibylle Kreiger, Report of the Review of Commonwealth Legal Services Procurement (Report, 2009) 35 [85].
93 Transcript, Mark Withnell, 24 February 2023 [p3747: line 25-35].
94 Transcript, Anna Fredericks, 27 January 2023 [page 2515: line 23-43]; See also, Exhibit 9495 - DSS.5125.0001.1029_R Report (Final - 11 February).pdf p 7, 13.
95 Exhibit 1-0850;Exhibit 1-1207 - CTH.3716.0001.0001_R, NM signed brief Concepts for future compliance activity.pdf; Exhibit 4-6379 – TCO.9999.0001.0008_R2, Clean PDF - Statement of T Collins NTG-0166 amended 22 February 2023 [page 162: para 597]; Exhibit 1-1185 – CTH.3000.0001.6195_R, 2015-16 Budget Measures [DLM=Sensitive]; Exhibit 2-2752 – CTH.3000.0001.6304_R, RE- 2015-16 Budget Measures [DLM=Sensitive],; Exhibit 4-5646 – CTH.3000.0001.8416_R, DSS - PAYG analysis [DLM=For-Official-Use-Only]; Exhibit 4-5647 – CTH.3000.0001.8417, DSS - PAYG analysis; Exhibit 2-2802 – CTH.3000.0001.8680_R, PAYG - Risk Category [DLM=ForOfficial-Use-Only]; CTH.3061.0002.8190, Document to be tendered, Re: new compliance measure [DLM=Sensitive].
96 Exhibit 1-0061, DSS.5002.0001.0001_R - PR25629819_2014 - November - Department Org Chart.
97 Exhibit 1-0087 - DSS.8000.0001.0607_R, RE- Legal Advice - Data matching- notifications and debt raising.
98 Exhibit 1-0087 - DSS.8000.0001.0607_R - RE- Legal Advice - Data matching- notifications and debt raising.

99 See Exhibit 1-0065, DSS.5031.0001.0108_R in which Mr Whitecross informs Ms Wilson that DSS advised DHS of its concerns; Exhibit 2-2114 - MKI.9999.0001.0002_R - 20221111 NTG-0062 Response (Kimber, M), p 13 [70]; Exhibit 2-2066 - CTH.2004.0002.0332_R - FW- DSS comments on DHS Welfare integrity options (2); Exhibit 2-2067 - CTH.2004.0002.0333 - DSS comments on DHS Welfare integrity options (2); Exhibit 2-2094 - DSS.5024.0001.0191_R - DSS comments on DHS Welfare integrity options (2); Exhibit 2-2095 - DSS.5024.0001.0192 - DSS comments on DHS Welfare integrity options (2) at .0193; Transcript, Murray Kimber [p1401: line 35-45].

100 Exhibit 4-5212 - CTH.3008.0008.1599_R, Fwd: Urgent: Brief on opportunities to strengthen compliance; Exhibit 4-5213 - CTH.4000.0399.0109_R, B15 92, Compliance processes and options - Mr Morrison cover brief.docx; Exhibit 1-1257 - CTH.3008.0008.3968_R, RE: URGENT: Compliance brief [DLM=Sensitive]; Exhibit 1-1258 - CTH.3008.0008.3970_R, new version of the compliance brief [DLM=Sensitive]; Exhibit 1-1259 -CTH.3008.0008.3971_R, 09022015155728-0001.pdf.

101 Exhibit 4-5231 - CTH.4000.0399.0127_R, Strengthening the Integrity of Welfare Payments NPP (8); Exhibit 4-5257 - CTH.3094.0001.9242_R, Re- revised NPPs have been signed off by Minister and are now with DSS [SEC=UNCLASSIFIED].pdf; Exhibit 2-2022 - PMC.001.0002.017_R, PMC-001-0002-017_Redacted.

102 Exhibit 1-0087 - DSS.8000.0001.0607_R - RE- Legal Advice - Data matching- notifications and debt raising.

103 Exhibit 1-0071 - DSS.8000.0001.1007_R, FW- Legal Advice - Data matching- notifications and debt raising; Exhibit 1-0076;Exhibit 2-2193 - DSS.8002.0001.0259_R, Request for clarification on income testing rules. [DLM=For-Official-Use-Only].

104 Exhibit 1-0087 - DSS.8000.0001.0607_R - RE- Legal Advice - Data matching- notifications and debt raising.

105 Legal Services Directions 2005 (Cth) cl 10.8; Ms Wilson agreed that the final legal advice ought to have been provided to DHS given the significance and shared responsibilities raised under the proposal. Transcript, Serena Wilson, 9 November 2022 [p773: line 5 – p774: line 16].

106 Exhibit 2-2114 - MKI.9999.0001.0002_R - 20221111 NTG-0062 Response (Kimber, M), [p10: para 55]; Exhibit 1-0170 - CTH.3035.0021.0385_R - RE- Internal DSS legal advice.

107 Exhibit 4-6353, DSS.5063.0001.0003_R, RE- Teleconference detail; Exhibit 2-2105 - DSS.5023.0002.2163_R, Background to issue; Exhibit 2-2106 - DSS.5023.0002.2164_R, 2.01701150954175E+1

108 Exhibit 1-0170 - CTH.3035.0021.0385_R, RE- Internal DSS legal advice [SEC=OFFICIAL-Sensitive, ACCESS=Legal-Privilege].

109 Transcript, Murray Kimber, 8 December 2022 [p1401: line 19 – 36]. Exhibit 2-2114 - MKI.9999.0001.0002_R - 20221111 NTG-0062. Response (Kimber, M) [p10: para 56].

110 Jodi Moore and James Tanna, 'Legal Briefing No.117: Legal professional privilege and the Government' (Web Page, 30 June 2021) 2 <https://www.ags.gov.au/sites/default/files/2021-07/lb117-legal-professional-privilege.pdf>; NSW Council for Civil Liberties Inc v Classification Review Board (No. 1) [2006] FCA 1409, [29]-[34].

111 Legal Services Directions 2005 (Cth) para 3.1.

112 Legal Services Directions 2005 (Cth) para 3.1.

113 Guidance Note 7', Attorney-General's Department (Web Page) <Guidance note 7 - Reporting and settlement of significant issues (ag.gov.au)> [3].

114 Guidance Note 7', Attorney-General's Department (Web Page) <Guidance note 7 - Reporting and settlement of significant issues (ag.gov.au)> [3] footnote 2.

115 Transcript, Sara Samios, 6 March 2023 [page 4431: line 40-42].

116 Exhibit 4-5304 - AGD.0003.0001.5028_R - RE- Centrelink debt-recovery, 4 January 2017.

117 Ms Wilson gave evidence that before and when she returned from leave for the meeting on Sunday, 15 January 2017, she knew the law did not allow income averaging to allege a debt (Transcript, Serena Wilson, 9 November 2022 [p800 lines: 35-46]); Mr McBride gave evidence that by the time of the meeting on Sunday, 15 January 2017 he knew that DHS were using averaging to assess income and calculate debts and that this was unlawful (Transcript, Paul McBride, 9 March 2023 [p4840: line 43 - p4841: line 14; p4847: lines 28-35]); When Ms McGuirk received the 2014 DSS legal advice she understood that the DHS proposal of the Robodebt Scheme to DSS in 2014 did not fit within the legislative requirements for raising debts (Transcript, Emma Kate McGuirk, Transcript, 2 November 2022, [p4245 lines 25-29]).

118 Exhibit 4-5830 - SKR.0001.0001.0054_R, Re- UPDATE- Media and Social Media Commentary re- online compliance system - Friday 6 January.

119 Exhibit 4-5830 - SKR.0001.0001.0054_R, Re- UPDATE- Media and Social Media Commentary re- online compliance system - Friday 6 January.

120 Exhibit 4-5827 - CTH.3111.0017.9684_R, Social security law - averaging provisions.
121 Exhibit 4-5845 - CTH.3113.0004.7076, calculating of income for income support payments; Exhibit 4-8090 - JBL.0001.0001.0456 - calculating of income for income support payments.
122 Exhibit 4-5845 - CTH.3113.0004.7076, calculating of income for income support payments; Exhibit 4-8090 - JBL.0001.0001.0456 - calculating of income for income support payments.
123 Exhibit 3-4231 - CTH.3038.0002.6641, AGS Instruction.
124 Exhibit 4-5848 - CTH.3881.0001.0009_R, RE- urgent advice – calculating income for income support payments
125 Exhibit 4-6245 - CTH.3884.0001.0001_R - Fw- debts
126 Exhibit 4-6245 - CTH.3884.0001.0001_R - Fw- debts
127 Legal Services Directions 2005 (Cth) cl 10.4.
128 Legal Services Directions 2005 (Cth) cl 10.4.
129 Legal Services Directions 2005 (Cth) cl 10.1.
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131 Legal Services Directions 2005 (Cth) cl 10.1.
132 Legal Services Directions 2005 (Cth) cl 10.8.
133 Exhibit 4-5309 - CTH.3854.0001.0007, FW- OLSC
134 Exhibit 4-5308 - CTH.3854.0001.0006, FW- Updates on Centrelink online compliance platform issues; Exhibit 4-5310 - CTH.3854.0001.0010, RE- Updates on Centrelink online compliance platform issues; Exhibit 4-5311 - CTH.3854.0001.0011, FOI requests relating to the Centrelink online compliance platform.
135 Exhibit 4-5313 - CTH.3854.0001.0015, Re- FOI requests relating to the Centrelink online compliance platform
136 Exhibit 4-5314 - AGD.0003.0001.6221_R, RE- File note - call from DHS Legal - Centrelink automated debt recovery - 6 Jan 2017 5-30pm
137 Exhibit 4-7168 - LMA.1000.0001.2267_R, FW- Section 8 Questions under IOIs 2016-400007 and 2016-600004; Exhibit 4-7253 - LMA.1000.0001.1245_R, RE- Further s 8 questions under IOI-2016-400007; Exhibit 4-7150 - LMA.1000.0001.3193_R, Commonwealth Ombudsman own motion investigation notice.
138 Legal Services Directions 2005 (Cth) sch cl 3.1,note 2
139 Exhibit 5314 – AGD.0003.0001.5028_R, RE: File note - call from DHS Legal - Centrelink automated debt recovery - 6 Jan 2017 5:30pm, 9 January 2017.
140 Exhibit 5315 – AGD.0003.0001.8819_R, RE: next steps - media - Commonwealth Ombudsman launches Centrelink investigation [DLM=Sensitive:Legal], 10 January 2017.
141 Exhibit 4-5316 – AGD.0003.0001.6056_R, OLSC - Significant Issues - Centrelink debt-recovery matter [SEC=PROTECTED], 13 January 2017.
142 Exhibit 4-5316 – AGD.0003.0001.6056_R, OLSC - Significant Issues - Centrelink debt-recovery matter [SEC=PROTECTED], 13 January 2017.
143 Exhibit 6733 – AGD.2000.0073.6226_R, RE: Attorney-General's Department Daily Print Media Overview - Friday 20 January 2017 [SEC=UNCLASSIFIED], 19 January 2017.
144 Exhibit 6733 – AGD.2000.0073.6226_R, RE: Attorney-General's Department Daily Print Media Overview - Friday 20 January 2017 [SEC=UNCLASSIFIED], 19 January 2017.
145 Transcript, Sara Samios, 6 March 2023 [page 4433: line 5-10 and p 4438: line 15-20]; Exhibit 4-6733 – AGD.2000.0073.6226_R, RE: Attorney-General's Department Daily Print Media Overview - Friday 20 January 2017 [SEC=UNCLASSIFIED], 19 January 2017
146 Transcript, Sara Samios, 6 March 2023 [page 4439: line 20-35]
147 Transcript, Sara Samios, 6 March 2023 [page 4440: line 25].
148 Transcript, Sara Samios, 6 March 2023 [page 4444: line 15-45].
149 Transcript, Sara Samios, 6 March 2023 [page 4442: line 30-35].
150 Transcript, Sara Samios, 6 March 2023 [page 4438: line 40] and Exhibit 6271, Statement of Sara Samios, 28 February 2023 [page 8: para 38].
151 Exhibit 5317, AGD.0003.0003.2335_R – RE: Filenote - discussion with Brad Smith - LAB - 18 01 2017 - Centrelink debt recovery issues [DLM=Sensitive:Legal], 18 January 2017; Exhibit 6271, Statement of Sara Samios, [p9: para 42].
152 Transcript , Michael Johnson, 21 February 2023, [page 3412: line 35-40]; Transcript, Sara Samios, 6 March 2023 [page 4430: line 45 – 4431: line 1].
153 Exhibit 5300, Statement of Michael Johnson, 27 October 2022, OLS.9999.0001.0001 [p5: para 27].
154 Transcript, Sara Samios, 6 March 2023 [page 4444: line 28-32].

155 Legal Services Directions 2005 (Cth) cl 11.1, 15 (definition of 'accountable authority); Public Governance, Performance and Public Accountability Act 2013 (Cth) ss 8, 12(2) (definition of 'accountable authority').
156 Exhibit 8572 - CTH.3857.0001.0011 - legal-practice-standard-legal-officer-duties, page 2 [para 6], page 3 [para 13]
157 General Counsel Charter, Australian Government Legal Service (at January 2022) <General Counsel Charter | Australian Government Legal Service (governmentlawyers.gov.au)>.
158 Ms Wilson gave evidence that before and when she returned from leave for the meeting on Sunday, 15 January 2017, she knew the law did not allow income averaging to allege a debt (Transcript, Serena Wilson, 9 November 2022 [p800 lines: 35-46]); Mr McBride gave evidence that by the time of the meeting on Sunday, 15 January 2017 he knew that DHS were using averaging to assess income and calculate debts and that this was unlawful (Transcript, Paul McBride, 9 March 2023 [p4840: line 43 - p4841: line 14; p4847: lines 28-35]); When Ms McGuirk received the 2014 DSS legal advice she understood that the DHS proposal of the Robodebt Scheme to DSS in 2014 did not fit within the legislative requirements for raising debts (Transcript, Emma Kate McGuirk, Transcript, 2 November 2022, [p4245 lines 25-29]).
159 Transcript, Sara Samios, 6 March 2023 [page 4446: line 30-34].
160 Legal Services Directions 2005 (Cth), cl 3, Note 2 - The obligation to report significant issues also requires the relevant agency to regularly update the Attorney-General or OLSC on any developments involving the significant issue
161 Legal Services Directions 2005 (Cth), cl 3.2
162 Statement of Michael Johnson, 27 October 2022, OLS.9999.0001.0001 [18]; Chris Moriatis, Secretary's Review of Commonwealth Legal Services (Report, 2016) 69.
163 Anthony S Blunn and Sibylle Kreiger, Report of the Review of Commonwealth Legal Services Procurement (Report, 2009) 40 [109]
164 Chris Moriatis, Secretary's Review of Commonwealth Legal Services (Report, 2016) 58.
165 Chris Moriatis, Secretary's Review of Commonwealth Legal Services (Report, 2016) 78.
166 Chris Moriatis, Secretary's Review of Commonwealth Legal Services (Report, 2016) 59.
167 Chris Moriatis, Secretary's Review of Commonwealth Legal Services (Report, 2016) 77-78.
168 Exhibit 4176 - DSS.5036.0001.0163_R, [page 3: para 15,17].
169 Exhibit 2-1928 - DSS.5000.0002.2744_R, NOL4DMFD6_2019-10-31_16-03-07-106.
170 Exhibit 3-4147 - DSS.5044.0001.0176_R, FW- Request for legal advice- Department of Social Services - Income Smoothing Advice; Exhibit 2-1928 - DSS.5000.0002.2744_R, NOL4DM FD6_2019-10-31_16-03-07-106.
171 Exhibit 2-1928 - DSS.5000.0002.2744_R, NOL4DMFD6_2019-10-31_16-03-07-106, [para 1.1].
172 Transcript, Allyson Essex, 27 January 2023 [page 2588: lines 15-20].
173 Legal Services Directions 2017 (Cth) cl 10.8.
174 Exhibit 1-0038 - VLA.9999.0001.0001, Originating application.pdf, 5 February 2019.
175 Exhibit 4-5477 - AGD.0001.0001.1464_R, CM- New Significant Issues Report - Masterton v Commonwealth of Australia
176 Exhibit 2-1732 - CTH.2001.0013.3100_R, 20190327 Advice on prospects - Masterton - DRAFT 19001151.DOCX p19: para 88.
177 Exhibit 2-1732 - CTH.2001.0013.3100_R, 20190327 Advice on prospects - Masterton - DRAFT 19001151.DOCX p:11 para 42-43.
178 Exhibit 2-1732 - CTH.2001.0013.3100_R, 20190327 Advice on prospects - Masterton - DRAFT 19001151.DOCX p16: para 65.
179 Exhibit 2-1732 - CTH.2001.0013.3100_R, 20190327 Advice on prospects - Masterton - DRAFT 19001151.DOCX p11 [para 42] The advice uses the term 'apportioned fortnightly income.'
180 Exhibit 2-1732 - CTH.2001.0013.3100_R - 20190327 Advice on prospects - Masterton - DRAFT 19001151.DOCX p16 [para 89].
181 Legal Services Directions 2005 (Cth) cl 10.8.
182 Exhibit 4-5322 - DSS.5059.0001.0023_R, FW- Masterton Advice from AGS [SEC=OFFICIAL-Sensitive, ACCESS=Personal-Privacy, ACCESS=Legal-Privilege].pdf; Transcript, Paul Menzies-McVey, 21 February 2023 [p3367: line 15].
183 Exhibit 3-4997 - CTH.3035.0019.3429_R, FWRequest to brief the Solicitor-General for opinion on questions of law-use and reliance on apportioned ATO PAYG data to assess and raise debts under the SSA 1991; Exhibit 3-4998 - CTH.3035.0019.3436_R, 20190827 Brief to Solicitor-General 19004815.
184 Exhibit 4-5356 - TFF.9999.0001.0005_R - 3 January 2023 Tim Ffrench Signed Statement page 31-32 para 178 , 180-182; Exhibit 4-5354 - MRO.9999.0001.0001_R - Matthew ROSER Statement 21 October 2022 (NGT-0024) page 19 [118]

185 Exhibit 1-0001 – CTH.2013.0012.5070_R, EC19-002086 Attachment A.PDF, 24 September 2019; Exhibit 1-0164 – CTH.3017.0001.0374_R, FW: SG No 15 of 2019 - Use of apportioned ATO PAYG data to assess and raise debts under the Social Security Act 1991 [DLM=Sensitive:Legal].
186 Transcript, Renee Leon, 28 February 2023, Brisbane [p 4044: lines 10 to 32];Exhibit 4-6088 - CTH.4000.0006.7450_R, Update on timing for next steps brief- income compliance [SEC=PROTECTED, SH=CABINET];Exhibit 4-6089 - CTH.4000.0006.7451_R, MS19-000365 - Minute - Income Compliance Programme Redesign_V23 ROS [SEC=PROTECTED, SH=CABINET];Exhibit 4-6090 - CTH.4000.0006.7452, DSS one pager.
187 Exhibit 4-8202B - DSS.9999.0001.0042_R - 20230220 NTG-0176 Secretary Griggs signed statement 47202363.1, page 8 [para 46].
188 Exhibit 9495 - DSS.5125.0001.1029_R Report (Final - 11 February).pdf
189 Exhibit 9495 - DSS.5125.0001.1029_R Report (Final - 11 February).pdf, page 100.
190 Exhibit 9495 - DSS.5125.0001.1029_R Report (Final - 11 February).pdf, DSS Recommendations 25-29; SA Recommendations 34-38.
191 Exhibit 9495 - DSS.5125.0001.1029_R Report (Final - 11 February).pdf, page 98
192 Exhibit 4-8202A - CTH.9999.0001.0155_R - Response to NTG-0177 (Rebecca Skinner)_Redacted, page 26 [para 3.24(b)]; Exhibit 4-8202B - DSS.9999.0001.0042_R - 20230220 NTG-0176 Secretary Griggs signed statement 47202363.1, page 19 [para 116].
193 Exhibit 4-8202B - DSS.9999.0001.0042_R - 20230220 NTG-0176 Secretary Griggs signed statement 47202363.1, page 15 [86]

Chapter 20: The Administrative Appeals Tribunal

1 Introduction

The AAT was intended not only to give better administrative justice in individual cases but also to secure an improvement in primary administrative decision-making. This had to be achieved by the quality of the AAT's reasoning. Departments, like any organised human activity, tend to have an inward focus and the corporate culture tends to be the most powerful influence on the conduct of individuals engaged in that activity. External review is only as effective if it infuses the corporate culture and transforms it.
– Hon Sir Gerard Brennan[1]

The Commonwealth treated adverse decisions as no more than pin-pricks – Peter Hanks KC[2]

The financial hardship and distress caused to so many people could have been avoided had the Commonwealth paid heed to the AAT decisions, or if it disagreed with them appealed them to a court so the question as to the legality of raising debts based on income averaging from ATO data could be finally decided – Hon Justice Murphy in the Robodebt class action judgement[3]

The Commission's terms of reference require it to inquire into how the Australian Government responded to adverse decisions made by the Administrative Appeals Tribunal (the AAT), how the government responded to legal challenges or threatened legal challenges and whether the government sought to prevent, inhibit or discourage scrutiny of the Robodebt scheme (the Scheme), whether by moving departmental or other officials or otherwise.[4]

The AAT, which will soon be abolished and replaced by a new body,[5] is the Commonwealth body responsible for the merits review of administrative decisions made by government, including DHS decisions about social security debts. Effective merits review is an essential part of the legal framework that protects the rights and interests of individuals; it also promotes government accountability and plays a broader important role in improving the quality and consistency of government decisions.[6]

From 2016, the AAT made a series of decisions that questioned the legal basis for DHS's use of income averaging to calculate social security debts. While DHS and DSS had some processes in place to consider whether AAT decisions should be appealed, those processes were aimed at managing individual AAT decisions. There was no mechanism for ensuring AAT decisions were reviewed in any systematic way. The result was that adverse decisions of the AAT about the use of income averaging were not sufficiently examined by either department; indeed, they were effectively ignored.

On 8 March 2017, Professor Terry Carney (in his position as AAT1 member) handed down the first decision giving reasons for concluding that income averaging was unlawful. DHS did not appeal the 8 March 2017 decision, or other similar decisions that followed it. Nor did it provide AAT members with those decisions, in breach of its duty as a model litigant to assist the AAT. It also did not report those decisions as a significant issue to the Office of Legal Services Coordination (OLSC). Instead, DHS felt free to reject the reasoning in those decisions, and continued its use of income averaging under the Scheme.

2 Review of social security decisions

Decisions about social security during the Scheme were made by DHS officers exercising the delegation of the secretary of DSS.[7] (They are now made by officers of Services Australia, the agency which replaced DHS, but since this chapter is concerned primarily with the conduct of DHS in response to AAT decisions, the nomenclature 'DHS' will be used when discussing past actions).

Such decisions can be subject to several levels of review if a social security recipient wishes to challenge them. An internal review is first carried out by an authorised review officer (ARO) within DHS[8] and external review is carried out by the AAT.[9] The AAT currently comprises two "tiers" of merits review, AAT1 (the first level) and AAT2 (the second level, to which application can be made for review of AAT1 decisions).[10] While the vast majority of cases can be resolved expeditiously at AAT1, a smaller proportion of more complex and contested matters are properly resolved at the AAT2 level.[11]

2.1 Non-publication of decisions

The majority of decisions concerning the Scheme, and all those which considered income averaging, were made at AAT1 level where there is a high volume of matters, hearings are held in private[12] and decisions are not published.[13] This meant that AAT1 social security decisions were not published and DHS was able to ignore any adverse decisions in relation to its use of income averaging without any public scrutiny or criticism.

At the AAT2 level, decisions are published and a DHS legal officer generally appears and presents arguments.[14] The AAT at both levels is required to give written reasons for decisions in social security cases where the initial decision is not affirmed, or, if it is affirmed, where it is requested to do so.[15] It is not clear why AAT1 reasons for decision are not published and if there is a cogent legal or policy justification for this.[16] It may be that the AAT has regarded the requirement for privacy of AAT1 hearings[17] as militating against publication.[18] (The justification for holding AAT1 hearings in private is that the AAT1 requirements of informality and speed and the need to protect the privacy of social security claimants are more likely to be met if hearings are conducted this way).[19]

There, is, however, no obvious reason that AAT1 decisions involving significant points of law or policy in social security matters should not have been published, anonymised to preserve the privacy of applicants. Publishing reasons in such cases would promote uniformity in decision-making,[20] and allow public scrutiny and wider community understanding of how the AAT was applying law and policy.

2.2 Division of responsibility between the departments

DHS was responsible for the management of litigation arising out of decisions made by its officers.[21] It did not normally take an active role in AAT1 hearings.[22] The DHS Appeals Branch, an "administrative operational branch," was responsible for the collation of documents for AAT1 reviews[23] and relied on lawyers in its Legal Services Division to review AAT1 decisions and provide legal advice.[24]

As the agency responsible for the *Social Security Act* 1991 (Social Security Act) and *Social Security (Administration) Act 1999* (the Social Security (Administration) Act) under the Administrative Arrangement Orders,[25] DSS had an interest in social security litigation in the AAT. Indeed, the secretary of DSS was required to have regard to relevant decisions of the AAT in administering the social security law.[26]

DHS was required to provide information to and seek instructions from DSS in circumstances set out in the Standing Operational Statements – Social Security Litigation (SOS).[27] DHS was also required to refer AAT1 decisions to DSS where they were less favourable to the secretary than the decision reviewed and one or more of the following applied:[28]

- DHS recommended an appeal
- there was a significant error of law
- there was a significant issue of policy or administrative practice
- the matter had attracted, or was likely to attract, media or parliamentary attention, or
- the matter was of a kind specified by DSS (with the approval of the General Counsel FOI and Litigation Branch).

"Appeal" was defined in the SOS as extending to administrative review. It is the term used in DHS and DSS documents to mean the process of applying to AAT2 for review of an AAT1 decision, and will be used in this chapter in the same way. (An appeal to AAT2 is undertaken on behalf of the secretary of DSS).[29]

The *Administrative Appeals Tribunal Act 1975* (the AAT Act) empowers the AAT to affirm, vary or set aside a decision under review.[30] All AAT1 decisions setting aside or varying a DHS decision on terms less favourable to DHS were required to be scrutinised by a DHS lawyer[31] who prepared an Advice for Further Administrative Review (AFAR).[32] The AFAR would consider whether the AAT decision should be implemented (i.e. accepted) or referred to DSS if one of the SOS criteria were met, either for information or with a recommendation for appeal to AAT2. DHS relied heavily on the AFAR process, which Annette Musolino (General Counsel, DHS) described as "very transactional";[33] by which she meant, focused on individual decisions, with no wider frame of reference in mind.

Under DHS's own Advocacy Procedures, the AFAR was to be forwarded to the relevant program area of DHS (which one assumes was, for Robodebt decisions, the Integrity and Information Branch) as well as to DSS where it identified that there was:[34]

- a conflict between policy and legislation
- a systemic issue in the administration of social security law
- inadequacies or unintended outcomes in law or policy, or
- an issue impacting on the normative effect of AAT decisions.

In considering whether an appeal to AAT2 should be recommended, DHS lawyers were required to assess the importance of the decision and whether there was a reasonable prospect of success if it were to be appealed.[35]

DSS was to respond with information, comments and clear and timely instructions to DHS on whether to proceed with an appeal.[36] DSS's decisions in relation to appeals were required to be made according to the key principles set out in the Social Security Appeals and Litigation Arrangements (Litigation Principles), to which DHS was also to have regard.[37] In general, DSS would not seek to appeal unless there was an error of law or an important issue of principle. A guiding principle was to "provide for honest, transparent and fair appeal processes and practices which balance[d] all relevant considerations and promoted confidence in the system for all stakeholders."[38]

2.3 Failure to systematically review Tribunal decisions

The SOS document described a process that was largely aimed at managing individual AAT decisions between the two departments. In her submissions to the Commission, Kathryn Campbell, former secretary of both DHS and DSS, said the process described in the SOS and its attachments was both comprehensive and precise, and that any failures on the part of particular DHS officers to comply with the SOS were not due to the lack of a system of referring relevant decisions. The Commission disagrees, as did the Commonwealth in its submission.

The SOS process was inadequate to monitor AAT decisions for referral in any effective way. Moreover, there was no system or policy in place to allow DHS or DSS to systematically review AAT decisions; monitor statements of legal principle emerging from AAT decisions; consider how any guidance the AAT gave could

improve decision-making; raise significant cases with senior officers in DHS or DSS; or generally exchange information about AAT decisions with each other.[39]

Such a system would have been valuable. It would have enabled an approach to appeals which could have resolved the issues of law and policy which the Robodebt decisions raised and, at the least, had the beneficial effect of improving the quality and consistency of decisions made by DHS officers.

Had DHS had a system in place to properly review AAT1 decisions, it would have seen that the number of decisions where the AAT was not satisfied that the applicant's debt was accurately calculated, because income averaging had been used, far exceeded the number of decisions where the AAT accepted that income averaging was appropriate in the circumstances. This is made clear by the document at appendix - AAT Tier 1 reviews which contains the Commission's review of 558 AAT1 decisions (produced to it by DHS) where income averaging was a key issue, a summary of which is set out in the following table.

Year	Category of decisions		
	Decisions where the AAT was **not** satisfied that the department's calculations were accurate because income averaging was used to calculate the debt or part of the debt	Decisions where the AAT accepted that income averaging was appropriate in the circumstances	Decisions that did not consider the merits of income averaging because the Applicant conceded the debt
2015	**0**	**0**	**0**
2016	**39**	**21**	**3**
2017	**132**	**41**	**5**
2018	**46**	**22**	**1**
2019	**110**	**28**	**4**
2020	**97**	**2**	**0**
2021	**6**	**0**	**0**
2022	**1**	**0**	**0**

Additionally, what was noteworthy about decisions where the AAT accepted that income averaging was appropriate in the circumstances was that they did not embark upon any considered analysis of the relevant statutory provisions and legal principles that might impact on the lawfulness of averaging. This was in contrast to the decisions made by Professor Carney, starting with the 8 March 2017 decision which contained a considered and thoughtful analysis of those provisions and principles.

3 Initial response to criticism of the Scheme

Criticisms of the Scheme in AAT1 decisions emerged as early as 2016 when AAT members started to express the view that calculating social security debts relying solely on income averaging was unlawful.[40] DHS employees became aware of these decisions in an ad hoc way, and exchanged emails acknowledging there was an issue, without properly examining the trends.[41] The evidence shows:

- DHS first noted the AAT's "strident" criticisms of the use of income averaging to calculate a social security recipient's income on 8 November 2016.[42]
- In late 2016 and early 2017, senior DHS employees were in touch on an "almost" daily basis in relation to the AAT decisions.[43]
- In late March 2017, DHS became aware of further decisions setting aside income-averaged debts. This was a subject of discussion among staff in the Appeals Branch.[44]
- In April and May 2017, emails circulated about AAT decisions relevant to the Scheme, this time including members of the Legal Services Division.[45]
- On 19 April 2017 Elizabeth Bundy (Manager, Appeals Branch, DHS) provided Ms Musolino with a list of "10 set aside decisions relating to OCI" which listed some key Robodebt decisions set aside by the AAT and in particular those that "raise the issue around [DHS] relying on averaging without obtaining other information."[46]
- In July 2017, an email between DHS lawyers noted that there were "clear trends on the AAT1 decisions" that "the averaging of income is inconsistent with the legislation which requires that income be taken into account on fortnightly rests."[47]

Despite these observations about trends and criticism, no resulting change was made in process to achieve systematic review of AAT decisions. Whether the decisions referred to in these emails should have been referred to DSS required consideration of the following criteria in the SOS:[48]

- There is a significant error of law.
- There is a significant issue of policy or administrative practice.
- The matter has attracted, or is likely to attract, media or parliamentary attention.

On the first point, DHS's position was that income averaging as used in the Scheme was lawful, so it must also have been its position that decisions asserting that income averaging was inconsistent with the legislation were wrong in law.

On the second point, the cases raised a very significant issue in relation to whether DHS should, as a matter of practice and policy, be using the income-averaging method.

In relation to the third point, by January 2017 there was significant media attention on the Scheme and the prospect of a Senate Committee inquiry.

Despite each of those criteria clearly applying to the AAT decisions setting aside income-averaged debts, none of them was referred to DSS.

3.1 Failure to appeal Tribunal decisions

In March 2017, Professor Carney had before him a case in which an overpayment and debt had been raised solely on the basis of averaged PAYG data. Before determining the matter, Professor Carney exercised the power of the AAT to require DHS to make written submissions in response to particular questions of law,[49] and also invited it to appear and make oral submissions. DHS made written submissions in accordance with the request but did not address two of the questions asked by Professor Carney,[50] who observed that the submissions "did not delve deeply into the [the law about determining whether there is an overpayment]."[51] DHS did not take up the invitation to provide oral submissions.[52]

On 8 March 2017, Professor Carney handed down his decision, in which he set aside the DHS decision, having reached a reasoned conclusion that income averaging based on PAYG data could not provide a sufficient evidentiary basis to prove an overpayment or give rise in law to a debt.[53]

DHS did not appeal the decision.

In the AFAR concerning it, a DHS lawyer concluded that there was no error of law that affected the decision and that there were no grounds for appeal.[54] A DHS principal government lawyer agreed with that assessment.[55]

Remarkably, they also concluded that the decision did not involve any "important legal or policy principle."[56] That is difficult to understand, particularly when the relevant general counsel, whose team was responsible for advising on whether to appeal AAT1 decisions, accepted in evidence before the Commission that he had formed the view that the legal reasoning in the 8 March 2017 decision was correct.[57] Accordingly, from that point on he should have understood that income averaging, in the manner in which it was used in the Scheme, was unlawful.

Professor Carney made another four decisions in which he took the same approach to averaging as in his original decision. None were appealed by DHS or referred to DSS, though this was a requirement of the SOS.[58]

Other AAT members made decisions that applied the same reasoning as the 8 March 2017 decision.[59] In each case, the decision was not appealed because of legal advice, in the form of the AFAR, that there were no grounds for appeal.[60] For example, in a decision made on 4 May 2018, the AAT found that the legislation "did not authorise the calculation of youth allowance by reference to averaging of income in this case" and referred to the academic commentary by Professor Carney (by that stage no longer an AAT1 member) impugning the validity of averaging.[61] The AFAR for the 4 May 2018 decision did not cavil with that reasoning and did not recommend an appeal, noting that an appeal would put the income averaging methodology "squarely into the public arena" and there was "a risk that the whole approach of the OCI would be undermined."[62] However, the decision was referred to DSS for information; a "protective appeal' was filed and then withdrawn on instruction from DSS.[63]

The Commission has identified no appeals on behalf of the secretary which went directly to the lawfulness of income averaging.[64]

Ms Musolino sought to justify the failure to appeal the 8 March 2017 decision, and others applying similar reasoning, on the basis that the circumstances of the recipient and the impact an appeal would have on them and their family was a paramount consideration;[65] DHS would not, she said, lightly put a recipient through an appeal.[66] The Commission accepts, as submitted by the Commonwealth, that this was consistent with DHS's obligation to act as a model litigant which requires endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible.[67]

However, that approach paid no regard to the Litigation Principles (which both DSS and DHS were required to consider), which required the decision maker to consider the beneficial nature of the social security law and the impact of an appeal on the recipient *against the broader principles of social security administration* (emphasis added).[68] That included:

- considering "whether there [was] a significant point of law or stated Government policy which needed to be clarified or defended"[69] and "a realistic assessment of the broader effect of leaving an inconsistent decision of a … tribunal undisturbed and the potential for other decision makers to follow it"[70] and
- recognising that while AAT decisions were not binding, in practice they might be followed in similar factual circumstances.[71]

One is entitled to be cynical about the proposition that the failure to appeal sprang from concern for the wellbeing of applicant recipients. It does not, for example, really seem to have been foremost in the mind of the legal officer who prepared the AFAR on the 4 May 2018 decision. But assuming it was genuinely a factor in decision making, it could not be a "paramount" consideration; the Litigation Principles required that it be weighed against the wider concerns identified above. Here the legality of a government program was at stake, but DHS appears to have disregarded that aspect altogether.

3.2 Failure to bring relevant information to the attention of the Tribunal

Consistent with DHS's obligation to act as model litigant in proceedings before the AAT,[72] officers of the Commonwealth must use their best endeavours to assist the AAT to make its decision in relation to the proceeding.[73] That includes ensuring that the AAT has all relevant information and bringing the AAT's attention to arguments of the other side where it appears the AAT has overlooked them.[74]

The reasoning in the 8 March 2017 decision, the decisions which followed it, and the fact that DHS did not pursue appeals of those decisions were matters relevant to other cases in which the AAT had to consider the use, and lawfulness, of income averaging. AAT members showed an increased awareness and interest in the Scheme, as demonstrated by a request from the AAT to DHS for a presentation about the process.[75] (Professor Carney gave evidence about one of these presentations.)[76] It would have assisted the AAT for those decisions to be drawn to its attention in other cases involving income averaging, as the Commonwealth accepts. The fact that DHS did not pursue appeals of those decisions was also relevant information for AAT members; it would have provided a strong indication of DHS's level of confidence in the lawfulness of income averaging. It was a fact that would not generally be known to AAT members.

DHS's failure to inform the AAT of the decisions, and that it had not pursued appeals of them, deprived AAT members of information relevant to the discharge of their function and undermined consistency in AAT decision-making. It also advantaged DHS by rendering members of the AAT and the public, including social security recipients, less likely to be aware of the reasoning in the decisions and of the fact (from the absence of appeal) that DHS lawyers likely considered that reasoning to be legally correct.

The Commission put to the Commonwealth that DHS's failure to inform the AAT of the decisions was a breach of the model litigant obligation. The Commonwealth denied that was so. The role of DHS in AAT1 proceedings, it submitted, was "extremely limited" and did not carry with it a duty to inform the AAT of the 8 March 2017 decision, the decisions which followed it or the fact that DHS did not pursue appeals of those decisions. It contended that DHS's role as the "agency party" in AAT1 proceedings was confined to giving the AAT and the other party the documents required by s 37(1) of the AAT Act and responding to requests or orders from the AAT for submissions on a specific issue. The AAT's General Practice Direction did not specify that decisions such as the 8 March 2017 decision should be lodged as part of the s 37 documents.[77]

The Commission does not accept this submission. The respondent to an AAT1 application for review was the secretary of DSS or the chief executive of Centrelink (where the decision was made by a DHS employee).[78] As litigants, complying with the General Practice Direction was the bare minimum of what was required of them; they were bound by the much larger obligation to use their best endeavours to assist the AAT. DHS had a particular advantage as the repository of specialist knowledge about social

security law and practice with access to all written AAT decisions. The respondent secretary or chief executive should have been informing AAT members and applicants of highly relevant decisions on a new and controversial program. The 8 March 2017 decision was a considered and thoughtful decision that other AAT members deciding similar cases unquestionably had an interest in knowing about.

3.3 Failure to report income averaging decisions to the Office of Legal Services Coordination

The lawyer who prepared the AFAR in relation to the 8 March 2017 decision was wrong to conclude that the decision did not involve any "important legal or policy principle." The 8 March 2017 decision, and those which followed it, raised serious questions about the legal basis for the use of income averaging to give rise to a debt; a practice that affected many thousands of social security recipients.

The 8 March 2017 decision constituted a "significant issue" in the provision of legal services for the purposes of para. 3.1 of the Legal Services Directions.[79]

As the agency responsible for managing social security litigation, DHS was engaged in "the provision of legal services" by its involvement in AAT proceedings concerning debts raised under the Scheme and its preparation of legal advice in the form of AFARs following AAT decisions. Consequently, DHS was required to report to the Office of Legal Services Coordination (OLSC) proceedings concerning debts raised under the Scheme and its preparation of legal advice in the form of AFARs following AAT decisions.

In evidence, Michael Johnson (Assistant Secretary, OLSC) agreed that a significant legal issue would exist where the AAT, whether it be Tier 1 or Tier 2, concluded that averaged income was insufficient to ground an allegation of debt in circumstances where the government had a program to raise hundreds of thousands of debts on that basis.[80]

DHS did not report any of the AAT decisions concerning the Scheme to the OLSC. Had it done so, the Attorney-General and the OLSC may have been informed about the questions being raised by various AAT members about the legality of the Scheme in 2017.

4 The continuing use of income averaging in the calculation of debts

4.1 Ignoring the reasoning in Tribunal cases

Rather than appeal AAT1 decisions rejecting the use of income averaging as a basis for raising debts, DHS generally implemented the directions given by the AAT (for example, that the debt be recalculated based on actual income information). However (and notwithstanding the views of some of its lawyers), Ms Musolino explained in evidence before the Commission, DHS felt free to reject the reasoning in those decisions because it was not uniformly adopted by all AAT members, and DHS considered itself entitled to continue its practice of income averaging under the Scheme.[81]

Ms Musolino's argument, that because some AAT1 decisions endorsed averaging, DHS could continue with it in disregard of the 8 March 2017 decision and those following it, does not bear scrutiny. The Commission was referred by DHS officers to some AAT1 decisions which upheld debts raised solely through income averaging.[82] None of those decisions, nor any of the 558 decisions reviewed by the Commission, contained any statement of legal principle or references to legislation justifying the use of income averaging in the absence of other evidence to support that calculation.[83]

More importantly, the Social Security (Administration) Act requires the secretary of DSS, whose powers DHS officers exercised pursuant to delegation, in "administering the social security law" to have regard to "the need to apply government policy in accordance with the law and with due regard to relevant decisions of the Administrative Appeals Tribunal".[84] There is no question that the 8 March 2017 decision and those following it were relevant decisions, because they contained considered and detailed legal reasoning about the lawfulness of income averaging. Consequently, the secretary and DHS officers exercising the secretary's powers were obliged by statute to have regard to them.

As a general proposition, where the secretary (or their delegates) are of the view that a considered decision of the AAT1 is wrong, so that having regard to it will create problems in administering the law, DSS should appeal that decision to AAT2.[85] If it is not willing to appeal, DHS and DSS should accept the principles laid down by the decision,[86] and allow them to guide future decision-making. If DHS notices inconsistencies in AAT decision-making, it should recommend that DSS undertake an appeal of the inconsistent decision in order to clarify the issues.

In relation to the AAT1 cases setting aside debts raised through income averaging, DHS's recourse, if it thought them wrong, was to recommend to DSS that it challenge them by appeal. But instead of taking that step (which would have exposed the illegal basis on which the Scheme was operating), DHS in the main ignored them. In one instance, the 4 May 2018 decision, where it did refer a matter (without recommending an appeal), an appeal was commenced but discontinued.[87] In the absence of any appeal, s 8 of the Social Security (Administration) Act required regard to be had to those decisions, which would necessarily have entailed acceptance that income averaging as used in the Scheme couldnot lawfully continue.

4.2 Implementing decisions contrary to the direction of the Tribunal

S 43(1)(c)(ii) of the AAT Act empowers the AAT to set aside the decision under review and remit the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.[88] The intent of the provision is plainly that the department or agency concerned will undertake any reconsideration in the way the AAT proposes.

The 8 March 2017 decision directed DHS not to recalculate the social security recipient's debt with income averaging but to recalculate it using fortnightly salary records obtainable in the exercise of DHS's statutory powers.[89] When it went to implement this decision, DHS was unable to obtain salary records from one of the recipient's four employers because it had gone out of business. DHS then proceeded to use income averaging to recalculate the recipient's debt.[90] In effect, DHS ignored both the legal reasoning and the directions of the AAT and reconsidered the matter in accordance with its own view of the law.

DHS used income averaging to recalculate the debt on the advice of Brian Sparkes' (Principal Legal Officer, DHS) that the decision "should be based on the best available evidence obtainable", so that if all avenues had been explored DHS was able to use income averaging to raise the debt "regardless of what the AAT1 said".[91] Mr Sparkes expressed the same view in relation to a similar direction in the 7 September 2017 decision:

> ….as long as our evidence gathering power are exhausted then it is still open to raise a debt based on averaging. In this respect the AAT1's direction is wrong in law and can be ignored...[92]

Mr Sparkes argued that was permissible by reference to s 126 and s 182 of the Administration Act.[93] That view was misconceived.

The secretary has a broad power in s 126 of the Social Security (Administration) Act to review the "decision of an officer," even if an application to the AAT is on foot "if the Secretary is satisfied that there is sufficient reason to review the decision."[94] There are obvious policy reasons for the existence of this power. It allows for a proceeding to resolve in advance of a full hearing or, if the matter does proceed to hearing, to clarify the issues in dispute.[95] It is in keeping with the objective that the AAT is informal, cost effective and quick.[96] It would be an extraordinary reading of the provision to regard the power as extending to review of the AAT's decisions;[97] it is plain on its face and in context that it does not contemplate the exercise of the review power once the decision has been made. Apart from the express reference to the power being exercisable even if an application to the AAT has been made (as opposed to determined), it appears in Part 4 of the Social Security (Administration) Act under "Internal Review", an indication that it has no application to decisions made externally.

The secretary is required to give notice of the review decision to the Registrar of the AAT, another indication that it can be made only while the AAT1 proceedings are live.[98]

S 182, the second provision on which Mr Sparkes relied, does not create any power of review but concerns the situation where an officer varies or substitutes a decision after an application for AAT1 review or after an application for AAT2 review. The first situation would arise with the exercise of the s 126 power; in that instance the application (to AAT1) is taken to be for review of the new or varied decision. In the second situation (application to AAT2) the varied or substituted decision is treated as having been made by AAT1, and the application is taken to be for review of that decision. Such a situation might arise where a decision is upheld by AAT1 or a decision is set aside and the matter is remitted for a new decision to be made, or an application for AAT2 review is made and an officer then varies the decision upheld by AAT1 or substitutes another decision in accordance with the AAT's directions.

Whatever Mr Sparkes' view of the secretary's powers of review, the secretary remained bound by any directions given by AAT 1 unless and until those directions were set aside.

The directions of the AAT prohibited the use of averaging. That prohibition was clear and unqualified. Beyond those directions, it was clear from the reasoning of the decision, which found the practice of averaging to be unlawful.

5 Conclusion

5.1 The disregard of Tribunal decisions

The Scheme was launched in circumstances where the DSS legal advice was that income averaging, as it was used in the Scheme, was not in accordance with the legislation,[99] and DHS had not obtained any relevant legal advice. The AAT1 decisions confirming that averaged PAYG data alone did not constitute evidence of fortnightly income earned, derived or received, as the Social Security Act required, should have reinforced that original advice and caused DHS and DSS to reconsider the legality of the Scheme.

Instead, DHS chose not to recommend any challenge to those decisions, explicitly or tacitly accepting them as legally correct, but implementing them only as far as was convenient and disregarding their effect for the purposes of the Scheme as a whole.

DSS took no active role, apart from discontinuing an appeal in the 4 May 2018 decision, which, as the AFAR astutely noted, would have brought the illegality issue into the public arena and undermined the "whole approach" of the OCI phase of the Scheme.

Because the adverse decisions were not published, they were not publicly accessible. DHS was able to take advantage of that situation; in the narrower sense, by not bringing them to the attention of applicants or AAT members, and in the wider sense by continuing with a Scheme based on unlawful debt raising. DSS was shielded from the adverse publicity which would certainly have followed a public understanding of what these decisions were saying and how many of them there were.

Clearly, to avoid repetition of that situation, publication of significant decisions in an accessible form is desirable. Professor Carney suggests that AAT1 be empowered, of its own volition, to publish de-identified rulings on key issues as it has done in the child support context.[100] Economic Justice Australia supports a recommendation to that effect, as does the Commonwealth.[101]

There was no systematic means of identifying AAT1 decisions significant to DHS's application of law or policy, which was a serious failing; however, there is reason to doubt that, had one existed, it would have changed DHS's view that it was entitled to disregard the AAT1 decisions. The SOS should have, in theory, caused referral of all the decisions which identified the legal issue in relation to income averaging to DSS, but they too seem to have been disregarded. Again, there is reason to doubt that even if they had been observed, DSS would have responded appropriately, given its conduct in relation to the 4 May 2018 decision.

As noted earlier in this chapter, it is the obligation of the secretary of DSS under s 8 of the Social Security (Administration) Act to pay due regard to relevant decisions of the AAT. Presumably, the referral requirements in the SOS are designed to bring relevant decisions to the attention of the secretary. Indeed, Ms Musolino's evidence was that the AFAR process was about meeting those requirements.[102] That did not happen; in fact, there is no evidence that the secretary was ever made aware of the effect of any relevant AAT decision by those who were responsible for informing the secretary about those matters. To the contrary, Finn Pratt AO (DSS Secretary) said that he did not recall any AAT cases about the illegitimacy of debt-raising on the basis of averaging.[103]

It is impossible to see how the secretary could have met their obligations under section 8 without an effective system in place for referring relevant decisions. It is clear that the system that was in place was not effective; DHS was not referring relevant decisions to DSS, and DSS was doing nothing to ensure that it was.

5.2 Steps taken since the Robodebt scheme

The Commission is aware of steps undertaken since to strengthen the processes for identification of, and responses to, significant AAT1 decisions.

Services Australia says its Legal Services Division launched a strategy in March 2022 that entails regular liaison meetings about AAT and court outcomes with "internal business areas and external policy clients" and the circulation of a quarterly newsletter containing updates on topical issues and litigation trends, including recent AAT and Federal Court decisions.[104]

DSS says it has strengthened its litigation management processes to include monthly litigation reports provided to the secretary which cover all merits and judicial review matters managed by Services Australia, significant litigation and secretary-initiated applications for review or appeal and prosecutions. The secretary is, the Commission is told, made aware of adverse comments made by a court or tribunal about the conduct of a matter or decisions made in the secretary's name and the secretary has meetings with the president of the AAT to discuss improvements in DSS's general dealings with the AAT.[105] These are encouraging developments.

Recommendation 20.1: AAT cases with significant legal and policy issues

Services Australia should put in place a system for identifying AAT1 cases which raise significant legal and policy issues and ensuring that they are brought to the attention of senior DSS and Services Australia officers.

Recommendation 20.2: Training for DHS legal officers

Services Australia legal officers whose duties involve the preparation of advices in relation to AAT1 decisions should receive training which emphasises the requirements of the Standing Operational Statements in relation to appeal recommendations and referral to DSS; Services Australia's obligations as a model litigant; and the obligation to pay due regard to AAT decisions and directions.

Recommendation 20.3: Identifying significant AAT decisions

DSS should establish, or if it is established, maintain, a system for identifying all significant AAT decisions and bringing them to the attention of its secretary.

Recommendation 20.4: Publication of first instance AAT decisions

The federal administrative review body which replaces the AAT should devise a system for publication on a readily accessible platform of first instance social security decisions which involve significant conclusions of law or have implications for social security policy.

5.3 Re-establishing the Administrative Review Council

The Administrative Review Council (ARC) was established as "an effective body, providing useful and timely advice on administrative review matters" whose role was to "ensure that our system of administrative review is as effective and significant in its protection of the citizen as it can be."[106] It performed a unique role in that it was the only entity charged with the function of advising the Attorney-General on the operation and integrity of the administrative law system as a whole.[107]

The ARC "is not simply concerned to promote administrative justice, although justice is of central importance. The ARC is concerned with good government and sound public administration."[108] Its functions and powers include keeping the Commonwealth administrative law system under review; monitoring developments in administrative law; inquiring into the adequacy of the procedures used by those, including Commonwealth authorities, who exercise administrative discretions or make administrative decisions, and consulting with and advising them about their procedures, to make sure that they exercise their discretions and make decisions in a just and equitable manner; and recommending to the Minister improvements that might be made to the administrative law system.[109]

The ARC is required to give the Minister a copy of any findings,[110] and the Minister is also able to refer matters to the ARC for inquiry and report.[111]

The AAT Act provides that membership of the ARC is to include the President of the AAT, the Commonwealth Ombudsman, the President of the Australian Human Rights Commission, the President of the Australian Law Reform Commission, the Australian Information Commissioner, and at least three other members of extensive experience in industry, government service, administrative law, professional practice or other prescribed areas.[112]

The ARC was defunded and effectively discontinued in the 2015-16 Budget (the same Budget that brought Robodebt into being) as part of the Smaller Government initiative of the Abbott Government.[113] However, the provisions concerning it in Part V of the AAT Act have never been repealed.[114]

The Scheme was within the remit of the ARC's functions. In particular, the ARC could have monitored developments at AAT1 level and noted the rejection of income averaging by reference to legal principle and its inconsistency with the legislation; inquired into DSS' failure to seek review of any of the AAT1 decisions relating to the Scheme; inquired into whether DHS was adequately assisting the AAT in matters coming before it in relation to the Scheme;[115] inquired into the equity and justice of the procedures used by DHS to make debt-raising decisions during Robodebt; and informed the Minister of its findings.

There is support for the re-establishment of the ARC. The Hon Ian Callinan AC KC called the decision to terminate the operation of the ARC "imprudent," and recommended that it be re-funded.[116] The Law Council of Australia supported its resurrection: "not only would that be consistent with the rule of law given the terms of the AAT Act require it to exist and operate, but it would serve a great deal of good for Australia's administrative review system."[117]

Monash University's Faculty of Law in its submission to the Commission also recommended the ARC's reinstatement:

> … improved monitoring…might help to ensure that the tribunal exercises its functions appropriately…the Ombudsman is a body which could take up this role. However, a more specifically adapted body is already provided for in Australian law: the Administrative Review Council.'[118] The submission goes on to say, 'it is hard to imagine a clearer example than robodebt of the inadequacies of government self-scrutiny. Insofar as Robodebt shows the need for measures to ensure that merits review decisions have a normative effect on government decision making, there is no reason to think that the Attorney-General's Department is an adequate substitute for the Administrative Review Council…The government's recent announcement that the AAT will be replaced with a new administrative review tribunal reinforces the need for robust monitoring of the treatment of merits review decisions.[119]

The Attorney-General has recently said that "as part of our commitment to reforming the administrative review system, the Government is giving careful consideration to the re-creation of the Administrative Review Council or similar body."[120]

Recommendation - Administrative Review Council

Re-instate the Administrative Review Council or a body with similar membership and similar functions, with consideration given to a particular role in review of Commonwealth administrative decision-making processes.

1 Gerard Brennan, 'Canberra Opening Address' (Speech, The Administrative Appeals Tribunal Twentieth Anniversary Conference, 1 July 1996).
2 Exhibit 4-5786, Statement of Peter Hanks, 14 February 2023 [p7: para 52].
3 Prygodicz v Commonwealth of Australia (No 2) (2021) 173 ALD 277, 281 [10]; [2021] FCA 634, [10].
4 Letters Patent –Royal Commission into the Robodebt Scheme dated 18 August 2022.
5 Exhibit 3-3504 – DSS.5037.0001.0670, Standing Operational Statements – Social Security (Department of Human Services/Department of Social Services) [p 6: para 38-39].
6 Gerard Brennan, 'Canberra Opening Address' (Speech, The Administrative Appeals Tribunal Twentieth Anniversary Conference, 1 July 1996); Minister for Immigration and Ethnic Affairs v Pochi (1980) ALD 130, 154 (Deane J). See also Garry Downes, 'Structure, Power and Duties of the Administrative Appeals Tribunal of Australia' (Speech, Administrative Court of Thailand and Central Administrative Court of Thailand, 21 February 2006) [48]; Re Drake & Minister for Immigration and Ethnic Affairs (No 2) (1979) 2 ALD 634, 639.
7 Transcript, Elizabeth Bundy, 24 January 2023 [p 2288: lines 1 - 10].
8 Social Security (Administration) Act 1999 (Cth) s 129 and s 135.
9 Social Security (Administration) Act 1999 (Cth) s 142.
10 The existence of the two tiers is a legacy of the absorption of the Social Security Appeals Tribunal by the AAT. See Ian Callinan, Review: Section 4 of the Tribunals Amalgamation Act 2015 (CTH) (Report, 19 December 2018) [13].
11 Exhibit 3-3489 - TCA.9999.0001.0059_R - Statement of Emeritus Professor Terry Carney AO FAAL, 19 January 2023 [p 2: para 15].
12 Social Security (Administration) Act 1999 (Cth) s 168.
13 'Publication of decisions', Administrative Appeals Tribunal (Web Page) <https://www.aat.gov.au/AAT/media/AAT/Files/Policies/AAT-Publication-of-Decisions-Policy.pdf>.; Transcript, Professor Terry Carney, 24 January 2023 [p 2243: line 45 – p 2244: line 9].
14 Exhibit 3-3489 - TCA.9999.0001.0059_R - Statement of Emeritus Professor Terry Carney AO FAAL [p 2: para 14].
15 Social Security (Administration) Act 1999 (Cth) s 178.
16 S 66B(1) of the Administrative Appeals Tribunal Act 1975 (Cth) allows the AAT to publish its decisions and the reasons for them. S 66B(2) provides that the AAT is not authorised to publish information the disclosure of which is prohibited or restricted by or under the AAT Act or any other enactment conferring jurisdiction on the AAT. The publication of AAT1 decisions is not restricted by the Administrative Appeals Tribunal Act 1975 (Cth) or the Social Security (Administration) Act 1999 (Cth). Sections 35(3)-(4) of the Administrative Appeals Tribunal Act 1975 (Cth) allow the Tribunal to make orders prohibiting or restricting the disclosure of information.
17 Social Security (Administration) Act 1999 (Cth) s 168.
18 The AAT is required to provide detailed reasons for its decisions and has the power to make non-publication and non-disclosure orders: see Administrative Appeals Tribunal Act 1975 (Cth) ss 43(2), 35(3)-(4). There does not appear to be a general restriction on the non-publication of first-review decisions relating to social security matters.
19 Administrative Review Council, The Structure and Form of Social Security Appeals (Report No 21, 12 April 1984) 46.
20 Garry Downes, 'The Implementation of Administrative Courts' Decisions' (Speech, International Association of Supreme Administrative Jurisdictions VIIIth Congress, 26-28 April 2004) [42], [45].
21 Exhibit 3-3504 – DSS.5037.0001.0670, D16 8696188 Social Security Litigation DHS-DSS (Standing Operational Statements) SOS - October 2016(3) [para 1]. See also Transcript, Annette Musolino, 30 January 2023 [p2623: lines 8–29]; Transcript, Kathryn Campbell, 11 December 2022 [p962: lines 1–9].
22 Exhibit 3-3489 - TCA.9999.0001.0059_R - Statement of Emeritus Professor Terry Carney AO FAAL, 19 January 2023 [p 2: para 13]; Transcript, Annette Musolino, 30 January 2023 [p2623: line 24-30].
23 Exhibit 3-3530 - EBU.9999.0001.0001_R - NTG-0098 L Bundy Statement, 29 November 2022 [p 9: para 13].
24 Transcript, Elizabeth Bundy, 25 January 2023 [p 2361: line 10-20].
25 Exhibit 2-1985 - RBD.9999.0001.0045 - 1. Administrative Arrangements Order made on 23 December 2014, 23 December 2014; Exhibit 2-1986 - RBD.9999.0001.0047 - 2. Administrative Arrangements Order on 1 September 2016, 1 September 2016; Exhibit 2-1987 - RBD.9999.0001.0049 - 3. Administrative Arrangements Order - summary of changes 1 September 2016, 1 September 2016; Exhibit 2-1990 - (Signed), 20 December 2017.
26 Social Security Administration Act 1999 (Cth) s 8(f).
27 Exhibit 3-3504 – DSS.5037.0001.0670 - D16 8696188 Social Security Litigation DHS-DSS (Standing Operational Statements) SOS - October 2016(3) [p 1: para 1]; Exhibit 3-4204 - DSS.5037.0001.0666 - Copy of D16 8696198 DHS DSS SOS - Flowchart of AAT1 Appeals Process [p 3].
28 Exhibit 3-3504 - DSS.5037.0001.0670 - D16 8696188 Social Security Litigation DHS-DSS (Standing Operational Statements) SOS - October 2016(3) [p 2: para 9].
29 Exhibit 9037 - CTH.2012.0014.5115, Advocacy Procedures, Version 1.71 [p 12: para 1.3.1], [p 14: para 2.1.2].
30 Administrative Appeals Tribunal Act 1975 (Cth) s 43.

31 AFARs were conducted by lawyers in DHS' Freedom of Information and Litigation branch: Transcript, Damien Brazel, 25 January 2023 [p 2368: lines 6-40]. The Commission's review of the AFARs shows that secondee lawyers (eg Exhibit 3-3487 – CTH.0010.0002.0312_R, AFAR.pdf, 20 September 2017), and paralegals (eg Exhibit 9474 - CTH.3067.0003.8744, [REDACTED]- AAT1 General AFAR - streamlined.docm) were also tasked with completing the AFARs.
32 Exhibit 9037 - CTH.2012.0014.5115, Advocacy Procedures, Version 1.71 [1.2.7]; Exhibit 9038 - CTH.3052.0014.2109, Advocacy Procedures, Version 1.8 [p 14]; Transcript, Elizabeth Bundy, 25 January 2023 [p 2343: lines 5-20].
33 Transcript, Annette Musolino, 30 January 2023 [p 2657: line 18 - p 2658: line 23].
34 Exhibit 9037 - CTH.2012.0014.5115, Advocacy Procedures, Version 1.73 [p 47-49: para 4.9.9]; Transcript, Annette Musolino, 30 January 2023 [p 2739: line 30-40]; Exhibit 3-4204 - DSS.5037.0001.0666 - Copy of D16 8696198 DHS DSS SOS - Flowchart of AAT1 Appeals Process.
35 Exhibit 9037 - CTH.2012.0014.5115, Advocacy Procedures, Version 1.73 [p 47: para 4.9.6].
36 Exhibit 3-3504 – DSS.5037.0001.0670 - Standing Operational Statements – D16 8696188 Social Security Litigation DHS-DSS (Standing Operational Statements) SOS - October 2016(3) [p 1: para 2].
37 Exhibit 9498 - CTH.3007.0052.3976 - SOS mark 2 - review June 2016.docx [p 2].
38 Exhibit 9498 - CTH.3007.0052.3976 - SOS mark 2 - review June 2016.docx [p 8].
39 See Transcript, Elizabeth Bundy, 25 January 2023 [p 2342: lines 35-41]; Transcript, Annette Musolino, 30 January 2023 [p 2740: lines 20-35]; Also note that the AGS Review 'Department of Social Services/Services Australia Legal Function Review', 11 February 2020 pointed to deficiencies in the standing operational statements and recommended their revision (Exhibit 9495 - DSS.5125.0001.1029, Report (Final - 11 February).pdf [p 104-106]).
40 Exhibit 3-3493A - TCA.9999.0001.0062_R - 20230120 Review of AAT decisions - (Carney) (without Applicant names).pdf, [row 2], [row 13], [row 27], [row 78], [row 80], [row 98].
41 Transcript, Elizabeth Bundy, 25 January 2023 [p 2361: lines 40-45].
42 Exhibit 1-1184 - CTH.3008.0015.7214_R - PAYG DEBT CASES - AAT Review numbers and update [DLM=Sensitive:Legal]; Exhibit 2-2703 - Exhibit 2-2703 - CTH.3008.0015.7237_R2 - RE- PAYG DEBT CASES - AAT Review numbers and update [DLM=Sensitive-Legal]; Transcript, Karen Harfield, 15 December 2022 [p 1905: line 10].
43 Transcript, Karen Harfield, 15 December 2022 [p 1901: line 20 – p1906: line 35].
44 Exhibit 3-4245 - CTH.3039.0021.4507_R - FW: A third 'Set Aside' OCI case at AAT1 Level (now there's a fourth!) [DLM=Sensitive].
45 Exhibit 3-3544 - CTH.2001.0006.1296_R, FW: SDRT weekending 14 April 2017 [DLM=For-Official-Use-Only]; Exhibit 3-3545 - CTH.2001.0006.1297 - 7 Service Delivery Roundtable - Appeals - week ending 14 April 2017 mark up.docx.; Exhibit 3-4303A - CTH.3007.0006.1940_R - OCI debt cases [DLM=Sensitive:Legal]; Exhibit 3-3460 - CTH.3007.0006.1949_R - AAT Case Summaries LSD comments.pdf.
46 Exhibit 3-3542 - CTH.2001.0006.1353_R, FW- SDRT weekending 14 April 2017 [DLM=For-Official-Use-Only], 19 April 2017;Exhibit 3-3543 - CTH.2001.0006.1354, AAT Case Summaries.
47 Exhibit 4-6682 - CTH.4750.0025.0123_R - FW: OCI AAT Case Summaries [DLM=Sensitive:Legal].
48 Exhibit 3-3504 – DSS.5037.0001.0670 - D16 8696188 Social Security Litigation DHS-DSS (Standing Operational Statements) SOS - October 2016(3) [p 2: para 9].
49 Administrative Appeals Tribunal Act 1975 (Cth) s 39AA(5); Exhibit 3-3482 - CTH.3761.0001.0223_R, 8 March 2017 [p14: para 24].
50 Exhibit 3-3482 - CTH.3761.0001.0223_R, 1569 [REDACTED], 8 March 2017 [p 4: para 25].
51 Exhibit 3-3482 - CTH.3761.0001.0223_R, 1569 [REDACTED], 8 March 2017 [p 7: para 37 - p 9: para 49].
52 Exhibit 3-3482 - CTH.3761.0001.0223_R, 1569 [REDACTED], 8 March 2017 [p9: para 49].
53 Exhibit 3-3482 - CTH.3761.0001.0223_R, 1569 [REDACTED], 8 March 2017.
54 Exhibit 3-3483 - CTH.0010.0001.0020_R - 17.03.23-[REDACTED]-AAT1GeneralAFAR, 24 March 2017.
55 Exhibit 3-3473 - CTH.3039.0021.2405_R, FW- A third 'Set Aside' OCI case at AAT1 Level [DLM=Sensitive-Legal].
56 Exhibit 3-3483 - CTH.0010.0001.0020_R - 17.03.23-[REDACTED]-AAT1GeneralAFAR, 24 March 2017.
57 Transcript, Damien Brazel, 25 January 2023 [p 2380: lines 10-45].
58 Exhibit 3-3504 – DSS.5037.0001.0670 - D16 8696188 Social Security Litigation DHS-DSS (Standing Operational Statements) SOS - October 2016(3) [p2: para 9]. None of the five decisions made by Professor Carney that rejected income averaging were referred to DSS. See email confirming this Exhibit 9463 -CTH.0010.0002.0243_R For review: Question on notice re certain Centrelink debt decisions[SEC=OFFICIAL:Sensitive]
59 Exhibit 3-3493A - TCA.9999.0001.0062_R - 20230120 Review of AAT decisions - (Carney) (without Applicant names).pdf, [row 78], [row 243], [row 257], [row 258], [row 278].
60 Exhibit 3-3473 - CTH.3039.0021.2405_R - FW: A third 'Set Aside' OCI case at AAT1 Level [DLM=Sensitive:Legal]; Exhibit 3-3483 - CTH.0010.0001.0020_R, 17.03.23-[REDACTED]-AAT1GeneralAFAR, 24 March 2017.
61 Exhibit 3-4176 - DSS.5036.0001.0163_R - AAT Decision 2018-AA119369, 4 May 2018 [p3: para 15 and 17].

62 Exhibit 3-4179; Exhibit 3-4836 - DSS.5036.0001.0008_R - DSS.5036.0001.0008_R - [REDACTED] – AFARm, 29 May 2018 [para 10].
63 Exhibit 9470 - CTH.3039.0031.1430 [REDACTED] - OCI - Documents re AAT2 Sec Appeal [SEC=OFFICIAL:Sensitive, ACCESS=Legal-Privilege]; Exhibit 9468 - CTH.3025.0007.5405_R [REDACTED] - Notice of Withdrawal.pdf; Exhibit 9467 - CTH.3025.0007.5404_R AAT2 appeal - [REDACTED] - Secretary, Department of Social Services and [REDACTED] - Notice of Withdrawal [SEC=UNCLASSIFIED]; Exhibit 9469 - CTH.3025.0007.5406_R [REDACTED] (2) Notice of dismissal.pdf.
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66 Transcript, Annette Musolino, 30 January 2023 [p 2655: lines 40-45].
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69 Exhibit 3-3505 - DSS.5037.0001.0667 - D16 7007795 - Litigation Principles, [para 4(b)].
70 Exhibit 3-3505 - DSS.5037.0001.0667 - D16 7007795 - Litigation Principles [para 4(d)].
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73 *Administrative Appeals Tribunal Act* 1975 s 33(1AA); Legal Services Directions 2017 (Cth) app B cls 3 - 4.
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81 Transcript, Annette Musolino, 31 January 2023 [p 2746: lines 5–40].
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120 ATTORNEY-GENERAL MARK DREYFUS - SPEECH - 2023 COUNCIL OF AUSTRALASIAN TRIBUNALS NATIONAL CONFERENCE - THURSDAY, 8 JUNE 2023; see also Attorney-General's Department, Administrative Review Reform: Issues Paper (Issues Paper, April 2023) p 22.

Chapter 21: The Commonwealth Ombudsman

1 Introduction

In January 2017 complaints about the Robodebt Scheme (the Scheme) were on the rise. This was the time when effective scrutiny by the Commonwealth Ombudsman might have made the continuation of the Scheme untenable, or at least thrown it into serious question.

The Commonwealth Ombudsman is empowered under the *Ombudsman Act 1976* (Cth) (Ombudsman Act) to investigate the administrative actions of Australian Government agencies and officers.[1] The Ombudsman, the Deputy Ombudsman and their staff make up the Office of the Ombudsman which carries out the functions of the Ombudsman.[2] (The terms "Ombudsman," "Ombudsman's Office" and "Office" are used interchangeably in this chapter.)

Complaints about the Scheme were made to the Ombudsman's Office, which undertook two investigations into the Scheme.

In January 2017, the Ombudsman commenced an "own motion" investigation into the Online Compliance Intervention program (the OCI program: the first online phase of the Scheme) pursuant to s 5(1)(b) of the Ombudsman Act (the 2017 own motion investigation).[3] The investigation culminated in the Ombudsman's report titled *Centrelink's Automated Debt Raising and Recovery System* dated April 2017 (the 2017 Investigation Report).[4]

In October 2018, the Ombudsman commenced its "implementation" investigation into the Scheme, pursuant to s 15 of the Ombudsman Act,[5] examining the extent to which the recommendations contained in the 2017 Investigation Report had been implemented by the Department of Human Services (DHS) and the Department of Social Services (DSS), and the extent to which implementation action had achieved the outcomes intended by those recommendations.[6] The report of that investigation was published in April 2019 (the 2019 Implementation Report).[7]

The Ombudsman took the position that current and former officers could not be compelled to give evidence to the Commission, pursuant to s 35(8) of the Ombudsman Act.[8] The Commission did not entirely accept this view but agreed to proceed on the basis that the Ombudsman would assist the Commission voluntarily. Current and former officers gave evidence by statement to the Commission, and in person at its hearings.

2 The "own motion" investigation power

The Ombudsman's Office can investigate as the result of a complaint or on its own initiative (by its "own motion").[9] Section 5(1)(b) of the *Ombudsman Act* permits the Ombudsman:

> … of his or her own motion to investigate any action, being action that relates to a matter of administration taken either before or after the commencement of this Act by a Department, or by a prescribed authority.

The term "matter of administration" is not defined in the Ombudsman Act, but was the subject of some discussion in the explanatory material for the Ombudsman Bill 1976, and its predecessor, the Ombudsman Bill 1975. It was thought preferable that the term be left undefined so as not to limit the Ombudsman's flexibility.[10]

The Ombudsman Act does not specify the considerations to which an Ombudsman is to have regard in exercising the discretion to initiate an own motion investigation or in the investigation's conduct. It may, however, be taken that the discretion should be exercised, and the investigation carried out, with regard to the purpose of the relevant provisions of the Ombudsman Act.[11] With that statutory purpose in mind, the fact that an own motion investigation is one that is commenced on the Ombudsman's own initiative, without there having first to be an individual's complaint, implies that the Ombudsman is to consider the exercise of the discretion with regard to broader considerations than the interests of any particular individual. (Of course, an accumulation of individual complaints may, as in the case of the Scheme, prompt an own motion investigation.)

The provisions that deal with reports of Ombudsman investigations are relevant. Section 15(1) lists defects in departmental action – including that it appears to have been contrary to law, was based on an error of law, was unreasonable, or was otherwise, in all the circumstances, wrong – as to which the Ombudsman's positive opinion formed after their investigation can give rise to a requirement for the Ombudsman to make a report to the department under investigation.

Section 15(2) empowers the Ombudsman in the report to make recommendations that steps be taken to remedy defective aspects of the department's action. A report is provided to the department concerned but may also be provided to the Prime Minister under s 16 and ultimately to Parliament under s 17, if those recommendations are not implemented. Those provisions indicate that an own motion investigation has as an object the exposure of instances of unlawful, unreasonable or wrong departmental action through a process that is separate from, and independent of, the political and bureaucratic processes of government.

A third relevant feature of the Ombudsman Act is to be found in the provisions which secure the Ombudsman's independence and confer the Ombudsman's investigative powers. The Ombudsman may only be removed from office by the Governor-General on grounds of misbehaviour or physical or mental incapacity after an address by both houses of Parliament.[12] The Ombudsman's investigative powers include coercive powers to require the production of documents and information and the attendance of persons, including public servants, at formal interviews.[13] These powers are not inhibited by provisions of other Acts, legal professional privilege, the privilege against self-incrimination or claims of public interest immunity.[14] The Ombudsman is empowered to examine witnesses on oath.[15]

These provisions ensure the independence of the Ombudsman. They confer on the Ombudsman sufficient powers to look behind the assertions of departments that are being investigated, rather than merely accepting at face value what those departments have to say. This includes what departments assert about the law. The Ombudsman is expressly authorised to report on action that appears to have been contrary to law or which was based either wholly or partly on a mistake of law.[16]

2.1 The 2017 own motion investigation

In late 2016 and early 2017, as the effects of the roll-out of the OCI phase of the Scheme began to be felt, the Ombudsman received complaints from recipients experiencing a variety of problems including debt inaccuracy, technical problems with the online platform, being forced to proceed online, being unexpectedly contacted by debt collectors, and inconsistent DHS advice.[17] Advocacy groups[18] and members of Parliament[19] were also making complaints on behalf of those they represented. Complaints to the Ombudsman almost tripled in December 2016.[20]

The various complaints were originally treated as three different "issues of interest"[21] but on 5 January 2017 Louise Macleod (then director, Social Services and Indigenous Team, Social Services, Indigenous and Disability Branch, Ombudman's Office) prepared a minute proposing that the Ombudsman, Colin Neave, conduct an own motion Investigation into the Scheme.[22]

Ms Macleod (who subsequently became acting Deputy Ombudsman) described the threshold that warrants an own motion investigation:

> … when a systemic issue of public administration is identified (such as being the subject of numerous complaints affecting many people that has or could cause appreciable damage to citizens, is complex, there is broader public interest in publicising the problem) and the Office perceives there is no, or insufficient, appetite or engagement by the relevant agency/s to address the systemic issue, which could warrant comment being made under s 12(4) of the Act or a report under s 15 that is published under s 35A of the Act.[23]

A deficiency in an individual case which was "likely to be repeated in other cases" could also, she said, meet the threshold for an own motion investigation.[24]

Ms Macleod outlined key concerns in relation to the Scheme in her minute to Mr Neave, based on complaints, feedback from stakeholders, and commentary in the media. Mr Neave decided to undertake the investigation. Ms Macleod's concerns were reflected in his letter to Finn Pratt (then DSS secretary), which informed DSS that the Ombudsman was undertaking an investigation pursuant to s 8 of the Ombudsman Act. (Before beginning an investigation, the Ombudsman must inform the principal officer of the agency or department concerned.[25]) The letter advised that the investigation would cover the following issues:

- adherence to relevant legislative requirements
- accuracy of debts being raised via the platform
- adequacy of risk assessments and decision making during the planning and implementation stages
- adequacy of safeguards and impact on vulnerable customers
- impact of automated decision making on quality of decisions
- service delivery issues.[26]

Letters advising of the investigation had also been sent to the DHS secretary and the ministers in the Social Security portfolio.

In her minute, Ms Macleod had elaborated on those concerns. In particular, she had referred to the first issue of "adherence to relevant legislative requirements" as arising "in the relevant social security and data matching legislation." In relation to the question of debt accuracy, Ms Macleod specified particular concern as to "the impact of: averaging data; shifting onus to supply historical fortnightly earnings information to customers; and shifting away from obtaining historical information from employers."

Ms Macleod also pointed out that from feedback it appeared that DHS was correcting decisions "without invoking formal internal review mechanisms," so that, without an investigation, "larger questions about whether the system fetters or fails to comply with legislative requirements" might not be addressed.[27]

Having sent the letters advising of the commencement of the own motion investigation, Mr Neave left the role of Ombudsman. Richard Glenn, who had previously been Deputy Ombudsman became Acting Ombudsman from 16 January 2017 to 25 April 2017.

2.2 The Ombudsman's use of the section 8(3) power in the own motion investigation

Section 8 of the Ombudsman Act deals with the Ombudsman's conduct of investigations. Investigations are conducted in private, and, subject to the Act, as the Ombudsman sees fit.[28] Section 8(3) gives the Ombudsman power to obtain information and make inquiries, also as the Ombudsman sees fit.[29] Although one would expect an agency or department to provide information requested by the Ombudsman under s 8, the provision does not impose an obligation to respond, nor does it say what is to happen in the event of non-compliance. That contrasts with s 9 of the Act, which empowers the Ombudsman to issue formal notices to compel the provision of information and documents. Section 9 gives the Ombudsman power to serve a notice in writing requiring a person, at a time and place specified, to produce information or documents[30] or where the Ombudsman has reason to believe a person can give information relevant to an investigation, require their attendance to answer questions relevant to the investigation.[31] A person attending under s 9 can be examined on oath or affirmation.[32] The failure to comply with a notice under s 9 is an offence.[33] The Ombudsman may make an application to the Federal Court for an order directing compliance with the notice.[34]

For the purposes of the 2017 own motion investigation into the Scheme and the 2019 Implementation Report investigation, the Ombudsman issued requests for information to DHS and DSS pursuant to s 8(3) of the Ombudsman Act. No requests for information were issued pursuant to s 9.

Both DHS and DSS provided incomplete responses to the Ombudsman's various s 8 notices and withheld key documents that fell within the scope of the requests.

2.3 The requests for legal advice and the responses

The December 2016 request

In December 2016, pursuing one of the "issues of interest" raised as a result of the many complaints received in connection with the OCI platform, the Ombudsman asked DHS, pursuant to s 8(3), the question:[35]

> Did DHS seek legal advice about the legality of averaging income for social security overpayment calculations? If yes, please provide a copy of the advice.

That request was followed up with an email from Ms Macleod to DHS, asking that the Ombudsman be briefed about a number of matters, including how DHS was ensuring:[36]

> the collection and assessment of income data and the subsequent decision to raise a debt adheres to the social security legislation…

and

> the income data is accurate and the decision to raise a debt is legally valid and complies with administrative law.

Ms Macleod's concern about the legality of the debt-raising process continued, as was evident from her identification, in the minute to Mr Neave, of adherence to relevant legislative requirements as an issue for the own motion investigation.

Ms Macleod led a small team of investigators (the Investigation Team) for the purposes of the own motion investigation. The Investigation Team reiterated the "issue of interest" question as to whether DHS had sought legal advice[37], requesting a copy of it in late January 2017, in the context of the own motion investigation.

DHS responded on 24 January 2017 with copies of three internal advices from its legal offices: the 14 January 2015 advice, the 17 April 2015 advice, and the 14 May 2015 advice.[39] As was apparent to the Investigation Team, none directly addressed the legality of income averaging as it was used in the Scheme.[40]

The 3 February 2017 request

On 3 February 2017, at a meeting between members of the Investigation Team and DHS employees, the Ombudsman's representatives provided a further list of questions and requests for information. As recorded in a DHS email of that date, the list included a request for "any legal advices that the Department thinks would be useful for the Ombudsman's investigation."[41] In a later email, however, an Ombudsman staff member added, "for clarity" a qualification to that request: "particularly in relation to automization [sic] of decisions."[42]

DHS responded by pointing to the three advices it had sent on 24 January.[43]

At the time of its responses, both to the January request and the February request, DHS was holding two further internal advices, given on 11 January after Barry Jackson (acting secretary, DHS) questioned the legal position in relation to averaging.[44]

The first, the draft advice of Mark Gladman (acting general counsel, DHS) expressed a tepid view that there were "some reasonable arguments" to support the use of income averaging, while counselling that it might be "prudent" to seek external legal advice. Instructions to the Australian Government Solicitor (AGS) were drafted for that purpose but were never sent.[45]

The second advice, from Glyn Fiveash (deputy general counsel, DHS), said bluntly that income had to be apportioned between fortnights "at the rate it was actually earned, derived or received;" averaging an amount received over a larger period such as 12 months was impermissible.[46]

Ms Macleod said that she considered that these documents – the advices and the instructions – fell within the scope of the s 8 legal advice request made by the Ombudsman to DHS and should have been provided.[47] The failure to provide the Fiveash advice in particular demonstrated to her "they weren't participating in good faith."[48]

That characterisation of the department's approach is fair but it is doubtful that the documents, strictly speaking, fell within the s 8 request. The question asked of DHS was in the past tense, "Did DHS seek legal advice?" which could reasonably be interpreted as asking about the period when the Scheme was first developed. A frank and forthcoming answer to the February request would have included the Fiveash and Gladman advices but it might be argued that the focus of that request was on "automization," which neither advice concerned.

The 19 February 2017 request

Perturbed that the advices provided by DHS did not disclose any legal basis for income averaging as it was used in the Scheme[49], Ms Macleod wrote to DSS on 19 February 2017 explaining that the Ombudsman wanted to understand what gave DHS authority to average employment income to determine entitlement to, and possible overpayment of, social security. She asked DSS to provide copies of any legal advice it had received on the topic, "either in the past or in the context of the OCI."[50] (The letter said that the Ombudsman had asked for "the same" from DHS, but, while that was undoubtably the intent of previous requests, those were not the terms used.)

The scope of the request was unquestionably broad enough to embrace advice DSS had obtained internally in 2014 (the 2014 DSS legal advice)[51] and the instructions on which it was given, explaining how the measure involving averaging would work. That advice cautioned that averaging might not be consistent with the legislative framework, because of the statutory requirement of assessing entitlement on the basis of income received in each fortnight.

Arguably within the request was the advice DSS had given DHS in early 2015, when DHS was preparing an Executive Minute for the then Minister for Social Services. The Executive Minute dealt with measures including the PAYG proposal, involving averaging of Australian Taxation Office (ATO) data, which became the beginning of the Scheme.

DSS's advice included a series of dot points (the DSS dot points) forwarded on 20 January 2015 setting out the legal problems with the proposal, one point being:

> DSS Public Law Branch confirms that the suggested calculation method does not accord with social security legislation, which specifies that employment income is assessed fortnightly.

Relevant, too, was internal DSS advice given on 3 March 2015,[52] in which a DSS lawyer, asked to advise on all the proposals contained within a New Policy Proposal, including the pay-as-you-go (PAYG) proposal, noted that it appeared to be part of the proposal that ATO information would be given some special status as "primary evidence;" he was "not sure" that the social security law would permit that. It might, he said, be necessary to insert a new rule in the Social Security Act to provide that in the absence of other information, the ATO data could be taken as the person's employment income.

None of that material was provided.

Instead, on 23 February 2017, DSS provided legal advice authored by Anne Pulford (principal legal officer, Social Security and Families, DSS) dated 24 January 2017 (the 2017 DSS legal advice). This advice expressed the opinion that the use of income averaging as a "last resort" to determine a social security debt where no other information about the recipient's circumstances was available was lawful.[53]

However, DHS had earlier provided the Ombudsman with a copy of the Executive Minute in which the statement was made of the PAYG proposal, "DSS has also advised that legislative change would be needed to implement this initiative." Plainly, that could not be a reference to the 2017 DSS legal advice.

The 23 February 2017 request

On the same day the 2017 DSS legal advice was received, Ms Macleod asked DSS to provide a copy of the advice about the legislative change referred to in the Executive Minute and "any other notes, documents, or emails related to [that] advice."[54] Precisely the same request was made of DHS.[55]

DSS responded to Ms Macleod's request on 2 March 2017 with an email that attached the text of the 2014 DSS legal advice and the text of the 2017 DSS legal advice, combined into one document without the benefit of the briefing instructions.[56] It contained an "explanation"[57] (the DSS explanation) of the inconsistent conclusions between the two.

The DSS explanation was as dishonest a document as the Commission has seen. According to it, when DSS gave the 2014 DSS legal advice, it had not been understood that recipients would have the opportunity to correct information presented to them on the basis of ATO income averaging or that averaged income would only be used if attempts had been made to obtain information from the recipient and no other information was available.

By early 2015, having become aware of those circumstances (DHS having adjusted the process), DSS had come to the view that no legislation was required to implement the measure and the Scheme was lawful. The 2017 DSS legal advice was only obtained because there had been some movement of staff responsible for social security and debt within DSS.

The instructions on which the 2014 DSS legal advice was provided would have given the lie to that excuse. Those instructions made clear that, as DSS knew in late 2014 (and as remained the position through all iterations of the proposal) a recipient would be provided with the information about the debt based on averaging and given the opportunity to dispute it. But, of course, the 2014 DSS legal advice was provided devoid of that information.

The DSS dot points which were unquestionably within the terms of this request as the more specific advice to DHS in connection with the Executive Minute were not provided at all. The dot points made it clear that by early 2015, DSS had not become at all comfortable with the proposal. The sanguine approach to averaging the DSS explanation attributed to DSS from early 2015 was irreconcilable not only with the DSS dot points but also with the insistence of senior DSS officers to the Commission that in early 2017 they were startled to learn that DHS was using income averaging.[58]

DSS forwarded a copy of what it had sent to the Ombudsman – the combined 2014 and 2017 DSS legal advice texts, devoid of instructions, and the DSS explanation – to DHS,[59] thus ensuring that there would be no confusion about the line adopted with the Ombudsman. DHS then provided its response to the Ombudsman. It noted that "very early in the development process" DSS had raised the possibility of a need for legislative change.

Ultimately, however, DSS had not identified legislative changes in respect of the PAYG measure as presented in the New Policy Proposal which went to Cabinet (which contained no reference to averaging). Nothing else relating to the advice referred to in the Executive Minute was provided, particularly not the DSS dot points.

Ms Macleod explained in her evidence the Ombudsman's reaction to the DSS explanation. It was accepted at face value as indicating that DSS had concerns prior to the commencement of the Scheme and communicated them to DHS, which made changes which dispelled those concerns. Nonetheless, the Investigation Team had some doubts which were not overcome but which were not acted on.[60]

After being taken to the 2014 DSS legal advice, complete with the instructions on which it was based, Ms Macleod said that she felt misled. Having the documents in their entirety would have had an impact on the investigation; it was "another piece of evidence we could have put to the Acting Ombudsman, showing they were 'not doing the right thing'."[61]

2.4 Requests for other information

It was not only in respect of legal advice that the Ombudsman was deceived.

Numbers of recipients who had a debt based on averaging?

The 3 February 2017 list of questions that the Investigation Team had given to DHS included, as question three:

> How many recipients, subject to OCI, have had their final outcome based on averaging?

Jason Ryman (director, Customer Compliance Branch, DHS) prepared a response to that question, which included the information that as at 27 January 2017, 76 per cent of the Scheme's debts had been based on averaging, involving 100,281 debts and 99,404 people.[62] That is comparable with the figure Services Australia gave the Commission of 79.4 per cent of debts raised on the basis of averaging in the 2016–17 financial year.[63]

Between 16 February 2017, when Mr Ryman sent it for "Dep Sec clearance" and mid-March 2017, his answer to question three bounced between Malisa Golightly (deputy secretary, DHS), Annette Musolino (chief counsel, DHS) and DHS's Ombudsman, Relationship and Management section.

Originally, Ms Golightly raised concerns about whether Mr Ryman's response was sufficient information, because it did not make clear whether averaging was occurring over a 12-month or a shorter period and whether it occurred because the recipient accepted the ATO data or because the system "auto-completed."

Another response was prepared which retained the figures in the original but explained the process by which DHS had arrived at the figures, with a sentence added to clarify that the identification of averaging did not differentiate between system-generated averaging and averaging proposed or agreed to by a recipient.[64]

Again, the response went via the chief counsel to the deputy secretary, who now expressed a concern that, in fact, the figures might overstate averaging because they might represent income figures which actually were identical each week or which had been averaged by the system or the recipient. This, in fact, made very little sense because if the income figures were identical every week across the entire benefit period, so that averaging unusually managed to produce a correct result, it would still have been a product of the system or the recipient's entering the information. And, however the averaging was done, it did not alter the averaging figures which Mr Ryman had originally proposed.

The end result was that Ms Macleod was told that the information was not available.[65]

The final DHS response was to note the complexities which the request raised – the fact that there were any number of reasons averaging might occur, and that earnings were not always divided by 26 fortnights.[66] None of this, of course, provided an answer to the question asked; an answer which was available and which could readily have been given.

It does not appear that the Ombudsman pressed the matter. A file note recorded that the complexity of the issue was explained and the reaction of the Ombudsman's Office was to say that a response to that effect would suffice.[67]

The acceptance of DHS's claim that it could not provide the averaging figures seems to have been largely the product of the pressure of time.

DHS was able to stall from 3 February until the middle of March 2017, when the Ombudsman was ready to produce the final draft of its Investigation Report, and then bat the enquiry away with the excuse that it was all very complex.

Scale of the Scheme?

The 3 February 2017 list of questions also included, as question two, a request for this information: "Scale of OCI in the total departmental compliance and debt recovery activity."[68] It seems the OCI information was not available, possibly because that phase of the program had only been in full swing for four months, but Craig Storen (general manager, Customer Compliance Division, DHS) was able to assemble figures for the manually-conducted Employment Income Matching program (EIM), the predecessor to the OCI program, for the 2015–16 year. Mr Storen reported that there had been 101,563 EIM reviews, with 99,035 debts raised. Debts resulting from the EIM measure were 47 per cent of all debts raised as a result of "social welfare compliance activity" but four per cent of all debts raised for "customer receiving social welfare payments" (which might include, for example, recovery of payments such as family tax benefit paid in advance). Ms Golightly expressed confidence that the Ombudsman only wanted the last figure[69] and that was the only information conveyed to the Ombudsman in answer to question 2, despite its specific reference to compliance activity.[70]

Data modelling?

Earlier, the Ombudsman had requested any modelling done on how many debts DHS had expected would be under-calculated or over-calculated as a result of averaging.[71] In fact, analysis had been done based on customer records for the years from 2010–11 to 2012–13 which showed that debts increased by 13.06 per cent when income averaging was applied.[72] Mr Ryman advised Ms Golightly accordingly. Ms Golightly informed him that she did not regard the analysis as "data modelling" and advised the Ombudsman that none had been undertaken.[73]

2.5 How information could have been sought

The power to obtain information and documents

The Ombudsman Act contains no sanction for non-compliance with a request made under s 8(3). Section 36 of the Act makes it an offence to refuse or fail without reasonable excuse to furnish information[74] or to answer a question or produce a document[75] when required pursuant to the Act, but in this case the Ombudsman's Office was making requests for information, rather than requiring its provision. That is not surprising given Mr Glenn's perspective, which was to assume that public servants would comply with the APS Code of Conduct.[76]

Mr Glenn also expressed the view that the Ombudsman's Office could not function effectively if it were required to question whether information provided by departments in response to complaints or investigations was true and correct. One can accept that the Ombudsman has a high level of interaction with Commonwealth departments and agencies, particularly agencies like Services Australia, and works with them on a cooperative basis. The arrangement would be unworkable if every piece of information communicated had to be checked. But where palpably incomplete and inconsistent information is provided on important matters, it may be necessary to use the powers available under s 9.

The responses to requests made for information in the 2017 own motion investigation warranted the use of the s 9 powers in the Ombudsman Act, particularly the associated power to examine on oath, to compel answers as to why the obvious inconsistencies and deficiencies in production of information were occurring and to require production of the documents which were so obviously missing.

The Commission does not propose to make any formal recommendation as to how the Ombudsman's Office should use s 9 in general, given the evidence of Iain Anderson, the current Commonwealth Ombudsman. Mr Anderson recognised the desirability of providing "guidance on the manner in which we scope out an investigation at the outset"[77] to ensure clarity on the purpose for and potential key issues in an investigation and to assist in making tactical decisions in the course of an investigation. That would include dealing with the manner in which information was sought. The formal issuing of a notice under s 9 of the Ombudsman Act "would not be taken lightly, given it will involve delay to an investigation," but it was important, he said, that the Office's investigation team know that it was an option and that they, and the Ombudsman, were able to draw the power to the attention of an agency, or their minister, as an option that they were willing to pursue if necessary.[78]

In light of the evidence of the readiness to conceal and mislead exhibited by certain departmental staff in relation to the Scheme, the Commission considers that there ought to be a clearly stated statutory duty reposed in departmental secretaries and agency chief executive officers to ensure that their departments or agencies use their best endeavours to assist in Ombudsman investigations and a corresponding duty on the part of Commonwealth public servants to use their best endeavours to assist in Ombudsman investigations. The obligation, which might be imposed in the form of an amendment to the Ombudsman Act or, alternatively, to the *Public Service Act 1999* (Cth) (PS Act), would not be dissimilar to that imposed on decision-makers and parties appearing in the Administrative Appeals Tribunal (AAT), to assist the AAT.[79]

Recommendation 21.1: Statutory duty to assist

A statutory duty be imposed on departmental secretaries and agency chief executive officers to ensure that their department or agency use its best endeavours to assist the Ombudsman in any investigation concerning it, with a corresponding statutory duty on the part of Commonwealth public servants within a department or agency being investigated to use their best endeavours to assist the Ombudsman in the investigation.

Another power to obtain information

Section 14 of the Ombudsman Act enables an "authorised person" of the Ombudsman's Office to enter premises occupied by a department to carry on an investigation in that place. The provision is expressed in similar terms to s 32 of the *Auditor-General Act 1997* (Cth) (Auditor-General Act), but there is no equivalent in the Ombudsman Act to s 33(3) of the Auditor-General Act, which compels the occupier to provide the authorised person with all reasonable facilities for the effective exercise of powers.

Mr Anderson noted that in practice the Auditor-General used the s 33(3) power to directly access the IT systems of agencies. He did not think that s 14 of the Ombudsman Act would permit him to do likewise (which is undoubtedly correct) but he had considered how he might obtain specialist services to "actually trawl through agency IT systems to be able to locate documents or to … double-check whether the agencies" had provided the documents.[80] He would not, of course, require such powers for investigations where the level of complexity did not justify it, or the agency participated in good faith.[81]

A power equivalent to that in s 33(3) of the Auditor-General Act would not, of course, be necessary if one could assume good faith participation in Ombudsman investigations. The departmental responses to the 2017 own motion investigation make it abundantly clear that good faith cooperation cannot be assumed, although it might reasonably be expected, and that greater power is needed in what one would hope would be the exceptional case where a department or agency sets out to thwart the investigation through non-compliance or deliberate misleading. In the Commission's view, the Ombudsman should be given the additional power.

Recommendation 21.2: Another power to obtain information

The Ombudsman Act be amended to confer on the Ombudsman a power in equivalent terms to that in s 33(3) of the Auditor-General Act.

2.6 Ensuring disinterested responses

Mr Glenn, Acting Commonwealth Ombudsman, assumed that Commonwealth public servants would adhere to their Code of Conduct and provide proper cooperation to his investigation.[82] It would, in ordinary circumstances, be reasonable to assume that officers serving one part of the Commonwealth government would assist those in another part of the Commonwealth government, but, as has already been observed, the evidence was plainly to the contrary when it came to the own motion investigation into the Scheme.

Part of the problem in the 2017 own motion investigation, unknown to the Ombudsman, was that the very people in DHS who had devised, or who, in DSS, had waved through, the Scheme in 2015, were involved in responding to the investigation. Departmental responses to own motion investigations by the Ombudsman (as the more significant investigations undertaken by the Ombudsman's Office) should be overseen by the relevant department's legal services division rather than those responsible for implementing the program or policy whose administration has come under question. That assumes, of course, the independence of departmental lawyers which itself is the subject of recommendations in the Lawyers and Legal Services chapter.

Recommendation 21.3: Oversight of the legal services division

Departmental and agency responses to own motion investigations by the Ombudsman should be overseen by the legal services division of the relevant department or agency.

2.7 Permitting involvement in the report drafting process

Section 8(5) of the Ombudsman Act prevents the Ombudsman from finalising a report that includes opinions that are expressly or impliedly critical of a department, unless the department has been given the opportunity to make submissions.

In *Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman*,[83] the Federal Court said that subs 8(5) requires that "prior to the completion of an investigation any opinions carrying potentially adverse implications about an individual, department or prescribed authority" be put to the relevant party, who must then be "afforded an opportunity to be heard before those adverse opinions are finally embodied in a report."[84] The Ombudsman need not, the court considered, put to the individual or department concerned the "exact critical opinion in the form it will appear in the final report," but must put the "substance" of the proposed opinion.[85]

In 2017, the usual practice of the Ombudsman's Office, in accordance with its *Work Practices Manual for Complaint Management* was to provide a draft report to the agency subject to investigation so that the recipient could understand what was investigated and the basis for any possible criticism, and provide comments on the draft.[86] That was to go beyond the requirements of s 8(5) but it might in some instances have been the most efficient way of proceeding. Mr Anderson, the current Ombudsman,[87] suggested that the provision of draft reports to departments under investigation could be an effective tool for achieving better engagement by those departments with Ombudsman investigations.

However, the process that the Ombudsman adopted in the 2017 investigation went further still. It involved taking the unusual step at the outset of the investigation of providing a draft "outline" of the report to DHS, with an invitation to comment on it, before the report itself had yet been drafted by the Ombudsman.[88] The draft outline detailed, at a high level of generality, topics that were proposed to be included in the report of the investigation, as well as an indication of the approach that was proposed to be taken in dealing with those topics. It evidently reflected preliminary thinking by members of the Ombudsman's Office.

This was a time of heightened media[89] and political interest[90] in the Scheme which DHS employees had sought to counter with a set of "master talking points."[91] The success of that strategy would be greatly enhanced if an independent office holder, such as the Ombudsman, were to reach conclusions in terms consistent with those talking points.[92] Mr Glenn recalled in his oral evidence that senior DHS officers with whom he met on 19 January 2017 emphasised that DHS was investing considerable resources in correcting the public record at every opportunity.[93]

The Ombudsman provided the draft outline to DHS by email on 30 January 2017,[94] giving the department the opportunity to make changes in track. Members of DHS saw this as an opportunity to influence the content of the report in a way that would further the department's interests, particularly by ensuring that it would be consistent with its public narrative about the Scheme.[95] Michael Robinson (national manager, Ombudsman and Information Release Branch, DHS) made this extraordinary observation in an email to other DHS employees about the draft outline shortly after it was provided:[96]

> Having read the report outline I think the department has been given a great opportunity to effectively co-write the report with the Ombudsman's Office.

The subsequent conduct of DHS employees is consistent with their seizing that opportunity.

On 3 February 2017, Jonathan Hutson (deputy secretary, DHS) provided a marked-up copy of the draft outline to Mr Glenn.[97] The marked-up copy included DHS comments in green text under the corresponding dot points.[98] In his email to Mr Glenn attaching the marked-up outline,[99] Mr Hutson said, "As you will see from our comments on the attached we have quite a long way to go."[100]

The language that Mr Hutson chose to use in his email, "...we have quite a long way to go," is not consistent with a process whose statutory object is that it be conducted in a manner independent of the department under investigation. It suggests Mr Hutson (and Kathryn Campbell, DHS Secretary, under whose instructions he was acting) took the view that the process was one of negotiation between DHS and the Ombudsman's Office as to what should be included in the 2017 Investigation Report. There is no evidence of anyone from the Ombudsman's Office dispelling that view which, indeed, was invited by the provision to DHS of the opportunity to comment on the draft outline.

Subsequent drafts of the 2017 Investigation Report were provided to DHS in Word format so that DHS could make proposed amendments in track changes. On 10 March 2017, the Ombudsman's Office provided a copy of the draft report to DHS[101] and DSS[102] for comment. A week later, on 17 March, Mr Glenn and members of his staff met Mr Hutson and other DHS officers to discuss the report. The email from Mr Hutson to Ms Campbell giving her the details of the meeting noted that they had agreed on "key changes to recommendations and findings." The Ombudsman's Office was to develop a new draft report based on their discussions, additional material and further discussions. The new draft report would be the basis for a formal reply from Ms Campbell, so there was no need for her to reply to the draft received on 10 March 2017.[103]

On 20 March 2017 Mr Robinson sent an email to Ms Macleod with the subject "Draft Report Markups."[104] Attached to the email was a document titled "Tracked Changes to draft own motion report 20 March 2017 (003).docx," which contained various insertions and revisions on the findings and recommendations in the report.[105]

On 29 March 2017, the Ombudsman's Office provided a copy of an updated draft report to DSS. The cover letter noted that the updated version reflected "further amendments we have made to the draft, following our consideration of comments from DHS." The covering letter also noted there had been a change to Recommendation 1 in relation to the 10 per cent recovery fee and no change to Recommendation 4 which related to DSS. On 30 March 2017, the Ombudsman's Office sent Mr Robinson a copy of a "clean version of the report incorporating the suggested changes discussed this afternoon."[106]

Some of DHS's changes were accepted by the Ombudsman's Office. Others were not. It may be that members of the Ombudsman's Office only accepted those changes after satisfying themselves that they were warranted.

However, in accepting those changes, the Ombudsman's Office allowed wording chosen by DHS for its own purposes to be inserted into the 2017 Investigation Report.

The Commission understands that there may be advantages, given the requirements of s 8(5), of providing draft report material to an agency being investigated. Doing so allows the agency to correct factual or technical information, provide context, explain action it is taking to address a problem, or comment on the practicality of implementing a proposed recommendation.[107] (The same objective could often be achieved, one would expect, by a letter articulating the issues, setting out the proposed opinion or recommendation and requesting that any comments be provided in the form of a submission.)

But the process used in the 2017 investigation involved DHS from an early stage in the drafting of the 2017 Investigation Report in a manner that was not fully documented. In his evidence, Mr Glenn sought to justify that process by reference to considerations of accuracy and fairness.[108] Beyond checking the accuracy of technical details in the report, it is not apparent how concern for "accuracy" could justify what was done. The process adopted for the investigation went well beyond any conventional understanding of procedural fairness requirements.[109] It also went well beyond what Mr Anderson appeared to contemplate in his evidence about better engagement.[110]

Professor John McMillan AO, former Commonwealth Ombudsman, identified a number of factors which he considered were particularly important in evaluating the performance and effectiveness of an Ombudsman Office. They included:

> Whether the office is perceived (functionally and anecdotally) as having an arms-length operation from the agencies that it investigates.[111]

Unfortunately, the circumstances here give rise to a reasonable perception that the Ombudsman's Office conducted the 2017 own motion investigation in a way which allowed DHS to influence the content of the resulting Investigation Report in order to further DHS's own interests, thus compromising the independence of the investigation.

The Ombudsman's Office is currently updating its guidance material in relation to own motion investigations. In his statement to the Commission, Mr Anderson said the guidance on procedural fairness should be updated:

> to make clear that the process is limited to enabling agencies to make submissions on the matters being investigated, that ultimately the report is a statement of the opinion of the Ombudsman, and also note that agencies will get an opportunity to respond formally when a s 15 report has been finalised.[112]

The guidance material should also counsel against the provision of draft reports to agencies in Word format, to avoid the both appearance and reality of inviting agencies to co-write reports. Consideration should be given to whether the obligation in s 8(5) can be met by articulating the issues in a letter and inviting the agency to make submissions. If the contents of the report must be provided to allow the agency to identify errors of fact or law, it should be provided in PDF.

The documentary evidence indicates that there was a number of discussions between DHS and the Ombudsman's Office which influenced the content of the 2017 Investigation Report.[113] Often, those discussions do not appear to have been recorded. Nor is there a record of the reasons why changes were made to the report outline or the report itself as a result of those discussions.

In its submission to the Commission, Monash University Law Faculty recommended that the Ombudsman's Office maintain a log of its communications with an agency undertaken in the course of its investigation into that agency. Such a record would help to ensure, and to evidence, the integrity of the Ombudsman's processes. The submission pointed to the value of a transparent record "accessible in the event of a controversy about the process of Ombudsman investigations."[114] There is considerable merit in that suggestion, at least in relation to own motion investigations, which are likely to be the more significant investigations undertaken by the Ombudsman. The Commission endorses it.

Recommendation 21.4: Log of communications

The Ombudsman maintain a log, recording communications with a department or agency for the purposes of an own motion investigation.

3 The failure to examine the Scheme's legality in the 2017 Investigation Report

The Ombudsman's ability to consider the legality of action taken by a Commonwealth official is clearly stated in the Ombudsman Act. Section 15 of the Ombudsman Act provides the Ombudsman's Office with powers to prepare a report that contains an adverse finding against an agency and that makes recommendations for corrective agency action. Among the grounds for an adverse finding are that the agency action "appears to have been contrary to law" (s 15(1)(a)(i)) or "was based either wholly or partly or in a mistake of law" (s 15(1)(a)(iv)). According to Professor McMillan, the Ombudsman's most important power is the ability to prepare a report that contains an adverse finding against an agency and that makes recommendations for corrective agency action.[115]

Despite undertaking to investigate the adherence of the Scheme to legislative requirements and despite holding concerns about the legality of the Scheme, the Ombudsman did not publish doubts about legality in the 2017 own motion report, and the Ombudsman's Office did not use tools available to it to substantiate those concerns.

3.1 The investigation of the legality question

On 6 January 2017 the Investigation Team had been given a DHS briefing about the Scheme, including a walk-through of the OCI platform, but it did not answer questions about the legality of averaging.

The team resolved to ask DHS what legislative provision it was relying on.[116] At the meeting on 3 February 2017, DHS officers advised that averaging was authorised by the "Guide to Social Security Law."[117] That claim was reiterated in DSS's comments on the Ombudsman's draft outline, in which it was asserted that the Guide provided for averaging in the absence of other information from the customer.[118]

On 20 February 2017, Ms Macleod briefed the Acting Ombudsman for a meeting he was to attend with Mr Hutson of DHS the following day.[119] In her email, Ms Macleod referred to the fact that she had made enquiries with the AAT about the possibility of a request for its opinion under s 10A of the Ombudsman Act. She attached an earlier version of the draft report (which has not been produced to the Commission) which contained a section about the legality of averaging.

On 23 February 2017, DSS provided to the Ombudsman the 2017 DSS legal advice, which was flawed in a number of respects. It was expressed to be confined to situations where averaging was used as a "last resort" which was not the case in the Scheme, and would have been irrelevant to the legality of the practice if it were. The advice referred to s 79 and s 80 of the Social Security Act.[120] Section 79 requires the secretary, if satisfied that the rate of a social security payment is higher than the rate provided for by the social security law, to make a determination specifying the correct rate. Section 80 was irrelevant. Neither provision entitles the secretary to assess income other than as provided for by the Social Security Act and no other provision of the social security law which did authorise income averaging as used in the Scheme was identified.

The deficiencies in the advice were not lost on at least one lawyer in the Ombudsman's Office:

> I could drive a truck through the holes in this advice.[121]

The draft report section on legality

In March 2017, the Ombudsman's Office prepared a draft report, in which the Investigation Team's doubts about the lawfulness of averaging were reflected in a section headed "Relevant Legislation and Policy" (the draft legality text).[122] The draft report made these points: DHS could argue that s 79 of the Social

Security Act contemplated a reduction in the rate of benefit payment if there had been an overpayment, which might be able to be shown on the balance of probabilities by pointing to averaged income. Against that, averaged income, as examples before the Ombudsman showed, was in some cases unreliable. It was, in any case, doubtful that the secretary could determine the correct rate of payment as s 79 required, because the Social Security Act provided for averaging only in very limited circumstances. The rate calculators in the Social Security Act required a person's income "earned, derived or received during the … pay period" to be taken into account, with certain statutory exceptions, for the calculation of entitlement for the corresponding benefit period on a fortnightly basis.

The Social Security Act did not specify what evidence was needed to establish the amount of income a recipient had received. DHS had advised that averaging was authorised under the *Guide to Social Security Law*, but the Guide was not a statute and in any event it was silent on averaging annual ATO income data. DHS's own Operational Blueprint envisaged averaging only if every other possible means of obtaining actual income information had been attempted, as had been the case in past reviews.

The DSS and DHS legal advices indicated that the Scheme had commenced and continued without adequate legal advice about the lawfulness of income averaging.

The draft legality text stopped short of pronouncing the use of averaging in the Scheme unlawful, but it included the following observations under the heading "Did DHS have due regard to questions of lawfulness?":[123]

> [2.50] While we understand DHS has used averaging for some time, to our knowledge its lawfulness has not been tested in the courts. With limited exceptions, an error of fact is generally not also an error of law. In our view, this question as it relates to the OCI is complex and can only be settled with certainty by the courts or can be clarified by an Act of Parliament.
>
> [2.51] Whether legal or not, best practice principles of good public administration required that decision makers ensure every finding of fact is based on evidence that is relevant and logically supports the finding. It requires that decision-makers must not base a decision on a finding that is manifestly unreasonable. They must not be based on guess work, preconceptions, suspicion or questionable assumptions.
>
> [2.52] Prior to the introduction of the OCI, the averaging process involved DHS basing a finding of fact about a person's fortnightly income on an estimate using best available evidence. The averaging process now involves DHS basing a finding of fact about a person's fortnightly income on an estimate using already available evidence.
>
> [2.53] The risks associated with this factfinding process are identified by DHS in its operational blueprint where it recognises that it can lead to incorrect results if a person's wages fluctuate, or if there were part periods of employment. We are concerned about how well these risks are managed under the OCI by providing people with the opportunity to challenge the proposed finding of fact, and what strategies are in place to assist disadvantaged and vulnerable customers. Our concerns about the fairness and adequacy of processes for customers to respond, and the support of people to obtain relevant information I discussed in Part 3 of this report.
>
> [2.54] Overall we are not satisfied that DHS gave adequate consideration to questions about the lawfulness of the averaging process. The risks identified in the pre-existing operational blueprint are not articulated in OCI documentation in any level of detail. In our view it would have been appropriate to include these risks in briefings, planning documents and risk assessments and to have sought external advice from the Australian Government Solicitor about the lawfulness of the approach.

Reasons to question legality

There was a number of reasons to doubt DHS's and DSS's claims about the legality of averaging.

1. DHS internal legal advices provided to the Ombudsman in the course of the 2017 investigation did not support the use of income averaging as it was applied in the Scheme[124] and it was evident that DHS had embarked on the Scheme without legal advice as to the legality of income averaging as used in it.

2. The 2014 DSS legal advice, given prior to the commencement of the Scheme, indicated that income averaging used in the way proposed was unlawful.[125]

3. It ought to have been apparent at the time the Ombudsman's Office received the DSS response of 1 March 2017, that DSS had withheld additional "notes, documents, or emails" that related to the 2014 and 2017 DSS legal advice advices (as requested in the s 8 notice dated 24 February 2017), because of the way that the two advices had been lifted and pasted into a single document, without any of the briefing questions.

4. The DSS explanation made no sense. The instructions for the 2014 DSS legal advice would have made it very clear that DSS understood the basis of the proposal as it was and continued to be, but even the 2015 executive minute, which the Ombudsman had, should have raised questions on that issue. It revealed, in relation to the PAYG proposal, that the customer was to be presented with the ATO information and given an "opportunity to update" it; the same proposal of which, in the executive minute, it was said that DSS had advised legal change would be needed.

5. The 2017 DSS legal advice did not identify any authority for income averaging and, in any case, on its face only applied when averaging was being used as a last resort.[126] The Ombudsman was aware that income averaging was not being used as a last resort in the Scheme.[127]

6. Neither department had provided the Ombudsman's Office any external legal advice.[128]

7. Finally, and critically, Mr Glenn's own staff of the Ombudsman's Office were unconvinced by the 2017 DSS legal advice obtained after the Scheme had commenced.

In those circumstances it should have been obvious to Mr Glenn that there was substantial reason to doubt the lawfulness of income averaging as it was used in the Scheme and any assertion by either department that it was lawful.

That begs the question whether he should have taken steps to resolve the legality issue or, failing that, retained the wording in the draft report which concerned the legality of the Scheme.

The Ombudsman's reasons for not dealing with the legality question

Legality was, Mr Glenn said, just one part of the broader consideration of the Scheme as required by the Ombudsman Act.[129] He considered it important to finalise the 2017 Investigation Report quickly because the Scheme was having an immediate effect upon people and immediate recommendations were needed. He wanted to complete the report before his term as Acting Ombudsman ended so that the next Ombudsman could continue the work, and finalising the report would not prevent the Ombudsman's Office from further assessing the Scheme, as was occurring in any event, or preclude it making a referral to the AAT.[130]

In any event, Mr Glenn said he thought it preferable that questions of law be ventilated in matters proceeding through the AAT.[131] He provided a list of "pending AAT cases" of which, according to his statement, the Ombudsman's Office was aware.[132] Missing from that list, unfortunately, is a key AAT decision in respect of the Scheme, made by Professor Carney on 8 March 2017. Professor Carney reached a reasoned conclusion that calculating social security debts based on income averaging was unlawful because income averaging provided an insufficient evidentiary basis for the calculation.[133] There was no appeal of that decision.[134] It would have supported a finding in the 2017 Investigation Report that the continued use of income averaging was unlawful, but the Investigation Report contains no mention of the decision or of the fact that it was not appealed.

Mr Glenn sought to justify the failure to deal with the lawfulness of income averaging in the 2017 Investigation Report on the basis that he had not been able to come to a "crisp … view" on the issue.[135] While his Office had doubts, it did not have a definitive view and ultimately "took a path that focused on implementation for the report with a view that other questions could be dealt with subsequently."[136]

However, there were powers available to him as Ombudsman which might have been used to determine the issue, such as seeking independent legal advice or recommending that DHS do so, making a referral to the AAT himself or recommending to the principal officer of DHS that a referral be made.

Professor McMillan observed that his experience was that agencies would cite internal or external legal advice as their reason for defending a disputed decision. As Ombudsman he was prepared, if he held a strong doubt on an issue, to question the agency's advice, to obtain his own independent legal advice and share it with the agency, or to foreshadow that he might refer the matter to the AAT for an advisory opinion. Using those options might be necessary if there were disagreement with the agency about the correct construction of a statutory provision, or the Ombudsman doubted that the agency had properly considered the legal basis for actions with detrimental consequences for individuals.[137]

3.2 Failure to obtain external legal advice

The Ombudsman's general powers of investigation are sufficiently wide to empower the Ombudsman to seek independent legal opinions on contentious questions of law relevant to investigations. According to Ms Macleod, the Ombudsman's Office did, on occasion, seek advice from AGS.[138] However, despite its doubts about the advice provided by DSS, the Ombudsman's Office did not take steps available to it to obtain its own legal advice.

Mr Glenn regarded the *Legal Services Directions 2005* (Cth) (the Directions) as an obstacle to obtaining an independent legal opinion.[139] The Ombudsman's Office is subject to the Directions,[140] paragraph 10.1 of which would have required the Office to consult with DSS, as the agency administering the social security legislation, before obtaining external legal advice.[141] But is not clear why that presented any insuperable difficulty.

Mr Anderson, the current Ombudsman, did not see the requirements of the Directions as a problem,[142] although his preferred option was to inform the department that it should seek external legal advice. If it declined to do so, his Office had the alternatives available to it of seeking the advice itself or issuing a s 15 report formally recommending that the agency seek the advice within a specified timeframe on a specified question, and share it with his Office.[143]The advantage of the latter course, in his eyes, was that it served to improve public administration because the agency itself agreed to take the action.[144]

In circumstances where there was a live question about the legality of averaging in the Scheme not satisfactorily answered by anything produced by DHS or DSS, the Ombudsman should have seriously considered the possibility of obtaining advice from the AGS or at least should have made the formal recommendation that DHS obtain advice from an external provider. The latter course would not have imposed any additional strain on the resources of the Ombudsman, nor would it have lengthened the investigation. It would have aligned with the last point at [2.54] in the draft legality text, that it would have been appropriate for DHS to have sought external advice from the AGS about the lawfulness of the averaging process.

Not to adopt either option was to fail to confront a fundamental issue in the investigation.

3.3 Failure to refer

As well as seeking an independent legal opinion, the Ombudsman has the power under s 10A of the Ombudsman Act to refer questions of law arising in an investigation for the opinion of the AAT and a related power, under s 11, to recommend that the principal officer of a department do so.[145] That recommendation may be contained in the Ombudsman's report or can be made at any time before the investigation is completed and must be acted on by the principal officer within 30 days, or a longer date if the Ombudsman agrees. The provisions conferring those powers ensure that the Ombudsman's power to report on instances of departmental action that are contrary to law or based on mistakes of law is not

defeated by unresolved legal controversy associated with the action under investigation. The referral power in s 10A has never been used. The cognate power in s 11, of requiring an agency to refer a question to the AAT has been used twice, with only one of those referrals resulting in a decision.[146]

In February 2017, staff within the Ombudsman's Office formed a view that the referral power in s 10A should be used.[147] Ms Macleod sought advice from the AAT on what it would need from the Ombudsman's Office before an advisory opinion under s 10A could be obtained and was informed by the AAT that its president would require a "fully argued hearing supported by written submissions from both sides."[148] However, she said, Mr Glenn did not consider the s 10A referral feasible within the existing resources dedicated to the investigation and was concerned that it would considerably extend the length of the investigation.[149]

Mr Glenn considered the exercise of the referral powers, but chose not to exercise them for a number of reasons. As Ms Macleod confirmed, one was that using the referral power would extend the length and cost of the investigation.[150] In his statement of 22 February 2023, Mr Glenn asserted that the need to finalise the 2017 Investigation Report rapidly weighed against referral to the AAT. He was also constrained by the limited resources of his Office, because counsel would have to be engaged for "a fully contested AAT hearing." Another reason offered for not seeking a referral was his assumption that the lawfulness of income averaging would be dealt with by decisions of the AAT.[151]

It is not clear why the 2017 Investigation Report needed to be completed so quickly, and why it could not have been completed by a newly appointed Ombudsman. Mr Anderson said that it seemed to him that "that the 2017 investigation and report were completed in a very short timeframe for a report on such a major issue." [152] In any case, Mr Glenn conceded in oral evidence that the report could have been completed even if proceedings in the AAT on a referral were not finished.[153]

As to the resources required, as Mr Anderson pointed out, a contested hearing on a narrow question of law could be conducted in a very focussed manner.[154]

In any case, resource considerations have to be balanced against the statutory purpose of own motion investigations.[155] Given the scale of debt raising under the Scheme, and of the impact on social security recipients if those debts were being raised unlawfully, limitations on the resources of the Office did not justify Mr Glenn refusing to make the referral to the AAT which his own staff recommended.

The fact that the s 10A process had not been used previously was not an argument against it. If the previously identified circumstances in relation to the paucity of any convincing legal advice to support the Scheme, and the proportions and effects of the Scheme itself were not sufficient reason, it is difficult to conceive of a use for the power. There could be no confidence that the AAT, whose focus is on merits review, would produce a decision which articulated why income averaging, as used in the Scheme, did not comply with the social security law, (although unknown to Mr Glenn, Professor Carney, had in fact done so) or that if it did so, it would be publicly accessible.

Given the doubts about the Scheme's legality and the implications if they were realised, there was no reason not to make a recommendation under s 11 that the secretary of DSS refer the question to the AAT, which, pursuant to s 11(3), they would have been obliged to do.

The referral powers in s 10A and s 11 are an important tool for the Ombudsman, the use of which ought not to have been dismissed in the own motion investigation, and should not be overlooked in future investigations. Mr Anderson has expressed an intention that the Office's revised guidance material make the formal and informal options and powers clear to staff, as well as the fact that the Ombudsman is willing to use them.[156] The Commission endorses this approach.

Recommendation 21.5: Powers of referral

The AAT is soon to be replaced by a new administrative review body. S 10A and s 11 of the Ombudsman Act should be amended so as to ensure the Ombudsman has the powers of referral and recommendation of referral in respect of that new administrative review body.

3.4 The failure to include draft text concerning legality in the 2017 Investigation Report

Mr Glenn did not take any of the possible steps to have the question of legality resolved. But that should not have prevented him from including the draft legality text in the 2017 Investigation Report. It did not pronounce on the lawfulness of income averaging but raised some valid questions about it and made the entirely reasonable point that DHS should have sought advice from the AGS about its lawfulness before embarking on the Scheme.

Mr Glenn elected not to include the draft legality text.[157] Ms Macleod said that she and the others in the Investigation Team had genuine doubts about the lawfulness of the Scheme but Mr Glenn was reluctant to publish a report relying on their views and dismissing DHS's and DSS's advice and position.[158]

Mr Glenn's recall was somewhat different. He did not think that it was possible on the available information to confidently express a final conclusion in relation to the Scheme's legality. He had questioned the robustness of the Investigations Team analysis as well as their confidence in what they were saying. They then updated the report draft removing the section and did not question his views.[159] But the decision as to what opinions, reasons and recommendations were included in the Investigation Report was, by virtue of s 15, entirely Mr Glenn's as Ombudsman.

In his statements, Mr Glenn offered a number of reasons for not dealing with the issue.[160] Public servants were obliged to ensure the legality of their actions, and DHS and DSS had taken a strong position on the basis of their legal advice, on which they were entitled to rely. He placed considerable weight on the fact that Mr Pratt, the DSS Secretary had signed a letter asserting that his department was satisfied the Scheme was "operating in line with legislative requirements." (Unfortunately, Mr Pratt had not made any enquiry to satisfy himself of the truth of that statement, [161] but there is some irony in the fact that after the release of the 2017 Investigation Report, both DHS and DSS cited the report in support of the proposition.)

The 2017 Investigation Report abstained from making any comment about whether the use of averaging in the Scheme was legal or even about whether there were questions to be asked on the matter. It also did not make it clear that it was refraining from doing so. Instead, it included the confusing statement that the "business rules in the OCI that support the debt calculation are comprehensive and accurately capture the legislative and policy requirements."[162]

Ms Macleod explained that the "business rules" were the "Detailed Requirements Document" for the Scheme which contained business rules and requirements for the design and build of the system.[163] The only sense in which it appears to have been understood that the legislative requirements were met was that the rate calculators had not changed.[164] That was not explained in the Investigation Report and the term "business rules" was not defined, so it was most unlikely that anybody not intimate with the specifications for the system would have understood what was being conveyed. Instead, that statement was misread and misused by DHS as representing an endorsement of the legality of the Scheme.

Mr Glenn accepted that the final 2017 Investigation Report did not clearly state that it was not purporting to express a concluded view on the legality of the Scheme. With the benefit of hindsight, he said, he could see how making that clear would have made it more difficult for the final Report to be misrepresented as supporting the legality of the Scheme.[165] However, the risk of misrepresentation was not something he considered at the time, and he was focused on completing a report within his tenure "that outlined substantive matters of improvement for the Scheme."[166]

3.5 The failure of the 2017 Investigation Report to deal adequately with debt accuracy

Accuracy, like lawfulness, was one of the "key concerns" that had been identified in Ms Macleod's minute proposing the own motion investigation.[167] It was plainly a matter that needed to be addressed in the 2017 Investigation Report, regardless of any conclusions on the question of lawfulness.[168]

The Executive Summary on page one[169] of the 2017 Investigation Report said:

> Administrative decisions are made based on the best available information at the time of the decision. If further information becomes available, a new decision can be made.
>
> We examined the accuracy of debts raised under the OCI. We are satisfied the data matching process itself is unchanged. There are a number of instances where no debts were raised following contact with a customer (approximately 20%) was consistent with DHS's previous manual debt investigation process. This figure has been incorrectly referred to as an "error" rate.
>
> We are satisfied that if the customer can collect their employment income information and enter it properly into the system, or provide it to DHS to enter, the OCI can accurately calculate the debt. After examination of the business rules underpinning the system, we are satisfied the debts raised by the OCI are accurate, based on the information which is available to DHS at the time the decision is made.
>
> However, if the information available to DHS is incomplete the debt amount may be affected.

Those words emphasised the circumstances in which debts raised under the Scheme could be accurate. However, as the Ombudsman knew,[170] the Scheme was likely to raise inaccurate debts if the qualifications contained in the statement, particularly that "the customer can collect their employment income information and enter it properly into the system, or provide it to DHS to enter," were not met.

Those qualifications were highly significant. It is implicit in the "key issues" identified in Part 3 of the 2017 Investigation Report[171] that those qualifications were systemically not being met under the Scheme. It followed that inaccurate debts were systemically being raised on a massive scale against social security recipients.

However, the 2017 Investigation Report contained no express acknowledgement of this fact. Instead, the report used neutral language to highlight the potential for inaccurate debts to be raised and suggested that the issue be the subject of "more thorough research and analysis."[172]

This was in contrast to words which appeared in a draft of the report that at least went some way to explicitly acknowledging the inaccuracy of debts that could be produced by the Scheme. That language was removed in track changes proposed by DHS and accepted by the Ombudsman's Office.[173]

Tracked changes added at the instance of DHS included these words: "Administrative decisions are made on the best available information at the time of the decision."[174] Those words were a DHS talking point that was frequently used by persons defending the Scheme against criticism that it raised inaccurate debts.[175] They were, and are, meaningless absent a requirement that the best available information also be probative; in other words, if the best available information still does not prove what the Social Security Act requires to be proved, it is no basis for a decision at all.

The words were also, to the knowledge of the Ombudsman's Office,[176] inapplicable to the use of income averaging in the Scheme because, by the Scheme's explicit design, income averaging was used to calculate and raise debts against social security recipients when no inquiries had been made to ascertain whether there was better information available through the use of evidence-gathering powers.[177]

The adoption of those words in the 2017 Investigation Report conferred validation by an independent statutory office holder of DHS talking points that had no objective basis and which were contrary to the facts known to the Ombudsman's Office. That was precisely what DHS intended.[178]

Those who sought to defend the Scheme took advantage of the way in which the accuracy issue was dealt with in the 2017 Investigation Report.[179]

3.6 The effect of the 2017 Investigation Report

Ultimately, the 2017 Investigation Report contained no section examining the legality of averaging and it did not include any expression of the Ombudsman's doubts about the legality of averaging or the potential for it to produce inaccurate debts.[180]

Mr Glenn argued the positive aspects of the Investigation Report, saying that it provided a foundation for further investigations. It was "critical of the Scheme and highlighted a range of issues related to the Scheme that needed to be addressed."[181] He pointed out that the Investigation Report covered:

- DHS's use of PAYG data from the ATO
- the method by which the 10 per cent penalty was applied
- the requirement for public administration processes to be transparent
- a recommendation for improvement of the *Guide to Social Security Law* to include guidelines in relation to obtaining employment income evidence
- the use of fortnightly income tests under the Social Security Act, and
- the use of automated decision making and the concern as to fettering the exercise of discretion through its use.

The Commission understands that in the 2017 own motion investigation, the Ombudsman's Office was operating under great pressure to rapidly produce results which would improve the situation income support recipients were facing with the Scheme. There is no doubt that the 2017 Investigation Report identified a number of practical measures, many of which DHS were putting in place, to improve recipients' encounters with the system.

But the fact is that the 2017 own motion investigation did more harm than good. It gave those wanting the Scheme to continue unexamined a shield against criticism from advocacy groups, the media and political opponents.

The Ombudsman's 2017 Investigation Report was regularly quoted from the time the Minister for Human Services, the Hon Alan Tudge, first issued a media release in relation to it on 10 April 2017.[182] That media release, titled (not surprisingly in the circumstances) "Government welcomes Ombudsman's report on Online Compliance system,"[183] asserted that the Ombudsman had found that "the system calculate[d] debts accurately."

In June 2017 Mr Tudge wrote to the Chief Executive Officer of the Australian Council of Social Service and cited the 2017 Investigation Report as calculating debts "accurately based on the information when the decision is made."[184]

When the Shadow Minister for Human Services issued a press release[185] ahead of an anticipated report from a Senate Committee critical of the Scheme, Mr Tudge countered with a media release which asserted that the Commonwealth Ombudsman had found:[186]

> The online system meets all legislative requirements, accurately calculates debts when the required information is entered and the method of data matching has not changed from the approach used by successive governments.

DHS seized on those words, even though the first part of the statement – that the online system met legislative requirements – misrepresented what the Ombudsman had found, and the second part – that it accurately calculated debts when the required information was entered – was misleading, because it referred to a minority of cases.

The third contention in the media release, that the method of data matching had not changed, was correct only in a very general sense (aspects of it had changed). In any case, DHS adjusted that element to make the much broader claim that the Ombudsman had found that debts were raised consistently with previous investigation processes.

The claim of consistency with previous processes was certainly untrue, and it was untrue to say that it was what the Ombudsman had found. The 2017 Investigation Report set out the details of the previous manual process involving DHS compliance officers investigating debts by issuing notices under the Social Security Act to recipients seeking information and obtaining payroll records from employers, all undertaken by an allocated DHS compliance officer dealing with the customer.[187] As the Ombudsman's description of the Scheme made clear, that was entirely different from the processes adopted.

The response regularly made to troublesome enquiries from journalists was:[188]

> The independent review by the Commonwealth Ombudsman found the Online Compliance system meets all legislative requirements, accurately calculates debts when the required information is entered, and debts raised are consistent with the previous investigation processes.

"Holding lines" for DHS's use in responding to the media for the December 2017 – January 2018 period advocated the use of those words.

The 2017 Investigation Report, rather than exposing the questions surrounding a program whose lawfulness was doubtful and which was known to recover debts which were not necessarily accurate from a vulnerable population, instead, through abstention from comment and a lack of clarity, gave the Scheme a veneer of legitimacy which enabled it to continue.

3.7 Failure to correct the public record

Section 35A of the Ombudsman Act makes it clear that the Ombudsman can disclose information or make a statement to the public in relation to his or her functions investigation if it is in the public interest to do so. As Professor McMillan says, it is an important power.[189] Surprisingly, the Ombudsman did not at any time elect to make a statement pointing out that the 2017 Investigation Report was being misquoted in significant respects.

In May 2018 Jaala Hinchcliffe (Deputy Ombudsman) raised with Ms Musolino a quote by Hank Jongen (DHS media spokesperson), which used the first two elements of the department's line:

> The Commonwealth Ombudsman found the Online Compliance system met all legislative requirements and accurately calculated debts when the required information was entered.

The Deputy Ombudsman remonstrated, mildly, that while the second part of the sentence reflected what was in the 2017 Investigation Report, she did not think that the first part "reflects our findings."[190] It does not seem that the criticism penetrated very deeply, because as at 23 November 2018 DHS was responding to an enquiry from *The Age*:[191]

> … the Commonwealth Ombudsman's investigation … found the Online Compliance system meets all legislative requirements, accurately calculates debts when the required information is entered, and debts raised are consistent with the previous investigation processes.

The legality question continues

Michael Manthorpe assumed the position of Ombudsman in May 2017, on Mr Glenn's departure. During the balance of 2017, he focussed on improving the Scheme's administration, but in early 2018 began to form the view that there was a risk that the use of averaging rendered the Scheme unlawful.[192]

In May 2018, possibly stung by an article in *The Guardian* in which Professor Carney was quoted as saying that the Ombudsman's Office had failed in its 2017 Investigation Report to make proper enquiries as to the legality of debts raised under the Scheme,[193] and certainly concerned about a lengthy article Professor Carney had written in which he went into detail about why the Scheme did not comply with the law,[194] the Ombudsman's Office arranged a meeting with DHS officers to speak about legal issues relating to debt recovery action.

It seems that at the meeting, which both Mr Manthorpe, who was not a lawyer, and Ms Hinchcliffe, who was, attended, there was some discussion about the prospect of averaging leading to inaccurate debt raising. DHS employees, including the chief counsel, advanced arguments about the legal aspects and represented a high degree of confidence in the legality of the program.[195] The discussion was summarised in an email from Ms Musolino to Ms Hinchcliffe in which Ms Musolino said that Professor Carney had disregarded the abundance of procedural fairness afforded to DHS customers, misunderstood the burden of proof and wrongly asserted that DHS had specific legal obligations and evidential burdens in debt raising. Averaged income was, Ms Musolino contended, in some instances the only information and hence the best evidence available to determine a recipient's earnings. (That seems to have been the sum of the legal justification of averaging.)

Ms Hinchcliffe in reply expressed some concern about the situation where a debt higher than was actually owed (having regard to the actual fortnightly income earned) was raised, because it had been acknowledged at their meeting that could occur. She enquired whether this would mean that part of the debt was raised *ultra vires* (beyond the power of the department); whether DHS had considered this and obtained external legal advice; and whether DHS considered it might have some limited duty to make further enquiries when raising debts. The Ombudsman would, she said, be grateful for "further assurance as to [the Scheme's] legal underpinnings and practical application."[196]

Ms Musolino replied that the social security law did not provide for how debts were to be raised, so the decision to raise a debt was clearly an administrative decision within the department's legal authority. Where the recipient had not taken the opportunity to explain a discrepancy between declared income and ATO income information, the ATO information could be used to conclude that a debt was owed and, as the best information available, used to make a finding of fact as to what the debt was. The debt amount could be reduced or increased if additional information came to hand; which was where procedural fairness came in, because recipients had the opportunity to contradict the department's findings or seek merits review.[197]

3.8 The Ombudsman's options in dealing with the legality issue

The Ombudsman was unconvinced. Not only was there Professor Carney's view as to the Scheme's unlawfulness, but in July 2017 Peter Hanks KC had given his paper at the Australian Institute of Administrative Law Conference in which he too raised questions about the legality of the Scheme.

Mr Manthorpe considered the options available. One of the members of his staff, who had been involved in the 2017 own motion investigation, suggested obtaining advice from an external administrative law expert.[198] But Mr Manthorpe was concerned that a legal advice from an external expert would be repudiated in the way that the views of other legal experts had been repudiated.[199] He was not sure that getting external advice "would get [him] much further."[200] One would think, to the contrary, had Mr

Manthorpe obtained external legal advice, he would have been on much firmer ground in dealing with DHS and DSS.

Mr Manthorpe was not very clear about the AAT option, but he knew that it had been ruled out by his predecessor in the 2017 own motion investigation. Certainly, it might have been rather awkward, given the lapse of time since the Ombudsman had first become involved in investigating the Scheme, to now seek to have the matter referred to the AAT.

Mr Manthorpe said he had also considered the option of writing to the relevant ministers to raise his concerns about the legality of the Scheme along the lines of what was later contained in the draft 2019 Implementation Report. He did not do so because he did not think it would be effective: "The Government's senior ministers were plainly committed to Robodebt."[201] If he had raised his doubts, they would have taken advice from DHS and DSS which would have assured them that the Scheme was legally sound.[202]

But the fact that writing to the relevant ministers with concerns about legality might not have produced the desired result was not a reason for not doing it. It might have produced a response and the failure to take that step meant that the ministers were left unaware that a senior independent officeholder considered that there were live issues of legality associated with the Scheme.

Mr Manthorpe settled instead on the idea of using an own motion investigation report to air his concerns. The Ombudsman's Office had commenced an implementation investigation in respect of the 2017 Investigation Report in September 2017 and it was decided to move this into a new phase with the aim of publishing a report which would include comments on legality.[203] DHS and DSS were duly advised.[204] In a 20 August 2018 letter to DSS seeking information under s 8, a staff member expressed the view of the Office that the legality of the Scheme was not certain and that certainty would only be provided by legislation or a decision by the Federal Court or High Court.[205]

The Ombudsman was not to know that a week earlier DSS had received advice from Clayton Utz[206] that the Social Security Act did not permit determination of fortnightly income by averaging, requiring instead evidence of actual fortnightly income.

3.9 The removal of the "comment on legality" from the 2019 Implementation Report

The decision to prepare a "comment on legality"

Mr Manthorpe did not consider that he was in a position to reach a firm view as to the Scheme's legality,[207] but he did want to draw attention to the issues in that regard.[208] He communicated to Ms Macleod that in the section of the report dealing with legality, he wanted to acknowledge and summarise the concerns raised by various stakeholders about legality, summarise the legal position of DHS and DSS and conclude that his Office was unable to resolve the issue of legality. He would recommend the department clarify the legality of the Scheme by obtaining external legal advice, running a test case or obtaining legislative amendment.[209]

On 22 February 2019, a draft of the 2019 Implementation Report was prepared by the Ombudsman and provided to DHS.[210] The draft report included Part 4, a section titled "Comment on Legality" which made a number of observations regarding the legality of the Scheme, including:

- that "the question around the legality of the EIC system [was] still a matter of public debate," with "some observers [citing Professor Carney and Mr Hanks] arguing that the use of averaging was "legally flawed," although DHS had "strenuously refuted"[211] that view.
- that the Ombudsman had "concluded that the complex question of the system's legality could only be resolved with certainty by a court" and that "it would be unhelpful to speculate in a public report

about what the Federal or High Court might decide on the untested and complex questions of legality raised by the EIC."

- that there was a matter in the Federal Court (Masterton) where issues of legality might be considered.
- that "with the benefit of hindsight," a lesson from the implementation of the EIC was the importance of providing public assurance about the legality of decisions made under new digital systems."
- that "if the legality of programs of automation are [sic] not reasonably certain… agencies should ensure a mitigation strategy is in place," which would include seeking external legal advice which could be cited to reassure the public, or advising the minister to amend the relevant legislation.[212]

DHS seeks to remove the "comment on legality"

On 1 March 2019 Mr Manthorpe met Renee Leon (secretary, DHS) to discuss the draft Implementation Report. Ms Leon expressed her view that Part 4 should be removed from the draft report,[213] a view she reiterated by email on 8 March 2019. She asserted (correctly) that DHS had consistently maintained that the Scheme had a sound legal basis, and pointed out that the department would have to waive legal professional privilege if it were to make advices concerning the Scheme public (without giving any reason for not obtaining external legal advice at all). She said that it was premature to consider legislative amendment when the department's position was that the Scheme was not legally uncertain, and asked Mr Manthorpe to refrain from making comments regarding the legality of the Scheme on the basis that doing so might appear to pre-judge or in fact prejudice the litigation's outcome.

Ms Leon omitted to mention in connection with the department's alleged certainty as to legality that two days earlier AGS lawyers had given an advice in which they said they did not think Ms Masterton's application in attacking the use of averaging was "hopeless;" a roundabout way of saying that she had some prospect of success.[214]

Mr Manthorpe decided to remove the "comment on legality" from the 2019 Implementation Report, advising Ms Leon by email on 13 March 2019 that he would do so. Consistent with his obligation under s 8(5) of the Ombudsman Act, he provided Ms Leon with an embargoed version of the Implementation Report in advance of publication on 29 March 2019. Two days earlier, AGS had given a more formal advice that Ms Masterton had good prospects of succeeding in her application on the basis that averaged income would not establish that she owed a debt.[215] That was not communicated to the Ombudsman.

In April 2019, *Centrelink's Automated Debt Raising and Recovery System: Implementation Report* (the Implementation Report) was published. It contained no reference to questions of legality.

The reasons for the decision to remove the "comment on legality"

Mr Manthorpe gave three reasons in his statement, expanded on in a submission, for deciding to do as DHS wished.

- He thought that, because the Ombudsman was part of the administrative review system, it was not appropriate for him to make public comment on the topic of legality when the Masterton case was before the Federal Court.
- Given DHS's reaction of vigorous defence of the Scheme and rejection of experts' public criticism, he did not think publishing the "comment on legality" would have any useful effect and it might be counter-productive in reducing DHS's willingness to engage with his Office to improve the Scheme. He said that to his perception, publishing the comment would not have made any difference because his doubts had been repudiated.
- He considered he had fulfilled his responsibility to raise his concern with senior DHS and DSS officials and whether he published the comment was a "secondary issue."[216]

Mr Manthorpe said he did consider publishing the "comment on legality" to respond to those critics of the Ombudsman's Office who perceived it as having turned a blind eye to the question of the Scheme's legality, but because the Ombudsman Act stipulated for investigations in private and it was then the Ombudsman's responsibility to decide whether or not to publish opinions or findings, he had formed the judgment that refraining from publishing the comment at that time was the correct approach.[217]

Mr Manthorpe said that he was anxious to maintain his Office's ability to produce improvements to the Scheme. The 2019 Implementation Report had included recommendations for that purpose. He was not certain that the Scheme was unlawful and even if he thought it was, he could not have made a binding determination to that effect. He was aware that the matter was before a court where the question of legality would be resolved.

But Mr Manthorpe had started from the position that he could not pronounce on the legality of the Scheme, hence the "comment on legality," which simply raised the issues without reaching a conclusion. Even without the AGS advices, he must have entertained a healthy scepticism about Ms Leon's claim as to DHS's certain position on legality. He had the 2014 DSS advice, he was aware of the views of Mr Hanks and Professor Carney, and Ms Hinchcliffe had raised some valid doubts. There was no reason not to make the observations that there was a live issue with the proposed (entirely reasonable) recommendation that agencies embarking on automated programs first make sure they were legal. There was no prospect whatever that the comment, which expressed no view as to the correct outcome, could have any implications for the Masterton case or even be faintly inappropriate. It seems highly likely that if Mr Manthorpe had consulted one of his own Office's lawyers he would have been told as much.

The fact that public criticism, including from legal experts, was having no effect on DHS and DSS and was not causing them to reconsider the legality of the Scheme, was all the more reason for Mr Manthorpe to take the matter up publicly. In circumstances where for two years DHS and DSS had not produced any external legal advice to support averaging, or even any convincing internal advice, but had instead chosen to rely on consistent misrepresentation of the Ombudsman's position to claim the Scheme was lawful, remaining silent in order to secure further cooperation was a very poor choice indeed.

If the Ombudsman had included the "comment on legality" in April 2018 it might have expedited the end of the Scheme, but it is more likely that DHS and DSS would have held their ground as long as possible. What is depressingly clear, however, is that the Ombudsman's Office was not able to fulfil its role in exposing maladministration over the almost three years it investigated Robodebt complaints; it took litigation to do that. Individuals who were the victims of unfair debt raising could not look to the Ombudsman's Office for relief.

4 Observations on the Ombudsman's role

It can be accepted that it is important for the Ombudsman to work cooperatively with the departments it is investigating, but it is also necessary that the Ombudsman be capable of taking a stand. Maladministration is much less likely to occur where there is an Ombudsman who is known to impose limits on the cooperative approach in an appropriate case.

Robodebt was a massive scheme. In 2017 the Ombudsman knew, from the information provided pursuant to s 8 notices,[218] that it was affecting tens of thousands of people. There had been an outcry from the public, the media, academia, advocacy groups and some politicians about its unfairness. By mid-2017 there was respectable and publicly-available legal opinion in the form of Mr Hanks' paper that it did not meet the legislative requirements (to say nothing of the less accessible AAT decisions to the same effect (of which the Ombudsman seems not to have been aware). However, successive holders of the Ombudsman's Office were hesitant to use the investigative and reporting powers the Ombudsman Act conferred when the circumstances clearly warranted it.

The Scheme demonstrates the importance of a properly resourced and, more importantly, an independent and robust Ombudsman. It exemplifies the social importance and economic sense of having such a person in the role. The Ombudsman could have played an important part in stopping a poorly thought-through and, worse, illegal program from proceeding at grave personal cost to thousands of individuals and at enormous public expense.

1 *Ombudsman Act 1976* (Cth) s 5(1)(a).
2 *Ombudsman Act 1976* (Cth) s 4A.
3 Exhibit 3-4921 - DSS.6000.0001.3105_R - IOI-2016-400007 - The Hon Christian Porter MP, 10 January 2017.
4 Exhibit 4-7147 - LMA.1000.0001.2996_R - Report - Centrelink's automated debt raising and recovery system - April 2017 copy, April 2017.
5 Exhibit 4-7273 - LMA.1000.0001.3545_R - Signed Minute to Ombudsman - seeking s 15 EIC report approval copy, 4 October 2018.
6 Exhibit 4-7328 - CTH.3005.0010.3076_R - Attachment A - Centrelink's Automated Debt Raising and Recovery System - Implementation Report, April 2019.
7 Exhibit 4-7328 - CTH.3005.0010.3076_R - Attachment A - Centrelink's Automated Debt Raising and Recovery System - Implementation Report, April 2019.
8 Exhibit 9482 - RBD.9999.0001.0527_R - 2022 10 06 - Letter to the AGS re NTG-0006.pdf.
9 *Ombudsman Act 1976* (Cth) s 5(1)(b).
10 Explanatory Memorandum, Ombudsman Bill 1975 (Cth) 7; Ombudsman Bill 1976 (Cth) 16 [28].
11 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, [49]-[50].
12 *Ombudsman Act 1976* (Cth) s 28.
13 *Ombudsman Act 1976* (Cth) s 9.
14 *Ombudsman Act 1976* (Cth) s 9(4).
15 *Ombudsman Act 1976* (Cth) s 13.
16 *Ombudsman Act 1976* (Cth) s 15.
17 Exhibit 4-7125 - LMA.9999.0001.0011_R, Response to NTG-0006 – Statement of Louise Macleod, 22 February 2023 [p7-8: para 40-42]
18 Transcript, Genevieve Bolton, 11 November 2022 [p1001: lines 5-36]; ANON-24KG-9SFC-D, Submission by National Council of Single Mothers, 28 September 2022, p 6.
19 Exhibit 4-7165 - LMA.1000.0001.0380 - Minute to Ombudsman DHS online compliance platform OM copy
20 Exhibit 4-7125 - LMA.9999.0001.0011_R, Response to NTG-0006 – Statement of Louise Macleod, 22 February 2023 [p7-8: para 44]
21 Exhibit 4-7125 - LMA.9999.0001.0011_R, Response to NTG-0006 – Statement of Louise Macleod, 22 February 2023 [p7-8: para 43-44].
22 Exhibit 4-7165 - LMA.1000.0001.0380 - Minute to Ombudsman DHS online compliance platform OM copy
23 Exhibit 4-7125 - LMA.9999.0001.0011_R, Response to NTG-0006 – Statement of Louise Macleod, 22 February 2023 [p7: para 39].
24 Exhibit 4-7125 - LMA.9999.0001.0011_R, Response to NTG-0006 – Statement of Louise Macleod, 22 February 2023 [p7: para 39].
25 *Ombudsman Act 1976* (Cth) s 8(1).
26 Exhibit 3-4921 - DSS.6000.0001.3105_R, IOI-2016-400007 - The Hon Christian Porter MP.pdf, 10 January 2017().
27 Exhibit 4-7165 - LMA.1000.0001.0380, Minute to Ombudsman DHS online compliance platform OM copy, 5 January 2017.
28 *Ombudsman Act 1976* (Cth) s 8(2).
29 *Ombudsman Act 1976* (Cth) s 8(3).
30 *Ombudsman Act 1976* (Cth) s 9(1).
31 *Ombudsman Act 1976* (Cth) s 9(2).
32 *Ombudsman Act 1976* (Cth) s 13
33 *Ombudsman Act 1976* (Cth) s 36.
34 *Ombudsman Act 1976* (Cth) s 11A(2).
35 Exhibit 4-7168 - LMA.1000.0001.2267_R - FW- Section 8 Questions under IOIs 2016-400007 and 2016-600004 [SEC=UNCLASSIFIED], 16 January 2017.
36 Exhibit 2-1302 - CTH.1000.0006.9216_R , RE- Further s 8 questions under IOI-2016-400007 [SEC=UNCLASSIFIED].pdf.
37 Exhibit 2-1317 - CTH.3502.0001.0611_R - 1.3 Legal Advice EIM, 14 January 2015.
38 Exhibit 2-1317 - CTH.3502.0001.0611_R - 1.3 Legal Advice EIM, 14 January 2015.
39 Exhibit 4-5594; Exhibit 2-1317 - CTH.3502.0001.0609_R - FW- Raising Debts - Decision Making process - Third Party Information [DLM=Sensitive-Legal], 14 May 2015.
40 Exhibit 4-7182, Regarding the legal advice DHS sent us..... [SEC=UNCLASSIFIED], 20 February 2017.
41 Exhibit 2-1345 - CTH.3007.0004.5417_R, URGENT - Ombudsman OCI Own Motion Investigation Update Meeting 3 February 2017 - Action Items [DLM=Sensitive], 3 February 2017.
42 Exhibit 4-7152, LMA.1000.0001.1012_R, RE- FOR INFORMATION- Online Compliance Intervention Meeting 3 February 2017 - Action Item 11 response [DLM=Sensitive].

43 Exhibit 9395 - CTH.3007.0004.8103 - Action Item Response - Online Compliance Intervention [SEC=UNCLASSIFIED].
44 Exhibit 4-5830 - SKR.0001.0001.0054_R - Re- UPDATE- Media and Social Media Commentary re- online compliance system - Friday 6 January [DLM=For-Official-Use-Only], 6 January 2017.
45 Exhibit 3-4231 - CTH.3038.0002.6641 - AGS Instruction.
46 Exhibit 4-5107 - CTH.3007.0004.3602_R - FW- debts [DLM=For-Official-Use-Only], 11 January 2017.
47 Transcript, Louise Macleod, 8 March 2023 [p4702 : lines 10-15].
48 Transcript, Louise Macleod, 8 March 2023 [p4699: line 42 – p4670: line 24].
49 Transcript, Louise Macleod, 8 March 2023 [p4711: lines 44-47].
50 Exhibit 4-7180 - LMA.1000.0001.2298_R - Request for meeting and-or documents [SEC=UNCLASSIFIED], 19 February 2017.
51 Exhibit 1-0087 - DSS.8000.0001.0607_R - RE- Legal Advice - Data matching- notifications and debt raising [DLM=Sensitive-Legal], 18 December 2014.
52 Exhibit 1-0077; Exhibit 2-2227 - DSS.8002.0001.0002_R - FW- New version of draft brief on fraud and compliance [DLM=Sensitive], 4 March 2015.
53 Exhibit 1-0003 - DSS.5006.0001.2713_R - Email from Anne Pulford to Emmakate McGuirk and preceding chain, 24 January 2017.
54 Exhibit 4-7209 - LMA.1000.0001.0151_R - Request for information-documents [SEC=UNCLASSIFIED], 24 February 2017.
55 Exhibit 2-1384 - CTH.3008.0016.7788_R – Fwd: Request for information/documents under own motion investigation [SEC=UNCLASSIFIED], 24 February 2017.
56 Exhibit 4-5607; Exhibit 2-1396 - CTH.3023.0006.8897 - Combined 2014 and 2017 advice.
57 Exhibit 4-7173 - LMA.1000.0001.0081_R - FW- Request for information-documents [SEC=UNCLASSIFIED], 2 March 2017; Exhibit 4-5607; Exhibit 4-5607; Exhibit 2-1396 - CTH.3023.0006.8897 - Combined 2014 and 2017 advice.
58 Transcript, Serena Wilson, 9 November 2022 [p794 : lines 10-25]; Transcript, Paul McBride, 9 March 2023 [p4829 : lines 2-8].
59 Exhibit 9484, CTH.3030.0025.8374, FW: Issue re brief [DLM=For-Official-Use-Only]
60 Transcript, Louise Macleod, 8 March 2023 [p4717: line 13 – p4718: line 23].
61 Transcript, Louise Macleod, 8 March 2023 [p4721: line 45 – p4722: line 14].
63 Exhibit 4-7287 - CTH.3030.0025.7062_R - FW- Ombudsman - Response to Questions- [DLM=For-Official-Use-Only], 16 February 2017.
63 Exhibit 3-4806 - CTH.9999.0001.0060 - [Final] Services Australia - Response to NTG-0103.
64 Exhibit 9445 - CTH.3004.0002.8222 - FW: ACTION: Action Item Response - Online Compliance Intervention [SEC=UNCLASSIFIED] 20 February 2017.
65 Transcript, Louise Macleod, 8 March 2023 [page 4734: lines 1-6].
66 CTH.3001.0038.3243, Action Item number 03.02.2017_3.docx, Document to be tendered, 6 March. 2017
67 CTH.3510.0003.5127, Feedback from Ms Golightly - 27 February 2017.pdf, 24 February 2017, Document to be tendered.
68 Exhibit 2-1345 - CTH.3007.0004.5417_R - URGENT - Ombudsman OCI Own Motion Investigation Update Meeting 3 February 2017 - Action Items [DLM=Sensitive], 3 February 2017.
69 Exhibit 2-1346 - CTH.3001.0035.1556_R - RE- For Ombudsman meeting- debts data [DLM=For-Official-Use-Only], 6 February 2017.
70 Exhibit 2-1374 - CTH.3502.0001.1474_R - FOR INFORMATION- Online Compliance Intervention Meeting 3 February 2017 - responses to Action Items 2 and 5 [DLM=Sensitive], 23 February 2017.
71 Exhibit 1-1173 - CTH.3510.0002.9576_R - RE- Own Motion Investigation - Items 2.4, 2.6 [DLM=For-Official-Use-Only], 1 February 2017.
72 Exhibit 2-1330 - CTH.3002.0007.1320 - PAYG High Level Assumptions V2.0.
73 Exhibit 1-1136 - JRY.9999.0001.0002_R, Response to NTG-0019 - Statement of Jason Ryman 27.10.22, 27 October 2022 [p22: para: 164].
74 *Ombudsman Act 1976* (Cth) s 36(ba).
75 *Ombudsman Act 1976* (Cth) s 36(c).
76 Exhibit 9694 - RGL.9999.0001.0004_R - 20230406 - Statement R Glenn (final).pdf [p.7: para 43(c)].
77 Exhibit 4-7133 – IAN.9999.0001.0002_R, Response to NTG-0203 – Statement of Mr Iain Anderson, dated 22 February 2023 [p8: para 48].
78 Exhibit 4-7133 – IAN.9999.0001.0002_R, Response to NTG-0203 – Statement of Mr Iain Anderson, dated 22 February 2023 [p9: para 50].
79 *Administrative Appeals Tribunal Act 1975* (Cth) ss 33(1AA), 33(1AB).

80 Transcript, Iain Anderson, 9 March 2023 [p4790: lines 33-42].
81 Transcript, Iain Anderson, 9 March 2023 [p4791: line 25-34].
82 Exhibit 9694 - RGL.9999.0001.0004_R - 20230406 - Statement R Glenn (final).pdf [p.7: para 43(c)].
83 (1995) 63 FCR 163.
84 (1995) 63 FCR 163, 171.
85 (1995) 63 FCR 163, 191.
86 Ex 4-7125 - LMA.9999.0001.0011_R - Response to NTG-006 – Statement of Louise Macleod, 22 February 2023 [p20: para 106]; Exhibit 4-7256 - LMA.1000.0001.2607 - Work Practices Manual, December 2017 [p2734].
87 Exhibit 4-7133 – IAN.9999.0001.0002_R, Response to NTG-0203 – Statement of Mr Iain Anderson, dated 22 February 2023 [p6: para 43].
88 Exhibit 1-1323 - CTH.1000.0007.0268, Outline of OCI Own Motion Investigation Report, 30 January 2017.
89 Transcript, Jason McNamara, 5 December 2022 [p1041: lines 8-44].
90 Transcript, Jason McNamara, 5 December 2022 [p1051: lines 5-41]. See also Exhibit 4-7165 – LMA.1000.0001.0380 – Minute to Ombudsman DHS online compliance platform OM copy, 5 January 2017.
91 Transcript, Anne Fredericks, 17 January 2023 [p2502: line 45 - p2053: line 21].
92 Transcript, Jonathon Hutson, 6 December 2022 [p1209: line 1-38; p1218: line 4-36]; Transcript, Jason McNamara, 5 December 2022 [p1041: line 3 - p1043: line 17]; Transcript, Richard Glenn, 9 March 2023 [p4767: lines 19-45].
93 Transcript, Richard Glenn, 9 March 2023 [p4765: line 29-p4766: line 32].
94 Exhibit 2-1331 - CTH.3001.0034.6014_R - RE- [printed] Ombudsman Report [DLM=Sensitive], 1 February 2017.
95 Transcript, Jonathon Hutson, 6 December 2022 [p1209: lines 1-38; p1218: lines 4-36]; Transcript, Jason McNamara, 5 December 2022 [p1041: line 3 - p1043: line 17].
96 Exhibit 2-1329 - CTH.3005.0002.3363_R - FW- Outline of OCI Own Motion investigation report (A444638) [DLM=For-Official- Use-Only], 1 February 2017.
97 Exhibit 2-1343 - CTH.1000.0007.0533_R - DHS Comments on the Draft Outline [DLM=For-Official-Use-Only], 3 February 2017.
98 Exhibit 2-1343 - CTH.1000.0007.0534 - DHS comments on Outline of OCI Own Motion investigation report.
99 Exhibit 2-1343 - CTH.1000.0007.0533_R, DHS Comments on the Draft Outline [DLM=For-Official-Use-Only], 3 February 2017; Exhibit 2-1343 - CTH.1000.0007.0534 - DHS comments on Outline of OCI Own Motion investigation report.
100 Exhibit 2-1343 - CTH.1000.0007.0533_R, DHS Comments on the Draft Outline [DLM=For-Official-Use-Only], 3 February 2017.
101 Exhibit 2-1411 - CTH.1000.0007.3531_R, Ombudsman draft report - opportunity to comment [SEC=UNCLASSIFIED], 10 March 2017; Exhibit 2-1411 - CTH.1000.0007.3534_R, Report-Centrelink's automated debt raising and recovery-March 2017 (A447388).
102 Exhibit 4-7196 - LMA.1000.0001.0020_R, Ombudsman draft report - opportunity to comment [SEC=UNCLASSIFIED], 10 March 2017.
103 Exhibit 2-1415 - CTH.3001.0039.3861_R, Meeting with Ombudsman [DLM=For-Official-Use-Only], 17 March 2017.
104 Exhibit 2-1420 - CTH.3005.0003.6060_R, Draft Report Markups [DLM=For-Official-Use-Only], 20 March 2017.
105 Exhibit 2-1420 - CTH.3005.0003.6061_R, Tracked Changes to draft Own Motion report 20 March 2017 (003).
106 Exhibit 2-1440 - CTH.1000.0007.5707, Dra] report -DHS-Centrelink's automated debt raising and recovery-28 March 2017 (A485676) [SEC=UNCLASSIFIED], 30 March 2017; Exhibit 2-1440 - CTH.1000.0007.5709, Dra] report -DHS-Centrelink's automated debt raising and recovery-28 March 2017.
107 Exhibit 4-7905 - RBD.9999.0001.0499_R - 2023 03 07 RRC - Statement of John McMillan, 7 March 2023 at [6.5]; Transcript, Richard Glenn, 9 March 2023 [p4768: line 35–p4769: line 7].
108 Exhibit 4-7131 - RGL.9999.0001.0003_R – Response to Notice NTG-0204 - Statement of Richard Glenn, 22 February 2023 [p4: para 29].
109 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 162 [32]; *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, 591-592.
110 Exhibit 4-7133 - IAN.9999.0001.0002_R, Response to Notice NTG-0203 - Statement of Iain Anderson, 22 February 2023 [p6-7: 43, 54-55].
111 Exhibit 4-7905 - RBD.9999.0001.0499_R - 2023 03 07 RRC - Statement of John McMillan [p 13, 2.13].
112 Exhibit 4-7133 - IAN.9999.0001.0002_R, Response to Notice NTG-0203 - Statement of Iain Anderson, 22 February 2023 [p9: para 55].
113 Exhibit 2-1420 - CTH.3005.0003.6060_R, Dra] Report Markups [DLM=For-Official-Use-Only], 20 March 2017; Exhibit 2-1441 - CTH.3001.0040.6394_R, FW: Draft report -DHS-Centrelink's automated debt raising and recovery 28 March 2017 (A485676) [DLM=ForOfficial-Use-Only], 30 March 2017; Exhibit 4-7247 - LMA.1000.0001.2053_R, FW: Phone call with Jonathan Hutson - Tuesday 4.30pm [SEC=UNCLASSIFIED], 28 November 2019.

114 ANON-24KG-9BNS-M, Submission by Monash University, 31 January 2023 [p15].
115 Exhibit 4-7905 – RBD.9999.0001.0499_R, Statement of Professor John McMillan, 7 March 2023 [p 18: para5.3].
116 Exhibit 4-7125 – LMA.9999.0001.0011_R, Response to NTG-0006 – Statement of Louise Macleod, 22 February 2023 [p14: para 74].
117 Exhibit 4-7229 – LMA.1000.0001.2975, OCI Appendix A-F copy.docx [2.41].
118 Exhibit 4-7178 - LMA.1000.0001.1679, DHS comments on Outline of OCI Own Motion investigation report-3 February 2017 copy.
119 Exhibit 4-7247 - LMA.1000.0001.2053, FW- Phone call with Jonathan Hutson - Tuesday 4.30pm [SEC=UNCLASSIFIED]; Exhibit 4-7229 - LMA.1000.0001.2975, OCI Appendix A-F copy.
120 Exhibit 1-0084 - DSS.8001.0001.1736_R, FW- Advice please [DLM=Sensitive-Legal], 24 January 2017.
121 Exhibit 4-7185 - LMA.1000.0001.1234_R, RE- DSS - Legal advice [SEC=UNCLASSIFIED].
122 Exhibit 4-7229 - LMA.1000.0001.2975, OCI Appendix A-F copy [2.31-2.54].
123 Exhibit 4-7229 - LMA.1000.0001.2975, OCI Appendix A-F copy.docx [2.50-2.54].
124 Transcript, Richard Glenn, 9 March 2023 [p4776: lines 10-16].
125 Transcript, Richard Glenn, 9 March 2023 [p4776: lines 16-21].
126 Transcript, Richard Glenn, 9 March 2023 [p4776: lines 26-31].
127 Transcript, Richard Glenn, 9 March 2023 [p4776: lines 32-36].
128 Transcript, Richard Glenn, 9 March 2023 [p4776: lines 36-41].
129 Exhibit 4-7131 – RGL.9999.0001.0003_R, Response to NTG-0204 – Statement of Richard Glenn, 6 April 2023 [p8: para 46].
130 Exhibit 4-7131 – RGL.9999.0001.0003_R, Response to NTG-0204 – Statement of Richard Glenn, 6 April 2023 [p5: para 36-40; p6: para 48].
131 Exhibit 4-7131 – RGL.9999.0001.0003_R, Response to NTG-0204 – Statement of Richard Glenn, 6 April 2023 [p6: para 41].
132 Exhibit 9694 - RGL.9999.0001.0004_R - 20230406 - Statement R Glenn (final).pdf, [p7: para 43(d)].
133 Exhibit 3-3482 - CTH.3761.0001.0223_R, 1569 [REDACTED], 8 March 2017.
134 Exhibit 3-3483_R, 17.03.23-[REDACTED]-AAT1GeneralAFAR, 24 March 2017.
135 Transcript, Richard Glenn, 9 March 2023 [p4777: line 5].
136 Transcript, Richard Glenn, 9 March 2023 [p4777: line 6].
137 Exhibit 4-7905 – RBD.9999.0001.0499_R, Statement of Professor John McMillan, 7 March 2023 [p 18: para 5.5].
138 Transcript, Louise Macleod, 8 March 2023 [p 4678 lines 45-48].
139 *Legal Services DireCIons* 2005 (Cth) sch 1, cl 10.1.
140 *Public Governance, Performance and Accountability Act 2013* (Cth) s 11(b); *Legal Services Directions 2017* (Cth) cl 15.
141 *Legal Services Directions 2017* (Cth) sch 1 cl 10.1.
142 Exhibit 4-7133 - IAN.9999.0001.0002_R, Response to NTG-0203 – Statement of Iain Anderson, 22 February 2023 [p10: para 63].
143 Exhibit 4-7133 - IAN.9999.0001.0002_R, Response to NTG-0203 – Statement of Iain Anderson, 22 February 2023 [p11: para 64].
144 Exhibit 4-7133 - IAN.9999.0001.0002_R, Response to NTG-0203 – Statement of Iain Anderson, 22 February 2023 [p11: para 64].
145 *Ombudsman Act 1976* (Cth) ss 10(a), 11.
146 Exhibit 4-7905 – RBD.9999.0001.0499_R, Statement of Professor John McMillan, 7 March 2023 [p 5: para 3.6] ; *Re Reference under Section 11 of Ombudsman Act 1976 for an Advisory Opinion; Ex parte Director-General of Social Services* (1979) 2 ALD 86.
147 Transcript, Louise Macleod, 8 March 2023 [p4708: lines 9-37].
148 Exhibit 4-7247 - LMA.1000.0001.2053, FW- Phone call with Jonathan Hutson - Tuesday 4.30pm [SEC=UNCLASSIFIED]; Transcript, Louise Macleod, 8 March 2023 [p4708: lines 9-37]; Exhibit 4-7125 – LMA.9999.0001.0011_R, Response to NTG-0006 – Statement of Louise Macleod, 22 February 2023 [p18: para 92-93].
149 Exhibit 4-7125 – LMA.9999.0001.0011_R, Response to NTG-0006 – Statement of Louise Macleod, 22 February 2023 [p18: para 92-93].
150 Exhibit 4-7125 – LMA.9999.0001.0011_R, Response to NTG-0006 – Statement of Louise Macleod, 22 February 2023 [p18: para 92-93].; Transcript, Richard Glenn, 9 March 2023 [p4772: lines 22- 32].
151 Exhibit 9694 - RGL.9999.0001.0004_R - 20230406 - Statement R Glenn (final).pdf, [p6: para 43].
152 Exhibit 4-7133 - IAN.9999.0001.0002_R, Response to NTG-0203 – Statement of Iain Anderson, 22 February 2023 [p6: para 40].
153 Transcript, Richard Glenn, 9 March 2023 [p4774: line 26 - p4775: line 20].
154 Exhibit 4-7133 - IAN.9999.0001.0002_R, Response to NTG-0203 – Statement of Iain Anderson, 22 February 2023 [p11: 65].

155 Transcript, Iain Anderson, 9 March 2023 [p4798: line 5 - p4799: line 38].
156 Exhibit 4-7133 - IAN.9999.0001.0002_R, Response to NTG-0203 – Statement of Iain Anderson, 22 February 2023 [p10: para 62].
157 Transcript, Richard Glenn, 9 March 2023 [p4784: lines 1-6].
158 Exhibit 4-7125 – LMA.9999.0001.0011_R, Response to NTG-0006 – Statement of Louise Macleod, 22 February 2023 [p18: para 94-97].
159 Exhibit 9694 - RGL.9999.0001.0004_R - 20230406 - Statement R Glenn (final).pdf [p5-6: para 40].
160 Exhibit 9694 - RGL.9999.0001.0004_R - 20230406 - Statement R Glenn (final).pdf [p6-7: para 42-43].
161 Transcript, Finn Pratt, 10 November 2022 [p896: line 30 - p897: line 17].
162 Exhibit 4-7147 - LMA.1000.0001.2996_R, Report - Centrelink's automated debt raising and recovery system - April 2017 copy.pdf [2.28].
163 Exhibit 4-7125 – LMA.9999.0001.0011_R, Response to NTG-0006 – Statement of Louise Macleod, 22 February 2023 [p19: para 99].
164 Transcript, Louise Macleod, 8 March 2023 [p4730: line 35 – p4731: line 7].
165 Exhibit 9694 - RGL.9999.0001.0004_R - 20230406 - Statement R Glenn (final).pdf [p7: para 45].
166 Exhibit 9694 - RGL.9999.0001.0004_R - 20230406 - Statement R Glenn (final).pdf [p7: para 45].
167 Exhibit 4-7165 - LMA.1000.0001.0380, Minute to Ombudsman DHS online compliance platform OM copy, 5 January 2017.
168 *Ombudsman Act 1976* (Cth) s 15(1)(a)(iii).
169 Exhibit 4-7147 - LMA.1000.0001.2996_R, Report - Centrelink's automated debt raising and recovery system - April 2017 copy.pdf.
170 Transcript, Richard Glenn, 9 March 2023 [p4782: lines 25-32].
171 Exhibit 4-7147 - LMA.1000.0001.2996_R, Report - Centrelink's automated debt raising and recovery system - April 2017 copy.pdf - see page 7 and following.
172 Exhibit 4-7147 - LMA.1000.0001.2996_R, Report - Centrelink's automated debt raising and recovery system - April 2017 copy.pdf - see the last sentence from the Executive Summary "if the information available to DHS is incomplete the debt amount may be affected" and at [3.2]-[3.6] and [2.31]-[2.34])
173 Exhibit 2-1420 - CTH.3005.0003.6061, Tracked Changes to draft Own Motion report 20 March 2017 (003) [p2]2); Transcript, Jason McNamara, 5 December 2022 [p1055: line 4 – p1056: line 29]. See also words proposed in a draft developed by a member of the Ombudsman's Office that were not adopted by Mr Glenn: Exhibit 4-7147 - LMA.1000.0001.2996_R, Report - Centrelink's automated debt raising and recovery system - April 2017 copy. pdf [2.27], "The OCI does not guarantee the accuracy of all debts it raises because the accuracy of debts raised under the OCI relies on a process of being both willing and able to accurately verify their earnings for the debt period."
174 Exhibit 2-1420 - CTH.3005.0003.6060_R, Draft Report Markups [DLM=For-Official-Use-Only]; Exhibit 2-1420 - CTH.3005.0003.6061, Tracked Changes to draft Own Motion report 20 March 2017 (003); Transcript, Jason McNamara, 5 December 2022 [p1053: line 27 – p1056: line 29].
175 Transcript, Jason McNamara, 5 December 2022 [p1054: lines 20-22]. 36 Royal Commission into the Robodebt Scheme
176 Transcript, Louise Macleod, 8 March 2023 [p4714: lines 1-5].
177 Transcript, Karen Harfield, 15 December 2022 [p1908: lines 1-5].
178 Transcript, Jason McNamara, 5 December 2022 [p1054: line 1 – p 1055 line 2].
179 Exhibit 4-7306, CTH.3098.0011.5024_R, 170410 Minister for Human Services - Media Release - Ombudsman's Report on OCI.docx; Exhibit 3108 - ACS.9999.0001.0274_R, 2017.06.23 Letter from Minister Tudge re Compliance Integrity.pdf; Exhibit 4482 - CTH.3004.0010.6168_R, RE: For urgent clearance - Response to The Age - OCI [DLM=For-Official-Use-Only]; Transcript, Jason McNamara, 5 December 2022 [p1054: line 1 – p1056: line 29].
180 Exhibit 2-1411 - CTH.1000.0007.3531_R, Ombudsman draft report - opportunity to comment [SEC=UNCLASSIFIED], 10 March 2017; Exhibit 1-1220 - CTH.3004.0010.5247 - Ombudsman Report-Centrelinks-automated-debt-raising-and-recovery-system
181 Exhibit 9694 - RGL.9999.0001.0004_R - 20230406 - Statement R Glenn (final).pdf [p3: para 14(c)].
182 Exhibit 4-7306 - CTH.3098.0011.5024_R, 170410 Minister for Human Services - Media Release - Ombudsman's Report on OCI, 10 April 2017.
183 Exhibit 4-7306, CTH.3098.0011.5024_R, 170410 Minister for Human Services - Media Release - Ombudsman's Report on OCI.docx, 10 April 2017.
184 Exhibit 2-3108 - ACS.9999.0001.0274_R, 2017.06.23 Letter from Minister Tudge re Compliance Integrity.pdf, 19 June 2017.
185 Exhibit 9449 - CTH.3001.0047.3569, FW: BREAKING NEWS ALERT: Shadow Minister for Human Services Linda Burney - Media Release - Senate to issue final verdict on Tudge's robo-debt debacle - Wednesday, 20 June 2017 [DLM=For-Official-Use-Only].

186 Exhibit 9447 - CTH.3001.0047.3151 - 2017-06-21 - media release (update 5.40am) - DHS Senate Inquiry response + with MO.docx.
187 Exhibit 4-7147 - LMA.1000.0001.2996_R - Report - Centrelink's automated debt raising and recovery system - April 2017 copy, April 2017 [p3029: para 1.8-1.11].
188 Exhibit 9487 - CTH.3004.0008.5297 - Re: For clearance: Media enquiry - ABC (Ange Laviopierre) - extension of automated debt recovery system [DLM=For-Official-Use-Only]; Exhibit 3-4430 - CTH.3004.0008.3450_R - RE- For approval- Media response - The Canberra Times (Doug Dingwall) and The Guardian (Paul Karp and Christopher Knaus) - Online compliance [SEC=UNCLASSIFIED], 4 April 2018; Exhibit 3-4482 - CTH.3004.0010.6168_R - RE- For urgent clearance - Response to The Age - OCI [DLM=For-Official-Use-Only], 23 November 2018. See Exhibit 4-7248 - LMA.1000.0001.3436_R - FW- OCI [SEC=UNCLASSIFIED] referring to Fairfax Media on 5 April 2018 quoting Mr Jongen as stating that the Ombudsman's independent review found the online compliance system "met all legislative requirements and accurately calculated debts when the required information was entered" and Exhibit 3-4482 - CTH.3004.0010.6168_R - RE- For urgent clearance - Response to The Age - OCI [DLM=For-Official-Use-Only], 23 November 2018.
189 Exhibit 4-7905 - RBD.9999.0001.0499_R - 2023 03 07 RRC - Statement of John McMillan, 7 March 2023 at [2.5]
190 Exhibit 4-7248 - LMA.1000.0001.3436_R - FW- OCI [SEC=UNCLASSIFIED], 24 May 2018.
191 Exhibit 3-4482 - CTH.3004.0010.6168_R - RE- For urgent clearance - Response to The Age - OCI [DLM=For-Official- Use-Only], 23 November 2018.
192 Exhibit 4-7129 - MMA.9999.0001.0001_R, Response to NTG-0202 - Statement of Michael Manthorpe,27 February 2023 [p7-8: para 36-38].
193 Exhibit 9871 - RBD.9999.0001.0531 - Ombudsman failed to check legality of robo-debt, former tribunal member says _ Centrelink debt recovery _ The Guardian. Proofs or Moral Authority (UNSW Law Journal).pdf.
194 Exhibit 3-3495 – TCA.9999.0001.0013, Terry Carney, The New Digital Future for Welfare- Debts Without Legal
195 Transcript, Michael Manthorpe, 8 March 2023 [p4741: lines 30-33].
196 Exhibit 4-7248 - LMA.1000.0001.3436_R, FW- OCI [SEC=UNCLASSIFIED].
197 Exhibit 4-7253 - LMA.1000.0001.1245_R, RE- Further s 8 questions under IOI-2016-400007 [SEC=UNCLASSIFIED].
198 Exhibit 4-7264 - LMA.1000.0001.3424_R, Draft report - legality section (A1677898) [SEC=UNCLASSIFIED], 3 October 2018.
199 Transcript, Michael Manthorpe, 8 March 2023 [p4743: lines 25-34].
200 Transcript, Michael Manthorpe, 8 March 2023 [p4743: line 24- 32].
201 Exhibit 4-7129 - MMA.9999.0001.0001_R, Response to NTG-0202 – Statement of Michael Manthorpe, 27 February 2023 [p11:para 59].
202 Exhibit 4-7129 - MMA.9999.0001.0001_R, Response to NTG-0202 – Statement of Michael Manthorpe, 27 February 2023 [p11:para 59].
203 Exhibit 4-7268 - LMA.1000.0001.3541, EIC s 15 report - Project Initiation Form copy.
204 Exhibit 4-7708 - CTH.3007.0009.3994_R, 9-07-2018_16-01-01, 19 July 2018.
205 Exhibit 3-4157 - DSS.5099.0001.0003_R, EIC Implementation Phase 2 - SAO letter to DSS post entry meeting, 20 August 2018 [p3].
206 Exhibit 1-0135 - DSS.5006.0001.4242, Draft advice on income averaging 7.08.18, 14 August 2018.
207 Transcript, Michael Manthorpe, 8 March 2023 [p4741: lines 1-3].
208 Transcript, Michael Manthorpe, 8 March 2023 [p4740: lines 23-28].
209 Exhibit 4-7269 - LMA.1000.0001.3447_R, RE- Draft report - legality section (A1677898) [SEC=UNCLASSIFIED].
210 Exhibit 4-6054 -CTH.1000.0011.5562_R, Draft Ombudsman's report for comment - Employment Income Confirmation [SEC=UNCLASSIFIED], 22 February 2019.
211 Not a correct use of the word, "refuted". DHS had denied the correctness of those views; it had never refuted them.
212 Exhibit 4-6056 -CTH.1000.0011.5564_R, img-213085449-0001 [p27-28].
213 Exhibit 4-6041 - RLE.9999.0001.0002_R, Response to NTG-0044 – Statement of Renee Leon [p30: para 175].; Exhibit 4-7129 - MMA.9999.0001.0001_R, Response to NTG-0202 – Statement of Michael Manthorpe, 27 February 2023 [p9: para 50].
214 Exhibit 4-6254 – CTH.3003.001.0705_R, AGS Advice 5 March 2019, 5 March 2019.
215 Exhibit 4-6064 - CTH.3007.0011.6407_R - Masterton v the Commonwealth - Litigation re OCI - further discussion [DLM=Sensitive-Legal, 29 March 2019; Exhibit 4-6065 - CTH.3007.0011.6408_R - Advice on prospects - Masterton – DRAFT, 27 March 2019 [p1-2].
216 Exhibit 4-7129 - MMA.9999.0001.0001_R, Response to NTG-0202 – Statement of Michael Manthorpe, 27 February 2023 [p10: para 53].
217 Exhibit 4-7129 - MMA.9999.0001.0001_R, Response to NTG-0202 – Statement of Michael Manthorpe, 27 February 2023 [p10: para 53].
218 Exhibit 4-7146 - LMA.1000.0001.1702_R - FW- FOR INFORMATION- Online Compliance Intervention Meeting 3 February 2017 - Action Item 10 response.

Chapter 22: Office of the Australian Information Commissioner

1 Introduction

This chapter considers the roles that the Office of the Australian Information Commissioner (OAIC)[1] and the former and current Information Commissioners played in overseeing the Scheme's compliance with the *Privacy Act 1988* (Cth) (the Privacy Act), the voluntary Data-matching Guidelines and the *Privacy (Tax File Number) Rule 2015* (TFN Rule).

In the 2015–16 mid-year economic forecast (MYEFO), the OAIC received funding of $4.7 million across the years 2015-16, 2016-17, 2017-18 and 2018-19, to provide oversight of privacy implications arising from 'DHS's Enhanced Welfare Payment Integrity – non-employment income data matching' (NEIDM) Budget measure.[2]

While the NEIDM program did not form part of the Robodebt scheme (the Scheme), the Information Commissioner told the Commission that, as part of the OAIC's oversight role under the 'Enhanced Welfare Payment Integrity – non-employment income data matching' Budget measure, the OAIC conducted six privacy assessments over three years.[3] Three of those privacy assessments were relevant to the Scheme:

- DHS assessment: An assessment of the Department of Human Services' Pay-As-You-Go (PAYG) data-matching program under Australian Privacy Principle (APP) 10 (quality of personal information) and APP 13 (correction of personal information)[4]
- Services Australia assessment: An assessment of Services Australia's handling of personal information in respect of the PAYG and NEIDM programs under APP 11 (security of personal information)[5] (DHS became Services Australia before the report was completed)
- ATO assessment: An assessment of the Australian Taxation Office's handling of personal information by the PAYG and NEIDM programs under APP 11 (security of personal information)[6]

The Information Commissioner's decision to conduct three limited scope assessments[7] (rather than investigations) of DHS's and the ATO's processes under the Scheme meant that the Information Commissioner did not have the power to:

- compel production of records or information, or
- investigate potential interferences with privacy and if appropriate make enforceable determinations.

It also meant that the Information Commissioner had limited opportunity to consider whether the various collections and disclosures of personal information which attended the data-matches and data exchanges under the Scheme were compliant with:

- the APPs in the Privacy Act,
- the *Guidelines on data matching in Australian Government Administration 2014* (the voluntary Data-matching Guidelines), and/or
- the TFN Rule.[8]

1.1 Engagement with the Commission

The Commission's terms of reference required it to investigate and report on "how risks relating to the Robodebt scheme were identified, assessed and managed by the Australian Government."[9]

Both Timothy Pilgrim, the former Information Commissioner and Privacy Commissioner, and Angelene Falk, the current Information Commissioner and Privacy Commissioner, declined to provide witness statements and to attend the Commission and give evidence.[10] The Commonwealth informed the Commission:

> The Commissioner [Ms Falk] is not minded to give evidence or submit a witness statement particularly to avoid any potential that doing so may, or may be seen to, impact decisions presently under consideration by her or may touch on an actual historical case or investigation. She is concerned to avoid any potential that

> revealing information about a particular investigation or matter might prejudice the perceived independence of her office and thereby prejudice the functions of the office. As she would not, for those reasons, be in a position to elaborate on specific factual circumstances, the submission will be the extent of the assistance the Information Commissioner can provide.[11]

The Commission agreed to proceed on the basis that the Information Commissioner and Privacy Commissioner would assist the Commission voluntarily through the provision of the written submission, which was exhibited as evidence.[12]

In the circumstances, the Commission turned to documents produced by DHS and the ATO which touched upon their involvement with the OAIC over the course of the Scheme.

The Commission's findings in respect of the OAIC's role in relation to the Scheme have been reached

following examination of this evidence, notes made by a representative of the Ombudsman's Office of a conference with OAIC representatives in early 2017,[13] and the three publicly available reports produced by the OAIC in 2019[14] and 2020[15] concerning the Scheme.

To avoid confusion, all references to the OAIC relate to work undertaken by the Office of the Australian Information Commissioner on the oversight of the Scheme. References to the Information Commissioner and Privacy Commissioner refer to actions taken by Mr Pilgrim or Ms Falk in the discharge of their statutory functions as Information Commissioner and Privacy Commissioner. The Commission does not propose to make any findings in relation to Ms Falk or Mr Pilgrim personally.

2 The roles of the OAIC, the Information Commissioner and the Privacy Commissioner

Since 1 November 2010,[16] the OAIC has existed as an independent statutory agency within the Commonwealth Attorney-General's portfolio. The primary functions of the OAIC relate to privacy, freedom of information and government information policy.

The OAIC consists of three statutory appointees: the Australian Information Commissioner, the Privacy Commissioner and the Freedom of Information Commissioner, as well as staff who are APS employees.

The Information Commissioner is 'the agency head of the OAIC for the purposes of the *Public Service Act 1999* and the *Public Governance, Performance and Accountability Act 2013*.'[17]

Ms Falk was appointed as both Information Commissioner and Privacy Commissioner in August 2018.[18] Her predecessor, Mr Pilgrim, held both roles from July 2015 until his retirement in 2018.

On 3 May 2023, the Attorney-General announced that the government will appoint a "standalone" Privacy Commissioner.[19] At the time of writing this report, the new Privacy Commissioner has not been announced.

The privacy functions of the Information Commissioner relevantly concern responsibility for the following:

- The Privacy Act and specifically, compliance with the APPs

The voluntary Data-matching Guidelines

- Compliance with the TFN Rule
- Data-matching programs conducted under the *Data-matching Program (Assistance and Tax) Act* 1990 (Cth) (the DMP Act).

2.1 The Information Commissioner's power to conduct assessments and investigations

The Information Commissioner has the power to undertake both assessments (formerly known as audits)[20] and investigations[21] under the Privacy Act. The Information Commissioner can also direct an agency to conduct a privacy impact assessment.[22]

Assessments

In 2008, the Australian Law Reform Commission (ALRC) published its report, *For Your Information, Australian Privacy Law and Practice* (the ALRC Report).[23] The ALRC Report extensively reviewed the *Privacy Act* and led to substantial amendments to that Act in terms of its application to government agencies.[24]

The ALRC described the assessment process (which at that time was known as an "audit"):

> The OPC's (Office of the Privacy Commissioner's) audit functions are an important part of its compliance activities. The power to conduct audits is one of the few proactive regulatory tools vested in the OPC, in that it allows the Commissioner to monitor an agency or organisation's compliance with the Privacy Act before, and in the absence of, evidence of noncompliance, with the aim of preventing such non-compliance occurring in the future. It also allows the Commissioner to identify systemic issues and bring about systemic change, and to use information gathered in an audit to target educational materials and programs.[25]

Ms Falk told the Commission:

> The OAIC undertakes privacy assessments where it will contribute to achieving its goal of promoting and ensuring the protection of personal information. When deciding whether it is appropriate to undertake a privacy assessment in a particular situation, the OAIC will refer to the 'Selecting appropriate privacy
>
> regulatory action' section of the Privacy regulatory action policy. The OAIC also undertakes a risk assessment targeting exercise each financial year to identify possible industry sectors and/or entities that should be subject to a privacy assessment. The OAIC will also undertake an assessment when specifically funded to do so.[26]

Ms Falk also said:

> The OAIC publishes finalised assessment reports on its website to help promote good privacy practice.
>
> .. the voluntary Data Matching Guidelines aim to assist agencies to use data matching as an administrative tool in a way that complies with the APPs and the Privacy Act and is consistent with good privacy practice. The OAIC may take the voluntary Data Matching Guidelines into account when assessing whether an entity has complied with the APPs. The voluntary Data Matching Guidelines were considered in several of these assessments where appropriate.
>
> The OAIC made recommendations in these assessments in response to identified privacy risks. These recommendations were accepted or noted by the relevant departments.[27]

At the time of the Scheme's operation the Information Commissioner did not have the power to require an agency to produce documents or give information where the Commissioner was undertaking an assessment.

However, in 2022 the Privacy Act was amended to provide the Information Commissioner with this power, where the Information Commissioner has reason to believe that an entity being assessed has information or a document relevant to the assessment,[28] and subject to reaching a state of satisfaction that it is reasonable to do so having regard to the public interest, the impact on the recipient and other relevant matters.[29]

As noted by Ms Falk (above), the Information Commissioner may publish information relating to the assessment on the OAIC website.[30]

Investigations

Investigations can arise from an individual's complaint about a possible interference with their privacy, or the OAIC can conduct an "own motion investigation"[31] on its own initiative in respect of a possible interference with an individual's privacy or a breach of APP 1 of the Privacy Act: the obligation to manage personal information in an open and transparent manner.[32]

The ALRC Report also commented on the Information Commissioner's investigative power:

> It is important to maintain a clear distinction between the Commissioner's PPA (privacy impact assessment) functions under the Act, which are educative and preventative, and the power to conduct an own motion investigation.
>
> Where the OPC has a reasonable belief that an organisation is engaging in practices that contravene the privacy principles in the Act, then the appropriate power to investigate such conduct is the own motion investigation power. The point of the own motion investigation power is to allow the Commissioner to investigate an act or practice that may be an interference with privacy of an individual. It is not appropriate for the Commissioner to respond to such circumstances by undertaking a process with a purely educational focus. In addition, the distinction between an own motion investigation and a PPA will be much clearer if the ALRC's recommended compliance order power is implemented, which would empower the Commissioner to issue an order following an own motion investigation.[33]

The forensic decision to conduct an assessment as opposed to an investigation was an important one at the time of the Scheme, because the power to compel the production of documents or the giving of information existed only in respect of investigations.[34] An investigation may result in a determination

containing binding declarations concerning the practices of the entity investigated, which can be enforced in the Federal Court.[35]

The Information Commissioner has a statutory obligation to consider whether to investigate complaints lodged by individuals and, unless satisfied an investigation should not commence,[36] to investigate the complaints for possible interferences with the privacy of the complainant.[37]

The Commission has learned of two complaints made to the OAIC by individuals in respect of aspects of the Scheme. These are described below. They almost certainly do not comprise the totality of the complaints made to the Information Commissioner about the Scheme.

Privacy impact assessments

The Information Commissioner can at any time direct an agency to undertake a Privacy Impact Assessment (PIA).[38]

As the Information Commissioner and Privacy Commissioner noted in her submission to the Commission:[39]

> Undertaking a PIA can assist entities to:
>
> - describe how personal information flows in a project
> - analyse the possible impacts on individuals' privacy
> - identify and recommend options for avoiding, minimising or mitigating negative privacy impacts
> - build privacy considerations into the design of a project
> - achieve the project's goals while minimising the negative and enhancing the positive privacy impacts.

3 Consultation on the design of the Scheme

It does not appear that DHS engaged with the OAIC ahead of the commencement of the Scheme. However, following a meeting on 13 November 2015 with the OAIC to discuss the related NEIDM proposal, DHS gave the OAIC[40] an advice it had received that year from the Australian Government Solicitor (AGS) on data-matching in relation to the NEIDM process (the AGS data-matching advice).

That advice warned DHS of the need to ensure both it and the ATO complied with relevant secrecy provisions in undertaking the proposed data matches.[41] What it said in that regard was equally relevant to the data-matching under the Scheme.

The OAIC also encouraged DHS to undertake a PIA for its data-matching activities but as it transpired, no PIA was completed before the Scheme commenced.[42]

4 The Scheme commences

4.1 Early concerns and criticisms

The Online Compliance Intervention (OCI) phase of the Scheme commenced on 1 July 2016, following a manual pilot phase.

In January 2016, DHS was notified that the OAIC proposed to investigate a complaint lodged by a person who alleged that DHS interfered with her privacy by unlawfully collecting her TFN and employment history from the ATO and incorrectly applying it to, and raising a debt against, her twin sister.[43]

The OAIC advised DHS that it would be investigating whether breaches of the APPs had occurred, including breaches of APP 10.1 (accuracy of personal information collected, used and disclosed) and APP 13 (ensuring personal information held is accurate, up to date and complete, relevant and not misleading).[44]

The Commission has inferred from the available documents that a complaint was also lodged by either the complainant or her sister with the Inspector-General of Taxation.[45]

Dr Elea Wurth, a partner from Deloitte Risk Advisory Pty Ltd (Deloitte) who was engaged by the Commission to provide expert analysis on the technical structure of the Scheme, was asked to give a view on whether or not the "fuzzy" and "tight" matching processes that were introduced by DHS after this time would have prevented this issue from occurring:[46]

> DR WURTH: … Based on that information, and looking at the fuzzy and tight rules which are applied, it would seem that that would pass through…within the top sets of fuzzy rules there. If you can see on the next page is there are the rules specified, and…you are looking for a fuzzy surname, fuzzy first name and fuzzy date of birth, when here you would have a tight match on surname, a tight match on date of birth and a fuzzy first name.
>
> MS BERRY: And so is the upshot of that that because the medium confidence CIDC codes were being passed to DHS, even when the fuzzy and tight matching rules were introduced, a circumstance such as this would not have been prevented by those rules?
>
> DR WURTH: It is possible, yes.[47]

The Commission has not been able to determine how and when this complaint was resolved.

In early January 2017, *The Australian* was seeking information about what (if any) steps were being taken to investigate the Scheme.[48]

On 5 January 2017, Mr Pilgrim issued a statement to *The Australian* in response to questions about the OAIC and welfare data-matching issues.[49] The OAIC gave DHS advance notice of Mr Pilgrim's statement in which Mr Pilgrim referred both to action being taken on the NEIDM and the OAIC's oversight of DHS "data-matching activities" (in context, a reference to the Scheme).

Malisa Golightly (deputy decretary, DHS) rightly saw the statement as problematic for DHS, particularly as no PIA had been undertaken for the Scheme. In an internal email on 5 January 2017, she observed:

> However there are a number of concerns that I have picked up (there may be others):
>
> first we need to know what the media query was that generated this. If it wasn't a media enquire [sic] what was it?
>
> Who are proposing [sic] to issue this statement to? When?
>
> if it is not referring to the income matching programme then what is the relevance of the statement? Presumable [sic] they have been asked for a statement to do with the programme being discussed in the media – not some other programme?? their third para says that the assessment is not finalised – this will be interpreted by commentators as we released a system without have [sic] a privacy assessment completed and that will cause huge problems for us.

> Cathy – can you give OIPC and see what the background is (particularly if it is a media enquiry)
>
> Sue/Karen – can you review please and identify any other problems that this could cause.
>
> We will need to alert the Minister's Office once we have the detail on the context surrounding the statement.[50]

Ms Golightly's concern was well-founded. On 6 January 2017, *The Australian* incorrectly reported that the Information Commissioner had launched an investigation into "claims that welfare recipients have been wrongly issued with overpayment bills because of a shoddy data-matching scheme".[51] Rumours of an investigation were subsequently picked up by other media outlets.[52]

The Australian, in reporting on the "investigation", observed: [53]

> Mr Pilgrim has oversight of government data-matching projects in his capacity as Privacy Commissioner. Agencies are required to file documents detailing their data-matching plans and procedures with his office, and also provide him with regular progress reports.

The Commission has not identified any further statement issued by Mr Pilgrim on this matter.

In January 2017, the Commonwealth Ombudsman announced his intention to undertake an investigation into the Scheme. The Ombudsman identified as a key issue the question of the Scheme's "[a]dherence to relevant legislative requirements (in the relevant social security and data matching legislation)."[54] By 3 January 2017, representatives of the OAIC had met with representatives of the Ombudsman's Office to discuss "debt recovery and data matching" under the Scheme.[55]

A file note made by Louise Macleod of the Ombudsman's Office records what was discussed at the meeting:[56]

- OAIC are involved in oversight of data-matching across government – were given funding to oversee non-employment income data matching (NEIDM)
- DHS told OAIC last week that its compliance platform falls outside scope of oversight because its employment income data being used – OAIC don't necessarily agree with this distinction
- OAIC have had several briefings from DHS re data matching – have encouraged DHS to do Privacy Impact Assessment (PIA) ***recommend we seek copy of this and data matching protocol**
- OAIC going 2 DHS audits – field work for first audit in Feb 2017 and second audit at end of FY – second audit will look at accuracy of data and its use – therefore narrow focus compared with OCO oversight.
- Accuracy issues will include considering whether DHS has taken reasonable steps and adequate testing to ensure the accuracy of data.
- DHS are not using the Data Matching Act – ceased using it last July – now using OAIC's voluntary data matching guidelines and their own powers under the legislation and the Privacy Act. DHS would need to seek an exemption from the Privacy Commissioner if it wanted to deviate from the guidelines. The guidelines don't provide specific timeframes – for example notices to individuals must give a "reasonable" timeframe. Guidelines concern data retention, use and destruction.
- The OAIC audit looks at DHS compliance with:
    - APP 1.2 – open and transparent management of personal info, specifically governance arrangements and compliance with the data matching guidelines
    - APP 3 – collection of personal info
    - APP 5 – notification of collection of personal info
    - APP 11 – security of personal info
- Audit will involve notice to DHS, seeking policy and procedural documents, field work (ie interviews, collection of data, observations), report and recommendations. First audit to be published mid-year. Will look at governance arrangements, decision making, privacy by design approach, risk assessments (high, medium, low)
- At this stage the Privacy Commissioner is not intending to do a Commissioner-initiated report but this may change. OAIC keen to share information on data accuracy subject to any restrictions.

- OCO referred OAIC to the Better Practice Guide for Automated Decision Making and the Centrelink Service Delivery report (links sent after the meeting).
- OCO has received complaints about data matching issues with Centrelink debt recovery. Also has IOI's which monitor broader systemic issues. Has received briefings from DHS about the LMA.1000.0001.1971 platform over past 6 months and is seeking a further briefing about current issues with platform and debt recovery – broadly, governance and design, linkages between data matching and assessment, risk assessment of customers, linkages between platform and other systems, functionality of the platform.
- Also looking a [sic] issues of legality , auto-decision making and fettering of powers, averaging of data, customer vulnerabilities and ability to access DHS and to challenge the debt and seek review, what data is being obtained from ATO
- Agreed to meet again in mid Feb to share info obtained from field work/briefings etc.

[emphasis in original]

(The term "audit" in this email should be read as "assessments" as this was the term commonly used by the OAIC.[57] The term " Commissioner-initiated report" is assumed to mean "own motion investigation".)[58]

4.2 The 2004 and 2017 Protocols

In the 'Data Matching and Exchanges' chapter, the Commission has found that DHS did not review and replace the 2004 Protocol before the commencement of the Scheme.[59]

The Commission has also found that from 2011, DHS failed to comply with the 2004 and 2017 Protocols, and consequently failed to comply with the voluntary Data-matching Guidelines, by retaining the PAYG matched data it collected from the ATO even though it was no longer required.[60]

The OAIC was one of many interested parties which sought access to the 2004 Protocol. The document change history in the Protocol outlines that revisions were made to the document in 2004 (April and May) as a result of the OAIC's review,[61] but there is no evidence of having DHS provided it to the OAIC once finalised, or later.

The Information Commissioner did not have power, absent an assessment or investigation, to compel DHS to produce the 2004 Protocol.[62] On 16 January 2017, an OAIC officer wrote an email to DHS which suggested that the OAIC considered it should have received a copy of the 2004 Protocol:[63]

> I'm following up to ensure I have a broad overview of the data matching programs and protocols relevant to this issue.
>
> DHS has sent the OAIC a Privacy Impact Assessment and a data matching program protocol for the Non Employment Income Data Matching program.
>
> It would be helpful to have an updated list of all the data matching programs relevant to debt collection (including the Employment Income Data matching program).
>
> For those programs, could DHS please indicate which, if any, data matching program protocol they are operating under and when the protocol was sent to the OAIC?

Following enquiries from the media,[64] the public and the OAIC in early 2017 about the data-matching protocol, DHS proceeded to review and replace the 2004 Protocol in May 2017. This became the 2017 Protocol.[65]

The OAIC was consulted on the draft 2017 Protocol.[66]

The Commission has not identified any document where DHS disclosed to the OAIC that:

- it had failed to comply with the voluntary Data-matching Guidelines by failing to review the 2004 Protocol before the Scheme commenced, or
- it was not complying with the 2004 Protocol when the Scheme commenced.

Instead, DHS told the OAIC that the new protocol was required to accommodate the changes under the EIC phase of the Scheme.[67]

The Commission can infer from available documents that the OAIC provided comment to DHS on two drafts of the 2017 Protocol.[68] A second draft of the 2017 Protocol was provided to the OAIC on 23 May 2017 with the following advice from DHS:

> The department has been continuing to develop this protocol and has noted your feedback, which includes consideration of publication of its data-matching protocols on the external facing website to ensure awareness of the program and additional detail describing the administrative action which may be taken. Please see attached an updated draft for the PAYG Protocol May 2017 for your review and feedback.[69]

DHS prepared a submission for the Minister for Human Services to explain its intention to publish the 2017 Protocol. It included the following advice:

> The department developed a program protocol for this activity in 2004, when the department commenced receiving the PAYG data file from the Australian Taxation Office (ATO). The process for this data matching activity has not changed since 2004. The original program protocol for PAYG data matching was implemented in 2004, following consultation with OAIC.
>
> The 2004 protocol is out of date and currently being updated in consultation with the OAIC to establish a 2017 version. Once settled it is proposed that the 2017 version will be made available on request. The updates are focussed on changes such as the name of the entities involved and the technology that supports the data matching. The fundamentals of the data matching programme remain unchanged.[70]

The OAIC offers assistance

In April 2017, the Ombudsman's report *Centrelink's Automated Debt Raising and Recovery System* was published. It disclosed that the ATO was using TFNs to match identities and extract data for provision to DHS under the Scheme. [71]

On 16 May 2017, the OAIC advised DHS in writing that it did not propose to commence a Commissioner-initiated investigation into the Scheme, but was ready to assist DHS to implement the Ombudsman's recommendations in so far as they related to the Privacy Act:

> As you will be aware, the Australian Information Commissioner chose to await the Commonwealth Ombudsman's report into Centrelink's automated debt raising and recovery system, before deciding whether to commence a Commissioner Initiated Investigation (CII) into privacy aspects of the PAYG data matching program. The OAIC's data matching assessment program for DHS was also put on hold pending the outcome of this report. As the Ombudsman's report has now been published, I would like to let you know of the Australian Information Commissioner's decisions in relation to these matters.
>
> **Commissioner Initiated Investigation into PAYG data matching**
>
> Having reviewed the Commonwealth Ombudsman's recommendations and findings in relation to Centrelink's automated debt raising and recovery systems, including DHS' responses to these recommendations and findings, the Commissioner has decided not to undertake a CII (Commissioner initiated investigation) under s 40(2) of the Privacy Act 1988, into this matter.
>
> .....
>
> **OAIC assessment of the PAYG data matching program**
>
> While the Commissioner does not propose to commence a CII into Centrelink's automated data-matching and debt recovery system, based on our review of the Commonwealth Ombudsman's report, implementation of this system appears to have raised privacy implications that warrant monitoring. The particular issues that appear to arise include whether DHS has taken reasonable steps to ensure the accuracy of personal information used in the data-matching and debt recovery process (see APP 10), and whether individuals have had a reasonable opportunity to correct their personal information (see APP 13).
>
> To help address these issues, we would like to offer our expertise, to the extent permitted by our resources, to assist DHS to implement privacy aspects of the Ombudsman's recommendations. As a first step, we would appreciate if you could meet with us to provide a briefing about DHS' implementation of these recommendations.

> In addition, in the 2017-2018 financial year, the OAIC intends to conduct an assessment, under s 33C of the Privacy Act, in relation to the DHS PAYG data matching program Online Compliance Intervention system. This will provide an opportunity for DHS to implement the recommendations in the Commonwealth Ombudsman report and for the Commissioner to then assess whether concerns remain about the quality and accuracy of personal information.[72]

On 27 June 2017, Annette Musolino (chief counsel, DHS) responded to the OAIC.[73] She advised:

> I appreciate your offer to assist the department to implement the privacy aspects of the Commonwealth Ombudsman's recommendations. As noted at the meeting, the department is on track to implement the recommendations by August 2017. The department will provide status updates as appropriate.

There is no record to suggest the OAIC was involved in assisting DHS to implement the Ombudsman's recommendations.

More criticism

A damning media article was published by *The Mandarin* a few days later (on 30 June 2017), titled "A litany of privacy disasters: how to ruin public faith in just 12 months."[74] The article observed:

> The human services disaster-zone known as 'robodebt' hit the news, with stories of its victims raising significant concerns about the very real human cost of automated data-matching programs, designed and conducted by Centrelink without due regard to data quality.
>
> …
>
> Privacy Commissioner Timothy Pilgrim hinted at this, when he wrote to the Secretary of PM&C recently that, given the "several high profile privacy incidents in recent times", there is an "urgent need" for action by the Australian Public Service to ensure compliance with privacy law, and "broader cultural change" to improve privacy protections, so as to "facilitate the success of the Australian Government's broader data, cyber and innovation agendas".
>
> Pilgrim said that more work is needed by government to "build a social licence for its uses of data",
>
> particularly in relation to proposed new uses and increasingly 'open' data. He suggested that social licence can only be built through transparency about intended uses of personal information, and effective privacy governance – the current deficiencies in which were the trigger for his letter. However, he also noted that social licence can only be gained when 'the broader community must believe that the uses of data which are permitted are valuable and reasonable".[75]

The OAIC's review of the Scheme that followed did not align with the idea of an "urgent need" for action by the Australia Public Service to ensure compliance with privacy law.

5 The DHS Assessment (2017-2019)

In December 2017 the OAIC commenced an assessment of DHS's management of the Scheme (the DHS Assessment). It should be noted that the assessment commenced more than five months after field work was originally scheduled to begin, and more than two and a half years after the Scheme commenced.

Five months later, in May 2018, the OAIC issued a draft report to DHS with queries. Its final report was completed in June 2019, one and a half years after the DHS assessment commenced and just short of four years after the Scheme began.[76]

5.1 Scope

The scope of the DHS Assessment was confined. The OAIC did not assess whether DHS lawfully collected, used and disclosed personal information (including compliance with social security secrecy provisions) for the purposes of the data matches and data exchanges conducted under the Scheme.

Instead, and consistent with the original plan it had outlined to the Ombudsman in January 2017 and the Information Commissioner's correspondence to DHS on 16 May 2017,[77] the DHS Assessment was limited to DHS's handling practices:

> The scope of this assessment was limited to considering DHS's handling of personal information for the purposes of the PAYG program under Australian Privacy Principle (APP) 10 (quality of personal information) and APP 13 (correction of personal information).[78]

This is despite the OAIC being aware of the following matters which might have caused it to expand the scope of its assessment:

- The volume of records matched and resulting in debt-raising under the Scheme had substantially increased from those associated with the PAYG data-matching process which operated prior to the Scheme[79]
- Compliance with both social security and taxation secrecy provisions was necessary if the data matches and data exchanges were to be lawful[80]
- The ATO was using TFNs for the purposes of matching recipients' data with PAYG summaries[81]
- DHS and the ATO had commenced the Scheme without reviewing the 2004 Protocol and had also failed to publish the 2004 Protocol
- The 2017 Protocol was prepared and implemented almost one year after the Scheme commenced, and
- The Information Commissioner had encouraged DHS to conduct a PIA for its data-matching and had no reason to suppose that one had been conducted in respect of data-matching under the Scheme.
- The Data-matching and exchanges chapter examines some of these matters in more detail, as well as the possible associated interferences with privacy arising which might have suggested to the Information Commissioner that an own motion investigation should be conducted.

The OAIC had originally understood that the scope of the Ombudsman's investigation might address some of these matters.[82] The OAIC would not have wanted to conduct an assessment which covered the sameterritory as the Ombudsman. However, once the Ombudsman's 2017 Investigation Report was released in April 2017, it should have caused the OAIC to reflect on whether there were privacy issues arising from the data-matching process which the Ombudsman's report had not addressed. For example, this extract from the Ombudsman's 2017 report *Centrelink's Automated Debt Raising and Recovery System* should have raised questions:

> 2.3 Since 2010-2011 DHS has had the capacity to store its matched data, so it holds records of discrepancies from that year onwards. In early 2015 DHS proposed a new online approach to compliance which would allow it to review all discrepancies from 2010-2011.
>
> 2.4 The scale of the OCI project is significantly larger than DHS' previous debt raising and recovery process. DHS estimates it will undertake approximately 783 000 interventions in 2016-2017 compared to approximately 20 000 compliance interventions per year under the previous manual process.[83]

5.2 The Report

The following key findings emerged from the DHS Assessment report.

Failure to conduct a privacy impact assessment

The DHS Assessment report noted DHS had not conducted a privacy impact assessment (PIA) prior to the commencement of the Scheme. However, it did not make any finding on the topic beyond this faint criticism:

> A PIA was not conducted for the PAYG program before it commenced in 2004, prior to the introduction of the OCI (now EIC) system in 2016, or before the changes to introduce the EIC in February 2017. However, during fieldwork, DHS noted that a PTA (sic) had been completed in relation to the anticipated changes to the PAYG program that were scheduled to occur after the OAIC's assessment.[84]

The Information Commissioner recommended that DHS "continue to conduct … where appropriate, PIAs for any future changes to the PAYG program."[85]

Failure to comply with the voluntary Data-matching Guidelines

The DHS Assessment report also noted DHS's failure to review and update the 2004 Protocol ahead of the commencement of the Scheme, but explained that compliance with the Protocol was not a matter within the terms of its investigation:[86]

> 3.73 DHS created a program protocol for the PAYG program when the program formally commenced in 2004. An updated version of the protocol was published in May 2017, following consultation with the OAIC. DHS advised that a review of the protocol must occur every three years. The scope of this assessment did not specifically include examination of the program protocol. However, this assessment presented an opportunity for the OAIC to gain a clearer understanding of the context and technical details of the PAYG program, as well as to discuss the changes to the PAYG program since the publication of the May 2017 version of the protocol.

However, the DHS Assessment report did make some important observations about the 2017 Protocol, such as:[87]

> 3.75 The technical standards report provides very little detail about the matching algorithm used in the program, as well as only a brief overview of the risks associated with the program, the data quality controls employed, and the security and confidentiality safeguards in place to minimise access to personal information.
>
> 3.76 Further, some sections of the protocol appeared out-of-date, such as the sample initial contact letter provided at Appendix B of the protocol.

These observations suggest there was at least a potential risk of interferences with the privacy of an individual, namely:[88]

- The lack of evidence about the risks of the program and data quality controls which increased the risk of breaches of APPs 1, 10 and 11
- The lack of evidence of the security and confidentiality safeguards to minimise access to personal information which increased the risk of breaches of APP 11

- The protocol did not appear to contain an up to date description of the data-matching program suggesting the actual use by DHS of the personal information collected was not consistent with the stated purpose which increased the risk of breaches of APPs 1, 5, 6 and 10.
- A breach of the voluntary Data-matching Guidelines by DHS would not automatically constitute a breach of the Privacy Act, unless the agency's action also breached an APP in the Privacy Act.[89] However, the voluntary Data-matching Guidelines are drafted to encourage agencies to adopt best practice and conduct data-matching in a manner which complies with the APPs, so non-compliance is an indication that further investigation may be required.[90]
- The OAIC had also advised the Ombudsman in January 2017 that "DHS would need to seek an exemption from the Privacy Commissioner if it wanted to deviate from the guidelines."[91]

This is consistent with the advice on the OAIC website that:

> Agencies can request an exemption from complying with some parts of the guidelines, if the agency believes that is in the public interest. To ask for an exemption, the agency has to give the OAIC:
>
> - advice about the proposed program
> - details of the exemption they want
> - details of why they think the exemption would be in the public interest.[92]

The Information Commissioner and Privacy Commissioner advised the Commission:

> The OAIC does not have a formal role in ensuring that protocols governing data matching programs are regularly reviewed and, if necessary, updated. Under the voluntary Data Matching Guidelines, the responsibility for updating data matching protocols sits with the primary user agency conducting the data matching.[93]

6 The Services Australia Assessment (2018-2020)

In August 2018, more than three years after the Scheme commenced, the OAIC commenced another assessment of DHS's handling of personal information under the Scheme (the Services Australia Assessment). Similarly to the other assessments, the Services Australia Assessment had a very limited scope in respect of the Scheme:

> The purpose of this assessment was to establish whether DHS is taking reasonable steps to secure personal information under the Pay-As-You-Go (PAYG) and Non-Employment Income Data Matching (NEIDM) programs, in accordance with APP 11. APP 11 requires an entity to take reasonable steps to protect personal information it holds from misuse, interference and loss, as well as unauthorised access, modification or disclosure.[94]

The OAIC's draft report was provided to Services Australia on 24 February 2020 and the final report was published on 20 July 2020, more than five years after the commencement of the Scheme, and after the Scheme had been discontinued.

The following key findings were made in the Services Australia Assessment.

6.1 Destruction of data

The Services Australia Assessment addressed DHS's storage and destruction of data under the Scheme.

The Information Commissioner did not identify a lack of compliance with the 2017 Protocol.

Instead, the report found:

> 3.125 At the time of the assessment, Guideline 7 of the OAIC's Guidelines on Data Matching in Australian Government Administration (Guidelines), specifically advised agencies that in order to comply with the Guidelines they should destroy records collected for the purpose of data matching in accordance with the National Archives of Australia's General Disposal Authority 24 – Records Relating to Data Matching (GDA 24). GDA 24 stated that unmatched records and matched records not selected for investigation or where a decision was made not to proceed with investigation should be destroyed within 90 days of the completion of the data matching activity unless extension of time was approved by the Privacy Commissioner.
>
> 3.126 DHS provided the OAIC with updated copies of the PAYG and NEIDM program protocols. Both protocols state that DHS destroys all data that is not required, in line with Guideline 7.
>
> **Analysis**
>
> 3.127 The OAIC did not identify any privacy risks associated with DHS's destruction and de-identification processes of the PAYG and NEIDM data.[95]

6.2 Failure to conduct a PIA

Similarly to the DHS Assessment, the OAIC reported that DHS had failed to conduct a PIA ahead of the commencement of the Scheme.[96]

7 The ATO Assessment

On 10 December 2018, more than three and a half years after the Scheme commenced, the OAIC advised the ATO that it intended to review its handling of personal information under both the NEIDM and PAYG data-matching programs (the ATO Assessment).[97]

This was also an assessment by the OAIC under section 33C of the Privacy Act.[98] The assessment was limited to considering the ATO's compliance with APP 11 (the requirement to take reasonable steps to protect personal information it held from misuse, interference and loss, as well as unauthorised access, modification or disclosure).[99]

On 10 January 2019, the ATO corresponded with the OAIC and commenced by clarifying its role in the data-matching program under the Scheme. It took the opportunity in that correspondence to describe the steps in the data-matching program as it saw them. This description recorded the fact that TFNs were "appended to the input file" but did not directly acknowledge "use" of the TFNs in the data-matches the ATO conducted.[100]

On 6 June 2017, the ATO had corresponded with the OAIC to respond to a privacy complaint.[101] The complainant told the OAIC that his employment income details had been disclosed by the ATO to DHS.

In responding to the complaint, the ATO informed the OAIC:

> The ATO is authorised to disclose taxpayer protected information (e.g. income information) to DHS when the disclosure meets an exception in the taxpayer confidentiality provisions in Schedule 1 to the Taxation Administration Act 1953 (TAA 1953). Item 1 of table 1 in subsection 355-65(2) of Schedule 1 to the TAA 1953 provides that an ATO officer can lawfully disclose "protected information" to:
>
> > ...an Agency Head (within the meaning of the *Public Service Act 1999*) [sic] of an agency (within the meaning of that Act) dealing with matters relating to the social security law (within the meaning of subsection 23(17) of the *Social Security Act 1991)* [sic] [when that record or disclosure] "is for the purpose of administering that law".
>
> The ATO discloses taxpayer information to DHS for the purpose of DHS administering social security laws. The DHS letter to [the complainant] is consistent with such a disclosure. Consent is not required or indeed relevant to the lawfulness of this disclosure by the ATO.
>
> …
>
> We can only disclose protected information (described by [the complainant] as his 'personal information') to a third party when such a disclosure meets an exception in the taxpayer confidentiality provisions. The disclosure of [the complainant's] income details to DHS by the ATO was lawful. It was for the purpose of DHS administering their social security laws, which meets an exception in the taxpayer confidentiality provision in Schedule 1 to the TAA 1953.
>
> As it was authorised by law, it meets the exception provided by Australian Privacy Principle (APP) 6.2 (b) which permits the disclosure of personal information when -
>
> …the use or disclosure of information is required or authorised by…an Australian Law.[102]

In reply, on 15 June 2017, the OAIC advised the ATO that it was satisfied with the ATO's response to the complaint and had decided not to proceed to an investigation.[103]

More than a year and a half later, on 7 July 2020, the OAIC finalised the ATO Assessment. The report[104] accepted and wholly adopted the narrated steps for the Scheme that the ATO had provided.[105]

The report did not consider:

- the ATO's compliance with any other APPs
- whether the data-matches conducted by the ATO under the Scheme were lawful or the lawfulness of the ATO's use of TFNs for the purpose of the data-matches it conducted under the Scheme

- the changes from the PAYG program which had existed prior to the Scheme, to the Scheme, or
- the ATO's compliance with the voluntary Data-matching Guidelines including whether the ATO complied with the 2004 and the 2017 Protocol.

Despite being aware from April 2017 (from the Ombudsman's 2017 Investigation Report) that the ATO was using TFNs for the data matches it conducted under the Scheme, the OAIC did not amend the scope of its ATO assessment to consider the question of compliance with APP 6 of the Privacy Act (use and disclosure of personal information).[106]

The OAIC had asked a question about the ATO's use of TFNs when consulting DHS about the draft DHS Assessment report.[107] DHS had suggested that the OAIC ask the ATO. [108]

In the final DHS Assessment report the following words appeared:

3	Collection/Use (ATO)	The ATO uses its proprietary software to indentify match the DHS Customer information with ATO records

The question was an important one, not just because of the implications for the ATO's compliance with APP 6, but because of the TFN Rule, which obliged the ATO to use TFN information only for a permitted purpose under taxation or personal assistance law.[109]

It does not appear that the OAIC ever asked the question of the ATO.

7.1 Australian Government – Privacy Act Review Report 2023

On 16 February 2023, the Attorney-General released the Privacy Act Review Report[110] containing 116 proposals for reform of the Privacy Act. The government sought public comment on each of the proposed reforms.

The Report contains a number of proposals which are relevant to the privacy issues which have been canvassed in this chapter and the Data-matching and exchanges chapter:

Additional protections

Proposal 13.1 APP entities must conduct a Privacy Impact Assessment for activities with high privacy risks.

(a) A Privacy Impact Assessment should be undertaken prior to the commencement of the high-risk activity.

(b) An entity should be required to produce a Privacy Impact Assessment to the OAIC on request.

The Act should provide that a high privacy risk activity is one that is 'likely to have a significant impact on the privacy of individuals'. OAIC guidance should be developed which articulates factors that that may indicate a high privacy risk, and provides examples of activities that will generally require a Privacy Impact Assessment to be completed. Specific high risk practices could also be set out in the Act.[111]

Organisational Accountability[112]

Proposal 15.1 An APP entity must determine and record the purposes for which it will collect, use and disclose personal information at or before the time of collection. If an APP entity wishes to use or disclose personal information for a secondary purpose, it must record that secondary purpose at or before the time of undertaking the secondary use or disclosure.

Proposal 15.2 Expressly require that APP entities appoint or designate a senior employee responsible for privacy within the entity. This may be an existing member of staff of the APP entity who also undertakes other duties.

Automated decision making[113]

Proposal 19.1 Privacy policies should set out the types of personal information that will be used in substantially automated decisions which have a legal or similarly significant effect on an individual's rights.

Proposal 19.2 High-level indicators of the types of decisions with a legal or similarly significant effect on an individual's rights should be included in the Act. This should be supplemented by OAIC Guidance.

Proposal 19.3 Introduce a right for individuals to request meaningful information about how substantially automated decisions with legal or similarly significant effect are made. Entities will be required to include information in privacy policies about the use of personal information to make substantially automated decisions with legal or similarly significant effect.

This proposal should be implemented as part of the broader work to regulate AI and ADM, including the consultation being undertaken by the Department of Industry, Science and Resources.

Security, retention and destruction[114]

Proposal 21.7 Amend APP 11 to require APP entities to establish their own maximum and minimum retention periods in relation to the personal information they hold which take into account the type, sensitivity and purpose of that information, as well as the entity's organisational needs and any obligations they may have under other legal frameworks. APP 11 should specify that retention periods should be periodically reviewed. Entities would still need to destroy or de-identify information that they no longer need.

Proposal 21.8 Amend APP 1.4 to stipulate than an APP entity's privacy policy must specify its personal information retention periods.

The Commission notes that the government has not yet provided a formal response to the Privacy Act Review Report.

The Commission supports each of these proposals.

8 Conclusion

The Information Commissioner and Privacy Commissioner told the Commission that the OAIC's preferred regulatory approach is to facilitate voluntary compliance with privacy obligations and to work with entities to ensure compliance and better privacy practice and prevent privacy breaches.[115]

The Information Commissioner's task is a difficult one. The Commission appreciates the OAIC's preference for educative and preventative action by conducting assessments under the Privacy Act. However, as noted in the ALRC Report,[116] the OAIC needs to be prepared to adopt a more formal regulatory posture

where there is a "reasonable" apprehension of possible interferences with the privacy of an individual.

The Information Commissioner could have decided to undertake an own motion investigation into either or both of DHS or the ATO on the basis of a reasonable apprehension that one or more interferences with the privacy of individuals was suspected, but did not do so.

Instead, the Information Commissioner decided to proceed wholly by way of assessment of limited aspects of the Scheme on the assumption that this was the preferable course for achieving its aims in terms of compliance and education about the APPs in the Privacy Act.[117] In conducting the three assessments under the Privacy Act, the Information Commissioner did not have the power to compel DHS to produce documents (such as the 2004 Protocol).[118]

The Commission's findings about the possible breaches of the APPs in the Privacy Act in the Data-matching and exchanges chapter are significant and arise in the context of repeated and voluminous exchanges of personal information and data matches conducted by DHS and the ATO under the Scheme.

As discussed above, in January 2016 DHS was notified that the OAIC proposed to investigate a complaint lodged by a person who alleged that DHS interfered with her privacy by unlawfully collecting her TFN and employment history from the ATO and incorrectly applying it to, and raising a debt against, her twin sister.[119] Even if this complaint were successfully conciliated by the OAIC, it could have triggered an own motion investigation.

This chapter, and the Data Matching and Exchanges chapter, also point to other evidence that suggests there was much to be gained by the Information Commissioner undertaking an own motion investigation into the Scheme, particularly in respect of DHS and ATO compliance with APPs 1, 3, 6, 10, 12 and 13 in Schedule 1 of the Privacy Act.

While it is difficult to assess what difference it would have made, the Commission notes that the Information Commissioner also had the ability to direct DHS to undertake a PIA[120] but did not do so.

With the benefit of hindsight, it is apparent now that the OAIC approach, particularly in light of the substantial media attention and criticism around the Scheme, was too muted to meet the circumstances. Its three assessments, each with a narrow scope, were of little real consequence. What was occurring in the data matching under the Scheme was not given the examination which it needed and which could, with the use of the OAIC's full investigative powers, have occurred.

1 The OAIC comprises the positions of Information Commissioner, Privacy Commissioner and FOI Commissioner.
2 Exhibit 2-2566 - SMO.0001.0002.0013 - MYEFO_2015-16_Final.pdf [p 211].
3 Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [p 12: para 2.44].
4 Office of the Australian Information Commissioner, *Handling of personal information: Department of Human Services PAYG data matching program* (Report, 30 September 2019) [para 5.3].
5 Office of the Australian Information Commissioner, *Securing personal information: Services Australia (formerly Department of Human Services), data matching activities* (Report, 20 July 2020) [para 1.3].
6 Office of the Australian Information Commissioner, *Securing personal information: Australian Taxation Office, data matching activities* (Report, 7 July 2020) [para 1.4].
7 Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [page 12: para 2.44].
8 For further information about TFNs and the TFN Rule see Data-matching and exchanges chapter.
9 Commonwealth of Australia, Letters Patent, 18 August 2022 [p 2: (i)].
10 Exhibit 4-6716 - RBD.9999.0001.0452_R - 2022 12 09 - Letter to Falk re Invitation to give evidence, 9 December 2022; Exhibit 4-6717 - RBD.9999.0001.0473_R - 20221215 Letter to OSA - OAIC 22006293, 15 December 2022; Exhibit 8714 - TPI.9999.0001.0001_R - Letter to Timothy Pilgrim re Invitation to give evidence [SEC=OFFICIAL] [AGSDMS-DMS-FID4758427].
11 Exhibit 4-6717 - RBD.9999.0001.0473_R - 20221215 Letter to OSA - OAIC 22006293, 15 December 2022.
12 Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023.
13 Exhibit 4-7154 - LMA.1000.0001.1970 - Notes from meeting with OAIC re DHS data matching copy, 3 January 2017.
14 Office of the Australian Information Commissioner, *Handling of personal information: Department of Human Services PAYG data matching program* (Report, 30 September 2019).
15 Office of the Australian Information Commissioner, *Securing personal information: Australian Taxation Office, data matching activities* (Report, 7 July 2020).
16 *Australian Information Commissioner Act 2010* (Cth) s 2.
17 Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [page 1: para 1.3].
18 Angeline Falk was appointed AIC on 16 August 2018 and reappointed on 16 August 2021 for a three year term.
19 Attorney-General's Department (Cth), 'Bolstering Australia's national privacy and FOI regulator', (Media Release, 3 May 2023).
20 See the guidance in section 33C of the *Privacy Act 1988* (Cth).
21 See *Privacy Act 1988* (Cth) ss 36A and 40.
22 See *Privacy Act 1988* (Cth) s 33D(1).
23 *For Your Information Report, Australian Privacy Law and Practice*, Australian Law Reform Commission Report No. 108, 2008 <https://www.alrc.gov.au/wp-content/uploads/2019/08/108_vol2.pdf> [p 1585].
24 See the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth) (No. 197 of 2012).
25 *For Your Information Report, Australian Privacy Law and Practice*, Australian Law Reform Commission Report No. 108, 2008 [p 1585: paras 47.103-47.104].
26 Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [page 11: para 2.43].
27 Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [page 13: paras 2.45-2.47].
28 See *Privacy Act 1988* (Cth) s 33C(3).
29 See *Privacy Act 1988* (Cth) s 33C(4). The Information Commissioner's ability to issue a notice under s 33C is also subject to s 70 of the Privacy Act. Section 33C was amended by the *Privacy Legislation Amendment (Enforcement and Other Measures) Act 2022* (Cth) which inserted s 33(3)-(8).
30 See *Privacy Act 1988* (Cth) s 33C(8).
31 See *Privacy Act 1988* (Cth) s 40(2).
32 See *Privacy Act 1988* (Cth) ss 36A, 40(2).
33 *For Your Information Report, Australian Privacy Law and Practice*, Australian Law Reform Commission Report No. 108, 2008 [p 1586: paras 47.105-47.106].
34 See *Privacy Act 1988* (Cth) s 44.
35 See *Privacy Act 1988* (Cth) ss 52, 55, 55A.
36 See *Privacy Act 1988* (Cth) s 41.
37 See *Privacy Act 1988* (Cth) s 40(1).
38 See *Privacy Act 1988* (Cth) s 33D(1).
39 Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [page 17: para 2.72].

40 Exhibit 2-2790 - CTH.3000.0024.5960_R - RE- Data-matching proposal [DLM=Sensitive-Legal].pdf, 13 November 2015.
41 Exhibit 2-2790 - CTH.3000.0024.5960_R - RE- Data-matching proposal [DLM=Sensitive-Legal].pdf, 13 November 2015.
42 Exhibit 4-7154 - LMA.1000.0001.1970 - Notes from meeting with OAIC re DHS data matching copy, 3 January 2017; Office of the Australian Information Commissioner, *Handling of personal information: Department of Human Services PAYG data matching program* (Report, 30 September 2019) [para 3.71].
43 Exhibit 9906 - CTH.3023.0018.2130_R - CP15 02003 [redacted] s40 letter to DHS.PDF; Exhibit 9900 - CTH.3004.0009.6409_R - RE: 3 September 2018 PLEXID 24477 & 24478 - privacy complaint to the OAIC [DLM=Sensitive:Personal].
44 Exhibit 9906 - CTH.3023.0018.2130_R - CP15 02003 [redacted] s40 letter to DHS.PDF.
45 Exhibit 9910 - CTH.3030.0018.8382_R RE: For urgent review please - For action: Escalated Privacy Complaint - LEXID 12079 [DLM=Sensitive] [p 8385].
46 Transcript, Dr Wurth, 8 March 2023 [p 4652: lines 1-12]; see further discussion on "fuzzy" and "tight" data matches in the Data-matching and exchanges chapter.
47 Transcript, Dr Wurth, 8 March 2023 [p 4653: lines 3-14].
48 Exhibit 9451 - CTH.3001.0032.3904 - RE: RESUBMIT FOR OK/ Head's Up Media enquiries - Ben Butler - Australian [DLM=For-Official-Use-Only]; Exhibit 4-7055 - CTH.3001.0032.3989_R - FOR INFO- Minister's Office - today's media and communication interactions [DLM=For-Official-Use-Only], 5 January 2017.
49 Exhibit 9457 - CTH.3001.0032.3843 - FW: FYI - Statement by the Aust Information and Privacy Commissioner [SEC=UNCLASSIFIED].
50 Exhibit 4-7048 - CTH.3001.0032.3900_R - RE- URGENT-- FYI - Statement by the Aust Information and Privacy Commissioner [DLM=For-Official-Use-Only].pdf.
51 Exhibit 9452 - CTH.3001.0032.4031 - Top Stories - Friday 6 January 2017.pdf.
52 Exhibit 9859 - CTH.3001.0032.7691 - 2017.01.09 - Transcript - ABC Melbourne - Interview with Christopher Knaus.docx.
53 Exhibit 9452 - CTH.3001.0032.4031 Top Stories - Friday 6 January 2017.pdf - *Inquiry into 'Welfare Overpayments'*, Ben Butler, 6 January 2017.
54 Exhibit 4-7165 – LMA.1000.0001.0380, Minute to Ombudsman DHS online compliance platform OM copy.docx, 5 January 2017.
55 Exhibit 4-7154 - LMA.1000.0001.1970 - Notes from meeting with OAIC re DHS data matching copy, 3 January 2017.
56 Exhibit 4-7154 - LMA.1000.0001.1970 - Notes from meeting with OAIC re DHS data matching copy, 3 January 2017.
57 Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [page 2; para 1.16].
58 See *Privacy Act 1988* (Cth) s 40(2).
59 In late 2016 and early 2017, DHS received repeated media requests to disclose or publish the 2004 Protocol. This prompted DHS officers to review the 2004 Protocol, at which point it was realised that the 2004 Protocol had not been updated to reflect the OCI program and therefore was not compliant with the Information Commissioner's Guidelines: see section 5.1.2 of the Data-matching and exchanges chapter.
60 See section 6.2 of the Data-matching and exchanges chapter.
61 Exhibit 1-1108 - CTH.3000.0030.0386 - 2004 Pay As You Go PAYG v1.0.docx [p 1].
62 See *Privacy Act 1988* (Cth) ss 33C(3), 44.
63 Exhibit 2-2805 - CTH.2002.0005.5182_R - FW- Data Matching [SEC=UNCLASSIFIED], 16 January 2017.
64 See, e.g., Exhibit 3-4417 - CTH.3001.0032.2826_R - FOR OK- Head's Up Media enquiries - Ben Butler - Australian [DLM=For-Official-Use-Only], 5 January 2017 and Exhibit 9453 - CTH.3001.0033.1472 - For urgent clearance: Data matching protocol media response [DLM=For-Official-Use-Only].
65 Exhibit 9454 - CTH.3001.0044.8329 - FW: OAIC letter to Malisa Golightly - re Data Matching [DLM=For-Official-Use- Only]; Exhibit 9455 - CTH.3007.0006.2830_R - RE: OAIC letter to Malisa Golightly - re Data Matching [DLM=For- Official-Use-Only].
66 Exhibit 2-2772 - CTH.3000.0030.3655_R - RE- Updated PAYG Program Protocol.
67 Exhibit 2-2772 - CTH.3000.0030.3655_R - RE- Updated PAYG Program Protocol.
68 Exhibit 2-2772 - CTH.3000.0030.3655_R - RE- Updated PAYG Program Protocol.
69 Exhibit 2-2772 - CTH.3000.0030.3655_R - RE- Updated PAYG Program Protocol.
70 Exhibit 9456 - CTH.3004.0004.3000 - MS17-000506.docx.
71 Exhibit 1-1220 - CTH.3004.0010.5247 - Ombudsman Report-Centrelink's-automated-debt-raising-and-recovery-system, April 2017 [p 39: paras 2.13, 2.15].
72 Exhibit 9902 - CTH.3000.0030.1019 - Privacy Assessment of the Non-Employment Data Matching Program and PAYG Data Matching Program.pdf.

73 Exhibit 9903 - CTH.3001.0047.7961 - Letter to A Falk from DHS.PDF.
74 Anna Johnston, 'A litany of privacy disasters: how to ruin public faith in just 12 months', *The Mandarin* (online, 30 June 2017) <https://www.themandarin.com.au/80791-litany-privacy-disasters-ruin-public-faith-just-12-months/>.
75 Anna Johnston, 'A litany of privacy disasters: how to ruin public faith in just 12 months', *The Mandarin* (online, 30 June 2017) <https://www.themandarin.com.au/80791-litany-privacy-disasters-ruin-public-faith-just-12-months/>.
76 Office of the Australian Information Commissioner, *Handling of personal information: Department of Human Services PAYG data matching program* (Report, 30 September 2019).
77 Exhibit 9901 - CTH.3000.0030.1018 - IMPORTANT OIC ADVICE: Privacy Assessment of the Non-Employment Data Matching Program and PAYG Data Matching Program [SEC=UNCLASSIFIED]; and Exhibit 9902 - CTH.3000.0030.1019 - Privacy Assessment of the Non-Employment Data Matching Program and PAYG Data Matching Program.pdf.
78 Office of the Australian Information Commissioner, *Handling of personal information: Department of Human Services PAYG data matching program* (Report, 30 September 2019) [1.2].
79 Exhibit 4-7147 – LMA.1000.0001.2996_R – Report – Centrelink's automated debt raising and recovery system, April 2017 [p 5: para 2.4] and [p 40: para 2.21].
80 Exhibit 2-2790 - CTH.3000.0024.5960_R - RE- Data-matching proposal, 13 November 2015.
81 Exhibit 4-7147 – LMA.1000.0001.2996_R – Report – Centrelink's automated debt raising and recovery system, April 2017 [p 39: para 2.15].
82 Exhibit 4-7154 - LMA.1000.0001.1970 - Notes from meeting with OAIC re DHS data matching copy, 3 January 2017.
83 Exhibit 1-1220 - CTH.3004.0010.5247 - Ombudsman Report-Centrelink's-automated-debt-raising-and-recovery-system, April 2017 [p 5: para 2.3-2.4].
84 Office of the Australian Information Commissioner, *Handling of personal information: Department of Human Services PAYG data matching program* (Report, 30 September 2019) [3.71].
85 Office of the Australian Information Commissioner, *Handling of personal information: Department of Human Services PAYG data matching program* (Report, 30 September 2019) [4.9].
86 Office of the Australian Information Commissioner, *Handling of personal information: Department of Human Services PAYG data matching program* (Report, 30 September 2019) [3.73].
87 Office of the Australian Information Commissioner, *Handling of personal information: Department of Human Services PAYG data matching program* (Report, 30 September 2019) [3.75]-[3.76].
88 See *Privacy Act 1988* (Cth), s 13 and Schedule 1.
89 Exhibit 1-0505 - ATO.9999.0001.0003 - Guidelines on data matching in Australian Government administration [para 8].
90 Exhibit 1-0505 - ATO.9999.0001.0003 - Guidelines on data matching in Australian Government administration [para 6].
91 Exhibit 4-7154 - LMA.1000.0001.1970 - Notes from meeting with OAIC re DHS data matching copy, 3 January 2017.
92 Office of the Australian Information Commissioner, Government data matching, *Government data* matching (Web page, accessed 19 June 2023) <https://www.oaic.gov.au/privacy/privacy-legislation/related-legislation/government- data-matching>.
93 Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [page 18: para 2.74].
94 Office of the Australian Information Commissioner, *Securing personal information: Services Australia (formerly Department of Human Services), data matching activities* (Report, 20 July 2020) [para 1.3].
95 Office of the Australian Information Commissioner, *Securing personal information: Services Australia (formerly Department of Human Services), data matching activities* (Report, 20 July 2020) [paras 3.125-3.127].
96 Office of the Australian Information Commissioner, *Securing personal information: Australian Taxation Office, data matching activities* (Report, 7 July 2020) [para 3.41].
97 Exhibit 1-0293 - ATO.001.933.6001_R - OAIC Review Response, 10 January 2019.
98 Office of the Australian Information Commissioner, *Securing personal information: Australian Taxation Office, data matching activities* (Report, 7 July 2020) [para 1.2].
99 Office of the Australian Information Commissioner, *Securing personal information: Australian Taxation Office, data matching activities* (Report, 7 July 2020) [para 1.3].
100 Exhibit 1-0293 - ATO.001.933.6001_R - OAIC Review Response, 10 January 2019.
101 Exhibit 9907 - ATO.002.077.3568_R - 2016.06.06- [REDACTED] - Letter from ATO to OAIC - Final.docx.
102 Exhibit 9907 - ATO.002.077.3568_R - 2016.06.06- [REDACTED] - Letter from ATO to OAIC - Final.docx.
103 Exhibit 9909 - ATO.002.077.3575_R - Privacy complaint by [REDACTED]- Our ref: [SEC=UNCLASSIFIED].

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Section 7: The Australian Public Service

Chapter 23: Improving the Australian Public Service

1 Introduction

I think what we can see is that to some degree, the service, parts of the service at times have lost its soul, lost its focus on people, its empathy for people. We'll need to reflect on how we discharged our legal and ethical responsibilities under law, including in our leadership, and we'll need to examine and act to strengthen our systems, including training and performance management across the service, to ensure that what we've seen so far isn't repeated.[1]

- Gordon de Brouwer, current Australian Public Service Commissioner

Regardless of the political complexion of the government of the day, or its policies, it is highly desirable if not essential to the proper functioning of the system of representative and responsible government that the government have confidence in the ability of the APS to provide high quality, impartial, professional advice, and that the APS will faithfully and professionally implement accepted government policy, irrespective of APS employees' individual personal political beliefs and predilections.[2]

- Comcare v Banerji

The volume on the Chronology of the Robodebt Scheme in this report describes the conditions that led to the Robodebt Scheme's (the Scheme's) establishment and continuation. Those conditions included repeated failures by members of the Australian Public Service (APS) to discharge their professional obligations and to adhere to the values and standards that applied to their roles.

But the behaviour of individuals is only part of the story. In the Commission's view, many of the failures of public administration that led to the creation and maintenance of the Scheme can be traced to features of the APS structure. These features include:

- the separation of responsibilities between agencies in relation to the development and maintenance of government programs and the lack clear definition of those responsibilities
- a lack of independence on the part of secretaries
- woefully inadequate recordkeeping practices
- a lack of understanding on the part of some of those involved of the APS' role, principles and values.

Those hoping for recommendations for wholesale reform of the APS may be disappointed. The Commission had neither the time nor the resources to examine whatever shortcomings exist in the APS as a whole, and is anyway conscious of a recent and expert review.[3] However, the Commission's work does enable it to add its voice to some of the recommendations of that review and to make some recommendations of its own more particularly related to the deficiencies in conduct and failure to recognise responsibilities and obligations which were starkly manifested in the design and implementation of the Scheme.

2 The current state of public service reform

On 20 September 2019, an independent review of the APS titled *Our Public Service, Our Future* (the Thodey Review) was published.[4] In that review, an independent panel analysed the structure of the APS and made recommendations for reform.[5]

The Thodey Review affirmed the "basic role" of the APS is to provide robust and evidence-based advice to Ministers, frankly and freely.[6] The recommendations were largely directed at the need for a clear understanding of the APS's role. They included the codification of new "principles" in the P*ublic Service Act 1999* (Cth) (Public Service Act) to complement the existing APS values, and further training concerning the roles and responsibilities regulating interactions between ministers, their advisers and the APS. Additionally, the Thodey Review recommended the implementation of a more robust set of processes relating to the appointment, termination and performance management of secretaries.

That change is already under way. The Morrison Government accepted a number of recommendations made by the Thodey Review and began a process of implementation. In the wake of the 2022 federal election, the Albanese Government has indicated that its APS reform agenda will build on the recommendations made.[7]

As a result of the Thodey review, amendments to the PS Act have been proposed through the *Public Service Amendment Bill 2023* (Cth), introduced into Parliament on 14 June 2023. These proposed changes include the following:

- the addition of "stewardship" as an APS Value, recognising that the APS "builds its capability and institutional knowledge, and supports the public interest now and into the future, by understanding the long-term impacts of what it does,"[8]
- the imposition of requirements that "capability reviews" be undertaken of public service agencies to build organisational capacity and accountability,[9] and
- amendments that prohibit Ministers from directing Agency Heads.[10]

Other reforms traceable to the Thodey Review (that did not require legislative amendment) include the establishment of professions within the APS for data, digital, and human resources[11] giving effect to the recommended establishment of an APS professions model to build capability.[12]

The Commission welcomes the establishment of the National Anti-Corruption Commission (NACC) which will investigate and report on serious or systemic corrupt conduct in the APS.

The Commission also notes the establishment of the APS Integrity Taskforce on 8 February 2023 to deliver "a pro-integrity culture" across the public service.[13] That taskforce's terms of reference are directed at, in part, framing a comprehensive response to the themes emerging from this Commission. The taskforce will consider measures in relation to cultural and behavioural practices, values and leadership capabilities that support (or undermine) integrity and leadership (including the roles and responsibilities of secretaries and agency heads).[14]

The Thodey Review also recommended that the Public Service Act be amended to give the APS Commissioner own-motion powers to initiate investigations and reviews.[15] It envisaged that the expansion of the responsibilities and functions of the Australian Public Service Commissioner (APSC) would complement the NACC, which will have been established by the time this report is published.[16] The Commission agrees with this recommendation.[17]

What became apparent through the course of the Commission's inquiries is that there were practices by APS employees which would not reach the level of corrupt conduct in section 8 of the *National Anti-Corruption Commission Act 2022* (Cth) but which were systemic, not merely individual, and constituted conduct sufficiently concerning to warrant investigation.

3 Structural relationships between Social Services and Services Australia

Throughout the life of the Scheme, there was division between the responsibilities of DSS and DHS (now Services Australia). Fundamentally, DSS was responsible for policy while DHS was responsible for service delivery.

This was not a new idea. Following a review of statutory authorities published in 2004, the Howard Government created DHS, giving it oversight of six government agencies, including Centrelink.[18] Shortly after, the Hon Joe Hockey, then Minister for Human Services, noted that the new system – which had the effect that an agency would report to one departmental secretary on policy matters and another on service delivery – had already led to some "creative tensions" between portfolios.[19] In 2007, the service delivery agencies were brought within a new Human Services portfolio.[20] In 2008, DHS was given responsibility for the development of service delivery policy.[21] As Raymond Griggs AO CSC identifies,[22] and the evidence before the Commission clearly indicates, these creative tensions endured.

The effect of this was that service delivery policy and practice became separated from, and in some ways began to compete with, broader social services policy administration. Another result, according to Andrew Podger AO, who delivered a report to the Commission was that service delivery policy and practice became subject to much closer political control,[23] when, in his view, it is desirable for service delivery to be insulated from political control.[24]

This chasm between DSS and DHS, and a lack of clearly identified responsibilities was, in the Commission's view, a contributing factor to the Scheme's establishment and continuation. Despite the prescribed division of their responsibilities and how the relationship between agencies was defined, the Scheme and its underlying policy was developed primarily by DHS, with DSS kept on the periphery.[25]

Rebecca Skinner, CEO, Services Australia, cited confusion about the division of responsibility between DSS and DHS during the life of the Scheme.[26] Mr Griggs, Secretary, DSS, similarly acknowledged "tension" between the respective agencies, particularly in relation to service delivery and policy.[27] Mr Griggs' view was that if the NPP (that informed Cabinet's decision to approve funding for the Scheme) had been led by DSS, "the chances of the right advice being provided to Government would have been higher".[28]

The creation of Services Australia as an executive agency in February 2020 went some way in reversing those circumstances, in particular because responsibility for service delivery policy was returned to DSS at the time.[29] Mr Podger's report supports this change, although he maintains that Services Australia should now also be made a statutory authority, to further insulate it from political control.[30] Drawing on submissions from Mr Podger, the Thodey Review endorsed the view that "A greater degree of independence can be warranted for service delivery, regulation, integrity and government business functions".[31] The Thodey Review in turn recommended that the "form, function and number of government bodies" be reviewed to ensure they remain fit for purpose.[32] As part of that recommendation, the report proposed that the Commonwealth Government Structures Policy be amended "to include explicit guidance on the appropriate level of independence best suited to deliver different types of government functions."[33]

The Commission notes that the present government has undertaken to implement a number of the recommendations made by the Thodey Review, although it is not clear to what extent any formal organizational review is underway.[34] The most recent Government Structures Policy, updated in February 2023, recommends periodic reviews of existing government bodies every five to 10 years.[35]

While acknowledging that Mr Podger may well be right that Services Australia should become a statutory authority, the Commission is not well placed to consider that matter. It has not, for example, received sufficient evidence about the present structural shortcomings of DSS and Services Australia. However,

given Ms Skinner's observations about Services Australia's transition from DHS,[36] and the fact that that transition took place without the benefit of the information in this report, the Commission recommends that the government undertake an immediate and full review of the structure of the social services portfolio, and of Services Australia as an entity.

Recommendation 23.1: Structure of government departments

The Australian Government should undertake an immediate and full review to examine whether the existing structure of the social services portfolio, and the status of Services Australia as an entity, are optimal.

4 Public service employees

The idea for the Scheme was conceived by employees of DHS who failed to recognise its inconsistency with social security legislation, its incompatibility with an underlying policy rationale of that legislation and the cohort of people it was likely to affect.

Its continuation was enabled and facilitated by employees who disregarded the considered views of the Administrative Appeals Tribunal, deceived the Commonwealth Ombudsman and failed to give frank and fearless advice to the executive.

The findings in this report evidence a failure of members of the APS to live up to the values and standards of conduct expected of them by the Australian community. These expectations are not opaque. They are clearly set out in:

- The Public Service Act which sets out the standards of conduct required of APS employees in the form of 'APS Values' and 'APS Employment Principles' and establishes a framework for dealing with employee misconduct. All APS employees are required to inform themselves of their obligations under the Public Service Act.[37]
- The APS Code of Conduct, which lists a number of requirements governing the actions and behaviours of APS employees.[38]
- The *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act), under which APS employees are required to exercise their powers, perform their functions and discharge their duties honestly, in good faith and for a proper purpose,[39] with a degree of care and diligence that a reasonable person would exercise in their position.[40]
- The *Public Interest Disclosure Act 2013* (Cth) (PID Act), which serves to promote the integrity and accountability of the Commonwealth public sector and to ensure that disclosures by public officials (about conduct that is illegal, or that otherwise involves corruption, maladministration, abuse of public trust or wastage of public money)[41] are properly investigated and dealt with.[42]

Knowing these obligations and understanding how they apply is clearly essential for any public servant. Mr Podger argued that more needs to be done to ensure APS employees (in particular Secretaries, the SES and Executive Level officers) appreciate their statutory and other responsibilities.[43] The Commission agrees. It is quite clear that there was insufficient understanding and recognition of these obligations across DSS and DHS throughout the Scheme.

The Thodey Review recommended that the APSC should deliver whole-of-service induction on essential knowledge required for public servants, with participation required to pass probation.[44] The Commission agrees with that recommendation.

Recommendation 23.2: Obligations of public servants

The APSC should, as recommended by the Thodey Review, deliver whole-of-service induction on essential knowledge required for public servants.

Those who designed and implemented the Scheme failed to recognise their role in a service delivery organisation, and the characteristics of the people they sought to serve. Mr Griggs commented on the lack of citizen focus throughout the Scheme, acknowledging that the Department "failed to fully understand the cohort of citizens impacted and to keep their best needs central to any policy advice or actions".[45] Ms Skinner described her plan for Services Australia as embodying the principles of simple, helpful, respectful and transparent; and expressed her uncontroversial view that the Scheme did not reflect these principles, in design or customer experience.[46] The Australian Council of Social Service recommended that the DSS and Services Australia implement a strategy to actively employ people who have experience of using the social security system.[47]

Recommendation 23.3: Fresh focus on "customer service"

Services Australia and DSS should introduce mechanisms to ensure that all new programs and schemes are developed with a customer centric focus, and that specific testing is done to ensure that recipients are at the forefront of each new initiative.

Public servants, whether lawyers or not, should have a basic understanding of natural justice principles and administrative decision making, including the statutory provisions governing that decision making.

In the Administrative Appeals Tribunal chapter, the Commission has recommended the re-instatement of the Administrative Review Council (ARC) which was defunded and effectively discontinued in the 2015-16 Budget.[48] Its functions include facilitating training of members of authorities of the Commonwealth and other persons in exercising administrative discretions or making administrative decisions; and to promote knowledge about the Commonwealth administrative law system.[49]

During its operation, the ARC produced best practice guides on topics of lawfulness, natural justice, evidence facts and automated decision-making, which are still available on the Attorney-General's Department website (though may now be somewhat dated).[50] These are useful resources for public servants.

Recommendation 23.4: Administrative Review Council

The reinstated Administrative Review Council (or similar body) should provide training and develop resources to inform APS members about the Commonwealth administrative law system. (see Automated Decision-Making and the Administrative Appeals Tribunal chapters)

Both Dr Sue Vardon AO (former and inaugural Centrelink CEO)[51] and Mr Podger[52] referred the Commission to an internal college that was established within Centrelink in 2001 (and was at some point disbanded) to provide a facility for staff to acquire accredited training.[53] The college provided training and development to staff that was linked to the skills and knowledge required to undertake their duties[54] and reflected Dr Vardon's "vision for an organisational learning culture."[55]

There would be a good deal to be said for the availability of training in that form, but the Commission recognises that staff numbers in Services Australia are many times those of Centrelink in its heyday, so it may not feasible. Nonetheless, the possibility should be explored.

Recommendation 23.5: "Knowledge College"

The Commonwealth should explore the feasibility of establishing an internal college within Services Australia to provide training and development to staff linked to the skills and knowledge required to undertake their duties.

Senior Executive Service (SES) staff at Services Australia should be required to spend time in front-line service delivery, and should also spend time engaging with Services Australia Community Partnership Specialist Officers (CPSOs) placed in non-government community services as part of the Community Partnership Pilot (which is a community-based approach to helping customers in need).[56] The CPSOs are experienced Centrelink officers who have been co-located at a partner organisation (such as. St Vincent de Paul), work with people to connect them with relevant government support, and 'have expertise in identifying and addressing barriers face[d] by vulnerable cohorts in accessing Centrelink entitlements and rights.'[57]

Recommendation 23.6: Front-line Service

SES staff at Services Australia should spend some time in a front-line service delivery role and with other community partnerships.

5 Senior executives and secretaries

The Commission heard evidence from a number of SES officers who held leadership and other senior positions. The role of SES officers within each department is to provide APS-wide leadership of the highest quality that contributes to an effective and cohesive APS.[58] The most prominent SES officers within each department are the secretaries and deputy secretaries, who were integral to the making of key decisions, communications with ministers, and in directing other APS employees within their departments in relation to the Scheme.

The secretary of a department holds a distinct role as an "agency head",[59] and is bound by the Code of Conduct in the same way as APS employees.[60] However, as an agency head, the secretary of a department also has a separate statutory obligation to uphold and promote the APS Values and the APS Employment Principles.[61]

The APS Value of 'Impartial' requires the public service to be apolitical, and provide the government with advice that is frank, honest, timely, and based on the best available evidence.[62] The Commission heard evidence about APS leaders (both Secretaries and SES leaders) being excessively responsive to government, undermining concept of impartiality and frank and fearless advice.[63] For example, when the Scheme was developed in 2015, the New Policy Proposal was apt to mislead the Expenditure Review Committee and Kathryn Campbell (Secretary, DHS) did not take any steps to correct that misleading effect.[64]

Mr Podger referred to a number of recent developments that have discouraged the appropriate level of independence, including to the loss of tenure of Secretaries and the control that the Prime Minister has over the appointment and termination of Secretaries.[65] The Thodey Review found that the lack of transparency around the appointment, performance management and termination processes of senior leaders affects the APS's culture with the impact that "the APS leadership favours being 'agreeable' rather than engaging in debate and challenge".[66] The Thodey Review made recommendations aimed at ensuring confidence in the appointment of agency heads, ensuring that performance management of secretaries is robust and comprehensive, and that robust processes govern the termination of secretaries' appointments.[67] Mr Podger recommended that the APS Commissioner have the lead role in advising on Secretaries' appointments and terminations.[68]

The current government has emphasized that the public service must be empowered to be honest and truly independent.[69] It has asked the Public Service Commissioner to ensure that SES performance assessments cover both outcomes and behaviours.[70]

In the Commission's view, this does not go far enough.

The Commission endorses a number of recommendations made in the Thodey Review in relation to Secretarial appointments which should be revisited, including:

- That the PM&C Secretary and APS Commissioner agree and publish a policy on processes to support advice to the Prime Minister on appointments of secretaries and the APS Commissioner,[71]
- That the PM&C Secretary and APS Commissioner undertake robust and comprehensive performance management of secretaries,[72]
- That the PM&C Secretary and APS Commissioner publish the framework for managing the performance of secretaries under the Public Service Act,[73] and
- That the PM&C Secretary and APS Commissioner ensure that robust processes govern the termination of secretaries' appointments.[74]

The extent to which these recommendations have been endorsed by the government is unclear.

6 Former employees

A number of employees involved in the Scheme have resigned from the public service. In 2013, the Public Service Act was amended with the introduction of s 41B to empower agencies to determine alleged breaches of the Code by former APS employees.[75]

The Public Service Commissioner may inquire into a former APS employee's conduct,[76] but given that sanctions relating to a breach of the APS Code of Conduct can only be imposed on current APS employees,[77] no meaningful consequence would flow from any found breach. In Queensland, s 95 of the *Public Sector Act 2022 (Qld)* provides for a disciplinary declaration if employment as a public sector employee ends, and a disciplinary ground arises in relation to that person. The declaration includes a statement of the action that would have been taken against the former public sector employee had their employment not ended. A similar consequence for APS members would be relevant and appropriate if the individual wished to re-join the APS or seek consulting work from it.

However, the position is less clear in relation to former agency heads. Section 41A of the Public Service Act, which enables inquiry into conduct by agency heads, unlike s 41B, does not use the term "former". There is a strong argument that the time at which the person concerned must be an agency head for the purposes of the section is the time at which the breach occurred, not the time of inquiry, and it is in that sense that the expression "agency head" is used. It would be inconsistent with the Act's object of establishing an effective public service, if immunity were effectively conferred on any agency head who in that capacity committed breaches of the Code but then ceased to occupy the position (while possibly taking up a different APS role). That result would be anomalous and detrimental to the proper management of the APS.

If the conclusion were reached that s 41A did not apply to former agency heads, there remains an argument that s 41B would nonetheless apply to any former agency head who had commenced their career as an APS employee, because they would, literally, be a former APS employee as defined by s 7 of the APS. It is an unsatisfactory reading of the inquiry power, though, because it would mean that someone appointed to the position of agency head from outside the APS would not be caught, unlike a career public servant.

The uncertainty as to the meaning of s 41A should be resolved by further amendment.

Recommendation 23.7: Agency Heads being held to account

The Public Service Act should be amended to make it clear that the Australian Public Service Commissioner can inquire into the conduct of former Agency Heads. Also, the Public Service Act should be amended to allow for a disciplinary declaration to be made against former APS employees and former Agency Heads.

7 Record-keeping failures

I have been aware on many occasions of ministerial expectations that sensitive or difficult matters not be clearly expressed in written briefs. As a matter of good practice it would be desirable if Ministers did not impose that expectation on public servants, and clearly expressed an expectation that important advice — whether convenient or inconvenient — be conveyed in writing and maintained as a Commonwealth record.[78]

- Renee Leon PSM, Former Secretary of the Department of Human Services

The evidence before the Commission was riddled with instances in which no record could be found to explain why significant action was taken or not taken. The following are merely some examples of significant events where public servants and in-house lawyers failed to contemporaneously document and retain file notes of important decisions and conversations:

- **The decision not to proceed with the acting secretary's request:** On 6 January 2017, Barry Jackson (acting secretary, DHS) sought advice about the legality of averaging to determine social security entitlement.[79] A draft advice was subsequently prepared by DHS lawyers that recommended that external legal advice be sought on whether it was open to DHS to rely on information received from the ATO to calculate a customer's entitlement to income support.[80] Draft instructions to AGS were prepared,[81] and an AGS lawyer was contacted about the advice.[82] The documentary evidence suggests that a decision was made not to proceed with the work Mr Jackson had requested about the legality of averaging to determine social security entitlement, including to instruct AGS to advise. There is no record of this decision.
- **The DHS chief counsel handover meeting:** Ms Musolino had been on leave in January 2017. During her leave, Mr Menzies-McVey performed her role from 3 to 8 January 2017 and Lisa Carmody from 9 to 15 January 2017.[83] A lot happened during that period - the Scheme was under intense media scrutiny and, as above, a draft advice had been prepared,[84] and instructions drafted to AGS.[85] A further advice was prepared by Glyn Fiveash (deputy general counsel, DHS) which stated that where there was no income averaging method provided for in calculation of a person's social security rate in the first place, it could not be used to calculate a debt. [86] On 16 January 2017 there was a hand over meeting between Ms Musolino and Ms Carmody (the handover meeting), as is clear from a calendar record of that meeting.[87] The oral evidence suggests Ms Carmody provided Ms Musolino with a hard copy folder of documents.[88] However, there is otherwise no documentary record of what was said in that handover meeting, including whether Ms Musolino was provided with the significant advices about the Scheme and the instructions to AGS that had been prepared during her period of leave.
- **The DHS secretary handover meeting:** On 10 January 2017, Ms Campbell returned from leave and resumed the role of secretary from Mr Jackson. Mr Jackson recalls a verbal handover that took place.[89] Mr Jackson's evidence was that he informed Ms Campbell of his request for legal advice about averaging.[90] Ms Campbell did not recall a substantive handover.[91] There is no documentary record of this handover.
- **The discussion between OLSC and chief counsel, DHS:** Sometime after 20 January 2017 a phone call occurred between Ms Samios and Ms Musolino in which Ms Musolino informed Ms Samios that there were no legal issues and nothing to report to the Office of Legal Service Coordination (OLSC). There is no documentary record of this call.

The decision that the PwC report should not be finalised and delivered to DHS: On 13 February 2017, PricewaterhouseCoopers (PWC) was engaged to provide an independent review of the compliance and fraud activities of DHS.[92] The letter of engagement required PwC to set out its key recommendations in a final report.[93] No report was ever delivered and instead, a PowerPoint presentation was made to the Minister for Human Services on 22 May 2017.[94] There is no record of DHS communicating to PwC that the PowerPoint presentation satisfied the report deliverable set out in the letter of engagement, or any record of an internal DHS decision that effect.

- **The decision to pay for, but not to finalise, the Clayton Utz advice**: On 14 August 2018, Clayton Utz provided a draft advice to DSS.[95] That advice was left in draft and never finalised. On 18 September 2018, a decision was made to pay Clayton Utz for the advice. No record was made of why that occurred when instructions to finalise the advice were not given.

While there is no specific policy requiring important decisions and conversations to be documented by public servants, the APS values include that the APS is open and accountable to the Australian community under the law and within the framework of ministerial responsibility, which requires:

- being open to scrutiny and being transparent in decision making
- being able to demonstrate that actions and decisions have been made with appropriate consideration
- being able to explain actions and decisions to the people affected by them.[96]

The APSC Guide states that the creation, maintenance, and accessibility of Commonwealth records is essential for accountability and sound public administration[97] and that the level and standard of recordkeeping needs to reflect the circumstances and the importance of the decision or action being recorded. [98]

The National Archives of Australia information management policy, which came into effect on 1 January 2021, makes the point in its Foreword: "For transparent and accountable government, records of decisions – including the reasons for those decisions – need to be made and kept". [99]

The Commission does not suggest that the examples of record-keeping failure given above amount to breaches of the APS values. However, in the Commission's view, transparent and considered decision-making requires appropriate records to be kept of significant events, meetings, discussions and of course, decisions. Record-keeping is a basic skill that should be standard practice for any public servant. Throughout the Scheme, important information seemed to be given in oral conversations, limiting the ability of the Commission (and the public) to scrutinize actions and decisions taken.

Professor Peter Shergold AC, in his 2015 report *Learning from Failure,* following the Royal Commission into the Home Insultation Program, recommended that an APS-wide policy provide practical guidance about record keeping including when records should be created and retained.[100] Mr Podger also recommended that guidance should be issued from the Australian Public Service Commission.[101]

Recommendation 23.8: Documenting decisions and discussions

The Australian Public Service Commission should develop standards for documenting important decisions and discussions, and the delivery of training on those standards.

8 Ministerial staff Code of Conduct

The role of the APS is properly distinguished from the role of ministerial staff, who provide political and policy advice to ministers and whose employment is governed separately under the *Members of Parliament (Staff) Act 1984* (Cth) (MOP(S) Act). The inherently political nature of ministerial advisers' roles sets them apart from the APS and their separation is designed to enable and protect the political impartiality of the APS.[102]

Ministerial staff are employed under the *Members of Parliament (Staff) Act 1984* (MOP(S) Act) and are not subject to the APS Code of Conduct. They are employed to assist a parliamentarian to carry out duties as a Member of Parliament and not for party political purposes.[103]

In his report to the Commission, Andrew Podger AO pointed to the "steadily increasing role and number of ministerial staff" which may lead to "excessive responsiveness by APS leaders (both Secretaries and the SES who report to them) to the wishes of ministers." Such responsiveness may undermine "public confidence in the non-partisanship of the APS."

> I consider there has been such a failure over at least the last two decades and most particularly over the Relevant Period for the Robodebt scheme, and that this systemic problem may well have contributed to the 'fiasco' (the term used by Peter Whiteford (Whiteford 2021).[104]

The Thodey Review and the Jenkins Review both recommended that the MOP(S) Act be amended to include a legislated code of conduct for ministerial staff and a statement of values that clarifies their distinct role from that of the APS (and the Parliamentary Service); and that the code clarify that such staff do not have authority to direct the APS.[105] The Commission supports this recommendation, and understands that it will be implemented by the Parliamentary Leadership Taskforce.[106]

1 'Rebuilding trust and integrity after Robodebt', Work with Purpose: A podcast about the Australian Public Service (Institute of Public Administration Australia, 11 April 2023) <https://www.act.ipaa.org.au/wwp_81>, p 3.
2 Comcare v Banerji (2019) 267 CLR 373, 401 [34].
3 Independent Review of the Australian Public Service, 20 September 2019 (Thodey Review).
4 Commonwealth of Australia, Department of the Prime Minister and Cabinet, Our Public Service, Our Future. Independent Review of the Australian Public Service, 20 September 2019.
5 See for example: Independent Review of the Australian Public Service, 20 September 2019; Commonwealth of Australia, Department of the Prime Minister and Cabinet, Ahead of the Game: Blueprint for the reform of Australian Government Administration, 2 March 2010 (Moran Review); Australian Human Rights Commission, Sex Discrimination Commission, Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces, 30 November 2021 (Jenkins Review).
6 Commonwealth of Australia, Department of the Prime Minister and Cabinet, Our Public Service, Our Future. Independent Review of the Australian Public Service, 20 September 2019, p 22.
7 Senator the Hon Katy Gallagher, "Albanese Government's APS Reform agenda" (Speech, Institute of Public Administration Australia, 13 October 2022).
8 Commonwealth of Australia, Department of the Prime Minister and Cabinet, Our Public Service, Our Future. Independent Review of the Australian Public Service, 20 September 2019, p 96, recommendation 5; Public Service Amendment Bill 2023 sch 1, item 2.
9 Commonwealth of Australia, Department of the Prime Minister and Cabinet, Our Public Service, Our Future. Independent Review of the Australian Public Service, 20 September 2019, p 73, recommendation 2a; Public Service Amendment Bill 2023 sch 1, item 8.
10 Public Service Amendment Bill 2023 sch 1, item 6.
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12 Commonwealth of Australia, Department of the Prime Minister and Cabinet, Our Public Service, Our Future. Independent Review of the Australian Public Service, 20 September 2019, p 200.
13 Department of the Prime Minister and Cabinet, APS Integrity Taskforce Terms of Reference (Web Page, 14 February 2023) <https://www.pmc.gov.au/sites/default/files/resource/download/attacha-aps-integrity-taskforce-tor.pdf
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15 Commonwealth of Australia, Department of the Prime Minister and Cabinet, Our Public Service, Our Future. Independent Review of the Australian Public Service, 20 September 2019, p 113.
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Closing observations

In closing, I return to the Terms of Reference. I do not propose to go through them and tick them off – the report has addressed them and as far as possible answered the questions they raise – but I will make some observations about them and the difficulties the Commission encountered in inquiring into them. In the context of the first Term of Reference, the question of public interest immunity arises and I have made recommendations in respect of that issue.

The establishment, design and implementation of the Robodebt Scheme

The report paints a picture of how the Robodebt Scheme (the Scheme) was put together on an ill-conceived, embryonic idea and rushed to Cabinet. If ever there were a case of giving an unproportion'd thought his act, this was it. It is clear enough why it was thought necessary and desirable: because of the dual advantages of supposed savings – the misconceived notion that unreviewed discrepancies between ATO and DHS income data represented mountains of gold – and its neat alignment with the political rhetoric of the day about the social security system and the need for "integrity" in welfare payments.

The harder question to answer is how it was established, when a major component was the use of income averaging in the absence of other evidence to determine the entitlements of current and former recipients and, hence, the debts they were said to owe; when not only were the resulting debts inaccurate, but the method of determining entitlement was not one which the *Social Security Act* permitted; and when DSS had given that advice. How did the Scheme make its way to Cabinet in the form of a New Policy Proposal (NPP) which referred to the use of ATO income data but made no mention of the income averaging which would be required (and was used, despite its illegality) in its use to determine entitlement? One can understand that a member of Cabinet not involved in the formulation of the NPP would not have appreciated what applying ATO income to a recipient's record meant. But what about those who were involved, who were in the know? The Commission found it remarkably difficult to get any kind of consistent answer, and the process did not inspire confidence in the transparency of government policy making and implementation.

The Minister for Social Services, Mr Morrison, said that he knew the proposal involved income averaging,[1] but he thought that DSS, which had originally said legislative change would be required, had indicated a change of that position by ticking a checklist in the NPP saying no legislation was required.[2] Ms Wilson, Deputy Secretary DSS with responsibility for social security, said that DSS had advised legislative change would be needed to allow income averaging, but DHS had assured her that income averaging would not be part of the proposal.[3] The Secretary of DSS, Mr Pratt, said that he knew nothing of averaging, but he would assume that if DSS gave DHS advice that legislation was needed, DHS would have taken the advice and altered what they were doing so that legislation was not required.[4] The Secretary of DHS, Ms Campbell, said that the proposal remained the same (involving averaging) when it went to Cabinet,[5] but DHS did not get involved in legislation; that was up to DSS[6] and she did not remember whether she had asked about the legislative change.[7]

The General Manager of Business Integrity at DHS, Mr Withnell, who was involved in the preparation of the proposal, said that it was clear to him that income averaging could not be used because it would require legislative change,[8] so the whole idea was abandoned before it even went to the Minister for Social Services and the Minister for Human Services and formed no part of the NPP.[9] His subordinates, Mr Britton and Mr Ryman, said averaging was always part of the proposal, they just didn't think it would happen as much as it did.[10] The Minister for Human Services, Ms Payne, could not remember whether the need for legislation in relation to the income averaging proposal was raised with her;[11] she could not recall what happened to the advice that legislative change was needed[12] and she did not have a record.[13] Ms Payne did not remember anybody coming up with a proposal other than income averaging as a means of using

ATO data.[14] She did not have any specific recall how the question of legislative change for the proposal had disappeared and there was no material to inform her.[15] This series of disparate and unsatisfactory answers would have the makings of a child's nursery rhyme if it were not so serious.

The inability to gain access to Cabinet documents

Here a particular issue arises. There was a committed group of people trying to establish the facts of the Scheme: journalists, academics and activists. I do not propose a roll call; they know who they are and some of their names have emerged in the Commission's hearings. They played a stalwart role. Some of them attempted to get to the bottom of how this measure had come to pass by making Freedom of Information applications. But they were, in part at least, thwarted by the existence of public interest immunity. The application of the immunity has also limited the Commission's ability to reveal the entirety of the documentation concerning how the original proposal which became Robodebt, was passed and what was put to Cabinet thereafter. The salient points have been able to be made, but large parts of the relevant ministerial briefs, materials put before Cabinet and Cabinet minutes themselves have not been able to be revealed.

It is time to ask whether the rationale of public interest immunity – the maintenance of Cabinet solidarity and collective responsibility – really justifies the withholding of information that routinely occurs under that mantle. Nothing I have seen in ministerial briefs or material put to Cabinet suggests any tendency to give full and frank advice that might be impaired by the possibility of discolsure, and the Cabinet minutes which are in evidence are sparing in detail, with a careful mode of expression revealing nothing of individual views.

To explain: Cabinet documents are, by virtue of section 34 of the *Freedom of Information Act 1982 (Cth)* exempt as a class from disclosure. That means that the mere fact that they are documents of the kind exempts them from disclosure. The exemption applies to these documents:

- Cabinet submissions that:
  - have been submitted to Cabinet, or
  - are proposed for submission to Cabinet, or
  - were proposed to be submitted but were in fact never submitted and were brought into existence for the dominant purpose of submission for the consideration of Cabinet (s34(1)(a))
- official records of Cabinet (s34(1)(b)
- documents prepared for the dominant purpose of briefing a minister on a Cabinet submission (s 34(1)(c))
- drafts of a Cabinet submission, official records of the Cabinet or a briefing prepared for a minister on a Cabinet submission (s 34(1)(d)).

Cabinet records are released to the public and held in the National Archives of Australia once the "open access period" has been reached, which is 20 years for Cabinet records and documents, and 30 years for Cabinet notebooks.[16]

What has happened in the case of the Scheme demonstrates the need for greater transparency of Cabinet decisionmaking. If the Executive Minute that was put to Mr Morrison and the NPP which was presented to Cabinet had been available for public scrutiny, it would have become apparent firstly, that there was advice that income averaging in the way it was proposed to be used could not occur without legislative change, and secondly, that Cabinet was told nothing of those things. That raises the real question of whether the protection of Cabinet documents as a class from disclosure ought to be maintained or whether, when access is sought, disclosure should be given unless there is a specific public interest in maintaining its confidentiality.

New Zealand has gone as far as requiring, not merely allowing, publication of Cabinet documents,[17] and Queensland, having accepted the recommendation of the Coaldrake Report,[18] seems about to do something similar.

As with all Government documents, there may be reasons why disclosure of Cabinet documents, or parts of those documents, would not be in the public interest. Obvious examples include documents, or parts of documents, that would prejudice national security, law enforcement or Australia's international relations if released. Whether non-disclosure for those, or other, reasons, is warranted by the public interest would of course depend on the individual circumstances of each case.

However, the Government should end the blanket approach to confidentiality of Cabinet documents. To give effect to this, section 34 of the FOI Act should be repealed. The wide range of class and conditional exemptions in the FOI Act is sufficient to protect the public interest in relation to Cabinet documents. The mere fact that a document is a Cabinet document should not, by itself, be regarded as justifying maintenance of its secrecy.

Section 34 of the Cth FOI Act should be repealed

> The Commonwealth Cabinet Handbook should be amended so that the description of a document as a Cabinet document is no longer itself justification for maintaining the confidentiality of the document. The amendment should make clear that confidentiality should only be maintained over any Cabinet documents or parts of Cabinet documents where it is reasonably justified for an identifiable public interest reason.

DHS always intended to use income averaging in the Scheme. The report explores how that information came to be removed from the NPP, who knew or should have known that income averaging remained a feature of it, and who knew or should have known that it required legislative change and that Cabinet needed to be told that. But in this regard, a caution is needed. Because of the focus there has been on the unlawfulness of the Scheme, there is a risk of thinking that if legislation had been passed to allow the application of income averaging where recipients did not respond with information to contradict the results, there would have been nothing objectionable about the Scheme. It was extraordinary that a program with an unlawful aspect could be passed through Cabinet, but even if that obstacle had been recognised and legislation passed to authorise averaging as it was used in the Scheme, it would still have been problematic. As Mr Fiveash succinctly pointed out in his advice, it would have entailed paying people their benefits on the basis of one form of entitlement assessment and then clawing them back by applying a different entitlement test; taking back from them what they had legitimately received.

Even if the plan to use averaging were not retrospective, it would still run counter to the rationale for social security payments, to ensure that people on income support received benefit when they needed it, recognising what they actually were earning in any given fortnight, not using an average which did not reflect their reality. And, in addition, to suddenly require that hundreds of thousands of people prove their income after periods as long as five years on the basis of as uncertain an indicator as the discrepancy between an annual income figure and their reporting was simply unreasonable. In high discrepancy cases it would be perfectly reasonable to review the file and make inquiry, but not to issue mass demands of this kind which caught up so many people who had done nothing wrong in their reporting. DHS should have known how unreliable the discrepancy factor would be as an indicator of debt from the information that Professor Whiteford reports as to the tiny percentages – 6 per cent and lower – of Newstart and Youth Allowance recipients who were on any sort of regular income.[19]

The use of third party debt collectors

The Commission examined the role of third party debt collectors under the Scheme, but no witness came forward with any example of deliberate wrongdoing. The removal of the entire contents of Felicity Button's bank account was a mistake, albeit an appalling one, but it was not a systemic flaw except to the extent that it appears, alarmingly, that banks may be prepared to act on the say-so of debt collectors; but that is an issue for another day and another inquiry. Generally, what the Commission found was that the debt collectors did what debt collectors do: they badger people for payment. The evil in this case was the government's unleashing them on social security recipients who, even in normal circumstances, ought to

be given more consideration because of their financial and other vulnerabilities than a debt collector is likely to give. But these were not normal circumstances, these were demands for often inexplicable debts, made of bewildered people who had no warning that DHS was suddenly going to raise a debt against them and, in some instances, had no warning that DHS had, in fact, raised a debt against them.

Concerns raised about the Scheme once it was implemented

One of the worst aspects of the Government's response to concerns raised was its resistance to the warnings from staff who could see what was happening. Some of the witnesses who gave evidence before the Commission would make one despair of the Australian Public Service; but there were others, like Colleen Taylor, who restored faith. The shame is that people of her callibre were not listened to. Ms Taylor first began raising problems at the beginning of 2016. She saw clearly that the emperor had no clothes and did her best in a dispassionate, loyal way to warn the Secretary of the Department. She was absolutely correct in the points she made, but they were highly inconvenient, and they were never going to be received in the spirit in which they were delivered.

One of the questions in the Terms of Reference is when the Australian Government knew or ought to have known that debts were not, or may not have been, validly raised. That depends on how one construes the term "Australian Government". Some DHS senior executives always had that knowledge; some DSS senior executives must have suspected it, at least by 2016. As to members of the Government, one Minister, Mr Morrison, took the proposal to Cabinet, knowing that it involved income averaging and that his own Department had indicated that it would require legislative change, but on the basis of the contrary indication in the NPP checklist, proceeded without enquiring as to how the change had come about. There was no reason for any other member of Cabinet, however, to question the proposal, because it was devoid of any indication that income averaging was involved or that there was any issue of legislative authority.

In 2017, however, it was a different picture; there were plenty of indications that income averaging without other evidence was not a legitimate way of calculating entitlement. The shaky legal underpinnings of the system were being identified by journalists and academics. An obvious and necessary step then, for ministers and senior departmental executives, was the obtaining of authoritative legal advice, ideally from the Solicitor-General.

Prevention of scrutiny of the Scheme

As to whether the Australian Government sought to prevent scrutiny of the Robodebt Scheme, there is no doubt that there was a constant misrepresentation that the Scheme involved no change in the way income was assessed or debts were calculated. The report is replete with examples. The Ombudsman was deliberately misled, thus providing further opportunity for the Government to resist scrutiny by using his report as a shield.

Another question asked in connection with whether the Australian Government sought to inhibit scrutiny of the Scheme is, whether it did so by moving departmental or other officials or otherwise. There is evidence that Professor Carney was not reappointed to the Administrative Appeals Tribunal after his five decisions concluding that income averaging was unlawful,[20] and Ms Leon's position as Secretary of Services Australia was abolished[21] after she gave the direction to her department to cease income averaging. Ms Harfield[22] and Mr Britton[23] both gave evidence of being moved to other positions at the direction of Ms Golightly, in Ms Harfield's case after she, on her account, had raised whether the emerging problems of the Scheme required a broader approach. But there is not evidence enough from which one could draw the inference that the loss of position, in the case of Professor Carney and Ms Leon, or the transfers, in the case of Mr Britton and Ms Harfield, were part of an attempt to prevent scrutiny of the Scheme.

The "non-pecuniary impacts" of the Scheme on individuals

The impacts of the Scheme on the people embroiled in it were vividly illustrated in the evidence before the Commission from the witnesses who spoke of the distress and damage they had suffered and, of course, the evidence of the mothers of the two young men who took their own lives, at least in part because of it.

That brings me to a question I have given long and careful consideration to: whether there is any practical way of setting up some sort of compensation scheme. My reluctant conclusion is that there is not. Hundreds of thousands of people were affected by the Scheme. It is impossible to devise any set of criteria that will apply across the board, because people were affected in such varying ways. Not everyone was caught by averaging, but even in the cohort that was, there would be different groups. A minority would actually have benefited from the income spreading effect of averaging; for some, the difference made to the amount of debt would not have been significant; but for others, the demand made was substantial and wrong. To determine the use and effect of averaging in any given case, one would have to examine the DHS file, a time intensive activity.

Other people did not have their income averaged but experienced the stress of other errors in calculation; duplication of employer-reported income, for example. Others still suffered the distress of the automated process and lack of human involvement when a debt assessment, provisional or final, was made, or the sense of stigmatisation that went with being accused of owing the government money.

The point is that people suffered from the effects of the Scheme in a multiplicity of ways, so there is no common starting point. The administration costs of a scheme which addressed all the different ways in which people were harmed by the Scheme and examined their circumstances to establish what compensation was appropriate in each case would be astronomic, given the numbers involved. A better use of the money would be to lift the rate at which social security benefits are paid, to help recipients achieve some semblance of the "security" element of that term; because with financial security comes the dignity to which social security recipients are entitled and to which the Scheme was so damaging.

People may have individual or collective remedies. On the evidence before the Commission, elements of the tort of misfeasance in public office appear to exist. Where litigation is not available, the Commonwealth does have a "Scheme for Compensation for Detriment caused by Defective Adminstration" (which would be a very euphemistic way of describing what happened in the Robodebt Scheme) where a person has suffered from defective administration and there is no legal requirement to make a payment. It is not appropriate to say any more on that front.

As is apparent from the content of the chapter – Experiences of Human Services employees, the Commission also considered the impacts the Scheme had on DHS staff members. In that context, another question that has arisen is whether a recommendation should be made that Services Australia apologise to the staff who had to deal with the effects of the Scheme; because it was unquestionably a gruelling and demoralising time for them. I have decided against recommending an apology for the simple reason that an apology by direction is not worth very much. No doubt, senior levels of management at DSS and Services Australia will reflect on what is contained in the report and act appropriately.

The costs of the scheme

The economic costs of this misbegotten idea are set out in a separate chapter. The irony of the expense to the public purse of what was thought to be a savings bonanza is obvious.

Recommendations and referrals

The recommendations made are collected at the beginning of this report. I hope that they are of use. At the least, I am confident that the Commission has served the purpose of bringing into the open an extraordinary saga, illustrating a myriad of ways that things can go wrong through venality, incompetence and cowardice.

In addition to the recommendations, I have made referrals of information in respect of a number of individuals to four different authorities for further investigation. I do not propose to name the entities to which I have made referrals, because it would only lead to speculation about who had been referred where, which would almost certainly be wrong.

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2 Transcript, the Hon. Scott Morrison MP, 14 December 2022, [p 1842 : lines 11-25; p 1857 : lines 18-35; p 1867 : lines 35-46].
3 Transcript, Serena Wilson, 9 November 2022, [p 791 : lines 7-15; p 793 : lines 7-8].
4 Transcript, Finn Pratt, 10 November 2022, [p 903 : lines 15-25].
5 Transcript, Kathryn Campbell, 10 November 2022, [p 914 : lines 23-26].
6 Transcript, Kathryn Campbell, 10 November 2022, [p 913 : lines 21-26] [p 915 : lines 26-32].
7 Transcript, Kathryn Campbell, 11 November 2022, [p 944 : lines 11-20].
8 Transcript, Mark Withnell, 9 December 2022, [p 1487 : lines 27-45].
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11 Transcript, the Hon. Marise Payne, 13 December 2022, [p 1675 : line 41 – p 1676 : line 11].
12 Transcript, the Hon. Marise Payne, 13 December 2022, [p 1694 : lines 37-42].
13 Transcript, the Hon. Marise Payne, 13 December 2022, [p 1676 : lines 6-11; p 1694 : line 42].
14 Transcript, the Hon. Marise Payne, 13 December 2022, [p 1716 : lines 4-9].
15 Transcript, the Hon. Marise Payne, 2 March 2023, [p 4293 : lines 12-45].
16 Archives Act 1983 (Cth) s 3(7), s 22A.
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18 Professor Peter Coaldrake AO, Review of culture and accountability in the Queensland public sector | Final Report, 28 June 2022, p60.
19 Exhibit 4-8342, RBD.9999.0001.0505, Robodebt and Social Security Policy [p 11-12: para 3.6].
20 Transcript, Terry Carney, 24 January 2023, Brisbane [p 2252: line 20 – p2523: line 15].
21 Transcript, Renee Leon, 28 February 2023, Brisbane [p 3995: lines 28 to 30].
22 Exhibit 2690, KHA.999.0001.0001_2_R2 [at paras 190, 200 and 205].
23 Exhibit 1175, SBR.999.001.002_R [at paras 22 and 102].



Report

Royal Commission into the Robodebt Scheme

Report
Volume 3

This report talks about some difficult themes, including suicide, self-harm and mental ill-health. Readers may find parts of the report distressing. These are some support services which might be helpful if you or someone you know needs help:·

- Lifeline 13 11 14 (24/7 crisis support line)
- Beyond Blue 1300 224 636 (24/7 telephone, website or email short-term counselling)
- Suicide Call Back Service 1300 659 467 (24/7 counselling for suicide prevention and mental health)

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Appendix

Glossary

Term	Definition
#NotMyDebt	A grassroots organisation which uses social media to assist affected people to challenge debts raised under the Scheme.
2014 DSS legal advice	A legal advice prepared by officers of the Department of Social Services in late 2014 about their view on the lawfulness of income averaging. It said that a debt amount derived from annual smoothing (that is, averaging) over a defined period of time was not consistent with social security legislation, which required entitlements to be calculated based upon actual fortnightly income. In other words, the use of income averaging, in the absence of other information, was unlawful.
2014 DSS policy advice	An advice prepared by officers of the Department of Social Services in late 2014 about their view on the policy of income averaging. The advice did not support such a policy, because the calculation method was not consistent with Social Security Legislation, which required employment income to be assessed fortnightly. It woul d also result in incorrect debt amounts.
2017 AIAL Conference	Annual conference of the Australian Institute of Administrative Law held on Thursday 20 and Friday 21 July 2017 at Hotel Realm, 18 National Circuit, Barton, Australian Capital Territory.
2017 DSS legal advice	A legal advice prepared by officers of the Department of Social Services in 2017.
AAOs	Administrative Arrangement Orders set out which departments, agencies and legislation are administered by which department/portfolio.
AAT	Administrative Appeals Tribunal.[1] The Government plans to introduce legislation in 2023 to abolish the AAT, and create a new Federal administrative review body.
AAT1	Administrative Appeals Tribunal Tier 1 Review. This is the first level of review by the AAT. Tier 1 decisions of the AAT are not published.
AAT2	Administrative Appeals Tribunal Tier 2 Review. Provides for review of AAT1 decisions. Tier 2 decisions of the AAT are published.

Term	Definition
ACOSS	Australian Council of Social Services
AFAR	Advice for Further Administrative Review prepared for adverse AAT tier 1 decisions.
AGD	Attorney-General's Department
AGLS	Australian Government Legal Service. The AGLS is a formal professional network for all government lawyers.
AGS	Australian Government Solicitor
AI	Artificial Intelligence
AIAL	Australian Institute of Administrative Law
Amato case	*Deanna Amato v the Commonwealth of Australia* (VID611/2019)
ANAO	Australian National Audit Office
APPs	The Australian Privacy Principles in Schedule 1 to the *Privacy Act 1988* (Cth).
APS	Australian Public Service
APS Code of Conduct	The APS Code of Conduct can be found in the *Public Service Act* 1999 (Cth), s 13. All APS employees are required to comply with the Code.
APS Employment Principles	The APS Employment Principles can be found in the *Public Service Act 1999* (Cth), s 10A. The APS Employment Principles are designed to embody the principles of good public administration.
APS Values	The APS Values can be found in the *Public Service Act 1999* (Cth), s 10. The values "articulate the parliament's expectations of public servants in terms of performance and standards of behaviour." [2]
APSC	Australian Public Service Commissioner
ARC	Administrative Review Council
ARO	Authorised Review Officer
ATO	Australian Taxation Office
ATO PAYG data	See PAYG income data.
BPORs	Budget Process Operational Rules
Budget	The Commonwealth government's annual statement on public expenditure.
BVT	Business verification testing. Involves testing of a computer program to ensure particular coded functions work correctly.

Term	Definition
Cabinet	The council of senior Commonwealth Ministers who are empowered by the government to make binding decisions on its behalf.
Cabinet handbook	Sets out the structure, practices and processes of the Government's Cabinet and its committees.
Checklist	The NPP Due Diligence Checklist is a standard form completed by the department preparing an NPP to ensure that certain matters have been dealt with by the time the NPP reaches the ERC.
Class Action	See "Prygodicz case".
Clayton Utz advice	A legal advice from Clayton Utz which was received by DSS in August 2018. It said that the use of averaging of ATO PAYG data to determine a Youth Allowance or Newstart Allowance recipient's fortnightly income [in the absence of any other information] was unlawful.
Code	See APS Code of Conduct.
Commission	Royal Commission into the Robodebt Scheme
Commissioner	Commissioner Catherine Holmes AC SC
Commonwealth / the Commonwealth	The legal entity of the Australian Government.
CPSU	Community and Public Sector Union
CRN	Customer Reference Number
CSMC	Council of Single Mothers and their Children
CUPI	The online compliance intervention program called Check and Update Past Income, which involved compliance reviews initiated after on or around 30 September 2018.
Data set	A discrete, ordered collection of data. A data set may be sourced from a database, and may be defined by specific criteria — for example, the receipt of a certain benefit within a given period.
Data-matching	The bringing together of at least two data sets that contain personal information and that come from different sources, and the comparison of those data sets with the intention of producing a match.
Data-matching cycle	The completion of all the steps and processes necessary to generate a match, within a specific timeframe.
Data-matching program	The conduct of data matching to assist one or more agencies to achieve a specific objective. A data matching program may involve more than one data matching cycle.

Term	Definition
Debt collection agency / debt collector	A private business that collects debts / an individual working for a debt collection agency who contacts individuals to recover alleged debts.
DHS	Department of Human Services until 1 February 2020 when the department was replaced by an Executive Agency and its name changed to Services Australia [3].
Disclosure	An entity "discloses" personal information where it makes it accessible to others outside the entity and releases the subsequent handling of the information from its effective control.
DPOs	Departure Prohibition Orders which if issued, could prevent a recipient from leaving Australia.
DSS	Department of Social Services
DTO	Digital Transformation Office
Dun and Bradstreet	Debt collectors Illion Australia Pty Ltd trading as Milton Graham, formerly trading as Dun and Bradstreet.
EIC	The online compliance intervention program called Employment Income Confirmation, which applied to compliance reviews initiated in the period from on or around 11 February 2017 to on or around 30 September 2018.
EJA	Economic Justice Australia is the peak organisation for community legal centres providing specialist advice to people on their social security issues.
EL1/EL2	Executive Level 1 and Executive Level 2 –officer classifications in the Australian Public Service.
ERC	Expenditure Review Committee, a committee of Cabinet
Executive Minute	Refers to the Executive Minute from DHS addressed to the Hon Scott Morrison MP as Minister for Social Services, dated 12 February 2015.
FBO	Final Budget Outcome reports on the fiscal outcomes for the government over the previous financial year.
Finance	Department of Finance
FOI	Freedom of information
Garnishee notice	A notice issued to a creditor of a social security recipient which requires them to pay money to DHS to repay the recipient's debt.

Term	Definition
Income averaging	DHS's practice of treating income as if it were earned at a consistent rate over a period rather than applying the precise amounts against the fortnights in which the income was actually earned, where a customer accepted PAYG income data or did not enter data for all fortnights. Sometimes referred to as "smoothing" or "apportioning".
Intervention / compliance intervention	Action carried out by DHS on former or current income support recipients to assess and action compliance with reporting and other social security obligations. Also called a "review". It could result in a debt being raised against a recipient, if DHS determined that they had been overpaid.
LEA	Lived Experience Australia, a national representative organisation for Australian mental health consumers and carers.
Legal Services Directions	The *Legal Services Directions 2017* (Cth) (the Directions) is a set of binding rules issued by the Attorney-General under s 55ZF of the *Judiciary Act 1903* (Cth) providing obligations that departments and agencies must comply with in the performance of legal work.
Letters Patent	The Letters Patent issued on 18 August 2022 by the Governor-General, His Excellency General the Honourable David Hurley AC DSC (Ret'd) establishing the Royal Commission into the Robodebt Scheme and outlining its Terms of Reference.
Litigation Principles	Social Security Appeals and Litigation Arrangements
Manual program	The PAYG Manual Compliance Intervention Program, which operated from around 1 July 2015 to around 30 June 2016. Under the Manual program, compliance reviews were undertaken by compliance officers. The process was designed to mirror the Online Compliance Intervention process which commenced around 1 July 2016. Also known as the "Rapid Response" model.
Masterton case	*Madeleine Masterton v the Commonwealth of Australia* (VID73/2019)
Match	In relation to a data matching program, a result produced, including a meaningful discrepancy, in relation to which administrative action may be taken by the matching agency or source entity.
Matching agency	In relation to a data matching program, the agency whose information technology facilities or resources are used to conduct the data match comparison.

Term	Definition
Milton Graham	Debt collectors Illion Australia Pty Ltd trading as Milton Graham, formerly trading as Dun and Bradstreet.
Minute/Executive Minute	A memorandum or briefing note, containing information, and prepared for an officer of the public service or a Minister.
Mutual obligations	Activities that job seekers in receipt of certain income support payments are required to complete in order to maintain their entitlements.
MYEFO	Mid-Year Economic and Fiscal Outlook Delivered in around December each year, and provides an update on the performance on the Budget and the economic outlook.
NEIDM	Non-Employment Income Data Matching Program A compliance program related to the PAYG program but which falls outside the scope of the Royal Commission's Terms of Reference.
NPP	New Policy Proposal
OAIC	Office of the Australian Information Commissioner
OCI	The Online Compliance Intervention scheme which applied to compliance reviews initiated by the Department of Human Services in the period from on or around 1 July 2016 to on or around 10 February 2017.
OLSC	Office of Legal Services Coordination, Office of the Attorney-General's Department.
Ombudsman	Commonwealth Ombudsman or the Office of the Commonwealth Ombudsman
Ombudsman's 2017 investigation	The own motion investigation by the Office of the Commonwealth Ombudsman into the Robodebt Scheme. The Scheme was in the Online Compliance Intervention phase at the start of the Ombudsman's 2017 investigation, and transitioned to the Employment Income Confirmation phase by the end of the investigation.
Ombudsman's 2017 Report / Ombudsman Own Investigation Report	The report about the Commonwealth Ombudsman's self-initiated investigation into the Department of Human Service's Online Compliance Intervention System and cited as Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System* (Report No 2, April 2017).
PAYG	Pay As You Go Tax – a measure which provides for income tax to be withheld by a person's employer in anticipation of future tax liability.

Term	Definition
PAYG income data	Data sourced by the Department of Human Services, from the Australian Taxation Office, which contained details of income and other amounts contained on a PAYG Payment Summary. The amounts on the PAYG Payment Summary had been reported to the Australian Taxation Office by employers.
PAYG match data	See "PAYG income data".
PAYG reporting	Employers withholding tax needed to report to the ATO on the withholdings made on behalf of their employees. Those PAYG reporting details were matched by the ATO with recipients' details.
PBS	Portfolio Budget Submission
Penalty fee	An amount added to an alleged debt, equal to 10 per cent of the debt amount.
PIA	Privacy Impact Assessment
Pilot	The PAYG pilot program which ran from early 2015 to 30 June 2015.
PM&C	The Department of the Prime Minister and Cabinet
Portfolio	A portfolio is a Cabinet Minister's area of responsibility, including departments, agencies, boards and other structures.
Probe	Debt collection agency, Probe Operations, formerly trading as Probe Group.
Prygodicz case	*Prygodicz* v Commonwealth of Australia [2020] FCA 1454 *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634 *Prygodicz* v Commonwealth of Australia (No ٣) [2022] FCA 826 See also the Commonwealth's application for leave to appeal against orders granting leave to amend statement of claim: *Commonwealth of Australia v Prygodicz* [2020] FCA 1516
Rapid response model	See "Manual Program".
Recipient	A person who engages with Services Australia for the purposes of receiving financial support.

Term	Definition
Robodebt Scheme	The debt assessment and recovery scheme known as the Robodebt scheme reportedly comprised, from 1 July 2015, the PAYG Manual Compliance Intervention program, including associated pilot programs from early 2015 to 30 June 2015, and the following iterations of this program: • Online Compliance Intervention, which applied to assessments initiated in the period from on or around 1 July 2016 to on or around 10 February 2017; • Employment Income Confirmation, which applied to assessments initiated in the period from on or around 11 February 2017 to on or around 30 September 2018; • Check and Update Past Income, which applied to assessments initiated after on or around 30 September 2018.
Services Australia	From to 1 February 2020 (formerly Department of Human Services) an Executive Agency primarily managing service delivery for social security recipients.
SES	Senior Executive Service. An officer classification in the Australian Public Service.
SIP	Staged Implementation Phase. A period of testing in which the new online program was released in a limited way to a small number of recipients to test how it was working.
SIWP measure	Strengthening the Integrity of Welfare Payments' Budget measure.
SLIC	Significant Legal Issues Committee. The SLIC considers significant Commonwealth legal matters as referred by OLSC or raised by its members.
Solicitor-General	The Second Law Officer of the Commonwealth. The Solicitor-General acts as Counsel for the Commonwealth, provides opinions on questions of law and such other functions ordinarily performed by Counsel as the Attorney-General requests.
Staff assisted review	Under the Scheme, some vulnerable recipients were eligible for offers of staff assisted intervention at the income data verification and debt notification stage of the compliance process.
STP	Single Touch Payroll An ATO compliance and reporting program which requires employers to send employee payroll information to the ATO at the same times as they pay their employees.
TFN	Tax File Number

Term	Definition
The Guidelines	Australian Government – Office of the Australian Information Commissioner's *Guidelines on data matching in Australian Government Administration 2014.*
VLA	Victoria Legal Aid
Vulnerability indicator	A DHS digital tool to flag prescribed vulnerabilities known to DHS staff on a recipient's electronic record.

1 The Administrative Appeals Tribunal conducts independent merits review of various administrative decisions made by the Commonwealth Government.
2 Australian Public Service Commission at https://www.apsc.gov.au/working-aps/information-aps-employment/aps-values.
3 The name change to Services Australia was announced by the government on 29 May 2019.

Dramatis Personae

Below is a list of all persons of significance in regard to the Robodebt scheme as determined by the Commission with regard to the terms of reference.

The roles included are those the Commission has determined are most relevant; it is not intended as a full or thorough list of roles for each individual.

Name	Agency/Organisation	Role
Ricky Aik	N/A	Income support recipient
Deanna Amato	N/A	Lead Plaintiff in *Amato vs The Commonwealth*
Amy (Pseudonym)	N/A	Income support recipient
Iain Anderson	Office of the Commonwealth Ombudsman	Commonwealth Ombudsman
Andrew Asten	Ministerial Office of the Hon Alan Tudge MP	Chief of Staff
Luke Baker	Department of Human Services	Authorised Review Officer
Anthony Barford	Department of Human Services	Policy Manager, Debt Policy, Social Security Performance and Analysis Branch
John Barnett	Department of Human Services	Deputy General Counsel, Programme Advice Branch, Legal Services Division
Dr Roslyn Baxter	Services Australia	Deputy Secretary, Integrity and Information Group
Sandra Bevan	N/A	Income support recipient
Christopher Birrer	Services Australia	Deputy Chief Executive Officer, Royal Commission Response Team
Jeannie-Marie Blake	Department of Human Services	Compliance Officer
Genevieve Bolton	Economic Justice Australia	Chair
Thai Bowe	PricewaterhouseCoopers	Partner, Government Consulting team
Katherine Boyle	Welfare Rights Centre	Executive Director
Damien Brazel	Department of Human Services	National Manager, Acting General Counsel, FOI and Litigation
Cameron Brown	Department of Social Services	Director, Payment Integrity and Debt Management
Miles Browne	Victoria Legal Aid	Managing Lawyer, Economic and Social Rights program, Civil Justice
Elizabeth Bundy	Department of Human Services	National Manager, Appeals
Felicity Button	N/A	Lead Applicant in class action: *Prygodicz v The Commonwealth*

Name	Agency/Organisation	Role
Kathryn Campbell AO, CSC and Bar	Department of Human Services	Secretary
	Department of Social Services	Secretary
Emily Canning	Department of Human Services	Acting Chief Financial Officer
Lisa Carmody	Department of Human Services	Acting Chief Counsel, Legal Services Division
Emeritus Professor Terry Carney AO	Social Security Appeals Tribunal	Member
	Administrative Appeals Tribunal, Social Services and Child Support Division	Member
	University of Sydney	Emeritus Professor of Law
James Carter	Office of the Commonwealth Director of Public Prosecutions	Acting Commonwealth Solicitor
Rhys Cauzzo (deceased)	N/A	Income support recipient
Tenille Collins	Department of Human Services	Director, Customer Compliance Division
Charmaine Crowe	Australian Council of Social Service	Senior Advisor, Program Director, Social Security
Catherine Dalton	Department of Social Services	Acting Director, Payment Integrity and Debt Strategy Section, Social Security Performance and Analysis Branch
Russell De Burgh	Department of Social Services	Branch Manager, Pensions and Integrity, Payments Policy Group
Dimitra (Pseudonym)	Department of Human Services	Compliance Officer
Melissa Donnelly	Community and Public Sector Union	Member of National Executive
		National Secretary
Catherine Eagle	Welfare Rights and Advocacy Service	Principal Solicitor – Perth
Allyson Essex	Department of Social Services	Branch Manager, Payment Conditionality, Design Policy
		Acting Group Manager, Welfare and Housing Policy
Angelene Falk	Office of the Australian Information Commissioner	Australian Information Commissioner and Privacy Commissioner
Tyson Fawcett	Australian Taxation Office	Senior Director, ATO Smarter Data Program
Tim Ffrench	Department of Human Services	Acting Chief Counsel, Legal Services
Glyn Fiveash	Department of Human Services	Deputy General Counsel, Programme Advice Legal and Ombudsman Branch/ Business Transformation Legal Branch
Matthew Flavel	Department of Social Services	Deputy Secretary, Social Security
The Hon Paul Fletcher MP	Commonwealth of Australia	Minister for Families and Social Services

Name	Agency/Organisation	Role
Catherine Halbert	Department of Human Services	Acting National Manager, Internal Audit, Audit Division
		Director, Integrity Modernisation
		Director, Information Release
		Acting National Manager, Ombudsman and Information Release Branch
Anna Fredericks	Department of Human Services	Lawyer, Program Advice and Privacy Branch
	Department of Social Services	Principal Legal Officer, Social Security and Families, Legal Services Branch
Rosemary Gay	N/A	Income support recipient
Mark Gladman	Department of Human Services	Deputy General Counsel, Programme Advice and Privacy Branch
		Acting General Counsel, Programme Advice and Privacy Branch
Richard Glenn	Office of the Commonwealth Ombudsman	Acting Commonwealth Ombudsman
Dr Cassandra Goldie AO	Australian Council of Social Service	Chief Executive Officer
Malisa Golightly PSM (deceased)	Department of Human Services	Deputy Secretary, Participation, Aged Care and Integrity
		Deputy Secretary, Integrity and Information
Jennifer Goodrick	N/A	Income support recipient
Kathryn Graham	Australian Government Solicitor	National Leader, Office of General Council
Raymond Griggs AO CSC	Department of Social Services	Secretary
Alan Grinsell-Jones	Department of Social Services	Branch Manager, Legal Services Branch Executive
		Legal – Special Counsel, Legal Services Branch Executive
Catherine Halbert	Department of Social Services	Group Manager, Payments Policy
		Acting Deputy Secretary, Social Security
		Group Manager, Families and Communications
Peter Hanks KC	Victorian Bar	Barrister
Bevan Hannan	Department of Human Services	Acting National Manager, Customer and Media Engagement

Name	Agency/Organisation	Role
Karen Harfield	Department of Human Services	General Manager, Customer Compliance Division
		Deputy Secretary, Integrity and Information
		General Manager, Information, Debts and Appeals
Matthew Hay	Australian Taxation Office	Deputy Commissioner
Jeremy Hirschhorn	Australian Taxation Office	Second Commissioner, Client Engagement Group
Robert Hurman	Department of Social Services	Director, Payment Integrity and Debt Strategy
Jonathan Hutson	Department of Human Services	Deputy Secretary, Enabling Services
		Deputy Secretary, Shared Services
		Acting Secretary
Barry Jackson	Department of Human Services	Deputy Secretary, Service Delivery Operations
		Acting Secretary
Lyndsey Jackson	#NotMyDebt	Co-founder
Michael Johnson	Office of Legal Services Coordination	Acting Assistant Secretary
		Assistant Secretary
Mark Jones	Department of Social Services	Assistant Director, Payment Integrity and Debt Strategy team, Social Security Performance and Analysis branch
Hank Jongen	Department of Human Services	General Manager, Communication
		Acting General Manager, Community Engagement
		Acting General Manager, Communications
Simon Jordan	Department of Social Services	Senior Legal Officer, Legal Services Group
Ian Joyce	Department of Social Services	Director, Means Test Policy Section
Jarrod Kagan	Probe Group Pty Ltd	Chief Customer Officer
Lisa Keeling	Department of Human Services	General Counsel
		Acting Chief Counsel
Michael Keenan	Commonwealth of Australia	Minister for Human Services
Michael Kerr-Brown / Michael Brown	Australian Taxation Office	Data Management Adviser, Data Management Team, Small Business/Individual Taxpayers
		Data Management Officer, DATA Scheme Implementation Team, Data Management Smarter Data

Name	Agency/Organisation	Role
Murray Kimber	Department of Social Services	Branch Manager, Investment Approach Taskforce Branch
		Branch Manager, Policy Capability and Evaluation Branch
Melanie Klieve	N/A	Income support recipient
Sue Kruse	Department of Human Services	General Manager, Whole of Government Coordination
		Acting Deputy Secretary, Health and Aged Care
		Acting Deputy Secretary, Enabling Services
Megan Lees PSM	Ministerial Office of Senator the Hon Marise Payne, Minister for Human Services	Chief of Staff
Professor Renée Leon PSM	Department of Human Services	Secretary
Benjamin Lumley	Department of Human Services	Director, Data Strategy and Analytics, Business Integrity Division
Kristin Lumley	Department of Social Services	Assistant Director, Payment Integrity, Payment Conditionality, Design and Policy Branch
		Assistant Director, Strategy Analysis and Briefing Unit, Integrity Strategy, Engagement and Policy Branch
Paul McBride	Department of Social Services	Group Manager, Welfare and Housing Policy
		Acting Deputy Secretary, Social Security Stream
		Group Manager, Disability, Employment and Carers Group
Emma Kate McGuirk	Department of Social Services	Acting Group Manager, Payments Policy Group
		Group Manager, Redress
Louise Macleod	Office of the Commonwealth Ombudsman	Acting Senior Assistant Ombudsman, Social Services, Indigenous and Disability Branch
		Senior Assistant Ombudsman, Complaints Management and Education Branch

Name	Agency/Organisation	Role
Jason McNamara	Department of Human Services	General Manager, Audit
		General Manager, Debt and Appeals Division
		General Manager, Integrity and Information Group
		General Manager, Integrity Modernisation Division, Integrity and Information Group
		Acting Deputy Secretary, Integrity and Information Group
Rowan McRae	Victoria Legal Aid	Executive Director, Civil Justice Access and Equity
		Acting Chief Executive Officer
Jarrad Madgwick (deceased)	N/A	Income support recipient
Kathleen Madgwick	N/A	Mother of Jarrad Madgwick (deceased)
Michael Manthorpe PSM	Office of the Commonwealth Ombudsman	Commonwealth Ombudsman
Barbara Martin (Pseudonym)	Department of Human Services	Employee
David Mason	Department of Social Services	Acting Director, Rates and Means Testing Policy Branch
Madeleine Masterton	N/A	Lead applicant in *Masterton v The Commonwealth*
Paul Menzies-McVey	Department of Human Services	Acting Chief Counsel
Jennifer Miller	N/A	Mother of Rhys Cauzzo (deceased)
Rachelle Miller	Ministerial Office of Alan Tudge, Minister for Human Services	Senior Media Adviser
The Hon Scott Morrison MP	Commonwealth of Australia	Minister for Social Services
		Prime Minister
Annette Musolino	Department of Human Services	Chief Counsel, Legal Services
		Acting Deputy Secretary
Lisa Newman	Community and Public Sector Union	Deputy National President
Senator the Hon Marise Payne	Commonwealth of Australia	Minister for Human Services
Brenton Philp	Department of Social Services	Group Manager, Welfare and Housing Policy
		Group Manager, Pensions and Housing
		Group Manager, Housing and Homelessness

Name	Agency/Organisation	Role
Timothy Pilgrim	Office of the Australian Information Commissioner	Australian Information Commissioner and Privacy Commissioner
Andrew Podger AO	Australian National University	Honorary Professor of Public Policy
The Hon Christian Porter	Commonwealth of Australia	Minister for Social Services
		Attorney-General
Finn Pratt AO PSM	Department of Social Services	Secretary
Taren Preston	Department of Human Services	Senior Social Worker
Katherine Prygodicz	N/A	Lead Applicant in class action *Prygodicz v The Commonwealth*
Anne Pulford	Department of Social Services	Principal Legal Officer, Social Security and Families
Janean Richards	Department of Social Services	Chief Legal Counsel and Group Manager, Corporate Services Group
The Hon Stuart Robert	Commonwealth of Australia	Minister for Human Services
		Minister for Government Services
Michael Robinson	Department of Human Services	National Manager, Ombudsman and Information Release Branch
Matthew Roser	Department of Human Services	General Counsel, Litigation, Subpoena, and FOI
		General Counsel, Litigation, Subpoena, and Information Release
Christopher Ross	Illion Australia Pty Ltd trading as Milton Graham	Head of Compliance
Senator the Hon Anne Ruston	Commonwealth of Australia	Minister for Families and Social Services
Jason Ryman	Department of Human Services	Director, Compliance Risk Branch
Sara Samios	Office of Legal Services Coordination	Acting Assistant Secretary, Civil Justice, Policy and Programs Division
		Director, Legal Assistance and Women's Safety Section
		Acting Assistant Secretary, Legal Services Branch
Cain Sibley	Clayton Utz	Partner
Craig Simpson (Pseudonym)	Department of Human Services	Compliance Officer
Rebecca Skinner PSM	Services Australia	Chief Executive Officer
Ms Smith (Pseudonym)	Services Australia	Customer Service Officer
Brian Sparkes	Department of Human Services	Principal Legal Officer

Name	Agency/Organisation	Role
Maris Stipnieks	Department of Human Services	General Counsel, Programme Advice and Privacy
Craig Storen	Department of Human Services	General Manager, Customer Compliance Division
Colleen Taylor	Department of Human Services	Compliance Officer
The Hon Dan Tehan MP	Commonwealth of Australia	Minister for Social Services
Matthew Thompson	N/A	Income support recipient
Tracy Tozer	Department of Human Services	Assistant Director, Strategic Analysis, Business Architecture Branch, WPIT Programme, Business Transformation Division
		Acting Director, Strategic Analysis, Business Architecture Branch, WPIT Programme, Business Transformation Division
		Assistant Director, Transformation Integration, Business Architecture Branch, WPIT Programme, Business Transformation Division
		Director, Transformation Integration, Business Architecture Branch, Business Transformation Division
The Hon Alan Tudge	Commonwealth of Australia	Minister for Human Services
The Hon Malcolm Turnbull AC	Commonwealth of Australia	Prime Minister
Frank van Hagen	PricewaterhouseCoopers	Director, PwC Consulting
Rebecca Vonthethoff	Office of Legal Services Coordination	Officer
Charles Wann	Ministerial Office of the Hon Scott Morrison MP, Minister for Social Services	Senior Adviser
		Chief of Staff
Terrence Weber	PricewaterhouseCoopers	Partner
Shane West	PricewaterhouseCoopers	Partner
		Lead Partner for DHS account
Robert Whelan	ARL Collect Pty Ltd	General Manager
Andrew Whitecross	Department of Social Services	Acting Group Manager, Social Security Policy, Social Security Stream
Prof. Peter Whiteford	Crawford School of Public Policy, Australian National University	Academic
Nathan Williamson	Department of Social Services	Deputy Secretary, Social Security
Serena Wilson	Department of Social Services	Deputy Secretary, Social Security

Name	Agency/Organisation	Role
Mark Withnell	Department of Human Services	General Manager, Business Integrity
Mark Wood	Ministerial Office of the Hon Alan Tudge, Minister for Human Services	Senior Policy Adviser
Dr Elea Wurth	Deloitte	Partner, Risk Advisory

Hearings Witness Schedule

See **Dramatis personae** for further information.

Hearing Block 1

	Name	Date of first appearance
1	'Amy'*	31 October 2022
2	Madeleine Masterton	31 October 2022
3	Miles Browne	31 October 2022 (also 24/2/23)
4	Mark Jones	1 November 2022
5	Anne Pulford	2 November 2022
6	Emma Kate McGuirk	2 November 2022 (also 2/3/23)
7	Cameron Brown	3 November 2022
8	Lisa Keeling	3 November 2022
9	Jeremy Hirschhorn	3 November 2022 (also 4/11/22)
10	Robert Whelan	4 November 2022
11	Christopher Ross	4 November 2022
12	Matthew Flavel	7 November 2022
13	Christopher Birrer	7 November 2022 (also 23/1/23)
14	Scott Britton	8 November 2022 (also 23/2/23)
15	Jason Ryman	8 November 2022 (also 22/2/23)
16	Serena Wilson PSM	9 November 2022 (also 23/2/23)
17	Finn Pratt AO PSM	10 November 2022
18	Kathryn Campbell AO CSC & Bar	10 November 2022 (also 11/11/22, 7/12/22, 7/3/23)
19	Genevieve Bolton	11 November 2022
20	Katherine Boyle	11 November 2022
21	Catherine Eagle	11 November 2022

Hearing Block 2

	Name	Date of first appearance
22	Jason McNamara	5 December 2022 (also 6/3/23)
23	Melanie Klieve	5 December 2022
24	Craig Storen	6 December 2022
25	Jonathan Hutson	6 December 2022
26	Andrew Whitecross	8 December 2022
27	Murray Kimber	8 December 2022
28	Catherine Halbert	8 December 2022 (also 9/12/22)
29	Mark Withnell	9 December 2022 (also 24/2/23)
30	Tyson Fawcett	12 December 2022
31	Michael Kerr-Brown	12 December 2022 (also 9/3/23)
32	Melissa Donnelly	12 December 2022

33	Lisa Newman	12 December 2022
34	Senator the Hon Marise Payne	13 December 2022 (also 2/3/23)
35	Colleen Taylor	13 December 2022
36	The Hon Scott Morrison MP	14 December 2022
37	Karen Harfield	15 December 2022
38	Benjamin Lumley	15 December 2022
39	Sandra Bevan	16 December 2022
40	Dr Cassandra Goldie AO	16 December 2022
41	Charmaine Crowe	16 December 2022
42	Jarrod Kagan	16 December 2022
43	Catherine Dalton	16 December 2022

Hearing Block 3

	Name	Date of first appearance
44	Rosemary Gay	23 January 2023
45	Lyndsey Jackson	23 January 2023
46	Ricky Aik	23 January 2023
47	'Barbara Martin'*	24 January 2023
48	Terry Carney AO	24 January 2023
49	Elizabeth Bundy	24 January 2023 (also 25/1/23)
50	Anthony Barford	24 January 2023
51	Damien Brazel	25 January 2023
52	Robert Hurman	25 January 2023
53	Alan Grinsell-Jones	25 January 2023
54	Russell de Burgh	25 January 2023
55	Anna Fredericks	27 January 2023
56	Kristin Lumley	27 January 2023
57	Allyson Essex	27 January 2023
58	James Carter	27 January 2023
59	Annette Musolino	30 January 2023 (also 31/1/23, 1/3/23)
60	Rachelle Miller	31 January 2023
61	Hank Jongen	31 January 2023
62	Bevan Hannan	31 January 2023
63	The Hon Alan Tudge MP	1 February 2023 (also 2/2/23)
64	The Hon Christian Porter	2 February 2023
65	Janean Richards	2 February 2023
66	Shane West	3 February 2023
67	Nathan Williamson	3 February 2023
68	Maris Stipnieks	3 February 2023

Hearing Block 4

	Name	Date of first appearance
69	Jennifer Miller	20 February 2023
70	Katherine Prygodicz	20 February 2023
71	Felicity Button	20 February 2023
72	Megan Lees PSM	20 February 2023
73	Charles Wann	20 February 2023
74	Paul Menzies-McVey	21 February 2023
75	Michael Johnson	21 February 2023
76	Jeannie-Marie Blake	21 February 2023
77	Matthew Roser	22 February 2023
78	Tim Ffrench	22 February 2023
79	Rowan McRae	24 February 2023
80	Deanna Amato	24 February 2023
81	Peter Hanks KC	24 February 2023
82	Mark Gladman	27 February 2023
83	Lisa Carmody	27 February 2023
84	Sue Kruse	27 February 2023
85	Andrew Asten	27 February 2023
86	Mark Wood	27 February 2023
87	Renee Leon PSM	28 February 2023
88	Michael Keenan	28 February 2023
89	Matthew Thompson	1 March 2023
90	Tracy Tozer	1 March 2023
91	The Hon Stuart Robert	2 March 2023
92	Tenille Collins	3 March 2023
93	Frank van Hagen	3 March 2023
94	Thai Bowe	3 March 2023
95	Terrence Weber	3 March 2023
96	Brian Sparkes	3 March 2023
97	'Craig Simpson'*	3 March 2023
98	The Hon Malcolm Turnbull AC	6 March 2023
99	Sara Samios	6 March 2023
100	Kristen Foster	6 March 2023
101	Brenton Philp	6 March 2023
102	Barry Jackson	7 March 2023
103	Dr Elea Wurth	8 March 2023
104	Louise Macleod	8 March 2023
105	Michael Manthorpe PSM	8 March 2023
106	Richard Glenn	9 March 2023

107	Iain Anderson	9 March 2023
108	Paul McBride	9 March 2023
109	‘Ms Smith’*	9 March 2023
110	Luke Baker	9 March 2023
111	Taren Preston	10 March 2023
112	Kathleen Madgwick	10 March 2023
113	John Barnett	10 March 2023
114	Glyn Fiveash	10 March 2023
115	Melanie Metz	10 March 2023

* A pseudonym

List of Legislation

Legislation	
Proper Name of Act	**Act as described**
Administrative Appeals Tribunal Act 1975 (Cth)	AAT Act
Administrative Decisions (Judicial Review) Act 1977 (Cth)	ADJR Act
Archives Act 1983 (Cth)	Archives Act
Auditor-General Act 1997 (Cth)	Auditor-General Act
Australian Information Commissioner Act 2010 (Cth)	AIC Act
Competition and Consumer Act 2010 (Cth)	Competition and Consumer Act 2010
Data-matching Program (Assistance and Tax) Act 1990 (Cth)	DPM Act / Data-matching Act
Data-matching Program (Assistance and Tax) Act 1990 – Guidelines 1994	Voluntary Data-matching Guidelines / Guidelines
Data Protection Act 2018 (UK)	Data Protection Act 2018
Federal Court of Australia Act 1976 (Cth)	Federal Court of Australia Act
Financial Framework (Supplementary Powers) Regulations 1997	FF(SP) Regulations
Freedom of Information Act 1982 (Cth)	Freedom of Information Act
Human Services (Centrelink) Act 1997 (Cth)	Human Services (Centrelink) Act
International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 13 November 1980)	International Covenant on Civil and Political Rights
International Covenant on Economic, Social and Cultural Rights [1976] ATS 5	International Covenant on Economic, Social and Cultural Rights
Invalid and Old-age Pensions Act 1908 (Cth)	Invalid and Old-age Pensions Act
Judiciary Act 1903 (Cth)	Judiciary Act
Legal Profession Act 2006 (ACT)	Legal Profession Act / LPA
Legal Services Directions 2017 (Cth) *Legal Services Directions 2005* (Cth)	Directions / the Directions / LSDs
Members of Parliament (Staff) Act 1984 (Cth)	MOP(S) Act
National Anti-Corruption Commission Act 2022 (Cth)	NACC Act
National Anti-Corruption Commission Bill 2022 (Cth)	NACC Bill
Ombudsman Act 1976 (Cth)	Ombudsman Act
Ombudsman Bill 1976 (Cth)	Ombudsman Bill
Parliamentary Business Resources Regulations 2017 (Cth)	Parliamentary Business Resources Regulations
Privacy Act 1988 (Cth)	Privacy Act
Privacy (Australian Government Agencies — Governance) APP Code 2017	Australian Government Agencies Privacy Code
Privacy (Tax File Number) Rule 2015	TFN Rule
Public Governance, Performance and Accountability Act 2013 (Cth)	PGPA Act
Public Interest Disclosure Act 2013 (Cth)	Public Interest Disclosure Act
Public Interest Disclosure Amendment (Review) Bill 2023 (Cth)	Public Interest Disclosure Amendment (Review) Bill 2023

Legislation	
Proper Name of Act	**Act as described**
Public Service Act 1999 (Cth)	Public Service Act / PS Act
Public Service Amendment Bill 2023 (Cth)	Public Service Amendment Bill
Royal Commission Act 1902 (Cth)	Royal Commission Act
Services Australia Governance Amendment Act 2020 (Cth)	Services Australia Governance Amendment Act
Social Security Act 1991 (Cth)	SS Act / Social Security Act
Social Security (Administration) Act 1999 (Cth)	SS Admin Act / SS (Admin) Act / Administration Act
Social Services Act 1947-1973 (Cth)	Social Services Act
Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Act 2020	Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Act
Social Services Consolidation Act 1947–1949 (Cth)	Social Services Consolidation Act
Student Assistance Act 1973 (Cth)	Student Assistance Act
Taxation Administration Act 1953 (Cth)	TAA / TAA53 / Tax Administration Act
Work Health and Safety Act 2011 (Cth)	WHS Act

2014 DSS legal advice

Several months before the Robodebt scheme (the Scheme) was introduced in the 2015-16 Budget, internal policy and legal advice within the Department of Social Services (DSS) exposed the inherent deficiencies in the design of the Scheme.

On 18 December 2014, Simon Jordan (senior legal officer, Legal Services Group, DSS) gave internal legal advice in relation to the proposal (the 2014 DSS legal advice).[1] The 2014 DSS legal advice was "second counselled" by Anne Pulford (principle legal officer, Legal Services Group, DSS). The advice considered the question of "whether a debt amount derived from annual smoothing or smoothing over a defined period of time is legally defensible." The advice set out the legislative requirements under the *Social Security Act 1991* (Cth) (the Social Security Act) in relation to the calculation of social security entitlements and the identification of debts due to the Commonwealth.

Critically, the advice concluded that:

> In our view, a debt amount derived from annual smoothing or smoothing over a defined period of time may not be derived consistently with the legislative framework.

In support of this conclusion, the advice stated:

> In order to correctly determine a relevant debt, it would be necessary to consider the amount of income received in each relevant fortnight in order to apply the income test in that fortnight. There may not be a correct calculation of income received in each relevant fortnight if income is 'smoothed' over an income year or other defined period.

The 2014 DSS legal advice is to be understood in the context of the earlier policy advice that was given by David Mason (acting director, Rates and Means Testing Policy Branch, DSS) on 7 November 2014 (the 2014 DSS policy advice).[2] The 2014 DSS policy advice plainly articulated the core issues associated with the "smoothing" of employment income to determine and raise social security debts. The advice stated that the proposal was flawed and would not be supported because:

> …the suggested calculation method (averaging employment income over an extended period) does not accord with legislation, which specifies that employment income is assessed fortnightly. It follows that the debt amount calculated could be incorrect according to law, and it is unclear how a DHS delegate could validly make a determination about the amount of a debt in these circumstances. Further, we can't see how such decisions could be defended in a tribunal or court, particularly when DHS have the legislative authority to seek employment income information from employers.

This advice recognised the fundamental flaw in the proposal, in that it did not accord with the legislative requirement that social security entitlements are to be assessed on a fortnightly basis. The underlying policy rationale for this legislative requirement is that income support payments should be made at the time when the recipient is most in need of financial assistance.[3] That the proposal would introduce an arrangement that runs counter to this rationale is a matter which was explicitly addressed in the communication of DSS's views on the proposal to the Department of Human Services (DHS) in January 2015.[4]

Both the 2014 DSS legal advice and the 2014 DSS policy advice identified that the use of income smoothing may result in inaccurate debts being raised. The 2014 DSS policy advice also noted that the proposal appeared to involve a reversal of the onus of proof, making the following comment:

> In normal events a debt is supported by the evidence required to calculate it according to the law, and the approach of asking for supporting evidence should the customer disagree with the decision is not unreasonable. However, under this proposal, DHS will have raised an overpayment based on incomplete information and it is suggested that it would be the customer's responsibility to provide the information required to allow the debt to be calculated correctly. [emphasis in original]

These criticisms of the proposal raised in the early stages of its conception were ultimately reflected in external commentary from Peter Hanks KC and Professor Terry Carney throughout the life of the Scheme, as well as in the opinion of the Solicitor-General that at last brought an end to it.

2017 DSS legal advice

On 24 January 2017, Ms Pulford provided a further internal legal advice concerning the lawfulness of the use of income averaging (the 2017 DSS legal advice).[5] The 2017 DSS legal advice was directed at the question of whether using income averaging as a 'last resort' to determine a social security debt was lawful, in circumstances where no other information about the person's circumstances was available.

The advice given by Ms Pulford was heavily qualified. It opened with the following statement:

> We are providing this advice on a general basis, without details as to what information source is being used and for what period. We would appreciate your treating this advice on this general basis.

With this substantial qualification, the 2017 DSS legal advice concluded (without citing any relevant legislative provisions or case law) that it was lawful for income averaging to be used as a last resort in circumstances where no other information was available. The advice stated that in Ms Pulford's view:

> …reliable income information which makes it likely that a person has been overpaid, even if the information has this effect if taken at an averaged rate, may justify the Secretary lawfully taking action.

The advice also referred to sections 79 and 80 of the *Social Security (Administration Act) 1999* (Cth) (the Administration Act) in support of its argument. Neither of these provisions entitled the Secretary to assess income other than as provided for under the Social Security Act. As such, although the 2017 DSS legal advice reached a different conclusion as to the legality of the use of income averaging, it failed to properly engage with or overcome the fundamental issues identified in the 2014 DSS legal advice. The 2017 DSS legal advice was drafted in a manner that disregarded the accepted administrative law principle that there must be some probative evidence to support a decision and that in the absence of probative evidence, the decision is liable to be quashed on the basis that it was illogical or irrational.[6]

The 2017 DSS legal advice was obviously inconsistent with the 2014 DSS legal advice and failed to deal with the underlying policy rationale for the fortnightly calculation of social security entitlements. The advice was used by DSS and DHS from that point onwards to justify the use of income averaging in the scheme internally and, most notably, to the Ombudsman.

2017 DHS legal advices

In early January 2017, during a period of heightened media attention, Barry Jackson (acting secretary, DHS) sought advice about the legality of using income averaging to determine social security entitlement.[7] Sue Kruse (acting deputy secretary, DHS) communicated that request to Paul Menzies-McVey (acting chief counsel, DHS), seeking a paper on the department's current practice of averaging income for the purposes of calculating payments under the social security law.[8]

Two advices were prepared, the Fiveash advice and the DHS draft advice.[9]

On 11 January 2017, Glyn Fiveash (deputy general counsel, Programme Advice Legal and Ombudsman Branch, DHS) sent an email advice to Tracy Tozer (acting Director, DHS) about working out rates of social security payment for the purpose of calculating a debt (Fiveash advice).[10] The advice stated:

> When working out what rate a person should be paid a social security payment, whether it's the first time the calculation is done (the original rate calculation) or the second (for the purposes of working out whether the person owes a debt) the rules relating to the rate of payment are the same.
>
> …

> Where there is no 'income averaging' mechanism in the first instance of rate calculation, there can also be no 'income averaging' in the second instance. That is, the Department cannot apply an income amount received over a larger period (eg 12 months), in any way against a customer other than in the manner in which the person received it in those individual fortnights; ie the annual amount cannot simply be divided by 26 and applied as the person's income over 26 payment fortnights. Rather, the annual amount needs to be apportioned between the relevant fortnights in the period at the rate at which it was actually earned, derived or received.

The Fiveash advice was another legal opinion to the effect that averaging, as used in the Scheme, did not meet the requirements of the social security legislation. Unlike other internal advices, this advice actually addressed the statutory definition of "income" and, though brief, it encapsulated the fatal flaw at the heart of income averaging as used in the Scheme: that DHS could not legally or justly assess a recipient's entitlement to payment on one basis and then seek on a different basis to recover the payments made.

The advice drafted by Mark Gladman (acting general counsel, Legal Services Division, DHS) was titled "Calculating of income for income support payments" (the 2017 DHS draft advice).[11] That advice considered whether it was open to DHS to rely on ATO data to calculate a customer's entitlement to income support. From the outset the advice was sceptical in its support of income averaging:

> there are some reasonable arguments that could be made to support the process involving the use of information received from the ATO about annual income amounts to calculate a customer's entitlement to income support and to not use the information gathering powers. However, the Social Security law is complex.
>
> …
>
> Given the complexity of the legislation, and the significance of this issue for the department, it may be prudent to obtain external legal advice on this matter.

The 2017 DHS draft advice attempted to justify the Scheme by noting that "[t]he methodology as to how the department arrives at that fortnightly amount is not specified in the legislation."[12]

However, Mr Gladman acknowledged that even in drafting the advice, he "didn't feel that [he] could reach the conclusion that there were reasonable arguments to support income averaging."[13] Mr Gladman was not only concerned about identifying reasonable arguments to support what DHS was doing, but also about whether the factual information he had been provided was really an accurate description of DHS's processes (in which he referred to the example of a student who would not work consistent hours over the course of a year and so applying averaging on a fortnightly basis could not, mathematically, be applied).[14]

8 March 2017 AAT decision

On 8 March 2017, Professor Carney handed down a decision in the Administrative Appeals Tribunal (AAT) in which he articulated a reasoned conclusion that calculating social security debts based on income averaging was unlawful, because income averaging provided an insufficient evidentiary basis for the calculation of income support payments.[15]

Professor Carney concluded that the effective reversal of the onus of proof:

> does not absolve Centrelink from its legal obligation to obtain sufficient information to found a debt in the event that the 'first instance' contact with the recipient is unable to unearth the essential information about actual fortnightly earnings.[16]

Ultimately, the insufficiency of evidence which stems from the inaccuracy of averaging is a concept that was taken up by Peter Hanks KC in his article, and in the Solicitor-General's advice.[17]

In his reasons, Professor Carney considered the *Briginshaw* principle[18] (that findings of fact must be made upon logically probative evidence: ''reasonable satisfaction should not be produced by inexact proofs, indefinite testimony, or indirect inferences"),[19] to find that the fortnightly averaging methodology was

"too uncertain, and too slight a basis to satisfy the *Briginshaw* standard."[20] Professor Carney's analysis of *Briginshaw* was not drawn upon in Mr Hanks KC's paper or the Solicitor-General's advice which referred instead to the need for findings of fact that underpin administrative decision-making to be grounded in probative material.

Despite the significance of Professor Carney's reasons, DHS did not obtain legal advice on the question of lawfulness of the use of income averaging upon receiving it. Nor did DHS appeal the decision. Instead, DHS proceeded to use income averaging to recalculate the debt that was the subject of Professor Carney's decision despite an express direction not to do so and continued its use of income averaging under the Scheme.

July 2017 AIAL Conference

Peter Hanks KC delivered a presentation at the July 2017 Australian Institute of Administrative Law (AIAL) conference, which was later published as an article titled 'Administrative law and welfare rights: a 40-year story from *Green v Daniels* to "robot debt recovery"'. [21]

The presentation was highly critical of the OCI phase of the Scheme. Mr Hanks KC, with Victoria Legal Aid, was looking to agitate an appropriate challenge in the Federal Court in order to determine the lawfulness of the calculation method underpinning the Scheme.[22]

In his presentation, Mr Hanks KC compared two government schemes; the first being a 1976 initiative aimed at "school leavers" who were alleged to be abusing their entitlement to unemployment benefits. It was ultimately overturned after judicial review in a case known as *Green v Daniels.*[23]

Mr Hanks KC then considered the Scheme and suggested that it should be tested in the Federal Court in the same way as *Green v Daniels*. He noted two problems with the OCI process, firstly shifting the onus onto the social security recipient to prove that DHS's assumption as to the recipient's income was incorrect, and secondly, that the ATO earnings information was spread evenly over the period of employment despite the social security income test using income received in each fortnight.[24] He analogised that *Green v Daniels* demonstrated the capacity of judicial review to deliver a relatively quick and clear correction of DHS's potentially unlawful executive action under the Scheme.

The article takes forward the ideas articulated by Professor Carney in the 8 March 2017 AAT decision, but as foreshadowed, does not adopt the *Briginshaw* line of reasoning. In assessing the legal basis for the Scheme, Mr Hanks KC analysed the Social Security Act, the notion of reversing the onus of proof, the Department's failure to utilise its information-gathering powers, and the commentary (and omissions) in the Ombudsman's 2017 report. Mr Hanks KC explained the review process in the AAT and foreshadowed the need for a judicial review to provide a definitive ruling on the legitimacy of the OCI system – "in the same way it did 40 years ago, in *Green v Daniels*".

2018 Carney papers

Following Professor Carney's 8 March 2017 decision, he made four subsequent decisions based on similar reasoning. Professor Carney's appointment to the AAT was not renewed in September 2017 and he became a full-time academic. In 2018 Professor Carney published a paper which built upon the analysis in his AAT decisions. The article criticised the use of averaging from a legal and mathematical perspective.

The paper, titled 'The New Digital Future for Welfare: Debts Without Legal Proofs or Moral Authority?',[25] reviewed the OCI phase, specifically DHS's responsibility to obtain all information necessary to calculate debts based on actual fortnightly earnings rather than on the basis of assumed averages. He stated:

> It is trite maths that statistical averages (whether means or medians) tell nothing about the variability or otherwise of the underlying numbers from which averages are calculated. Only if those underlying numbers

> do not vary at all is it possible to extrapolate from the average a figure for any one of the component periods to which the average relates. Otherwise the true underlying pattern may be as diverse as the experience of Australia's highly variable drought/flood pattern in the face of knowledge of average yearly rainfall figures.

A fundamental point made in that article was that income averaging provided insufficient evidence of the debts that were alleged under the Scheme, there being no statutory scope for substitution of a notional average fortnightly income for actual fortnightly income.[26] The primary legal issue raised by the article was that income averaging as it was used under the Scheme was unlawful because it contravened the no evidence principle.

2018 Clayton Utz advice

In May 2018 DHS referred an AAT decision to DSS that concluded that the legislation "did not authorise the calculation of youth allowance by reference to averaging of income in this case."[27] The AAT member had placed reliance on the article by Professor Carney.[28]

This caused DSS to seek legal advice from Clayton Utz who provided a draft advice to Anna Fredericks (principal legal officer, DSS) on 14 August 2018.[29] The author of the Clayton Utz advice, Cain Sibley (partner, Clayton Utz) was also the AIAL president at the time Mr Hanks KC delivered his 2018 paper.[30]

The Clayton Utz advice echoed the sentiments of the 2014 DSS legal advice. On income averaging, it stated clearly:

> We consider that the Act does not allow the Department to determine a youth allowance or newstart's [sic] recipient's fortnightly income through conducting a notional income analysis of the data obtained by the ATO.

On the use of bank statements, it saw no reason why, in principle, bank statements (which showed a net income amount) could not be used to calculate gross income, but stated:

> As a matter of good administration, it would, of course, be preferable to use direct evidence of gross amounts paid to a person for a particular fortnightly period (for example, employer payslips or accounting systems) where those records are available, and we expect that the AAT would prefer to obtain and or rely on such direct evidence.

The advice also made comments about the reversal of the onus of proof:

> …it is not open to the Department to conduct a notional assessment of a person's income in respect of a particular fortnightly period in the manner proposed. The Act presently requires evidence of actual income paid to a person in respect of a fortnightly period to be assessed…

> Where such evidence exists (that is obtained from a source other than the welfare recipient), and the Department proposes to take it into account when making a decision that is adverse to a person, the Department should give the welfare recipient an opportunity to comment on that information (by sending particular [sic] of it to the last address that the person has given to the Department for the purpose of receiving communications).

The Clayton Utz advice pointed out inconsistencies with DHS's application of the rate calculators and fortnightly income tests under the Social Security Act.

The Clayton Utz advice acknowledged Professor Carney's 2018 paper[31] and the AAT's reasoning in a 4 May 2018 AAT decision (which found that the legislation "did not authorise the calculation of youth allowance by reference to averaging of income in this case"[32]), but did not consider it necessary to apply the *Briginshaw* or procedural fairness principles, as suggested by Professor Carney in the 8 March 2017 decision.

The Clayton Utz advice was distributed within DSS but ultimately was not finalised, and was not escalated.[33]

2019 Carney paper[34]

Professor Carney published a further article in 2019 titled 'Robo-debt illegality: The seven veils of failed guarantees of the rule of law'[34] which provided an analysis of the Scheme, and the wider structural deficiencies of the institutions which were designed to protect administrative decision making and implementation of the Scheme. The article considered the impact of the Scheme on the rule of law more broadly but also canvassed a selection of redacted AAT1 decisions. It also discussed the role of the model litigant obligations, automation, ethical administration and the accountability of government agencies (such as the Ombudsman) in the prolongment of the Scheme.

The article differed from Professor Carney's previous publications because it not only identified the illegality of the Scheme (which Professor Carney considers at that point to be "essentially uncontested"),[35] but it considered how the unlawfulness of income averaging went unpublicised and uncorrected for so long, and how the democratic and accountability protections failed.

Despite this article being published well prior to the settlement of the *Masterton* and *Amato* matters,[36] it succinctly highlighted the issues with the Scheme itself and the failures of monitoring bodies (for example, the Ombudsman, AAT and the Australian National Audit Office) and protocols (for example, model litigant obligations) to ensure accessibility, accuracy and efficiency of government administration.

2019 AGS advice

On 4 February 2019 Madeline Masterton commenced a test case challenging the lawfulness of the Scheme in the Federal Court.[37] Mr Peter Hanks KC was briefed to act for Ms Masterton on instruction from her solicitors, Victoria Legal Aid.

On 27 March 2019 the Australian Government Solicitor (AGS) provided DHS with a detailed prospects advice in relation to Ms Masterton's proceeding, which concluded that Ms Masterton had good prospects of succeeding in a challenge to the debts based on apportionment.[38] The AGS advice considered issues similar to those in the Clayton Utz advice.

The AGS advice pointed to the limitations of using income averaging, including that there was no statutory basis for it and that it provided weak evidence of the existence of a debt.[39] The AGS advice explored arguments in favour of income averaging which could be made by the Commonwealth but opined that they had "quite low prospects of success."[40] While the AGS advice was confined to considering Ms Masterton's matter in isolation from the Scheme as a whole, the advice noted that its conclusions had wider implications and recommended that consideration be given to seeking further advice from senior counsel and possibly the Solicitor-General.[41]

2019 Solicitor-General's Opinion

On 24 September 2019 the Solicitor-General gave his opinion in relation to the lawfulness of the use of, and reliance on, averaged income information for the purpose of determining and raising debts (the Solicitor-General's opinion).[42]

The fundamental conclusion reached in that opinion, which ultimately led to the winding back of the Scheme, was that:[43]

> A decision-maker is entitled to "have regard to" apportioned ATO PAYG data in considering whether a debt exists under [the Social Security Act]. However, a decision-maker is not entitled to give "decisive weight" to such data. While there may be some circumstances where the ATO PAYG data may provide the basis for an inference that a customer has not accurately reported his or her income, that inference will not provide any basis to calculate the amount of any debt that may be owed, and therefore cannot itself provide an adequate factual foundation for a debt decision. [emphasis in original]

The Solicitor-General's opinion stepped through a range of different scenarios to consider whether a decision maker would be entitled to give decisive weight to averaged ATO PAYG data in those circumstances. The only circumstance in which the Solicitor-General's opinion concluded that a decision maker would ordinarily be entitled to give decisive weight to averaged income data was where the decision maker also had regard to information suggesting that the recipient received a consistent fortnightly income over the period of their employment.[44] Where there is no information before the decision maker to suggest that this is the case, the decision maker would not be entitled to give decisive weight to the averaged data. In circumstances where the decision maker fails to have regard to information held by DHS that suggests whether or not the recipient received a consistent fortnightly income (for instance, an employment separation certificate on the customer's Centrelink record), the Solicitor-General concluded that any debt decision would be liable to be quashed for failure to consider a relevant matter.[45]

The Solicitor-General's opinion identified that social security entitlements are determined by reference to rate calculators set out in the Social Security Act, and that payment rates for many social security benefits are determined based on a fortnightly income test.[46] The advice then referred to the key provision of the Social Security Act[47] which provides that where a person obtains the benefit of a social security payment to which they were not entitled, the amount of the payment is a debt due to the Commonwealth from the time the payment is made.[48] The opinion specified that in any proceeding to recover a debt owing under that provision, the Commonwealth would need to prove the debt.[49]

The reasoning in the Solicitor-General's opinion makes clear that whether a debt is due to the Commonwealth under the Social Security Act is a matter of law, and does not involve any administrative assessment of the existence or amount of the debt.[50] However, the opinion identified that in order for the statutory prescription that a debt exists to have any practical consequence, there was an implicit requirement that an officer would have to "decide" that a debt was owed under the Social Security Act. Because such a decision has real practical consequences for the interests of the affected person, that decision is subject to both merits review and judicial review.[51]

The Solicitor-General's opinion highlighted that there must be some probative evidence to support a conclusion that a debt has arisen under the Social Security Act. Without such evidence, the debt decision would be liable to be quashed on the basis that it was irrational or illogical.[52]

Although the Solicitor-General recognised that averaged PAYG data is inherently capable of providing a degree of insight into a person's income and may justify further investigation, it cannot, without more, support a conclusion that a debt is due, or the amount of that debt. As was explained in the Solicitor-General's opinion:

> ….to conclude that a person had misreported their earning based solely on the fact that there is a discrepancy between a person's reported earnings in the fortnightly periods where the person received benefits and the figure obtained by averaging the person's income as recorded in the ATO PAYG data is mere conjecture.
>
> …
>
> The findings of fact that underpin administrative decision-making "must be grounded in probative material, and not in speculation or guesswork, or (worse) assumptions based on material incapable of supporting those assumptions". [emphasis in original]

With this administrative law principle in mind, the Solicitor-General's opinion concluded that even where PAYG data indicates a discrepancy between employment income and reported income over a similar or identical period, that PAYG data says nothing about how much a person earned in each fortnight during that period. There must therefore be an evidential basis for inferring that the income was earned in equal fortnightly amounts within that period before a debt decision could properly be based on apportioned PAYG data.

The Solicitor-General's opinion went on to consider whether such an inference could be drawn from a customer's failure to respond to a letter sent by Services Australia. The evidence of Tim Ffrench (acting chief counsel, DHS) and Mr Menzies-McVey suggested that at the time the Scheme was operational, there

was a view within DSS and DHS that an inference of this kind could arguably be drawn in reliance on the well-established principles in the case of *Jones v Dunkel*.[53] In essence, the rule in *Jones v Dunkel* allows for an inference to be drawn that where there is an opportunity to respond to an existing set of facts and it is not taken, any response would not have assisted in disproving those facts, and they can therefore be more confidently relied upon. In this instance, the reliance on the rule in *Jones v Dunkel* was directed at an officer being able to infer that where a customer did not respond to a letter from DHS putting them on notice of the PAYG data, any response would not have assisted the customer and the PAYG data can therefore be relied upon with greater confidence. However, the opinion of the Solicitor-General was that even if an inference could be drawn from the failure of a person to respond to a letter, while that inference might be capable of supporting other material which indicated that the assumption underlying apportioned PAYG data was correct, it could not itself provide a foundation for relying on averaged income data in the absence of other evidence.

In reaching this conclusion, the Solicitor-General identified the following crucial proposition:

> …an inference drawn from a failure to provide information in circumstances where it would be expected to be provided "can only make certain evidence more probable", and "cannot be used to make up any deficiency of evidence". Such an inference can "not properly be treated as supplying any gap" in the material before a decision-maker, nor can it "convert conjecture and suspicion into evidence".

The Solicitor-General's opinion was unequivocal in its conclusion that the principles of administrative law would not support reliance on averaged income in the absence of other evidence to raise a debt. Although the advice was given by the Solicitor-General in September 2019, it ought to be properly understood as reflecting a legal position about the scheme which always existed. The Solicitor-General's opinion, in its analysis of the use of averaged PAYG data, was fundamentally consistent with the position reached in the 2014 DSS legal advice almost five years earlier.

Endnotes

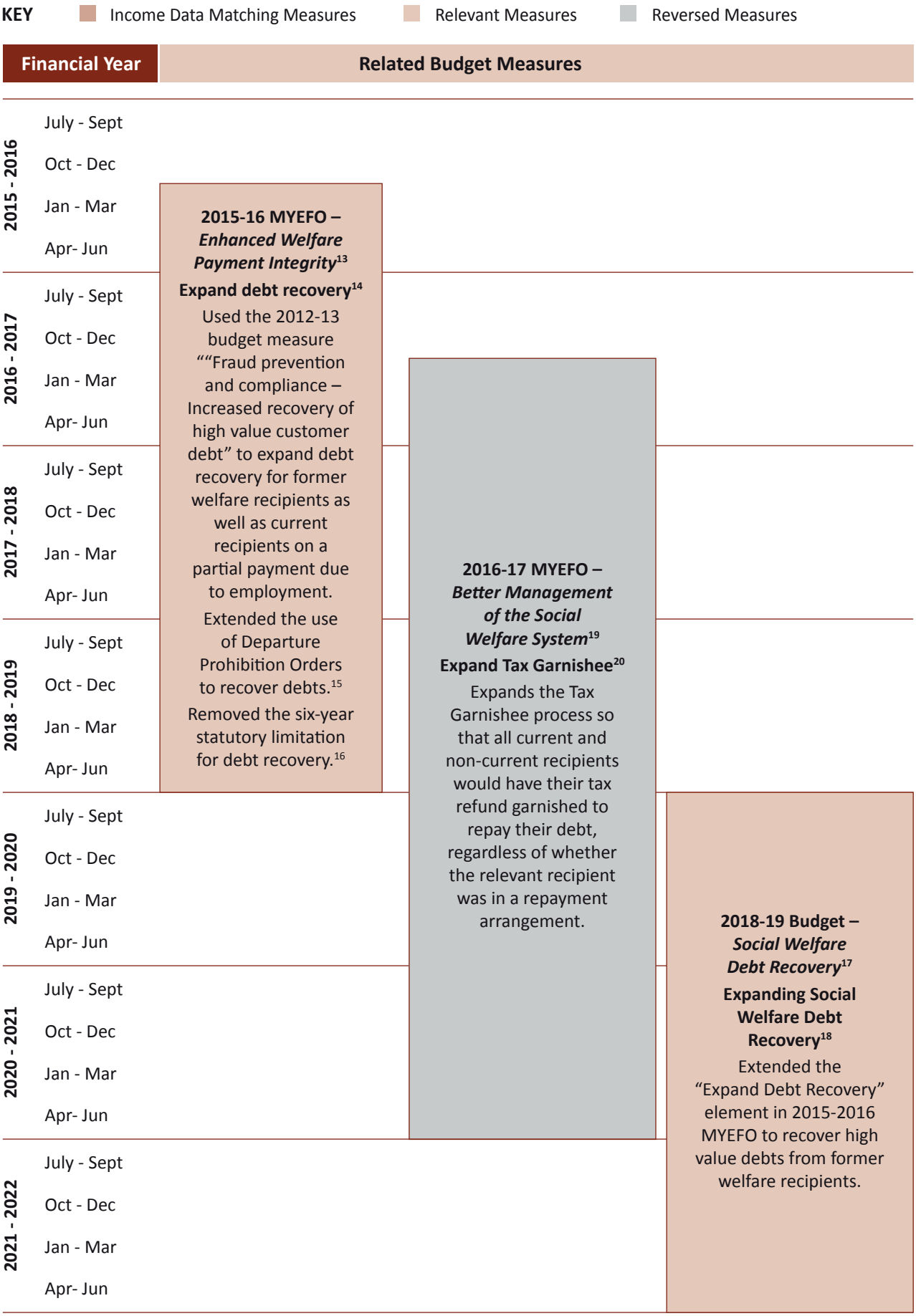
1 Exhibit 1-0002 – DSS.5006.0003.1833_R, Email from Jordan Simon to Mark Jones copying Anne Pulford and preceding chain, 18 December 2014.
2 Exhibit 1-0076 – DSS.8002.0001.0259_R, Request for clarification on income testing rules. [DLM=For-Official-Use-Only], 7 November 2014.
3 See Exhibit 1-0065 – DSS.5031.0001.0108_R, RE- Information about the DHS proposal to change the approach to identifying and raising debts [DLM=For-Official-Use-Only], 19 January 2015; Exhibit 4-8342 – RBD.9999.0001.0505, Robodebt and social security policy_10 March_clean, 10 March 2023 [p 44]; Transcript, Andrew Whitecross, 8 December 2022 [p 1351: lines 25–46].
4 Exhibit 2-2166 – CTH.3008.0007.8464, URGENT: DSS comments on DHS Welfare integrity options (2).
5 Exhibit 1-0003 – DSS.5006.0001.2713_R, Email from Anne Pulford to Emma Kate McGuirk and preceding chain, 24 January 2017.
6 Exhibit 1-0001 – CTH.2013.0012.5070_R, Advice prepared by Solicitor General to AGS re use of apportioned ATO PAYG data, 24 September 2019 [p 19: para 30] citing Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611 at [40] (Gummow A-CJ and Kiefel J), [130] – [132], [135] (Crennan and Bell JJ); Tisdall v Webber (2011) 193 FCR 260 at [126] (Buchanan J, Tracey J agreeing at [93]), cited with approval in P v Child Support Registrar (2014) 225 FCR 378 at [53] – [54] (Perram, Perry and Gleeson JJ); Rawson Finances Pty Ltd v Commissioner of Taxation (2013) 296 ALR 307 at [84] – [85] (Jagot J, with whom Nicholas J agreed at [142]). Sec also Kumar v Minister for Immigration and Citizenship [2009] AATA 124; 107 ALD 178 at [91], [106] – [116].
7 Exhibit 4-5830 - SKR.0001.0001.0054_R, Re- UPDATE- Media and Social Media Commentary re- online compliance system - Friday 6 January.
8 Exhibit 4-5828 - CTH.3111.0017.9701_R, Social security law - averaging provisions [DLM=Sensitive-Legal].
9 Exhibit 4-6245 - CTH.3884.0001.0001_R - Fw- debts; Exhibit 4-5890 - CTH.3113.0004.7297, 'calculating of income for income support.
10 Exhibit 4-6245 - CTH.3884.0001.0001_R - Fw- debts.
11 Transcript, Mark Gladman, 27 February 2023 [p 3861: lines 1 – 11].
12 Exhibit 4-5890 - CTH.3113.0004.7297, 'calculating of income for income support payments' [19].
13 Transcript, Mark Gladman, 27 February 2023 [p 3869: line 29].
14 Transcript, Mark Gladman, 27 February 2023 [p 3870: lines 4 – 27].
15 Exhibit 3-3482 - CTH.3761.0001.0223_R, 1569 REDACTED.
16 Exhibit 3-3482 - CTH.3761.0001.0223_R, 1569 REDACTED [33].

17 Exhibit 1-0002 – DSS.5006.0003.1833_R, Email from Jordan Simon to Mark Jones copying Anne Pulford and preceding chain, 18 December 2014.
18 Briginshaw v Briginshaw (1938) 60 CLR 336.
19 Briginshaw v Briginshaw (1938) 60 CLR 336, 362 (Dixon J).
20 Exhibit 3-3482 – CTH.3761.0001.0223_R, 1569 REDACTED [56].
21 Exhibit 4-5803 – MAS.0001.0045.3955, Peter Hanks AIAL lecture - 20 July 2017.pdf.
22 Exhibit 4-5786 - PHA.9999.0001.0002_R - 2023 02 15 Statement of P Hanks (002) [p 2: para 16, p 4: para 29].
23 Green v Daniels (1977) 13 ALR 1; 51 ALJR 463.
24 Peter Hanks, 'Administrative Law and Welfare Rights: A 40-year Story from Green v Daniels to ''Robot debt recovery'' ' (2017) 89 AIAL Forum 1 [p 9].
25 Exhibit 3-3495 – TCA.9999.0001.0013, Terry Carney, The New Digital Future for Welfare- Debts Without Legal Proofs or Moral Authority (UNSW Law Journal).pdf.
26 Transcript, Maris Stipnieks, 3 February 2023 [p 3236: lines 6 – 11].
27 Exhibit 3-4176 - DSS.5036.0001.0163_R, AAT Decision 2018/AA119369 [para 15, 17].
28 Exhibit 3-3495 – TCA.9999.0001.0013, Terry Carney, The New Digital Future for Welfare- Debts Without Legal Proofs or Moral Authority (UNSW Law Journal).pdf.
29 Exhibit 2-1928 – DSS.5000.0002.2744_R, NOL4DMFD6_2019-10-31_16-03-07-106.pdf.
30 Exhibit 3-4190 – DSS.5036.0001.0103_R, Request for legal advice: Department of Social Services - Income Smoothing Advice [CU-Legal.FID2448483]; Transcript, Christian Porter, 2 February 2023 [p 3101: lines 8 – 41].
31 The New Digital Future for Welfare: Debts Without Legal Proofs or Moral Authority
32 Exhibit 3-4176 - DSS.5036.0001.0163_R - AAT Decision 2018-AA119369, 4 May 2018 [p3: para 15 and 17].
33 Transcript, Christian Porter, 2 February 2023 [p 3102: lines 4-9].
34 Exhibit 3-3497 – TCA.9999.0001.0007, Terry Carney, 'Robo-debt illegality: The seven veils of failed guarantees of the rule of law?' (Alternative Law Journal).
35 Exhibit 3-3497 – TCA.9999.0001.0007, Terry Carney, 'Robo-debt illegality: The seven veils of failed guarantees of the rule of law?' (Alternative Law Journal) [p 2].
36 Volume 44 of the Alternative Law Journal was published in March 2019. The Masterton and Amato proceedings were not concluded until November 2019.
37 Exhibit 1-0038 – VLA.9999.0001.0001, Originating application.pdf, 5 February 2019.
38 Exhibit 1732 – CTH.2001.0013.3100_R, 20190327 Advice on prospects - Masterton - DRAFT 19001151.DOCX [p 19: para 88].
39 Exhibit 1732 – CTH.2001.0013.3100_R, 20190327 Advice on prospects - Masterton - DRAFT 19001151.DOCX [p 11: para 42-43].
40 Exhibit 1732 – CTH.2001.0013.3100_R, 20190327 Advice on prospects - Masterton - DRAFT 19001151.DOCX [p 14: para 54].
41 Exhibit 1732 – CTH.2001.0013.3100_R, 20190327 Advice on prospects - Masterton - DRAFT 19001151.DOCX [p 16: para 65].
42 Exhibit 1-0001 – CTH.2013.0012.5070_R, Advice prepared by Solicitor General to AGS re use of apportioned ATO PAYG data, 24 September 2019.
43 Exhibit 1-0001 – CTH.2013.0012.5070_R, Advice prepared by Solicitor General to AGS re use of apportioned ATO PAYG data, 24 September 2019 [p 2: para 2].
44 The period of employment being that recorded in the PAYG data. The Solicitor-General noted that the information suggests this conclusion sufficiently clearly so as to be probative evidence.
45 Exhibit 1-0001 – CTH.2013.0012.5070_R, Advice prepared by Solicitor General to AGS re use of apportioned ATO PAYG data, 24 September 2019 [p 3: para 2].
46 Exhibit 1-0001 – CTH.2013.0012.5070_R, Advice prepared by Solicitor General to AGS re use of apportioned ATO PAYG data, 24 September 2019 [p 12: para 12].
47 Namely, section 1223(1). Relevantly, sections 1223(1AB)(b) and (c) of the Social Security Act provide that a person is taken not to have been entitled to obtain the benefit of a payment if the payment should not have been made because, among other things, the person was not qualified to receive the payment, or the payment was not payable.
48 Exhibit 1-0001 – CTH.2013.0012.5070_R, Advice prepared by Solicitor General to AGS re use of apportioned ATO PAYG data, 24 September 2019 [p 13: para 14].
49 Exhibit 1-0001 – CTH.2013.0012.5070_R, Advice prepared by Solicitor General to AGS re use of apportioned ATO PAYG data, 24 September 2019 [p 15: para 20].
50 Exhibit 1-0001 – CTH.2013.0012.5070_R, Advice prepared by Solicitor General to AGS re use of apportioned ATO PAYG data, 24 September 2019 [p 15: para 20-22].
51 Exhibit 1-0001 – CTH.2013.0012.5070_R, Advice prepared by Solicitor General to AGS re use of apportioned ATO PAYG data, 24 September 2019 [p 15: para 21].
52 Exhibit 1-0001 – CTH.2013.0012.5070_R, Advice prepared by Solicitor General to AGS re use of apportioned ATO PAYG data, 24 September 2019 [p 19: para 30].
53 Transcript, Paul Menzies-McVey, 21 February 2023 [p 3371: line 40 – p 3372: line 2]; Transcript, Paul Menzies-McVey, 21 February 2023 [p 3373: lines 33 – 37]; Transcript, Timothy Ffrench, 22 February 2023 [p 3502: lines 37-47]; Transcript, Timothy Ffrench, 22 February 2023 [p 3503: lines 37-45].

Budget Measures Map

This map represents when activities were projected to be undertaken under programs established by each budget measure.

Financial Year		Budget Measures - Income Data Merging
2015 - 2016	July - Sept	**2015-16 Budget – *Strengthening the Integrity of Welfare Payments*[1]** **Employment Income Matching[2]** Used PAYG data obtained from the ATO to identify welfare recipients who had allegedly been overpaid. Focused on alleged overpayments in FYs: 2010-11, 2011-12 and 2012-13.
	Oct - Dec	
	Jan - Mar	
	Apr- Jun	
2016 - 2017	July - Sept	**2015-16 MYEFO – *Enhanced Welfare Payment Integrity*[9]** **Income Data Matching[10]** Extended the "Employment Income Matching" element of the 2015-16 budget measure to focus on alleged overpayments in FYs: 2013-14 and 2014-15.
	Oct - Dec	
	Jan - Mar	
	Apr- Jun	
2017 - 2018	July - Sept	
	Oct - Dec	
	Jan - Mar	
	Apr- Jun	
2018 - 2019	July - Sept	**2016-17 MYEFO – *Better Management of the Social Welfare System*[11]** **Extend Enhanced Welfare Payment Integrity – Income Data Matching[12]** Extended the "Income Data Matching" element of the 2015-16 MYEFO measure to focus on alleged overpayments in FYs: 2015-16, 2016-17 and 2017-18.
	Oct - Dec	
	Jan - Mar	
	Apr- Jun	
2019 - 2020	July - Sept	
	Oct - Dec	
	Jan - Mar	
	Apr- Jun	
2020 - 2021	July - Sept	**2020-21 Budget – *Changes to the Income Compliance Program**[3]** **Refund of ATO averaged debts[4]** Refunded all repayments made on debts raised based wholly or partially on averaged ATO data. **Reversal of PAYG measures[5]** Reversed income data matching elements introduced in 2015-16 and 2016-17 MYEFOs and 2018-19 Budget. ***Measure included component which provided direct cost for payment of interest for refunds[6]**
	Oct - Dec	
	Jan - Mar	
	Apr- Jun	
2021 - 2022	July - Sept	**2018-19 Budget – *Social Welfare Debt Recovery*[7]** **Strengthening the Integrity of Welfare Payments by Extending Income Data Matching[8]** Extended income data matching measures in the 2015-16 Budget, and the 2015-16 and 2016-17 MYEFOs which used PAYG information, income tax returns, and asset and investment sources. Focused on alleged overpayments in the 2018-19 FY.
	Oct - Dec	
	Jan - Mar	
	Apr- Jun	


KEY
Income Data Matching Measures
Relevant Measures
Reversed Measures
Financial Year
Related Budget Measures
2015 - 2016
2016 - 2017
2017 - 2018
2018 - 2019
2019 - 2020
2020 - 2021
2021 - 2022
July - Sept
Oct - Dec
Jan - Mar
Apr- Jun
2015-16 MYEFO – Enhanced Welfare Payment Integrity[13]
Expand debt recovery[14]
Used the 2012-13 budget measure ""Fraud prevention and compliance – Increased recovery of high value customer debt" to expand debt recovery for former welfare recipients as well as current recipients on a partial payment due to employment.
Extended the use of Departure Prohibition Orders to recover debts.[15]
Removed the six-year statutory limitation for debt recovery.[16]
2016-17 MYEFO – Better Management of the Social Welfare System[19]
Expand Tax Garnishee[20]
Expands the Tax Garnishee process so that all current and non-current recipients would have their tax refund garnished to repay their debt, regardless of whether the relevant recipient was in a repayment arrangement.
2018-19 Budget – Social Welfare Debt Recovery[17]
Expanding Social Welfare Debt Recovery[18]
Extended the "Expand Debt Recovery" element in 2015-2016 MYEFO to recover high value debts from former welfare recipients.

Appendix 6

1 Exhibit 1-1234 – RBD.9999.0001.0001, Budget Measure 2015-16, 12 May 2015 [p 116].
2 Exhibit 2-2022 - PMC.001.0002.017_R, PMC-001-0002-017_Redacted [p 22].
3 Exhibit 9894 - RBD.9999.0001.0534* - 2020-21 Budget - Budget Paper No. 2.pdf [p 269]; Exhibit 9855 - RBD.9999.0001.0535* - 2020-21 MYEFO [p 174]; Note: the government provided further funding to continue the refund of debts in the Exhibit 9855 - RBD.9999.0001.0535* - 2020-21 MYEFO [p 174].
4 Exhibit 2-2682 -PMC.001.0027.005_R, Attachment A2 Refund of ATO averaged debts.
5 Exhibit 9071 - CTH.9999.0001.0205- [Final] Services Australia - Response to NTG-0231 - Data Collection Template.XLSX; Exhibit 10031 - CTH.4700.0002.1699- Compliance Reversal 008458 008459 and 008460.pdf.
6 Exhibit 9070 - CTH.9999.0001.0204 - [Final] Services Australia - Response to NTG-0231.pdf; Exhibit 9071 - CTH.9999.0001.0205- [Final] Services Australia - Response to NTG-0231 - Data Collection Template.XLSX.
7 Exhibit 9857 - RBD.9999.0001.0537* - 2018-19 Budget Paper No. 2.pdf [p 178].
8 See Budget 2021-22, Budget Measures Budget Paper No. 2 2021 – 22, 11 May 2021 [p 269].
9 Exhibit 2-2566 - SMO.0001.0002.0013, MYEFO 2015 - 16 Final [p 210].
10 Exhibit 2-2672 - PMC.001.0003.012, ATTACHMENT B.1 Extension of Employment Income Matching.
11 Exhibit 2-2577 - SMO.0001.0002.0329, 2016-17-MYEFO-combined [p 189].
12 Exhibit 2-2674 - PMC.001.0007.001_R, ATTACHMENT A.3 EXTEND ENHANCED WELFARE PAYMENT INTEGRITY - INCOME DATA MATCHING.
13 Exhibit 2-2566 - SMO.0001.0002.0013, MYEFO 2015 - 16 Final [p 210].
14 Exhibit 2-2673 - PMC.001.0003.013_R, ATTACHMENT B.2 EXPANDING SOCIAL WELFARE DEBT RECOVERY. Note: this element commenced 1 March 2016.
15 Departure Prohibition Orders were to be applied from 1 January 2017– see Budget Savings (Omnibus) Act 2016 (Cth) (No 55/2016) which inserted Part 5.5 “Departure prohibition orders” (sections 1240 – 1260) into the Social Security Act 1991 (Cth).
16 Commenced 1 January 2017 – see Budget Savings (Omnibus) Act 2016 (Cth) (No 55/2016) which inserted section 1234B – No time limit on debt recovery action into the Social Security Act 1991 (Cth).
17 Exhibit 9857 – RBD.9999.0001.0537* - 2018-19 Budget - Budget Paper No. 2.pdf [p 178].
18 Exhibit 2-2677 - PMC.001.0013.004_R - Attachment A1.2 Expanding Social Welfare Debt Recovery.
19 Exhibit 2-2577 - SMO.0001.0002.0329, 2016-17-MYEFO-combined [p 189].
20 See 2017-18 MYEFO, December 2017 [p 182].

1. Submissions

On 21 September 2022, the Royal Commission issued a call for public submissions. The closing date for submissions was 3 February 2023. This timeframe was set so that submissions could be received in advance of finalising the Commission's Report by the original transmittal date of 18 April 2023.

The Commission continued to accept submissions beyond 3 February 2023. Submissions received by 2 June 2023 are included in the total list of submissions that appear later in this appendix and were considered for publication on the website.

1.1 Lodging a submission

The primary method for lodging a submission was via the use of the submissions form, available both online or in hard copy. As well as English, the submissions form was available in Arabic, Chinese (Simplified), Chinese (Traditional), Filipino, Greek, Hindi, Italian, and Vietnamese. Submissions were also accepted through email, telephone, post, or via an audio recording. The Commission had the capacity to take submissions via video if required. Participants who needed additional assistance were suported by the Commission's social work team both remotely and onsite in Brisbane during the hearing blocks.

The Commission directly contacted 43 stakeholder and advocacy groups to invite submissions. The Commission issued regular reminders to subscribers to the Commission's mailing list and social media profiles about the processes for lodging a submission.

1.2 How submissions informed the work of the Commission

Submissions have guided the Commission's enquiries and informed its findings in this Report. The experiences, expertise and recommendations shared through submissions by individuals and entities assisted the Commission in developing a more complete understanding of the impacts of the Robodebt scheme (the Scheme), as well as how such a scheme may be prevented in the future. Submissions also assisted the Commission to identify witnesses.

1.3 Publication

Terms of reference

Submissions received by 2 June 2023 and assessed as relating to the matters specified in the terms of reference were considered for publication to the Commission's website. Submissions were reviewed on a case-by-case basis, including any accompanying material received at the time of submission, any correspondence or supplementary documentation, or any information gained from personal engagement with the participant.

Suitability for publication

In determining whether to publish a submission, appropriate consideration is first given to the preferences conveyed when the submission was made.

When lodging their submission, participants chose a publication option:

- to be published under their own name

- published anonymously with their personal information redacted, or
- for the submission to not be published by the Commission.

Some public submissions - or components of a public submission – could not be published for legal or technical reasons.

Anonymous submissions were reviewed and, where necessary, redacted to protect a participant's identity. The names of individuals other than the submitter are similarly redacted, such as family members, public servants or members of Parliament.

Submissions which referred to details of a Tier 1 matter considered by the Administrative Appeals Tribunal (AAT) were redacted to remain consistent with current practice of the AAT.

Submissions often attached correspondence from Centrelink or other government departments and agencies. These materials have assisted the Commission in its work. However, this extra material has not been published.

1.4 Data and analytics

The Commission received a total of 1099 submissions, 990 of which were received before 3 February 2023 or with an approved extension. From this total, 771 submissions (70.15 per cent) were found to address matters within the terms of reference.

The Commission relied on self-reporting through the submissions form which enabled submitters to

Submissions by state and territory

State and Territory	Number of Submissions	Percentage
ACT	49	4.95%
NSW	231	23.33%
VIC	230	23.23%
TAS	25	2.53%
SA	67	6.77%
WA	98	9.90%
NT	8	0.81%
QLD	214	21.62%
Outside Australia	14	1.41%
Prefer not to say	54	5.45%
TOTAL	**990**	**100.00**

Submissions by area distribution

Area	Number of Submissions	Percentage
Remote area	29	2.93%
Rural area	101	10.20%
Regional area	273	27.58%
No	587	59.29%
TOTAL	**990**	**100.00**

Submissions by participants

Area	Number of Submissions	Percentage
Myself	895	90.41%
Another person	68	6.87%
An organisation	22	2.22%
TOTAL	**990**	**100.00**

Privacy Preference

Privacy Preference	Number of Submissions	Percentage
Public	389	39.29%
Public anonymously	456	46.06%
Not made public	145	14.65%
TOTAL	**990**	**100.00**

Was a Centrelink debt raised against you (or the person you are making a submission for)?

Response	Number of Submissions	Percentage
Yes	716	72.32%
No	245	24.75%
Not answered	29	2.92%
TOTAL	**990**	**100.00**

How were you (or the person you are making a submission for) notified of the debt?

Method of notification	Number of Submissions	Percentage
Mail	375	37.88%
Email	94	9.49%
myGov	204	20.61%
The Centrelink Express app	42	4.24%
Unsure	92	9.29%
Not answered	367	37.07%

Did you (or the person you are making the submission for) dispute the debt?

Response	Number of Submissions	Percentage
Yes	523	52.83%
No	117	11.82%
Not answered	350	35.35%
TOTAL	**990**	**100.00**

Was the debt ever repaid in whole or part?

Response	Number of Submissions	Percentage
Yes	483	48.79%
No	150	15.15%
Not answered	357	36.06%
TOTAL	**990**	**100.00**

Was the debt cancelled?

Response	Number of Submissions	Percentage
Yes	223	22.53%
No	407	41.11%
Not answered	360	36.36%
TOTAL	**990**	**100.00**

Did you (or the person you are making a submission for) seek review of the decision to raise the debt?

Response	Number of Submissions	Percentage
Yes	434	43.84%
No	192	19.39%
Not answered	364	36.77%
TOTAL	**990**	**100.00**

Have you (or the person you are making the submission for) had the debt resolved?

Response	Number of Submissions	Percentage
Yes	307	31.01%
No	315	31.82%
Not answered	368	37.17%
TOTAL	**990**	**100.00**

2. Submissions List

This list includes the submissions received by the Commission that:

- were determined to be within the terms of reference
- were not ruled out for technical or other reasons as described above
- were provided with the participant's express consent to be made public under their name or anonymously.

Submissions lodged under the condition the material not be made public, or without a specified preference, have been considered by the Commission but are not included in this list.

List of Submissions

* Not all submissions in this list have been published.

Submission ID	Primary Submitter	Which of the Royal Commission's terms of reference is your subbmission about?			
		The Establishment, design and implementation of the Robodebt Scheme	The use of third-party debt collectors under the Robodebt Scheme	Concerns raised following the implementation of the Robodebt Scheme	The intended or actual outcomes of the Robodebt Scheme
ANON-24KG-9B15-S	ACT Council of Social Service	■		■	■
ANON-24KG-9SWS-E	Aik, Ricky				
ANON-24KG-9SUW-G	Akter, Dr Shahriar	■		■	■
ANON-24KG-9SRY-F	Andrew, Professor Jane	■		■	■
ANON-24KG-9BY4-Z	Anglicare Australia	■	■	■	■
ANON-24KG-9BW4-X	Anonymous	■	■	■	
ANON-24KG-9SZD-2	Askew, Rebecca	■		■	■
ANON-24KG-9BRC-8	Australasian Society for Computers and the Law & The Allens Hub for Technology, Law and Innovation & The Gradient Institute	■		■	■
ANON-24KG-9B1V-T	Australian Council of Social Service	■	■	■	■
ANON-24KG-9B8V-1	Australian Unemployed Workers Union	■	■	■	■
ANON-24KG-9SNZ-C	B, Daniel	■	■	■	■
ANON-24KG-9SYY-P	B, Daniel	■	■	■	■
ANON-24KG-9SG2-W	B, Graeme	■		■	
ANON-24KG-9SG6-1	B, Martin	■		■	
ANON-24KG-9BRU-T	Banik, Ryan	■		■	■
ANON-24KG-9SNP-2	Bannister, Lisa	■		■	■
ANON-24KG-9SRQ-7	Ban tr, P ofessor Elise	■		■	■
ANON-24KG-9B49-Z	Baweja, Ash	■	■	■	■
ANON-24KG-9BAZ-E	Baweja, Ash	■	■	■	■
ANON-24KG-9BAB-P	Baweja, Ash	■	■	■	■
ANON-24KG-9SQ1-6	Berbari, Carol Rita			■	
ANON-24KG-9SJ2-Z	Berglund, Kyriae	■	■	■	■
ANON-24KG-9SNJ-V	Bevan, Sandra Jean	■	■	■	■
ANON-24KG-9SMM-X	Bickley, Jenny	■		■	
ANON-24KG-9SBJ-G	Birnie, Karen	■		■	
ANON-24KG-9SDV-X	Boehnke, Carmen	■		■	■
ANON-24KG-9SFP-T	Borton, Edward				■
ANON-24KG-9SW4-F	Brick, Naomi	■		■	
ANON-24KG-9S2N-4	Brogan, Dr Mark & Arratoon, Mark	■	■	■	
ANON-24KG-9SYQ-E	Brooks, Cheree				
ANON-24KG-9BNC-4	Brooks, Cheree			■	
ANON-24KG-9SRU-B	Brown, Dr David Lloyd	■		■	
ANON-24KG-9STC-U	Bruce, Daniel Christopher	■		■	■
ANON-24KG-9S8C-Y	Burns, Thomas			■	■
ANON-24KG-9BAN-2	Cahalan, Penelope Anne		■	■	
ANON-24KG-9B48-Y	Cahill, Penni-Leigh			■	
ANON-24KG-9SWK-6	Campbell, Hamish	■		■	
ANON-24KG-9BAK-Y	Chadwick, Helen	■		■	■
ANON-24KG-9S4J-2	Cho, Whan Hee (Linda)	■	■	■	■
ANON-24KG-9SBM-K	Chuditch, Alison	■		■	■
ANON-24KG-9SXQ-D	Cipri, Luciano	■		■	
ANON-24KG-9SS9-G	Clark	■		■	■
ANON-24KG-9SAF-B	Clogg, Dylan	■	■	■	■
ANON-24KG-9S34-B	Connors, Claire	■	■	■	■
ANON-24KG-9S9N-B	Consumer Action Law Centre & Economic Justice Australia & Financial Counselling Australia		■		
ANON-24KG-9B1R-P	Consumers of Mental Health WA	■		■	■
ANON-24KG-9SZ7-N	Cooper, Karenfaye	■	■	■	■
ANON-24KG-9SQ7-C	Cooper, Lise	■		■	■
ANON-24KG-9SY4-H	Coulter, Debra			■	
ANON-24KG-9S4Q-9	Cox, Jeremy	■		■	■
ANON-24KG-9SC6-W	Crawford, Anwyn	■		■	■
ANON-24KG-9SRG-W	Crofts, Professor Penny	■	■	■	■
ANON-24KG-9SUY-J	Curtis, Peter	■		■	■
ANON-24KG-9SBW-W	Cutler, Trevor Keith	■	■	■	■
ANON-24KG-9SE1-T	D'Agostino, Carla J	■	■	■	■
ANON-24KG-9S66-G	Dalton, Greg	■		■	

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		The Establishment, design and implementation of the Robodebt Scheme	The use of third-party debt collectors under the Robodebt Scheme	Concerns raised following the implementation of the Robodebt Scheme	The intended or actual outcomes of the Robodebt Scheme
ANON-24KG-9BWT-X	Danson, Bruce Alan	■		■	■
ANON-24KG-9S29-F	Donovan, Beverly			■	■
ANON-24KG-9SMK-V	Donovan, Rosemary			■	
ANON-24KG-9SDP-R	Duffy, Stephen				
ANON-24KG-9SBT-T	Eastwood, Sarah	■	■	■	■
ANON-24KG-9BTN-N	Economic Justice Australia	■	■	■	■
ANON-24KG-9SB7-W	Ednie, Tara	■	■	■	■
ANON-24KG-9SXR-E	Edwards, Alinta	■	■	■	■
ANON-24KG-9STZ-J	F, Benjamin	■		■	■
ANON-24KG-9SFY-3	Fagan, Kaye	■		■	■
ANON-24KG-9S8D-Z	Fergus, Andrew	■		■	■
ANON-24KG-9BJN-B	Ficker, Katerina	■	■	■	■
ANON-24KG-9S39-G	Field, Anthony				
ANON-24KG-9SA8-W	Fisher, Dr Nicholas & Trewin, Dennis AO & Cressie, Professor Noel	■		■	
ANON-24KG-9S7E-Z	Fletcher, Nick			■	■
ANON-24KG-9B14-R	Flint, John	■		■	■
ANON-24KG-9SSP-7	Floyd, Danny Walter				
ANON-24KG-9SAA-6	Fong, Le Roy	■		■	■
ANON-24KG-9BJ6-K	Ford, Heather	■	■	■	
ANON-24KG-9SN7-9	Forsyth, Robert James	■	■	■	■
ANON-24KG-9SC7-X	Foster, Daren Edward				■
ANON-24KG-9B8A-C	Fouche, Jeanne			■	■
ANON-24KG-9S1Y-E	Fuller, Stephen	■		■	■
ANON-24KG-9SGB-D	Fuller, Stephen				■
ANON-24KG-9SBK-H	G, Carolyn	■		■	■
ANON-24KG-9SJ9-7	Gardiner, Tamara	■		■	■
ANON-24KG-9BN2-K	Garton, Susan C				■
ANON-24KG-9SAX-W	Gay, Rosemary	■		■	■
ANON-24KG-9SMU-6	Gibson, Damian				■
ANON-24KG-9BTE-C	Gibson, Geoffrey	■		■	■
ANON-24KG-9S7J-5	Godley, Maxine	■		■	■
ANON-24KG-9BNZ-U	Goodrick, Jennifer				■
ANON-24KG-9SD8-Z	Gorin, Lee				
ANON-24KG-9SXV-J	Goyne, Rohan Andrew Adrian	■		■	
ANON-24KG-9BTS-T	Graham, Alex	■	■	■	■
ANON-24KG-9BTB-9	Gray, Vicki			■	■
ANON-24KG-9SAJ-F	Green, Norma Ann		■	■	
ANON-24KG-9BNX-S	Greenwood, Jason	■	■	■	■
ANON-24KG-9BF5-E	Greyfox, Atlas				
ANON-24KG-9B1E-9	Griffin, Michael	■		■	■
ANON-24KG-9SJ5-3	Griffiths, Peter	■		■	■
ANON-24KG-9SFR-V	Grimley, Gregory	■	■	■	■
ANON-24KG-9SN2-4	Gulley, Tracey-Ann	■	■	■	■
ANON-24KG-9B4T-U	H, Fern	■		■	■
ANON-24KG-9BW8-2	H, Kathleen	■		■	■
ANON-24KG-9BTW-X	Halligan, John				
ANON-24KG-9BT1-R	Harper, Kevin	■		■	
ANON-24KG-9SNA-K	Harrington, Dylan	■		■	■
ANON-24KG-9SFW-1	Harris, Benjamin M	■		■	
ANON-24KG-9BA5-9	Harris, Luke	■	■	■	■
ANON-24KG-9SNG-S	Harvey, Sarah	■		■	■
ANON-24KG-9SR8-E	Harwood, Natalie	■		■	■
ANON-24KG-9BP4-Q	Hayes, Terry	■		■	
ANON-24KG-9BJY-P	Henderson, Scott Robert	■		■	■
ANON-24KG-9BPP-K	Hodges, Sarah	■	■	■	■
ANON-24KG-9SU8-H	Holmes, Julie	■		■	■
ANON-24KG-9S6C-W	Hoolachan, Tracey	■	■	■	■
ANON-24KG-9SXX-M	Hoolachan, Tracey	■	■	■	■
ANON-24KG-9BPW-T	Hopper, Wendy	■	■	■	■
ANON-24KG-9SXC-Y	Howlett, Murray	■	■	■	■

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ANON-24KG-9S7N-9	Jackson, Kerry A	■		■	■
ANON-24KG-9S97-M	Jenkin, Steve	■		■	
ANON-24KG-9S8S-F	Jenssen, Peter	■		■	■
ANON-24KG-9SK5-4	John, Adrienne St			■	
ANON-24KG-9BNR-K	Johnston, Raymond	■		■	
ANON-24KG-9SA4-S	Jolly, Jessica				■
ANON-24KG-9SM1-2	Jones, David				
ANON-24KG-9B86-1	Ollesch, Sarah		■		
ANON-24KG-9BJ8-N	Orchard, Alison	■		■	■
ANON-24KG-9BFU-E	Overton, Lorraine	■		■	■
ANON-24KG-9SCK-J	P, Shelley	■		■	■
ANON-24KG-9S7Z-N	Padget, Sophie	■		■	■
ANON-24KG-9SY1-E	Parker, Brodie Alice	■		■	■
ANON-24KG-9BPE-8	Pavati, Pheobe	■		■	■
ANON-24KG-9B1A-5	Pearson, Jeremy	■	■	■	■
ANON-24KG-9S3G-X	Perkin, Greg				
ANON-24KG-9BP7-T	Perry, Veronica Irene	■	■	■	■
ANON-24KG-9SF8-2	Pilgrim, Guy	■		■	■
ANON-24KG-9BN6-Q	Pimentel, Monica	■	■	■	
ANON-24KG-9BNG-8	Plog, Glenda			■	■
ANON-24KG-9S5A-T	Praljak, Adrian	■	■	■	■
ANON-24KG-9S4Y-H	Rayner, Paul	■		■	
ANON-24KG-9SAZ-Y	Ricciardo, Aidan	■		■	
ANON-24KG-9BPQ-M	Riel, Erik van	■		■	
ANON-24KG-9BR3-R	Rinta-Kahila, Dr Tapani & Someh, Dr Ida	■	■	■	■
ANON-24KG-9SW2-D	Ritchie, Natasha	■	■	■	■
ANON-24KG-9SJE-K	Roberts, Paul	■		■	
ANON-24KG-9SAH-D	Robley, Alison	■		■	■
ANON-24KG-9STQ-9	Rogers, Renee	■	■	■	■
ANON-24KG-9SMG-R	Rowan, Mark	■	■	■	■
ANON-24KG-9S38-F	Royal Australia and New Zealand College of Psychiatrists				■
ANON-24KG-9SUD-W	Russell, Lynette Gay	■	■	■	■
ANON-24KG-9SVQ-B	Russell, Lynette Gay			■	■
ANON-24KG-9BAA-N	Ryall, Karen	■		■	
ANON-24KG-9BYB-E	S, Daniel	■	■	■	■
ANON-24KG-9BPN-H	Sapounas, Epaminondas			■	
ANON-24KG-9S1E-T	Sara, Megan	■		■	
ANON-24KG-9SVZ-M	Schmidt, Robert		■		■
ANON-24KG-9SUU-E	Schneider, Michael			■	
ANON-24KG-9SRX-E	Schulz, Melissa	■	■	■	■
ANON-24KG-9SZ3-H	Scott, Cameron Leslie	■		■	■
ANON-24KG-9SF5-Y	Scott, Peter	■	■	■	■
ANON-24KG-9SJV-4	Sheaff, Jason	■		■	■
ANON-24KG-9SZR-G	Sheaff, Jason	■	■	■	■
ANON-24KG-9BWC-D	Sheargold, Colleen				
ANON-24KG-9S6E-Y	Shepherd, Adam	■	■	■	■
ANON-24KG-9BYP-V	Skilbeck, Dr Ruth	■		■	■
ANON-24KG-9SNU-7	Smith, Colin	■	■	■	■
ANON-24KG-9SBZ-Z	Smith, Garrie	■		■	■
ANON-24KG-9SYC-Z	Smith, Garrie				
ANON-24KG-9BY3-Y	Smith, Melissa	■		■	■
ANON-24KG-9SUK-4	Smith, Michael	■	■	■	■
ANON-24KG-9SF3-W	Solomon, Breanna			■	■
ANON-24KG-9B1S-Q	Southwell, Kathleen	■	■	■	■
ANON-24KG-9SBS-S	Spall, Thomas William	■		■	
ANON-24KG-9BWD-E	Spall, Tomas	■		■	■
ANON-24KG-9S7Y-M	Spendlove, Annette Joan	■		■	■
ANON-24KG-9S4X-G	Stafford, Glen	■	■	■	■
ANON-24KG-9S44-C	Stagg, Phil	■	■	■	■
ANON-24KG-9S3C-T	Stanley, Annalise	■		■	■

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ANON-24KG-9SV6-G	Stannard, John	■		■	■
ANON-24KG-9SC3-T	Stannard, John	■		■	■
ANON-24KG-9B17-U	Stannard, John	■		■	
ANON-24KG-9SAC-8	Stokes, Richard			■	■
ANON-24KG-9ST3-B	Storey, Janet	■		■	
ANON-24KG-9B12-P	Studans, Thomas				■
ANON-24KG-9SK3-2	Stutz, Judith	■		■	
ANON-24KG-9S2F-V	Suicide Prevention Australia				
ANON-24KG-9SAK-G	Swan, Leanne	■	■	■	■
ANON-24KG-9S67-H	Taylor, Alison	■		■	
ANON-24KG-9SEH-H	Taylor, Collen			■	
ANON-24KG-9BJC-Z	Thain, Lauren Jade	■	■	■	■
ANON-24KG-9SC8-Y	Theodore, Nicholas				
ANON-24KG-9SDA-9	Thompson, Matthew	■	■	■	■
ANON-24KG-9SD5-W	Thorpe, Kenneth John			■	■
ANON-24KG-9B1T-R	Todd, Richard				
ANON-24KG-9STY-H	Toft, Stephanie	■		■	■
ANON-24KG-9S1U-A	Tunnecliffe, Andrew	■		■	■
ANON-24KG-9SE5-X	Ure, Richard	■		■	■
ANON-24KG-9B8K-P	Ure, Richard	■		■	■
ANON-24KG-9SSF-W	Vaiente, Nicholas	■		■	
ANON-24KG-9S3V-D	Valentine, Polly Johannody	■		■	■
ANON-24KG-9BR4-S	Victoria Legal Aid	■	■	■	■
ANON-24KG-9S3A-R	W, Alannah	■	■	■	■
ANON-24KG-9B8S-X	W, Steven	■	■	■	■
ANON-24KG-9BAW-B	Waite, Stanley Michael	■		■	■
ANON-24KG-9SH4-Z	Warburton, Mark			■	
ANON-24KG-9BNT-N	Warren, Justin	■		■	■
ANON-24KG-9S7B-W	Webb, Gayle				
ANON-24KG-9SRR-8	Weblin, Mark	■		■	
ANON-24KG-9S5F-Y	Wesley Asylum Seeker Welcome Place	■		■	■
ANON-24KG-9BPX-U	Whelan, Barry	■		■	■
ANON-24KG-9SGT-Y	Wielders, David	■	■	■	■
ANON-24KG-9SE4-W	Wielders, David	■	■	■	■
ANON-24KG-9B4E-C	Williams, Catherine	■		■	■
ANON-24KG-9SGX-3	Williams, Donald	■		■	■
ANON-24KG-9SFZ-4	Wilson, Leanne			■	■
ANON-24KG-9S1C-R	Windle, Trevor	■		■	■
ANON-24KG-9B4G-E	Woodroofe, Sarah Louise	■		■	■

List of Anonymous Submissions

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ANON-24KG-9SW9-M	Anonymous	■	■	■	■
ANON-24KG-9SWJ-5	Anonymous		■	■	■
ANON-24KG-9SPN-2	Anonymous	■	■	■	■
ANON-24KG-9SP5-9	Anonymous	■	■	■	■
ANON-24KG-9SPB-P	Anonymous	■		■	■
ANON-24KG-9SP4-8	Anonymous	■		■	■
ANON-24KG-9SPP-4	Anonymous	■	■	■	■
ANON-24KG-9SP3-7	Anonymous	■		■	■
ANON-24KG-9S4B-T	Anonymous	■	■	■	■
ANON-24KG-9S4U-D	Anonymous			■	
ANON-24KG-9S4A-S	Anonymous	■		■	■
ANON-24KG-9S4V-E	Anonymous				■
ANON-24KG-9SN5-7	Anonymous	■		■	
ANON-24KG-9SNE-Q	Anonymous	■		■	■
ANON-24KG-9SNH-T	Anonymous	■	■	■	■
ANON-24KG-9SND-P	Anonymous	■		■	■
ANON-24KG-9SNK-W	Anonymous		■	■	
ANON-24KG-9SN9-B	Anonymous	■	■	■	■
ANON-24KG-9SNV-8	Anonymous	■		■	
ANON-24KG-9SNS-5	Anonymous	■	■	■	■
ANON-24KG-9SN8-A	Anonymous	■		■	
ANON-24KG-9SNQ-3	Anonymous				■
ANON-24KG-9SF9-3	Anonymous	■		■	■
ANON-24KG-9SFV-Z	Anonymous	■		■	
ANON-24KG-9SF4-X	Anonymous				■
ANON-24KG-9SF1-U	Anonymous	■		■	
ANON-24KG-9SFJ-M	Anonymous	■		■	
ANON-24KG-9SFQ-U	Anonymous	■		■	■
ANON-24KG-9SJR-Z	Anonymous	■	■	■	■
ANON-24KG-9SJM-U	Anonymous	■		■	
ANON-24KG-9SJS-1	Anonymous				■
ANON-24KG-9SJ1-Y	Anonymous	■		■	
ANON-24KG-9SJT-2	Anonymous	■		■	■
ANON-24KG-9SJJ-R	Anonymous	■		■	
ANON-24KG-9SJ3-1	Anonymous	■		■	
ANON-24KG-9SJH-P	Anonymous	■		■	■
ANON-24KG-9SR9-F	Anonymous	■	■	■	■
ANON-24KG-9STN-6	Anonymous	■	■	■	■
ANON-24KG-9ST5-D	Anonymous				
ANON-24KG-9STR-A	Anonymous	■	■	■	■
ANON-24KG-9STU-D	Anonymous	■	■	■	■
ANON-24KG-9ST7-F	Anonymous	■		■	■
ANON-24KG-9STV-E	Anonymous	■	■	■	■
ANON-24KG-9STF-X	Anonymous	■	■	■	■
ANON-24KG-9STP-8	Anonymous	■	■	■	■
ANON-24KG-9ST2-A	Anonymous	■		■	■
ANON-24KG-9STT-C	Anonymous	■	■	■	■
ANON-24KG-9SAN-K	Anonymous	■	■	■	■
ANON-24KG-9SAE-A	Anonymous	■		■	■
ANON-24KG-9SAM-J	Anonymous	■		■	■
ANON-24KG-9SA7-V	Anonymous	■	■	■	■
ANON-24KG-9SA1-P	Anonymous				■
ANON-24KG-9SAQ-P	Anonymous	■		■	
ANON-24KG-9SY5-J	Anonymous	■	■	■	■
ANON-24KG-9SYD-1	Anonymous	■		■	■
ANON-24KG-9SYU-J	Anonymous	■	■	■	■
ANON-24KG-9SYH-5	Anonymous			■	
ANON-24KG-9S1D-S	Anonymous			■	

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Submission ID	**Primary Submitter**	The Establishment, design and implementation of the Robodebt Scheme	The use of third-party debt collectors under the Robodebt Scheme	Concerns raised following the implementation of the Robodebt Scheme	The intended or actual outcomes of the Robodebt Scheme
ANON-24KG-9S1G-V	Anonymous	■	■	■	■
ANON-24KG-9S19-E	Anonymous	■		■	■
ANON-24KG-9S1V-B	Anonymous	■	■	■	■
ANON-24KG-9S12-7	Anonymous	■		■	
ANON-24KG-9S1Q-6	Anonymous				
ANON-24KG-9S8H-4	Anonymous	■	■	■	■
ANON-24KG-9S8M-9	Anonymous	■		■	
ANON-24KG-9S8F-2	Anonymous	■	■	■	
ANON-24KG-9STM-5	Anonymous			■	■
ANON-24KG-9S6N-8	Anonymous	■	■	■	■
ANON-24KG-9S6Y-K	Anonymous	■	■	■	■
ANON-24KG-9S6G-1	Anonymous	■	■	■	■
ANON-24KG-9S69-K	Anonymous	■		■	■
ANON-24KG-9S64-E	Anonymous	■		■	
ANON-24KG-9S6P-A	Anonymous	■		■	
ANON-24KG-9S62-C	Anonymous	■		■	■
ANON-24KG-9SUH-1	Anonymous	■	■	■	■
ANON-24KG-9SUX-H	Anonymous	■		■	■
ANON-24KG-9S4E-W	Anonymous		■	■	
ANON-24KG-9SU1-A	Anonymous			■	■
ANON-24KG-9STH-Z	Anonymous	■	■	■	■
ANON-24KG-9SGD-F	Anonymous	■		■	
ANON-24KG-9SUQ-A	Anonymous		■	■	■
ANON-24KG-9SGR-W	Anonymous	■	■	■	■
ANON-24KG-9SWQ-C	Anonymous	■		■	
ANON-24KG-9SGM-R	Anonymous		■	■	■
ANON-24KG-9S1W-C	Anonymous			■	■
ANON-24KG-9SG4-Y	Anonymous			■	■
ANON-24KG-9SG1-V	Anonymous	■		■	
ANON-24KG-9SG8-3	Anonymous	■		■	
ANON-24KG-9SHN-T	Anonymous	■		■	■
ANON-24KG-9SHR-X	Anonymous	■	■	■	■
ANON-24KG-9SHU-1	Anonymous	■		■	
ANON-24KG-9SHX-4	Anonymous	■	■	■	
ANON-24KG-9SH6-2	Anonymous	■		■	
ANON-24KG-9SGH-K	Anonymous				
ANON-24KG-9SEE-E	Anonymous	■		■	
ANON-24KG-9SEW-Z	Anonymous				
ANON-24KG-9SE6-Y	Anonymous	■	■	■	■
ANON-24KG-9SET-W	Anonymous			■	■
ANON-24KG-9SEC-C	Anonymous	■		■	
ANON-24KG-9SE3-V	Anonymous	■	■	■	■
ANON-24KG-9SBD-A	Anonymous	■	■	■	■
ANON-24KG-9SBU-U	Anonymous	■		■	■
ANON-24KG-9SBX-X	Anonymous	■	■	■	■
ANON-24KG-9SBV-V	Anonymous	■	■	■	■
ANON-24KG-9SB6-V	Anonymous	■		■	■
ANON-24KG-9SB2-R	Anonymous			■	■
ANON-24KG-9SBQ-Q	Anonymous	■	■	■	■
ANON-24KG-9SXN-A	Anonymous	■		■	
ANON-24KG-9SXD-Z	Anonymous	■	■	■	■
ANON-24KG-9SXH-4	Anonymous	■		■	■
ANON-24KG-9SXU-H	Anonymous	■	■	■	■
ANON-24KG-9SXW-K	Anonymous	■	■	■	■
ANON-24KG-9SX7-K	Anonymous	■		■	■
ANON-24KG-9SXF-2	Anonymous	■	■	■	■
ANON-24KG-9SXJ-6	Anonymous	■		■	■
ANON-24KG-9SX8-M	Anonymous	■	■	■	■
ANON-24KG-9S5D-W	Anonymous	■		■	
ANON-24KG-9S5U-E	Anonymous	■		■	

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ANON-24KG-9S5M-6	Anonymous			■	■
ANON-24KG-9S5V-F	Anonymous	■		■	■
ANON-24KG-9S51-A	Anonymous	■	■	■	■
ANON-24KG-9S58-H	Anonymous	■	■	■	■
ANON-24KG-9S9U-J	Anonymous	■		■	■
ANON-24KG-9S9A-X	Anonymous				■
ANON-24KG-9S9J-7	Anonymous	■		■	
ANON-24KG-9S9C-Z	Anonymous			■	■
ANON-24KG-9SDE-D	Anonymous				
ANON-24KG-9SDH-G	Anonymous	■	■	■	■
ANON-24KG-9SDU-W	Anonymous	■		■	
ANON-24KG-9S94-H	Anonymous	■	■	■	■
ANON-24KG-9SF2-V	Anonymous	■	■	■	■
ANON-24KG-9SD9-1	Anonymous	■		■	■
ANON-24KG-9SD1-S	Anonymous	■		■	
ANON-24KG-9SD3-U	Anonymous	■	■	■	■
ANON-24KG-9SKE-M	Anonymous	■	■	■	■
ANON-24KG-9SK9-8	Anonymous			■	
ANON-24KG-9SKM-V	Anonymous		■		
ANON-24KG-9SK4-3	Anonymous	■		■	
ANON-24KG-9SKF-N	Anonymous	■		■	■
ANON-24KG-9SK1-Z	Anonymous	■		■	■
ANON-24KG-9SKC-J	Anonymous	■	■	■	
ANON-24KG-9SVR-C	Anonymous				
ANON-24KG-9SVM-7	Anonymous			■	
ANON-24KG-9SV7-H	Anonymous	■	■	■	■
ANON-24KG-9SVV-G	Anonymous	■		■	
ANON-24KG-9SVS-D	Anonymous	■	■	■	■
ANON-24KG-9S95-J	Anonymous	■		■	■
ANON-24KG-9SV4-E	Anonymous	■		■	■
ANON-24KG-9SVP-A	Anonymous	■		■	
ANON-24KG-9SSH-Y	Anonymous				■
ANON-24KG-9SSB-S	Anonymous	■	■	■	■
ANON-24KG-9SSR-9	Anonymous	■		■	■
ANON-24KG-9SSG-X	Anonymous	■	■	■	■
ANON-24KG-9SSX-F	Anonymous	■		■	■
ANON-24KG-9SS1-8	Anonymous	■		■	■
ANON-24KG-9S2D-T	Anonymous				■
ANON-24KG-9S25-B	Anonymous	■		■	■
ANON-24KG-9S2Y-F	Anonymous	■	■	■	■
ANON-24KG-9S2B-R	Anonymous	■		■	
ANON-24KG-9S2R-8	Anonymous	■		■	■
ANON-24KG-9SSD-U	Anonymous			■	■
ANON-24KG-9S21-7	Anonymous				■
ANON-24KG-9S2T-A	Anonymous	■		■	■
ANON-24KG-9S2J-Z	Anonymous			■	■
ANON-24KG-9SQK-Z	Anonymous	■		■	■
ANON-24KG-9SQG-V	Anonymous	■		■	■
ANON-24KG-9SQV-B	Anonymous			■	■
ANON-24KG-9SQT-9	Anonymous	■	■	■	■
ANON-24KG-9S3B-S	Anonymous	■		■	■
ANON-24KG-9S36-D	Anonymous	■		■	■
ANON-24KG-9S3K-2	Anonymous	■	■	■	■
ANON-24KG-9S3M-4	Anonymous	■	■	■	■
ANON-24KG-9S3T-B	Anonymous	■		■	■
ANON-24KG-9SMH-S	Anonymous	■		■	
ANON-24KG-9SQN-3	Anonymous			■	
ANON-24KG-9SZV-M	Anonymous			■	
ANON-24KG-9SCD-B	Anonymous	■		■	■
ANON-24KG-9BWG-H	Anonymous	■	■	■	■

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ANON-24KG-9BWU-Y	Anonymous	■	■	■	
ANON-24KG-9S71-C	Anonymous				■
ANON-24KG-9S73-E	Anonymous	■	■	■	■
ANON-24KG-9S77-J	Anonymous			■	■
ANON-24KG-9S7D-Y	Anonymous	■		■	
ANON-24KG-9S7R-D	Anonymous	■		■	■
ANON-24KG-9S7W-J	Anonymous	■	■	■	■
ANON-24KG-9S7X-K	Anonymous		■	■	■
ANON-24KG-9SC9-Z	Anonymous	■		■	■
ANON-24KG-9SCG-E	Anonymous	■	■	■	■
ANON-24KG-9SCM-M	Anonymous	■	■	■	■
ANON-24KG-9SCP-Q	Anonymous				■
ANON-24KG-9SCQ-R	Anonymous	■	■	■	■
ANON-24KG-9SCT-U	Anonymous		■	■	■
ANON-24KG-9SM8-9	Anonymous				■
ANON-24KG-9SMS-4	Anonymous	■	■	■	■
ANON-24KG-9SMT-5	Anonymous		■	■	■
ANON-24KG-9SMV-7	Anonymous	■		■	■
ANON-24KG-9SZ2-G	Anonymous				■
ANON-24KG-9SZ5-K	Anonymous		■		■
ANON-24KG-9SZF-4	Anonymous	■		■	
ANON-24KG-9SC1-R	Anonymous	■		■	
ANON-24KG-9BWW-1	Anonymous	■	■	■	■
ANON-24KG-9BWA-B	Anonymous				
ANON-24KG-9BW6-Z	Anonymous	■		■	■
ANON-24KG-9BW1-U	Anonymous	■		■	■
ANON-24KG-9BWJ-M	Anonymous	■		■	■
ANON-24KG-9BPY-V	Anonymous			■	
ANON-24KG-9BPZ-W	Anonymous			■	
ANON-24KG-9BPB-5	Anonymous	■		■	■
ANON-24KG-9BPK-E	Anonymous	■		■	■
ANON-24KG-9BPU-R	Anonymous	■	■	■	■
ANON-24KG-9BPS-P	Anonymous	■		■	
ANON-24KG-9BPT-Q	Anonymous	■	■	■	■
ANON-24KG-9B4N-N	Anonymous	■		■	■
ANON-24KG-9BP2-N	Anonymous	■	■	■	■
ANON-24KG-9SUP-9	Anonymous	■		■	■
ANON-24KG-9B4Z-1	Anonymous	■		■	■
ANON-24KG-9B4R-S	Anonymous	■	■	■	■
ANON-24KG-9B4B-9	Anonymous	■		■	■
ANON-24KG-9B4W-X	Anonymous	■		■	■
ANON-24KG-9S24-A	Anonymous	■	■	■	■
ANON-24KG-9B4M-M	Anonymous				■
ANON-24KG-9B4S-T	Anonymous				■
ANON-24KG-9BPC-6	Anonymous	■		■	
ANON-24KG-9B46-W	Anonymous			■	
ANON-24KG-9B42-S	Anonymous	■		■	
ANON-24KG-9S9R-F	Anonymous	■		■	■
ANON-24KG-9B4Q-R	Anonymous	■		■	■
ANON-24KG-9B43-T	Anonymous	■		■	
ANON-24KG-9S3Z-H	Anonymous	■		■	
ANON-24KG-9BNW-R	Anonymous	■		■	■
ANON-24KG-9BNY-T	Anonymous	■	■	■	■
ANON-24KG-9BN4-N	Anonymous				
ANON-24KG-9BN8-S	Anonymous				
ANON-24KG-9BFD-W	Anonymous	■		■	
ANON-24KG-9BFH-1	Anonymous	■	■	■	
ANON-24KG-9BFY-J	Anonymous		■	■	■
ANON-24KG-9BFR-B	Anonymous	■		■	■
ANON-24KG-9BFV-F	Anonymous				■

* Not all submissions in this list have been published.

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ANON-24KG-9BN1-J	Anonymous	■	■	■	■
ANON-24KG-9BFK-4	Anonymous	■		■	
ANON-24KG-9BF4-D	Anonymous	■		■	
ANON-24KG-9BFP-9	Anonymous	■	■	■	■
ANON-24KG-9BF2-B	Anonymous	■		■	
ANON-24KG-9BF1-A	Anonymous	■		■	■
ANON-24KG-9BF8-H	Anonymous			■	
ANON-24KG-9BFT-D	Anonymous	■	■	■	■
ANON-24KG-9BFQ-A	Anonymous		■	■	■
ANON-24KG-9BF3-C	Anonymous	■	■	■	■
ANON-24KG-9BJ5-J	Anonymous				
ANON-24KG-9BJR-F	Anonymous				■
ANON-24KG-9BJK-8	Anonymous	■		■	■
ANON-24KG-9BJA-X	Anonymous				■
ANON-24KG-9BJG-4	Anonymous	■		■	■
ANON-24KG-9BJM-A	Anonymous	■		■	■
ANON-24KG-9BJX-N	Anonymous	■		■	
ANON-24KG-9BJ7-M	Anonymous	■	■	■	■
ANON-24KG-9BJ4-H	Anonymous	■		■	■
ANON-24KG-9BJF-3	Anonymous	■		■	■
ANON-24KG-9BJP-D	Anonymous	■		■	■
ANON-24KG-9BJ3-G	Anonymous	■		■	
ANON-24KG-9BRD-9	Anonymous			■	
ANON-24KG-9BJQ-E	Anonymous	■	■	■	
ANON-24KG-9BRR-Q	Anonymous	■	■	■	■
ANON-24KG-9BRZ-Y	Anonymous	■		■	■
ANON-24KG-9BRG-C	Anonymous			■	
ANON-24KG-9BRK-G	Anonymous			■	
ANON-24KG-9BRB-7	Anonymous				
ANON-24KG-9BRX-W	Anonymous	■	■	■	■
ANON-24KG-9BRS-R	Anonymous	■		■	■
ANON-24KG-9BRV-U	Anonymous				■
ANON-24KG-9BRF-B	Anonymous				■
ANON-24KG-9BR6-U	Anonymous	■		■	■
ANON-24KG-9BRE-A	Anonymous	■	■	■	■
ANON-24KG-9BTY-Z	Anonymous	■	■	■	■
ANON-24KG-9BTZ-1	Anonymous				■
ANON-24KG-9BTR-S	Anonymous	■	■	■	■
ANON-24KG-9BTH-F	Anonymous	■		■	
ANON-24KG-9BT9-Z	Anonymous	■		■	■
ANON-24KG-9BTF-D	Anonymous		■	■	■
ANON-24KG-9BTP-Q	Anonymous	■		■	■
ANON-24KG-9BT8-Y	Anonymous	■		■	■
ANON-24KG-9BTC-A	Anonymous		■		
ANON-24KG-9BTJ-H	Anonymous	■		■	■
ANON-24KG-9BAY-D	Anonymous	■	■	■	■
ANON-24KG-9BTX-Y	Anonymous	■	■	■	■
ANON-24KG-9BPJ-D	Anonymous	■	■	■	■
ANON-24KG-9BNP-H	Anonymous	■	■	■	■
ANON-24KG-9BAG-U	Anonymous	■		■	
ANON-24KG-9BTM-M	Anonymous	■		■	
ANON-24KG-9BAV-A	Anonymous			■	
ANON-24KG-9BAD-R	Anonymous	■	■	■	■
ANON-24KG-9BA1-5	Anonymous	■		■	
ANON-24KG-9BA2-6	Anonymous				
ANON-24KG-9BAT-8	Anonymous	■	■	■	■
ANON-24KG-9BRJ-F	Anonymous	■	■	■	■
ANON-24KG-9BYN-T	Anonymous	■	■	■	■
ANON-24KG-9BNE-6	Anonymous	■		■	■
ANON-24KG-9BYE-H	Anonymous			■	■

* Not all submissions in this list have been published.

		Which of the Royal Commission's terms of reference is your subbmission about?			
Submission ID	**Primary Submitter**	The Establishment, design and implementation of the Robodebt Scheme	The use of third-party debt collectors under the Robodebt Scheme	Concerns raised following the implementation of the Robodebt Scheme	The intended or actual outcomes of the Robodebt Scheme
ANON-24KG-9BY9-5	Anonymous				
ANON-24KG-9BYR-X	Anonymous				
ANON-24KG-9BYK-Q	Anonymous				
ANON-24KG-9BY7-3	Anonymous				
ANON-24KG-9BYA-D	Anonymous				
ANON-24KG-9BYQ-W	Anonymous				
ANON-24KG-9B1N-J	Anonymous				
ANON-24KG-9S4Z-J	Anonymous				
ANON-24KG-9B1D-8	Anonymous				
ANON-24KG-9B1K-F	Anonymous				
ANON-24KG-9B19-W	Anonymous				
ANON-24KG-9B1F-A	Anonymous				
ANON-24KG-9B1Z-X	Anonymous				
ANON-24KG-9B4F-D	Anonymous				
ANON-24KG-9B85-Z	Anonymous				
ANON-24KG-9B8E-G	Anonymous				
ANON-24KG-9B8Y-4	Anonymous				
ANON-24KG-9B8R-W	Anonymous				
ANON-24KG-9B8D-F	Anonymous				
ANON-24KG-9B8M-R	Anonymous				
ANON-24KG-9B8U-Z	Anonymous				
ANON-24KG-9BPA-4	Anonymous				
ANON-24KG-9BTA-8	Anonymous				
ANON-24KG-9B8G-J	Anonymous				
ANON-24KG-9B18-V	Anonymous				
ANON-24KG-9B8X-3	Anonymous				
ANON-24KG-9B84-Y	Anonymous				
ANON-24KG-9B13-Q	Anonymous				
ANON-24KG-9B82-W	Anonymous				
ANON-24KG-9B81-V	Anonymous				
ANON-24KG-9BYS-Y	Anonymous				

List of Submissions received after 3 February and before 2 June 2023

* Not all submissions in this list have been published. Terms of reference data input by submitters was not able to be gathered for these submissions.

Submission ID	Primary Submitter				
ANO.9999.0001.0090	Akter, Dr Shahriar				
ANO.9999.0001.0011	Anonymous				
ANO.9999.0001.0016	Anonymous				
ANO.9999.0001.0035	Anonymous				
ANO.9999.0001.0037	Anonymous				
ANO.9999.0001.0045	Anonymous				
ANO.9999.0001.0057	Anonymous				
ANO.9999.0001.0062	Anonymous				
ANO.9999.0001.0068	Anonymous				
ANO.9999.0001.0069	Anonymous				
ANO.9999.0001.0082	Anonymous				
ANO.9999.0001.0083	Anonymous				
ANO.9999.0001.0087	Anonymous				
ANO.9999.0001.0104	Anonymous				
ANO.9999.0001.0107	Anonymous				
ANO.9999.0001.0110	Anonymous				
ANO.9999.0001.0115	Anonymous				
ANO.9999.0001.0028	ARC Centre of Excellence for Automated Decision-Making and Society				
ANO.9999.0001.0096	Australian Human Rights Commission				
ANO.9999.0001.0026	Biagtas, Jai (Jolly)				
ANO.9999.0001.0089	Brogan, Dr Mark & Arratoon, Mark				
ANO.9999.0001.0021	Community and Public Sector Union				
ANO.9999.0001.0008	Community Legal Centres Australia				
ANO.9999.0001.0085	Crofts, Professor Penny				
ANO.9999.0001.0116	Dalton, Deb				
ANO.9999.0001.0005	Davey, Darren				
ANO.9999.0001.0086	Dickson, Peter				
ANO.9999.0001.0105	Dyer, Greg				
ANO.9999.0001.0097	Fisher, Dr Nicholas & Trewin, Dennis AO & Cressie, Professor Noel				
ANO.9999.0001.0095	Gay, Rosemary				
ANO.9999.0001.0017	Graycar, Adam & Masters, Adam				
ANO.9999.0001.0073	Griffin, Michael				
ANO.9999.0001.0042	Henman, Professor Paul				
ANO.9999.0001.0030	Howell, Nicola & Brown, Dr Catherine (Queensland University of Technology)				
ANO.9999.0001.0063	Hunter, David				
ANO.9999.0001.0020	Hunter, Richard (Austlii)				
ANO.9999.0001.0094	Innes, Peter				
ANO.9999.0001.0112	Jeffrey, Michelle Dawn				
ANO.9999.0001.0024	Krieg, Gerry				
ANO.9999.0001.0117	McGovern, Dr Mark				
ANO.9999.0001.0038	McMillan, Professor John AO				
ANO.9999.0001.0010	National 4Rs Community Legal Network				
ANO.9999.0001.0006	O'Donovan, Dr Darren (La Trobe University)				
ANO.9999.0001.0022	Organisations, Australian Federation of Disability				
ANO.9999.0001.0072	Reed, Prof Karl & McDonald, Prof Craig				
ANO.9999.0001.0055	Risk Insights Australia				
ANO.9999.0001.0081	Rogers, Trevor				
ANO.9999.0001.0060	Seth-Purdie, Robyn				
ANO.9999.0001.0053	Stannard, John				
ANO.9999.0001.0043	Sutherland, Peter				
ANO.9999.0001.0099	The Commonwealth of Australia				
ANO.9999.0001.0100	The Commonwealth of Australia				
ANO.9999.0001.0064	Turk, Dr Andrew				
ANO.9999.0001.0091	Turk, Dr Andrew				
ANO.9999.0001.0056	Vardon, Sue AO				
ANO.9999.0001.0036	Willemse, Wendy				
ANO.9999.0001.0025	Wolf, Asher				

9 January 2023

The Hon Mark Dreyfus KC MP
Attorney-General
Suite MG51
House of Representatives
Parliament House
CANBERRA ACT 2600

Email: Attorney@ag.gov.au

Dear Attorney,

As you know, I am currently conducting the Robodebt Royal Commission and am required by the relevant Letters Patent to submit a report of the results of my inquiry, with recommendations, to the Governor-General not later than 18 April 2023. However, I write now to seek an amendment of that date to 30 June 2023, so as to extend by approximately ten weeks the time available for the completion of the inquiry and provision of the report.

One reason for requesting the additional time is that the work done so far has uncovered a far larger range of issues which need to be addressed than might originally have been contemplated. Another is this: while I appreciate that there have been real difficulties for the Commonwealth in assembling material at short notice, the time taken to produce documents, their arrival in fits and starts and the level of disorganization in them have constituted a significant hindrance to the work of the Commission. There is a good deal of irrelevant material and duplication among the half million documents received to date, so the identification of critical documents – often emails – is an extraordinary time-consuming process. Because important documents continue to emerge, further Notices to Give Information will have to be served on some witnesses, and some will have to be recalled to give further evidence.

In consequence of these factors, I anticipate that the Commission will not be able to conclude its hearings until mid-March, after which it will still be necessary, of course, to provide the opportunity to comment to those who may have adverse findings made against them. The result is that I do not think it will be possible for me to deliver a report to the standard I would wish in the time available. Hence, I seek the extension of time to the end of June. I anticipate that I may in fact be able to provide the report somewhat earlier, but as you will understand, I would prefer to err on the side of caution.

I am informed that notwithstanding that extensions the Commission will be able to complete its work with the allocated budget, so I seek no further funds for the purpose.

Yours faithfully



Catherine Holmes AC SC
Royal Commissioner

24 April 2023

The Hon Mark Dreyfus KC MP
Attorney-General
Suite MG51
House of Representatives
Parliament House
CANBERRA ACT 2600

Email: Attorney@ag.gov.au

Dear Attorney,

I am writing to seek a further amendment of the Letters Patent in relation to the Robodebt Royal Commission to permit a short extension of the time for provision of the Report of the results of my inquiry and recommendations to the Governor-General.

The reason is simply explained: presently, the report must be submitted by 30 June 2023. But as you are, of course, aware, by Proclamation, parts 2 to 9 of the *National Anti-Corruption Commission Act 2022* will commence on 1 July 2023, the following day. The practical result of the day's difference is that I am not presently able to refer individuals to the National Anti-Corruption Commission under s 6(p) of the *Royal Commissions Act* should I reach the view their conduct may meet the definition of "corrupt conduct" under the *National Anti-Corruption Commission Act*.

For that reason, I seek an extension of the time for delivery of my report to a day in the week of July 3023 (other than Monday 3 July, when I understand the Governor-General would not be available to receive it). I do not contemplate that an extension of that brevity would involve additional cost for the Commission or anyone else.

I would be very much obliged if this request could be given attention as quickly as possible. That is because, in the interests of natural justice, I would want to advise any persons who might be the subject of such a referral of the prospect when they are involved to respond to a Notice of Potential Adverse Findings (those presently being delivered).

Yours faithfully



Catherine Holmes AC SC
Royal Commissioner

Review of AAT Tier 1 decisions

AAT Review Number	DOC ID	Member	Date
2015/B088092	CTH.3761.0002.7631	P White	18 January 2016
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that the debt be recalculated with reference to the Applicant's fortnightly payroll information, with the recalculated debt to be recoverable.

Key findings

- The Tribunal noted that 'Centrelink undertook a data match with the Australian Taxation Office (ATO) for the 2011, 2012 and 2013 tax years. The enquiries revealed clear discrepancies' [10].
- The Tribunal accepted that the information from the ATO was 'correct and independent' [10].
- The Tribunal referenced an extract from the ARO's findings which noted that Centrelink had apportioned earnings in the absence of the Applicant providing any information about 'actual earnings' during the period. The Tribunal found the extract suggested that the debt calculation was 'inaccurate, in that it uses averaged earnings, during the entirety of his employment with [employer], rather than the precise fortnightly earnings' [12].
- The Tribunal found that this part of the debt should be recalculated given there appears to be 'reasonable doubt as to the accuracy of the calculation' [12].
- The Tribunal concluded:

  that the precise debt calculation is attended by some doubt. It should be reconsidered. The fortnightly payroll information, which is now available should be worked into the calculations. It would also be desirable for an appropriately qualified Centrelink officer to discuss the debt calculation with [the Applicant] and his partner. They are entitled to a proper explanation. At the very least, he should be allowed to put submissions to Centrelink [16].

- The Tribunal noted the Applicant had:

  … all the payslips (as does Centrelink) and he wants them to be considered. He also seeks an explanation about the debt. He cannot understand the ADEX Debt Schedule. He is concerned by apparent discrepancies [17].

- The Tribunal was satisfied that the Applicant had been overpaid, but found it was 'necessary to set aside the debt, pending the recalculation or reconsideration' [19]
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2015/M088021	CTH.3039.0012.1135	A Treble	25 January 2016
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with a decision that the Applicant owed a debt of $490.11 for the period between 15 June 2013 to 13 December 2012.

Key Findings

- Centrelink raised the debt following a data match with the ATO [2].
- The Tribunal noted that the Applicant's pay records corroborated with the ATO information used by Centrelink.
- The Tribunal stated:

  The tribunal examined the information available on [the Applicant's] Centrelink file, which showed the amounts she had declared to Centrelink, her actual wage information and the debt calculations. As the Centrelink fortnight did not match the fortnightly period used by the employer, and actual dates worked were not known, Centrelink apportioned [the Applicant's] earnings to arrive at the amounts earned for specific Centrelink fortnights over the entire period of employment [10].

…

In the tribunal's view it would be inappropriate to disregard the two final underpayments for two reasons. Firstly, it is quite apparent [the Applicant] was correctly declaring to Centrelink on the next available reporting date the amounts shown on her payslips... Secondly, Centrelink is relying on the apportionment method to determine the overpayment in the absence of records showing actual dates worked and amounts owed in each relevant Centrelink fortnight. The purpose of the apportionment exercise is to arrive at the most accurate determination of the amount of newstart allowance overpaid to [the Applicant] whilst she was employed by [Employer]… As discussed below, subsection 1223(1) requires the decision maker to be positively satisfied that a person who obtains the benefit of a payment was not entitled to that benefit. In the absence of actual records showing dates worked and amounts earned in specific Centrelink fortnights, the tribunal can only be satisfied about the likely amount of newstart allowance overpaid over the entire period of employment using the apportionment method. The tribunal therefore finds that the overpaid amount is $490.11 from 15 June 2012 to 13 December 2012. (In the alternative, the tribunal would have found that the difference between the calculated debt amount of $776.65 and $490.11 should be waived in the special circumstances of the case as it is manifestly unfair that [the Applicant] should face a much higher debt in the circumstances described above, and it is also more appropriate to waive than to write off where such an unfairness arises.) [14].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2015/B089933	CTH.3761.0006.0052	D Gillespie	26 February 2016
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key findings

- The Tribunal noted that 'as [the Applicant] worked a variable number of hours on a few days per week, a calculation (like the one performed by Centrelink) based on fortnightly average earnings may produce a different (not necessarily lesser) result'. The Tribunal noted the Applicant was not able to provide any more detailed information than that already provided to Centrelink, being total weekly hours and earnings [7].
- The Tribunal agreed:

  …that a more precise allocation of hours worked may produce a different result. But as [the Applicant] was unable to provide any detailed records of the days and hours she worked, it was unable to perform the calculation on any other basis and so confirmed Centrelink's calculations as being accurate [8].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2015/M090054	CTH.3039.0013.3097	E Geraghty	2 March 2016
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt under the direction that there was an NSA debt for the fortnight ending 1 March 2013 and that the quantum was to be calculated taking into account any working credit accrued by the Applicant from 5 January 2013.

Key Findings

- Centrelink raised the debt following a data match with the ATO [14].
- The Tribunal examined the Applicant's payslips to determine the Applicant's income for the relevant period.
- In relation to Centrelink's calculations, the Tribunal found:

  The Centrelink debt calculation is based on [the Applicant] earning $689.58 a fortnight in the period from 24 October 2012 to 30 June 2013, apparently derived from dividing the figure from the ATO by the weeks/days in the period. This

is clearly incorrect as is the debt end date of 20 July 2013 listed in the papers. As well, [the Applicant] reported earnings from [Employer] for the Centrelink fortnights ending 9 November 2012, 23 November 2012 and 7 December 2012 and these appear to also have been included in the debt calculation, thus "double counting" these amounts [15].

- The Tribunal also, however, found that the Applicant did not correctly report his information in relation to one employer but also that the Applicant's earnings could not be qualified based on the available information [18].
- The Tribunal also found that the Applicant did not correctly declare his income for the second and third employers [20]-[21].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2015/S090058	CTH.3761.0005.8021	E Cornwell	7 March 2016
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink with the direction to recalculate the debt on the basis that the Applicant had no earnings from one of his employers in the debt period.

Key findings

- The Tribunal found:

  The debt should therefore be recalculated on the basis that this income was earned before the Applicant had claimed newstart allowance. These amounts of income should not be included when the debt is recalculated. The tribunal, however, is satisfied that the Applicant reported his net rather than gross earnings from [employer] and the remainder of the debt arose because of this [14]-[15].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2015/S089953	CTH.3761.0005.4119	R Petrucci	9 March 2016
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key Findings

- The Tribunal found that Centrelink apportioned the Applicant's gross earnings, following a data match with the ATO, across the fortnightly reporting period as he was unable to provide payslips [13].
- The Tribunal was satisfied with Centrelink's calculations [14].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2015/B088656	CTH.3761.0005.6653	DC McKelvey	9 March 2016
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that the matter be remitted back to Centrelink for reconsideration and recalculation, with any recalculated debt to be recovered in full.

Key findings

- The Tribunal found the debt raised could not be correct for the period because the Applicant 'was not working at this time' [8].
- The Tribunal was not satisfied that the debt calculation was correct where 'the debt for that period forms the substantial component of the total debt before the Tribunal' [15].
- The Tribunal also noted there was no 'information before the Tribunal as to the fortnights in which the income was received. The data match refers to a period where there is no information before the Tribunal' [15].
- The Tribunal stated that the Department advised it did not obtain copies of pay records from the Applicant's employer [15].
- The Tribunal did not find that any special circumstances existed to justify a waiver or the writing off of the debt.

AAT Review Number	DOC ID	Member	Date
2016/P090333	CTH.3067.0002.6038	S Brakespeare	15 March 2016
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt for a specific period.
- The recalculated debt was recoverable.

Key Findings

- The Applicant contested Centrelink's attribution of income to her for one out of three employers [13].
  The Tribunal noted:

  [The Applicant] explained that she only worked for [Employer] for a short period each year during the pruning season; generally about five weeks per year from the beginning of July. She said that she earned significant amounts of money during that time and that income should only be attributed to the weeks that she earned it (and not apportioned over the whole year). She said that in July 2011 she do not receive any newstart allowance because of the income that she received from [Employer]. When she finished work there she again claimed newstart allowance. The following two years when she was working for [Employer] she declared some but not all of the income she earned over each five-week pruning period. In the fortnights she declared income she did not receive any newstart allowance [14].

- In relation to Centrelink's calculations, the Tribunal stated:

  The tribunal notes that the Department relied upon information provided by the Australian Taxation Office (ATO) in determining [the Applicant] income from [Employer] for the purposes of the debt calculations. In the absence of any other evidence the Department has apportioned the income reported for 2010/11 and 2011/12 over the whole of the relevant financial year. The income for 2012/13 has been apportioned over the period 1 July 2013 to 23 August 2013 (being the period reported by the employer to the ATO) [16].

  The tribunal had regard to folio A7 provided by [the Applicant]. The tribunal is satisfied that the document is an accurate reflection of [the Applicant] income from casual employment in the period 16 June 2012 to 13 August 2012 and the period 1 June 2013 to 23 August 2013. The tribunal finds that the income from this employment should be taken into account in the fortnights in which it was earned [17].

- The Tribunal also, however, found that the Applicant did not correctly report her income and therefore that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M091437	CTH.3761.0004.8827	E Geraghty	6 April 2016
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that there was a debt of $16,535.46 for the period between 27 February 2012 to 30 May 2014.

- Part of the debt for the period between 27 February 2012 to 12 July 2012 inclusive was waived on the basis of sole administrative error.
- The part of the debt for the period between 13 July 2012 to 30 May 2014 was recoverable.

Key Findings

- In relation to one employer, the Applicant accepted that averaged ATO data was a reasonable assessment of her earnings [13].
- The Tribunal accepted that Centrelink's other calculations using ATO data were accurate [15].
- The Tribunal found that part of the debt resulted solely due to administrative error as the Applicant had declared her employment and income in her austudy application and Centrelink failed to take this into account [25].
- The Tribunal found that no special circumstances existed to justify the waiver of the remainder of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M091163	CTH.3761.0004.7814	E Geraghty	7 April 2016
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that there was a debt and the quantum was to be calculated and recovered.

Key Findings

- The Applicant agreed that she did not report her income from her first employer on a fortnightly basis as the online screen told her there was nothing to report when she attempted to do so [13].
- In relation to the second employer, Centrelink's documents demonstrated that a data match had been conducted and the Applicant's income had been applied evenly to each fortnight across the period. The Tribunal noted that '…this approach [did] not identify what [the Applicant's] income was each for fortnight, whether the figure she advised on 2 May 2012 was correct and when her income "increased"' [16].

- The Tribunal further stated:

  The EAN screen also shows that for the period 11 July 2012 to 22 August 2012 varying fortnightly amounts have been recorded to calculate the debt. The Tribunal asked Centrelink to provide evidence of these amounts but Centrelink advised that the earnings for the debt calculation in relation to [Employer] were derived from the ATO data already provided in the papers. The Tribunal was unable to locate in the papers any ATO data for the period after 27 June 2012 [17].

  Based on the information before it the Tribunal is satisfied that [the Applicant] was employed for variable hours by [Employer] between 2 April 2012 to 22 August 2012. The Tribunal also finds that [the Applicant's] earnings for the fortnights in that period have not been identified nor has it been established when those earnings increased. Whilst it is possible that [the Applicant] was overpaid in this period, the quantum of any overpayment cannot be reliably calculated on the information before the Tribunal and the Tribunal cannot confirm that an overpayment exists. However, the Tribunal acknowledges that it is open to Centrelink to obtain details of [the Applicant's] actual fortnightly earnings and dates worked and then calculate and raise a further overpayment in the future. [the Applicant] would be entitled to seek a review of any such future decision [18].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M092372	CTH.3761.0002.5523	A Treble	8 April 2016
How it was decided and key facts			

Outcome

The decision under review was set aside and substituted with the decision that the debt was to be recalculated.

Key findings

- ATO data matching identified a discrepancy between the income the Applicant received, and what they had reported to Centrelink.
- A debt was calculated by using the gross income from three employers.
- In response to the debt being raised, the Applicant provided payslips from two of her three employers to Centrelink. The debt was then recalculated and reduced.
- The Applicant then requested the decision be reviewed, as two of the employers were actually the same and Centrelink had potentially double counted some of her income. The Applicant however was unable to provide proof of this to the Department.
- The Tribunal found on review that two of the employers were the same, however, that the Applicant had still underreported her income. The Tribunal directed that the debt was to be recalculated and then recovered.
- The Tribunal stated:

…there is still a likely overpayment. However, the overpaid amount will need to be recalculated by Centrelink to take account of the following issues:

- The employers [Employer 1] and [Employer 2] are the same, so that earnings from [Employer 2] must be removed when recalculating youth allowance entitlement. Only the actual earnings for [Employer 1] are to be used.
- Earnings from [Employer 3] for the 2012/13 financial year are to be averaged over the period 1 July 2012 to 15 November 2012 only [given [Employer 4] had closed and it was no was no longer possible to obtain payslips] [13].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt.

AAT Review Number	DOC ID	Member	Date
2015/M090945	CTH.3761.0004.4042	E Geraghty	18 April 2016
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key Findings

- The Tribunal accepted the Applicant's income information as demonstrated by ATO data [12].
- The Applicant accepted that she was overpaid however noted that Centrelink was aware of her employment at the time [13].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/P091508	CTH.3761.0006.1546	W Budiselik	26 April 2016
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the direction that Centrelink provides additional time to the Applicant to provide Centrelink officers with relevant information so the debt could be recalculated, with any resultant debt to be recovered.

Key findings

- The Tribunal noted that Centrelink had utilised information provided by the ATO and raised a debt. The Applicant then sought review of the decision but did not provide information to establish his case that calculations of the debt were in error [17].
- The Tribunal noted that an ARO subsequently affirmed the decision and recorded (in their notes dated 9 February 2016) advice given to the Applicant about the decision:

He offered to supply bank statements but I advised him they would not be useful as they did not show gross earnings. He asked if I could obtain his payslips from his employers but I advised him the Department's policy was not to do this. He said he was unable to obtain his payslips, some of the employers in question were no longer in business and he was no longer on good terms with some of them [18].

- The Tribunal considered that the Applicant's bank records 'might have been useful in coming to a decision … because the lack of payments from sources other than Centrelink might indicate periods of unemployment' [19].
- The Tribunal found that Centrelink needed to recalculate the Applicant's debt taking into account additional payroll information [22].
- Although the Tribunal found the Applicant's circumstances at the relevant time constituted a special circumstance, the Tribunal did not find this warranted writing off or waiving the debt because the Applicant was now in a position to repay the debt at a rate negotiated with Centrelink [42].

AAT Review Number	DOC ID	Member	Date
2016/M091668	CTH.3030.0021.1676	E Geraghty	27 April 2016

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that there is no debt.

Key Findings

- Centrelink raised the debt following a data match with ATO.
- The Applicant worked five different jobs over the debt period.
- The Tribunal noted that earnings were averaged across the period worked [14].
- The Applicant stated that the ATO dates for two of his jobs were incorrect [18].
- For one job, the Tribunal noted that the ARO had averaged the Applicant's income and included a period after he stopped working there.
- The Tribunal concluded that no debt could be calculated for the other jobs as there was no verified evidence of the Applicant's individual fortnightly pay [20] – [23].
- The Tribunal criticised the use of income averaging:

  There is no evidence of actual fortnightly earnings and the ATO data is not sufficient to establish these fortnightly earnings. Again, no debt can be quantified on the basis of earnings from these employers [23].

- The Tribunal was not satisfied as to the quantum of any debt but acknowledged it was open to Centrelink to obtain earning details to recalculate the debt [24].

AAT Review Number	DOC ID	Member	Date
2016/B092842	CTH.3761.0005.7630	P Jensen K Chapman	17 May 2016

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with directions that the debt be recalculated based on actual income information.

Key findings

- Centrelink received an ATO data match which suggested that the Applicant had not fully disclosed his income during the period in question. The Tribunal found: 'Centrelink apportioned those earnings across [the Applicant's] periods of employment during the financial years in question to calculate the discrepancies between the Applicant's declared income and his actual income' [2].

- The Tribunal was not satisfied Centrelink's calculations were based on actual fortnightly income and remitted the decision for recalculation.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M092779	CTH.3067.0002.6593	E Geraghty	18 May 2016

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that the Applicant was overpaid $1,420.03 in NSA and this amount was to be recovered.

Key Findings

- The Tribunal found that the Applicant reported her net rather than her gross income for part of the period [15].
- The Tribunal further stated that Centrelink's documents contained information from a data match with the ATO. It found:

  The debt calculations also show that Centrelink has calculated that [the Applicant] was overpaid $193.04 for fortnight ending 24 May 2012 as she had earnings in this fortnight. This is based on the advice in the ATO data that [the Applicant] was paid by [Employer] between 14 February 2102 and 14 May 2012. [the Applicant's] bank statements show she was paid a weekly pay of $668.20 by [Employer] on 10 May 2012 and then paid $155.44 net on 14 May 2012. [the Applicant] did not declare any earnings in the fortnight ending 24 May 2012. There is no evidence in the papers of the exact dates that [the Applicant] worked and actually earned these amounts. In the absence of such evidence, the Tribunal is unable to be satisfied that [the Applicant] was overpaid in the fortnight ending 24 May 2012 [17].

- The Tribunal found that the Applicant under-declared her earnings by a small amount in relation to the second employer and accepted Centrelink's calculations [21].
- The Tribunal found that the Applicant was overpaid due to a lump sum she received from the first employer which did not meet the definition of 'compensation' and therefore needed to be treated as ordinary income [23].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt.

AAT Review Number	DOC ID	Member	Date
2016/A091595	CTH.3761.0002.6188	S Cullimore	19 May 2016

How it was decided and key facts

Outcome

The decision under review was affirmed.

Key findings

- The Applicant received a debt arising from the receipt of a parenting payment and NSA between 2011 and 2013.
- An ARO varied the decision on internal review by reducing both the PPS and NSA debt.
- The Applicant did not provide any payslips to Centrelink, and so Centrelink obtained records from the ATO. In calculating the debt Centrelink 'apportioned' the Applicant's income over the four-month period [19]
- In the absence of payslips and other supporting material, the Tribunal was 'reasonably satisfied' [29] with Centrelink's calculation of the NSA debts and could detect no error in the calculation of the PPS debt [28].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt.

AAT Review Number	DOC ID	Member	Date
2016/A092922	CTH.3066.0002.4671	K Millar	20 May 2016

How it was decided and key facts

Outcome

The decision under review was affirmed.

Key Findings

- Centrelink raised the debt following a data match with the ATO [1].
- The Tribunal was satisfied that the Applicant under-declared her income and that Centrelink's calculations were accurate [10].
- The Tribunal further found that because the Applicant's reported income from the first employer was less than her actual income and the majority of her income from the second employer was not taken into account, she had been overpaid a parenting payment in the relevant period [12].
- The Tribunal noted that the Applicant had been offered the opportunity to provide payslips from one of her employers after the hearing; however, the Applicant advised she was unable to obtain her payslips from that Employer. The Tribunal noted that, as a result, 'the information from [the Applicant's] tax return of her annual payment from [the Employer] was used' [14].
- The Tribunal found that Centrelink had calculated the debt correctly [15]-[17].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt.

AAT Review Number	DOC ID	Member	Date
2016/D093816	CTH.3761.0002.5508	D Gillespie	25 May 2016

How it was decided and key facts

Outcome

The decision under review was affirmed.

Key findings

- Centrelink raised two debts in 17 November 2015: $9,351.50 (the First Debt); and $5,315.2 (the Second Debt) after receiving income information from the ATO and apportioning income over a period [9].
- In 2016, an ARO varied the decisions on internal review. The first debt was reduced and the Second Debt increased due to further information received from Applicant's employers. The ARO also removed the 10% penalty in respect of each debt.
- For first debt, the Applicant said that payments were incorrectly included as 'income'. The Tribunal found that income amounts were correctly incorporated in the debt calculations.
- For the second debt, the Applicant received an ex-gratia lump sum payment in relation to the termination of her employment. This lump sum was apportioned over the entire year, and included it in debt calculation. The Tribunal found that this payment also counted as income and that the debt had been calculated correctly.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt.

AAT Review Number	DOC ID	Member	Date
2016/B093818	CTH.3761.0002.5365	P White	6 June 2016

How it was decided and key facts

Outcome

The decision under review was affirmed.

Key findings

- Centrelink had averaged the Applicant's income due to a lack of information having been provided. The Applicant was unable to provide further information, because he had earned no income from any employment [16]. However, he had received payments from a Family Trust which was categorised as income.
- The Tribunal found that it was reasonable to use income averaging in the circumstances, and that the debt should be repaid.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M092358	CTH.3761.0006.0783	W Boddison	14 June 2016
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with directions that:
  - the Applicant's debts be recalculated taking into account additional payroll information that was provided to the Tribunal;
  - that the debts incurred prior to March 2012 were not recoverable as they were incurred before the Applicant was bankrupt;
  - that recovery of half of the outstanding debts (as recalculated) be waived.

Key findings

- The Applicant did not dispute the income figures that were obtained from the ATO but did dispute the timeframe over which the earnings information obtained from the ATO was applied [12]. The Tribunal made inquiries with Centrelink about how income had been applied in calculating the debt and was informed that income that was used was the entire year's income as declared in the Applicant's tax return.
- The Tribunal found:

  [Income] was averaged over the year and not only applied to the two 12 week periods [the Applicant] was working and earning. Obviously if [the Applicant] provided more payslips and pay information from [Employer] his debt, if any could be calculated more accurately but he is unwilling to approach [Employer] after the bad experiences he had there [24].

- The Tribunal found that recalculation should occur but that there would still be an overpayment and a debt to the Commonwealth.
- The Tribunal found special circumstances existed to justify a waiver of half of the debt [43]

AAT Review Number	DOC ID	Member	Date
2016/P093220	CTH.3761.0002.5171	D Gillespie	15 June 2016
How it was decided and key facts			

Outcome

The decision under review was affirmed.

Key findings

- The Applicant submitted that the earnings were not accurately included as the ATO had provided a half year figure but he had only been employed by that employer for eight days during the debt period [7].
- Centrelink averaged the Applicant's pay over a period of months.
- The Tribunal found that in lieu of payslips which accurately set out exactly what was earned in the period, Centrelink had accurately performed the earning calculation [8].
- Having considered the evidence, the Tribunal was satisfied that in the absence of further evidence as to other periods to which the payments relate, that the amount of the overpayment as calculated by Centrelink was correct [9].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt.

AAT Review Number	DOC ID	Member	Date
2016/S092111	CTH.3761.0004.7950	P Ryan	16 June 2016

How it was decided and key facts

Outcome

The decision under review was affirmed.

Key Findings

- Although the Applicant believed Centrelink had estimated her earnings and averaged these figures on a fortnightly basis to calculate the overpayment, the information she provided to the Tribunal were found to be consistent with the earnings figures used by Centrelink [22].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M093771	CTH.3761.0003.4945	W Boddison	21 June 2016

How it was decided and key facts

Outcome

- The decision under review was set aside and the matter remitted to the Chief Executive Centrelink for recalculation of the debt.
- Centrelink was directed to take into account the payslips provided by the Applicant to the Tribunal.

Key Findings

- Centrelink used ATO data to determine that the Applicant owed a debt of over $6,500 in total [12].
- The Tribunal found that the Applicant was overpaid parenting payment and newstart allowance and accepted evidence that the Applicant reported his income on some occasions but did not do so consistently or accurately on others [22].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M094051	CTH.3761.0006.1210	A Carson	29 June 2016

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration with the direction that the overpayment of DSP be recalculated by apportioning the $11,162.00 income payments to the Applicant over the relevant period against the fortnightly DSP payment periods relevant to the income payments, taking into account any working credits.
- The resulting overpayment was to be a recoverable debt.

Key findings

- The Tribunal noted the debt amount was calculated based on income information obtained from the ATO through data matching by Centrelink [2].
- On the evidence presented, including the Applicant's CUA statements and his evidence at the hearing, the Tribunal found that the income earned by the Applicant, as set out in the CUA statements, had not been taken into account in calculating his rate of DSP [12].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M095528	CTH.3761.0003.7247	A Ducrou	7 July 2016

How it was decided and key facts

Outcome

- The decisions under review were set aside and remitted to the Chief Executive Centrelink.
- Centrelink was directed that the Applicant was overpaid age pension for the period between 24 November 2012 to 21 March 2013.
- Centrelink was directed that from 7 July 2016, recovery of the outstanding balance attributable to the period from 30 January 2013 to 21 March 2013 was to be waived.
- The outstanding balance for the period from 24 November 2012 to 29 January 2013 was recoverable. The 10% penalty was to be applied to this debt.

Key Findings

- The Applicant did not dispute Centrelink's calculations or apportionment of her income using ATO data across the relevant fortnights. The Tribunal accordingly found that the Applicant had been repaid [12].
- The Tribunal checked the calculations and was satisfied they were correct [14].
- The Tribunal found that the Applicant did not properly report her income and the debt was not due to sole administrative error [17].
- Due to the Applicant's medical condition, the Tribunal decided to waive the debt from the date of the decision [26].
- However, the Tribunal found that the Applicant's condition was not so compromised that she was unable to report her income for the entire period. It accordingly found that the 10% penalty should apply to the debt for the period between 24 November 2012 to 19 January 2013.

AAT Review Number	DOC ID	Member	Date
2016/A094386	CTH.3761.0002.6365	Y Webb	7 July 2016

How it was decided and key facts

Outcome

- The decision under review was set aside.
- The matter was remitted to Centrelink with directions:
  - to recalculate the debt in relation to two employers using payslips provided at the hearing
  - to spread income for another employer over the period and take into account payslips; and
  - that the debts in relation to two other employers were calculated correctly.

Key Findings

- The Tribunal found that the ATO information in relation to the Applicant's employment with [Employer 1] for the period between 1 July 2012 to 30 June 2013 was accurate but stated:

  Centrelink has calculated the debt for [the Applicant]by dividing her total income of $32,155 by 365 to obtain a daily rate and then applying this daily rate in 14 day increments for the period 14 January 2012 to 13 July 2012. However, this is incorrect as the payslips clearly show that averaging [the Applicant's]earnings over the entire period does not reflect the fact that her earnings were much higher in the period 1 July 2011 to 15 January 2012 (being $28,487) than they were in the period 16 January 2012 to 30 June 2012 (being $3,668.23). [the Applicant]told the Tribunal – and it accepts – that [the Applicant's]hours of work per week dropped very significantly in January 2012 and that this was the reason that she made a claim for newstart allowance on 16 January 2012. This is reflected in a document confirming that [the Applicant]contacted Centrelink on 16 January 2012. The Tribunal therefore finds that the debt calculations in relation to [the Applicant's]employment with [Employer] are inaccurate and will need to be recalculated based on the payslips provided [22].

- In relation to the second period of earnings from [Employer 1], the Tribunal noted that the reason provided by the ARO for increasing the debt was incorrect and the overpayment would need to be recalculated on the basis that the $1,151 reported by the ATO would need to be 'spread' over the period between 1 July 2012 to 7 September 2012 as opposed to being deemed the income for one fortnight [24].

- The Applicant stated that [Employer 2] mis-reported her income to the ATO and she had been in a dispute with the ATO over this. The Tribunal stated:

She disputed the two payslips which showed that she earned $600 per week in the month of November 2012. However, the Tribunal has no other verifiable evidence upon which to rely to amend the earnings recorded on the payslips and by the Australian Taxation Office and in the absence of further evidence, the Tribunal finds that [the Applicant] was overpaid newstart allowance in the period 29 October 2012 to 31 January 2013 when she was employed by [Employer 2] in accordance with Centrelink's calculations [25].

- The Applicant did not dispute her income from [Employer 3] as reported by the ATO, however, the Tribunal was 'unable to reconcile the Centrelink overpayment calculations and its treatment of this income with its statement that [the Applicant] received $831 in this period but that she declared income of $2,885 to Centrelink during this period' [26].
- The Tribunal was satisfied with Centrelink's debt calculations in relation to the Applicant's income from [Employer 4].
- Ultimately, the Tribunal found that the Applicant had been overpaid newstart allowance, however, the quantum would need to be recalculated [28].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/P094544	CTH.3761.0005.8452	Dr W Budiselik	12 July 2016

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration.
- The Tribunal directed Centrelink to provide the Applicant with time to provide Employer payroll information for recalculation.
- The Tribunal directed any resultant debt from recalculation was to be recovered.

Key findings

- The Tribunal noted the debt arose due to a data match with the ATO [2].
- The Tribunal noted it had:

  …examined Centrelink policy in respect to raising debts for past periods following advice from the ATO about a person's income. In general terms Centrelink policy provides that the person to whom the debt will be applied is to be provided with an opportunity to provide evidence about their past period income. If the person does not provide evidence then the match data (i.e. that provided by the ATO) is applied to their record [14].

- The Tribunal noted it 'appreciates the pragmatic nature' of the ARO's discussion with the Applicant, however, the correct amount of the debt required consideration of actual earnings [18].
- The Tribunal did not find that any special circumstances existed to justify a waiver or the writing off of the debt.

AAT Review Number	DOC ID	Member	Date
2016/A094425	CTH.3041.0063.1449	D Benk	19 July 2016

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key Findings

- In relation to Centrelink's calculations, the Tribunal found:

  …The tribunal notes that in the calculation of the debt, Centrelink have taken the annual income as reported by the Australian Tax Office and averaged it on a fortnightly basis. Whilst it is preferable to undertake a week by week calculation, the tribunal finds that Centrelink had no other option in this matter given the passing of time and [the Applicant's] lack of contemporaneous reporting [9].

- The Tribunal reviewed and was satisfied with Centrelink's calculations [10].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M095564	CTH.3761.0006.0558	A Carson	25 July 2016
How it was decided and key facts			

Outcome

The decision under review was affirmed.

Key findings

- The Tribunal noted that Centrelink had data matched PAYG records from the ATO in respect of the Applicant's earnings from his employers and found that the earnings had not been fully taken into account when assessing his DSP payments [12].
- The Tribunal noted that Centrelink invited the Applicant to provide documentation with respect to his earnings but Centrelink reported that no further documents were received [12].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M093862	CTH.3761.0005.6315	Dr A Treble	26 July 2016
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration.
- Centrelink was directed to reconsider the decision in accordance with the Tribunal's reasons including the debt amount not being recoverable for the period of declared bankruptcy.

Key findings

- In 2016, Centrelink commenced an investigation of the Applicant's earnings based on information provided by the ATO [2].
- Centrelink relied on the ATO data to identify the discrepancy between the Applicant's declared earnings and information from the ATO [9]-[10].
- The Tribunal noted the Applicant reported fortnightly but did not report correct income from three part-time jobs [10].
- The Tribunal noted that there was no legislative power for the recovery of a debt owed by the Applicant up to the date of bankruptcy, rather the debt became provable in his bankruptcy [15].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M094826	CTH.3761.0003.2382	T Hamilton-Noy	1 August 2016
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that the debt be waived.

Key findings

- The Tribunal noted that the overpayment had been calculated based on the Applicant's annual earnings, rather than on fortnightly earnings, due to the Applicant's inability to obtain copies of her payslips for the period in question. The Tribunal stated that the Applicant's representative was still having difficulty obtaining the payslips in question at the time of the hearing [10].

- The Tribunal discussed making a request for the payslips following the hearing; however, given the findings made by the Tribunal under the waiver provisions the Tribunal decided it was not necessary to do this [10].
- The Tribunal found that the annual PAYG summaries were the best evidence of the Applicant's earnings [10].
- The Tribunal did not find that any sole administrative error existed, but found that special circumstances existed to justify a waiver of the debt [23].

AAT Review Number	DOC ID	Member	Date
2016/M095299	CTH.3036.0007.9591	A Treble	3 August 2016

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for reconsideration in accordance with directions that:
  - the Applicant did not owe a recoverable parenting payment of debt for the period between 1 July 2011 to 29 June 2012 except that her entitlement to PP between 8 March 2021 to 21 March 2012 was to be recalculated as directed and any resulting debt was to be recoverable
  - the Applicant's entitlement for the period between 30 June 2012 to 30 June 2013 was to be recalculated according to the Tribunal's directions and the recalculated debt was recoverable and
  - the Applicant did not owe a PP debt for the period between 22 August 2013 to 22 October 2013.

Key Findings

- Centrelink raised the debt following a data match with the ATO [3]. The decision was varied by an ARO to increase the debt [5].
- The Tribunal found that the Applicant was not overpaid parenting payment between 23 July 2011 to 29 June 2012 because of income from the first employer. However, the lump sum she was paid (which would need to be divided into weekly amounts) would need to be taken into account for the following income year [23].
- The Tribunal noted that the Applicant informed Centrelink when she commenced work at her second employer and notified Centrelink of her income. Accordingly, any resulting overpayment was the result of an error on Centrelink's part as the Applicant's payments did not change to reflect the change in her income [24].
- The Tribunal found that the Applicant did not properly declare her income from her second employer for the fortnight commencing 8 March 2014 [25].
- The Tribunal undertook an extensive review of the evidence and Centrelink's calculations. It appeared that a combination of bank statements, payslips and ATO averaging were used to calculate the debt.
- The Tribunal further stated:

  [The Applicant's] tax records for 2011/12 showed that she earned $5,437 from [Employer 1] in the period 23 January 2012 to 27 June 2012. Centrelink apportioned this income over the period 23 January 2012 to 27 June 2012, so that [the Applicant] was recorded as earning $475.74 per fortnight. It is evident from [the Applicant's] payslip dated 22 February 2012 that [the Applicant's] first pay period was 16 February 2012 to 22 February 2012, and that she did not commence employment on 23 January 2012, as the year to date figure is the same as the amount she was paid on 22 February 2012. The only evidence is of three wage payments in February and March 2012, totalling $878. Regarding the remaining earnings for the 2011/12 tax year from [Employer 1], [the Applicant] told the tribunal the long service leave she was paid as part of her former employment with [Employer 1] was included in her 2011/12 payment summary for this employer, but she did not receive the payment until 9 July 2012. This was the amount she reported to Centrelink on 26 July 2012, and for which she served an income maintenance period from 26 July 2012 to 5 September 2012 [27].

- The authorised review officer recorded that there was a debt owed for the period 1 November 2012 to 14 November 2012 for the same amount of $109.68, however the tribunal was unable to determine how the authorised review officer arrived at this conclusion. There is ongoing income from [Employer 2] of $650 per fortnight recorded for this fortnight. The earnings screen for [Employer 1] shows one entry for 12 November 2012 of $493.75, and another for 14 November 2012 of $637.50, both show as notifiable events, meaning that the income was reported by [the Applicant], although it is not clear when the reports occurred. A letter sent to [the Applicant] by Centrelink on 15 November 2012 shows that Centrelink had taken into account fortnightly earnings of $650 from [Employer 2], and other earned income of $1,287.50 from 1 November 2012 to 14 November 2012. There were no payslips or other information to indicate that the income apparently taken into account by Centrelink on 15 November 2012 was incorrect. The tribunal was unable to conclude that [the Applicant] was overpaid in the period 1 November 2012 to 14 November 2012 because of the wages earned from [Employer 2] and [Employer 1]. However, as the leave payment from [Employer 1] must be taken into

account in this financial year, there will now be an overpayment for this and other fortnights in the 2012/13 year [32]
- The Tribunal did not consider whether circumstances existed to justify a write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M093014	CTH.3761.0005.6577	A Treble	9 August 2016
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration.
- Centrelink was directed to recalculate the period of entitlement because 'Centrelink apportioned income across the year and attributed income to fortnights when (the Applicant) was unlikely to have been working' [19].

Key findings

- The Tribunal noted Centrelink apportioned income across the year and attributed income to fortnights when the Applicant was unlikely to have been working [19].
- The debt must be recalculated to more accurately reflect the Applicant's actual earnings [40].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M092933 and 2016/M092935	CTH.3761.0006.0838	A Ducrou	12 August 2016
How it was decided and key facts			

Outcome

- The decision under review in relation to part of the entitlement period was affirmed.
- The decision under review not to apply the 10% penalty was affirmed.
- The decisions under review to raise and recover debts for the 2012/2013 and 2013/2014 financial years were set aside and directed that Centrelink waive the recovery of the remainder of the debts.

Key findings

- The Tribunal noted that, in 2016, Centrelink commenced an investigation of the Applicant's earnings based on information provided by the ATO and on 11 Feb 2016 a decision was made to raise and recover a debt on the basis the Applicant had not correctly declared his earnings [2].
- The Tribunal noted that, in determining the overpayment, Centrelink had some payslip information from the Applicant but otherwise apportioned the income from each of the three employers across the periods recorded in the ATO records [11].
- The Tribunal was not satisfied that Centrelink had correctly calculated the debt and stated:

  …because there is now more accurate information about [the Applicant's] income from [the Employer], and because Centrelink apportioned income across the year and attributed income to fortnights when [the Applicant] was unlikely to have been working because of illness and absence overseas [19].

- The Tribunal found that Centrelink would need to recalculate the overpayment taking into account the actual wage income shown on the employer report from [Employer 1] and apportioning income from [Employer 2] across two dates. The Tribunal found that the manner in which Centrelink calculated the Applicant's income from two other employers was reasonable [10].
- The Tribunal found special circumstances existed to justify a waiver of the debts [35].

AAT Review Number	DOC ID	Member	Date
2016/A094588	CTH.3066.0002.6549	A Schiwy	18 August 2016

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key Findings

- In relation to Centrelink's calculations, the Tribunal stated:

  When Centrelink originally raised the debt they obtained gross income figures from the Australian Taxation Office and then annualised these amounts as though [the Applicant] earned each wage from each employer uniformly across the financial year. This resulted in debts of $3,070 and $5,350. [The Applicant] disputed these amounts and informed Centrelink of the start and finish dates for various employers. Centrelink then calculated his fortnightly income on a linear basis; assuming he earned the amounts in an even manner over the time periods given by [the Applicant] [13].

- The Tribunal found:

  [The Applicant] was working on a casual basis for several employers and it is unlikely that he was paid the same amount each pay period. By apportioning the payments it is possible that the debt has been overstated. However [The Applicant] also declared payment from one employer… when he received it rather than when he earned it ($3,780) due to the fact that [Employer] were late in paying him his wages. Also, from the evidence provided, it appears that [the Applicant] has declared less earnings (in total) than received and it is therefore likely that he made some errors in reporting his earnings [15].

  The tribunal decided that Centrelink's methodology in apportioning the earnings was reasonable in the circumstances and after reviewing the debt calculations provided by Centrelink the tribunal was satisfied that [the Applicant] had been overpaid newstart allowance [16].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M095910	CTH.3036.0008.1110	B Pickard	5 September 2016

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink with directions that:
  - Centrelink make reasonable efforts to obtain payroll information about the Applicant's income
  - Centrelink calculate the Applicant's income using averaging based on the data matched information if it is unable to obtain payroll information after reasonable efforts and
  - the recalculated debt was to be waived until the earlier of the date the applicant completed her course/ ceased being a full-time student or 1 December 2018.

Key Findings

- Centrelink raised the debt following a data match with the ATO [10]. The Tribunal found that Centrelink applied an averaging method to calculate the debt [12].
- The Tribunal stated:

  …Other than ask [the Applicant] to produce pay advice from her employers going back to 2010 there is no evidence that the Department has done anything about requesting information from employers about the weekly/fortnightly payments to [the Applicant] over the period of the debt. Unlike [the Applicant] the Department has statutory powers to require employers to provide this information. It may be administratively convenient for the Department to use the information provided by the data match. However, given the variable nature of [the Applicant's] income and the apparent prospective adverse effect on the calculation of [the Applicant's] entitlement, the Department must make

some reasonable effort to obtain payroll information from [the Applicant's] employers before adopting an averaging method to work out her fortnightly income [15].

[the Applicant's] evidence was that some of her previous employers may not be in business. If after reasonable efforts the Department cannot obtain payroll evidence from an employer the use of an averaging method can be adopted as was the case in Halls and Provan. Given that in some cases there is very large variability in [the Applicant's] fortnightly income I am of the view that it would be fairer to apportion the difference in actual income and reported income over the period in which that income was received rather than averaging the total actual income over the period. Adopting this method should produce a fairer result that will reflect [the Applicant's] variable income... [16].

I have some concerns about the income attributed to [the Applicant's] for the employer [Employer]. There is no verification of the amounts reported by [the Applicant] in the period 12 May 2012 to 6 July 2012. It is more probable than not that these amounts were part of the verified income paid to [the Applicant]. Accordingly, if no payroll information can be obtained from this employer the Department should adopt the verified amount of $5,979.65 as the total amount received by [the Applicant] over the period 12 May 2012 to 9 November 2012. The same methodology as set out in the preceding paragraph should be used to apportion the difference in the actual amount and the amount reported over the payment fortnights from 12 May 2012 to 9 November 2012 [17].

- The Tribunal found that as a full-time student, the Applicant did not have capacity to repay the debt and that a write off of the debt until she found employment and a means to repay the debt was justified.

AAT Review Number	DOC ID	Member	Date
2016/B097120	CTH.3761.0005.8366	P White	6 September 2016
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key findings

- The Tribunal noted that Centrelink was unable to obtain payslips for the Applicant and had averaged her gross earnings out over the debt periods, except for the period from 25 December 2010 to 9 January 2011, because the ARO had accepted that the Applicant did not work during that fortnight [8].
- The Tribunal accepted that averaging the Applicant's gross income for each financial year out over every fortnight was the correct methodology. No payslips were available [13].
- The Tribunal found that the Applicant did not declare all of her earnings and the under declarations were summarised in the ADEX debt calculation [15].
- The Tribunal did not find that any special circumstances existed to justify a write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/S096605	CTH.3761.0005.8805	S Letch	7 September 2016
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the direction that Centrelink reconsider the bank statement information provided by the Applicant, with the resultant debt (if any) to be recoverable.

Key findings

- The Applicant worked seasonally and had supplied additional evidence of her bank statements to the Tribunal that revealed what is likely after-tax deposits of her earnings, which were not previously available to Centrelink [10].
- The Tribunal stated that'[w]hilst the Centrelink approach to averaging was reasonable in the absence of better evidence, the Tribunal considered the new evidence renders the calculation unreliable' [10].
- In terms of Centrelink's reconsideration of the new material, the Tribunal noted that Centrelink may take steps to determine whether the sums paid to the Applicant's bank account were net or gross payments, and if the sums were

net of tax, Centrelink may wish to attempt to gross up the figures using information about standard marginal tax rates. Another alternative may be to calculate each net payment as a proportion of the total net payment and 'gross it up' on that basis [11].

- The Tribunal did not find that any special circumstances existed to justify a write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M095890	CTH.3039.0017.2389	E Geraghty	13 September 2016

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that no debt existed as any excess payments could not be quantified.

Key Findings

- The Tribunal found that Centrelink calculated the overpayment by averaging the 2012/2013 Employer earnings across the financial year and averaging the 2013/2014 income across the period of 1 July 2013 to 15 December 2013 [15].
- The Tribunal further found:

  After the hearing [the Applicant] provided a letter from [Employer] listing dates that he was on unpaid leave including during the period under review. This shows that he was on unpaid leave from 21 February 2013 to 22 February 2013; from 26 April 2013 to 19 August 2013; and from 28 August 2013 to 30 August 2013. Although this implies that he was paid for the periods he was not on unpaid leave, this is not stated by the employer. Clearly the averaging of his earnings across the period does not accurately reflect his fortnightly earnings in the period under review. The Tribunal concludes that no overpayment can be accurately quantified on the basis of earnings from [Employer] without details of [the Applicant's] fortnightly earnings during the period under review [16].

  The papers also contain ATO data showing [the Applicant] earned $2,264 from [Employer] in the 2013/2014 financial year. Again, Centrelink has averaged this income across the year resulting in a figure of $86.84 a fortnight. It is unlikely that this is an accurate reflection of [the Applicant's] fortnightly earnings from this employer [17].

- The Tribunal stated that no overpayment could be accurately quantified on the available information but that it was open to Centrelink to obtain details of the Applicant's actual fortnightly income to calculate and raise a further overpayment in the future [18]-[19].

AAT Review Number	DOC ID	Member	Date
2016/A098525	CTH.3761.0002.5281	A Byers	14 September 2016

How it was decided and key facts

Outcome

- The decisions under review to raise and recover parenting payment debts are affirmed.
- The decision under review to raise and recover a further parenting payment debt is varied.

Key findings

- Centrelink relied on information from a data match with the ATO:

  The usual procedure in the case of an ATO data-match involving earnings is that Centrelink subsequently contacts the relevant employer to obtain a breakdown of a person's salary or wage as paid to them. For some reason Centrelink has not done this in [the Applicant's] case. The Tribunal offered [the Applicant] the option of having her debt recalculated on this basis but warned the result could go either way. As [the Applicant] did not have a particular view, the Tribunal considers it acceptable to proceed as Centrelink has done [9].

- The Tribunal was satisfied the Applicant was overpaid parenting payment in relation to two of the debts [10].
- In relation to a further debt, the Tribunal found that the overpayment of $336.28 for the parenting payment fortnight ending 17 September 2012 is not a debt due to the absence of a notification obligation.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/A097430	CTH.3066.0002.8356	J Forgan	16 September 2016

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key Findings

- Centrelink raised the debt following a data match with the ATO [2].
- The Tribunal found that in the absence of evidence to the contrary, the Applicant undertook casual employment with all the employers whose details and income amounts were supplied by the ATO. The Tribunal found that the Applicant reported some of his earnings but that not all of his income was taken into account while calculating his rate of NSA [12].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M097861	CTH.3043.0005.5353	P White	20 September 2016

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that the debt was to be recalculated.

Key Findings

- Centrelink raised the debt following a data match with the ATO [7].
- The Tribunal stated:

  The Centrelink note to file dated 9 February 2016 is informative. It reveals a contact between [the Applicant] and the authorised review officer, made after the authorised review officer's decision had been finalised on 19 January 2016. The authorised review officer wrote:

  > I have looked at the scanned (pay slips) and they show the full $6848 earnings for the period July 2012 to 10 September 2012. The debt raised has averaged those earnings over the full year. Can the debt raised please be looked at again, as the Customer did not start payments until September 2012. I will re-open the Customer review, if there is a different outcome [14].

  The annotations made by Centrelink officers after the authorised review officer's comments, show that other decision makers persisted with the averaging out of [the Applicant's] earnings over 12 months. The review has not been re-opened by the authorised review officer, despite comments which are tantamount to an admission of error [15].

  The proper methodology was to calculate any debt on the basis of fortnightly earnings. The pay slips provided by [the Applicant] should be apportioned into Centrelink pay fortnights and any overpayment calculated on that basis [16].

- The Tribunal did not consider whether special circumstances existed to justify a write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M095985	CTH.3761.0002.3496 (Decision)	A Smith	29 September 2016

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the following directions:
  1. That the Applicant was not overpaid parenting payment in the period from 7 July 2011 to the date she returned to work in or around September 2011 and no debt arose in this period.
  2. That the Applicant owed a debt for parenting payment in the period from the date she returned to work to 20 June 2012 but that the debt must be recalculated after obtaining details of the date she returned to work and the termination payments she received in October 2011.
  3. That the portion of the debt (as recalculated) for the period from 16 Dec 2011 to 20 March 2012 be waived due to special circumstances.

Key Findings

- The review concerned whether or not the Applicant was required to repay a debt for parenting payment received over and above her entitlement in the relevant period.
- Centrelink reviewed the Applicant's entitlement as a result of a data match with the ATO in relation to her employment income. Centrelink raised the debt based on averaged payments for a period.
- The Tribunal found that the income had been incorrectly assessed and the matter should be remitted to Centrelink for investigation and confirmation of details as to when the Applicant returned to work [21]-[22].
- The Tribunal found that special circumstances existed to justify a waiver of the debt for the period from 16 Dec 2011 to 20 March 2012 [60].

AAT Review Number	DOC ID	Member	Date
2016/M09793	CTH.3039.0017.3954	C Breheny	4 October 2016

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that the Applicant's entitlement to NSA be recalculated on the basis of his actual earnings as indicated in his payslips.
- The resulting debt was recoverable.

Key Findings

- entrelink raised the debt following a data match with the ATO [2].
- In relation to the first employer, the Tribunal found that in the absence of payslips to verify his actual gross earnings each week, the gross income as provided by the ATO was to be used to calculate his rate of NSA [9].
- The Applicant provided the Tribunal with payslips from his second and third employers. Based on the payslips reviewed by the Tribunal, the Tribunal found that the Applicant had under-declared his income and had been overpaid NSA [9]-[14].
- The Tribunal, however, directed Centrelink to recalculate the debt amount using the payslip information provided by the Applicant [15]
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt

AAT Review Number	DOC ID	Member	Date
2016/B099050	CTH.3761.0002.5666	N Foster	5 October 2016
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt.

Key findings

- Applicant received an age pension debt of which was raised on the basis that the Applicant's earnings were not correctly considered in calculating her rate of age pension. Centrelink calculated missing income by subtracting the total income in Applicant's payslips from the total 2010/2011 income figure advised by ATO and averaging those sums across periods of several months [8]-[9].
- The Tribunal found that instead of averaging the sums across various fortnights, figures based on payslips should have been used when calculating the Applicant's entitlement to age pension in the relevant period [11].
- The Tribunal remitted the matter to Centrelink so that Applicant's entitlement to age pension during the overpayment period can be reassessed [12].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/P097088	CTH.3067.0003.8738	K Dordevic	11 October 2016
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink with directions that there was a recoverable YA debt of $1,389.20 for the period between 18 November 2010 to 29 June 2011 and that the Applicant's entitlement to NSA was to be recalculated on the basis of payslip evidence provided by the Applicant's employers.

Key Findings

- Centrelink raised the debt following a data match with the ATO. An ARO reduced upon the provision of payslips for the 2011 financial year by the Applicant [11].
- In relation Centrelink's calculations, the Tribunal stated:

  In this case, particularly as [the Applicant] worked on a casual basis, in order to accurately establish her correct entitlement, evidence is needed to establish what she earned in each relevant allowance fortnight. In general, the most complete, accurate and reliable evidence as to the person's employment income is from the employer's own records. Certainly, it is appropriate for the Department to rely on income evidence from the ATO if it is unable to gain more accurate information from employers. The tribunal is most concerned that there was no attempt made by the Department to gain access to information about [the Applicant's] earnings directly from her employers. Thus, the tribunal deferred the matter and requested that the Secretary exercise its power to gain access to the relevant documents [15].

- The Tribunal accordingly directed Centrelink to recalculate the debt based on payslip information for the other relevant periods provided [16].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M098318	CTH.3761.0002.1618	A Schiwy	13 October 2016

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key findings

- The debt was affirmed by the ARO on internal review.
- The Applicant argued that averaging his yearly earnings evenly over the whole year would not fairly reflect his actual earnings while he was in receipt of NA. Centrelink did not obtain any payment details from the Applicant's employer. The Applicant was able to obtain his bank records but not his weekly pay slips. The Tribunal commented this 'is not surprising given the debt occurred four years ago' [16].
- The Tribunal subsequently affirmed the ARO's decision, and discussed the evidence available to the Tribunal to be able to make the decision. The Tribunal commented:

  [the Applicant] provided his bank statements … which show the deposits of his net pay…. If he was being taxed correctly this would equate to approximately $900 per pay gross; or $1,800 per reporting period; significantly more than the averaged fortnightly amount for the year [15].

  The tribunal decided that a fair and equitable outcome would be to assume [the Applicant] earned $1,800 per fortnight for the period …This amount is still enough to preclude [the Applicant] from being entitled to newstart allowance and would therefore make no difference to the overpayment calculation [17].

- The Tribunal ultimately decided that the amount of the overpayment calculation was correct, based on the information that was available to Centrelink at the time.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/S097906	CTH.3039.0017.7660	P Jensen	18 October 2016

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink with a direction that Centrelink obtain payroll information from the Applicant's employers for the relevant period.

Key findings

- Centrelink raised the debt following a data match with the ATO [3].
- The Tribunal noted that Centrelink did not provide any evidence to support its submissions in relation to the Applicant's earnings. The Tribunal noted that Centrelink also did not provide evidence to support submissions that the Applicant worked for other employers but did not declare his earnings from those employers. The Tribunal stated: 'Centrelink has not provided any evidence from which I could be satisfied that a debt exists' [6].
- The Tribunal ultimately found:

  [The Applicant's] correct rate of pension in respect of a pension instalment fortnight depended, in part, on his earnings in respect of that fortnight. The best evidence of those earnings would be his employers' payroll records. Centrelink has the power to issue notices to those employers requiring them to provide those records and it should do so with a view to accurately calculating [the Applicant's] correct rates of pension during the period in question. Of course, if Centrelink is unable to obtain those payroll records it may need to resort to averaging [the Applicant's] earnings over longer periods [13].

  Centrelink knows how to properly investigate whether a debt exists. It also knows how to present the evidence it has gathered and the calculations it has made in a way that allows the Tribunal to properly review the decision it has made. The decision under review will be set aside and the matter will be sent back to Centrelink to allow it to commence that

process. If Centrelink decides to raise another pension debt, [the Applicant] will have review rights in respect of that decision [14].

- The Tribunal did not consider whether circumstances existed to justify a write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/S09802	CTH.3039.0018.0723	J D'arcy	26 October 2016
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt.

Key Findings

- The Tribunal noted that the Applicant's solicitor carefully examined the Applicant's earnings during the first and second debts periods. It stated:

  [The Applicant's solicitor] has carefully analysed [the Applicant's] earnings during the first and second debt periods indicating the amounts earned, the Department's apportionment of her earnings and the periods over which Mrs Barnett earned her income. [The Applicant's solicitor] noted that [the Applicant's] payslips indicate that she earned a total amount of $10,095.92 during the debt period which does not align with the Department's record of ATO earnings which show for 2012 she earned $7,381. [The Applicant's solicitor] also provided a detailed analysis of the second debt period [17].

- The Applicant's solicitor raised various errors with Centrelink's calculations [19]. The Tribunal accordingly determined that the matter be remitted to Centrelink for further investigation [20].
- The Tribunal did not consider whether circumstances existed to justify a write off or waiver of the original debt but did direct Centrelink, once it had recalculated the debt, to consider whether the remainder of the debts should be waived [21]-[22].

AAT Review Number	DOC ID	Member	Date
2016/S098742	CTH.3039.0018.3699	E Cornwell	1 November 2016
How it was decided and key facts			

Outcome

- The decision under review was varied such that there was a debt but that it was to be recalculated based on payslips provided by the Applicant.
- The recalculated debt was recoverable.

Key Findings

- The Tribunal stated: 'Centrelink has calculated the debts, based on apportioning an annualised figure provided by the Australian Taxation Office, as Centrelink did not have the payslips for the periods' [16].
- The Tribunal found:

  Having carefully considered the Centrelink overpayment calculations the tribunal was not satisfied that the debts had been accurately calculated because payslips were not available when the debts were calculated. However, there are debts, in unknown amounts, for the periods 20 December 2011 to 21 June 2012 and 5 July 2013 to 4 January 2014 [17].

- The Tribunal found that the debt for the period between 20 December 2011 to 21 June 2012 could be waived due to sole administrative error [23].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt but it stated:

  The debt therefore has to be recovered. Centrelink has calculated the debt based on apportioning an annualised figure provided by the Australian Taxation Office as Centrelink did not have the payslips for the periods [42].

  However, [the Applicant] has supplied her payslips for the debt period 5 July 2013 to 4 January 2014. The debt should be recalculated on the basis of this new information provided by Mrs Gollan [43].

AAT Review Number	DOC ID	Member	Date
2016/A099026	CTH.3761.0002.7705	Y Webb	3 November 2016
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key findings

- The Applicant undertook paid employment for three separate employers for the period of entitlement under review at [3] – [5].
- The Tribunal noted the ATO had provided information to Centrelink advising of gross amounts of income earned by the Applicant [7].
- The Applicant provided the ARO with detailed payslips regarding his employment with one employer and an Employment Separation Certificate from another Employer, and as a result the debt was recalculated [10]-[11].
- The Tribunal noted the Applicant did not dispute that the amounts notified by the ATO were inaccurate and the Tribunal found 'that the amounts of gross earnings provided by the Australian Taxation Office and detailed above at paragraph 7 are accurate' [20].
- The Tribunal was satisfied that the Applicant had been overpaid YA in the relevant period [26].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/B099388	CTH.3761.0002.5330	P Jensen	4 November 2016
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt.

Key findings

- The Tribunal commented that in the ARO's reasons Centrelink:

  … is simply stating that when the Australian Taxation Office ("the ATO") has advised it of a person's income in respect of a financial year it will raise a debt by averaging that income over the entire financial year rather than attempting to obtain evidence that would allow it to calculate the debt more accurately. If Centrelink is going to raise a debt against a social security recipient, it should take reasonable steps to calculate the debt accurately [7].

  In explaining why Centrelink elected to average [the Applicant's] income over an entire financial year, the authorised review officer did not refer to [the Applicant's] contemporaneous declarations of his income [8].

- The Tribunal noted that after the hearing it directed Centrelink to provide the Applicant's EAN screens. It did not provide those screens but it did provide an amended schedule. The Tribunal noted that the original schedule had been incomplete and misleading [10].
- The Tribunal sent the matter back to Centrelink to calculate the Applicant's overpayment. The Tribunal stated:

  However, it is also worth noting that even if I had accepted Centrelink's submissions concerning the averaging of incomes, the inclusion of allowances as income, and the prospective attribution of the company's profit, it would not have been possible to properly review Centrelink's decisions from the documentation it provided [27].

- The Tribunal found that Centrelink should take reasonable steps to calculate the debt accurately [28].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M098508	CTH.3761.0006.0261	Dr A Tremble	4 November 2016

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key Findings

- The Tribunal noted that during the period relevant to the review the Applicant had variable earnings. A data match with the ATO revealed that the Applicant's actual gross earnings were greater than the amount declared to Centrelink over the relevant period [7].
- The Tribunal noted that Centrelink subsequently asked for pay records, but the Applicant advised the company had closed down and it was not possible to obtain that information [7].
- The Tribunal noted that Centrelink calculated that [the Applicant] had been overpaid an amount by averaging his earnings over the relevant period. However, the Tribunal found it was evident from the Applicant's bank statements that he was not paid a regular amount of salary, his net pay varied, and in particular he had two large payments that he received on two separate dates [9].
- The Tribunal accepted that, in those circumstances, averaging the income was a reasonable method of determining the amount the Applicant was overpaid in the relevant period [9].
- The Tribunal did not find that any special circumstances existed to justify a write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/S098841	CTH.3043.0006.2656	K Dordevic	11 November 2016

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt based on payslips provided.
- The recalculated debt was waived on the basis of special circumstances.

Key Findings

- Centrelink raised the debt following a data match with the ATO.
- In relation to Centrelink's calculations, the Tribunal stated:

  Following a data matching exercise with the ATO, the Department was advised that [the Applicant] earned $31,557 in gross payments and allowances of $2,025 for the period 1 July 2013 to 13 May 2014 from [Employer]. The Department apportioned his [Employer] earnings over the relevant period [12].

- The Tribunal noted:

  The tribunal is most curious that the Department made no attempt to ascertain [the Applicant's] actual earnings during the relevant period and instead merely apportioned [the Applicant's] 2014 financial year income. With the evidence now available, the Secretary must recalculate [the Applicant's] entitlement to disability support pension during the relevant period. By the tribunal's calculations, this will significantly reduce the quantum of the overpayment from $12,440.47 to approximately $1,400 [14].

- The Tribunal found that special circumstances existed to justify a waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/S099385	CTH.3761.0001.5188	W Kennedy	15 November 2016

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with a decision that the Applicant owed a debt $5,271.42 which required repayment.

Key Findings

- The debt was varied by an ARO on internal review, and significantly reduced as a consequence of this review.
- In reviewing the decision, the Tribunal found that income averaging was used to calculate the debt, and deemed this to be an inappropriate way of calculating the debt, as the Applicant's earnings were lump sums received over short periods.
- The Applicant received large lump sum payments due to the nature of her job (acting), and the Tribunal accepted that the payments should be treated as ordinary income.
- The Tribunal provided an explanation of the methodology used by Centrelink in calculating the debt. It compared the use of income averaging to the methodology set out in the relevant section of the legislation. Specifically:

  Thus the correct methodology is to assess payments [the Applicant] earns, derives or receives in a given instalment period (being a fortnight) as having been earned, derived or received in that instalment period and applied accordingly to the calculation of [the Applicant's] benefits for that instalment period. There is no provision for those payments to be applied to another instalment period for the purpose of calculating her benefits for that other instalment period [18].

- The Tribunal substituted the decision with a recalculated debt using the above methodology.
- The Tribunal decided that the debt must be repaid. The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/A099902	CTH.3066.0003.1127	S Cullimore	17 November 2016

How it was decided and key facts

Outcome

- The decision was set aside and remitted to Centrelink for recalculation of the debt.
- The recalculated debt was to be recovered in full.

Key Findings

- Centrelink raised the debt following a data match with the ATO. The Applicant provided payslips, however, the ARO affirmed the debt periods and amounts [18]-[20].
- The Tribunal stated:

  However, there are significant disparities between the periods for which some of this income has been taken into account in calculating the NSA debts and the actual payslip data, when that data is considered in conjunction with the verbal evidence of [the Applicant] [22].

- The Tribunal made various findings in relation to the debt calculations and income periods based on payslips provided by the Applicant.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt

AAT Review Number	DOC ID	Member	Date
2016/A097377	CTH.3039.0019.3078	Harvey	19 November 2016

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Chief Executive Centrelink for recalculation of the debt based on the best evidence available of the Applicant's income in the relevant fortnights.
- Centrelink was directed to document the findings in a way that could be understood by a lay person.
- Centrelink was directed to also consider whether the recalculated debt should be waived on the basis of special circumstances.

Key Findings

- In relation to Centrelink's calculations and evidence provided, the Tribunal stated:
- Taken as a whole, these documents do no more than present an assertion that [the Applicant] was overpaid $20,046.09 or perhaps, that the debt is of this amount because Centrelink's computer says that it is of this amount. They are not documents which permit an independent check of whatever process the Secretary used to determine the amount that was recoverable [10].
- In relation to the second employer, the Tribunal found that no regard was given to two of the three payslips provided by the Applicant [13].
- The Tribunal found that 'no objective evidence was obtained' from the third employer [14].
- The Tribunal ultimately found:

  As I noted above, the documents do not set out how the figure of $20,046.09 was reached. However, the ADEX documents suggest that the fortnightly income amounts that were taken into account were worked out by apportioning an annual amount evenly into each fortnight. The relevant Rate Calculator, in section 1067G, requires regard to be had to the person's fortnightly amount of income and section 1073B requires that a person's income in a particular instalment fortnight is taken to be earned evenly on each day in the fortnight [18].

  The payslips, particularly those from Uniting Communities, show that [the Applicant] earned varying amounts in each fortnight, sometimes earning nothing. A calculation of her rate according to law must have regard to her income in each distinct instalment fortnight, not to her average fortnightly amount, viewed over a tax year [19].

  ...

  To exercise a debt recovery power in respect of a particular amount, the Secretary must be satisfied that the particular amount is a debt under the Act. In my view, the Secretary must be able to justify, on review, how that satisfaction was reached in relation to that particular amount. The Secretary cannot, and I am sure does not, simply declare some arbitrary amount to be a debt - a calculation process takes place, based on findings of fact as to the relevant matters, such as income amounts in individual fortnights. However, for the operative decision to be a proper and fair one, that process must be documented (or at least be capable of being documented) in a way which is capable of being checked by a reasonably informed and competent person. The decision in this case does not pass that fundamental test and I will not affirm it [22].

- Apart from directing Centrelink to consider whether the recalculated debt could be waived on the basis of special circumstances, the Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/B100552	CTH.3761.0006.0770	J Devereux	2 December 2016

How it was decided and key facts

Outcome

- The decisions under review were set aside and remitted to Centrelink with the direction that Centrelink contact the Applicant's employers to establish the dates the Applicant was employed and the earnings he received from those employers.

- Centrelink was directed to determine whether the Applicant was in receipt of YA during the periods he was employed and, if so, whether he failed to correctly declare to Centrelink details of his earnings.

Key Findings

- The Tribunal noted that, on the basis of information received from the ATO, Centrelink found the Applicant failed to declare income from one of his Employers [8].
- The Applicant was invited by the Tribunal to provide evidence of the dates he was employed and he sent a copy of his PAYG summary, which confirmed the dates the Applicant told the Tribunal he was working for the employer. The payment summary listed a higher amount of earnings than that which Centrelink had noted as verified income details from that Employer [9]-[10].
- The Tribunal found the Applicant had 'raised sufficient doubts in this case as to the accuracy of the information Centrelink used to raise the two debts' and the 'fairest thing to do is to set aside the two debts and remit the matter to Centrelink' [12].
- The Tribunal did not find that any special circumstances existed to justify a write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/B100138	CTH.3761.0005.7670	B Pickard	5 December 2016
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration with the following directions:
  - Centrelink make reasonable efforts to obtain payroll or other information about the Applicant's income from the Applicant's employer and recalculate the amount of parenting payment payable to the Applicant using that information;
  - if, after reasonable efforts, the Centrelink was unable to obtain payroll or other information from the Employer, Centrelink should recalculate the amount of parenting payment payable in accordance with directions set out in [16];
  - Centrelink disregard PAYG summary information when recalculating any parenting payment available.

Key Findings

- The Tribunal found '…it was apparent that the Department made no effort to clarify the matter of the two group certificates with the employer. A very quick enquiry with the employer would have clarified the issue' [13].
- The Tribunal directed Centrelink that '…the PAYG payment summary provided by the Applicant should be disregarded in any income calculations for the debt period' [13].
- The Tribunal found:

  Averaging income over a period such as a financial year can result in a skewing of the pension or benefit rate that is payable and as a consequence lead to overpayments that may not otherwise occur if the actual income received in the benefit payment fortnight was used to calculate the fortnightly rate of payment [14].

- The Tribunal did not find that any special circumstances existed to justify a write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M099489	CTH.3043.0006.6025	A Smith	8 December 2016
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink with directions to apportion the Applicant's income from one employer across the correct Centrelink fortnights and apportion the Applicant's income from his other employer according to payslips provided by him.
- The recalculated debt remained recoverable.

Key Findings

- The Tribunal was satisfied that Centrelink had used the correct earnings to calculate the Applicant's debt for one employer [21].

- Payslip information from two other employers, however, suggested that the Applicant's income had been incorrectly apportioned across the wrong periods [22]-[23].
- In relation to another employer, the Tribunal stated:

  Centrelink used the information obtained from the Australian Taxation Office to [the Applicant's] earnings from [Employer 1] for the period from 18 October 2012 to 30 June 2013. [the Applicant] provided evidence from [Employer 1] verifying that the earnings of $4,511 (being long service leave claimed during a period he was unemployed) were paid for the period from 1 October 2012 to 22 October 2012 (page A2). The Tribunal was satisfied these earnings should be apportioned across that period [24].

- The Tribunal also stated:

  Finally, in relation to the earnings from [Employer 2], the Tribunal discussed with [the Applicant] that some of these earnings were still being averaged across the 2013/2014 year in accordance with the information from the Australian Taxation Office. [The Applicant] believed he had provided all the relevant [Employer 2] payslips to Centrelink. The Tribunal was not provided with any payslips from this employer, although the authorised review officer indicated actual pay details were obtained. The EAN screen for [Employer 2] shows earnings of $1,348 have been averaged to $51.70 across the 2013/2014 year. Given [the Applicant] earned a similar amount in an earlier three week period in June 2013, the Tribunal infers the apportionment across the year is incorrect. In light of the Tribunal's determination that the matter is to be sent back to Centrelink for recalculation, the Tribunal considered it more efficient to finalise the decision and direct that [the Applicant] be provided the opportunity to clarify the earnings from [Employer 2] (and provide the missing payslips if necessary) [27].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M099314; 2016/M099317	CTH.3039.0019.7587	N Campbell	15 December 2016
How it was decided and key facts			

Outcome

- The decisions under review were set aside and substituted with new decisions to waive the whole of the carer payment for the period from 5 October 2011 to 25 June 2014 and the parenting payment debt for the period between 22 September 2011 to 27 July 2012 due to special circumstances.

Key Findings

- In relation to Centrelink's calculations, the Tribunal stated:

  Centrelink have obtained financial year gross income amounts for [the Applicant] through a data match with the Australian Taxation Office. It appears Centrelink has then applied these financial year amounts proportionally to the relevant periods of the stated overpayment. [The Applicant] gave evidence that he received personal leave and annual leave payments for approximately 23 February 2011 to 24 September 2011. He then received long service leave at half pay from 25 September 2011 until about 13 March 2012. [The Applicant] then commenced working two days per week. In about April 2012, he increased to three days per week and from May 2012 he worked four shifts per week. These changes in hours, and therefore changes in income, are not reflected in Centrelink's calculation of [the Applicant's] fortnightly income. …any calculation from Centrelink would need to be based on the fortnightly gross income amounts received by [the Applicant] during this period and not by an apportionment of income provided by the Australian Taxation Office for the full financial year [15].

- The Tribunal was satisfied that there were likely to be overpayments during the relevant periods as Centrelink failed to take all of the Applicant's combined income into account. [19].
- The Tribunal found that special circumstances existed to justify a waiver of the recalculated debts in their entirety.

AAT Review Number	DOC ID	Member	Date
2016/S097929	CTH.3761.0002.5941	J Leonard	26 December 2016

How it was decided and key facts

Outcome

- The decision under review was set aside.
- The matter is sent back to the Centrelink for reconsideration in accordance with the direction that the debt be recalculated having regard to the Applicant's payslips.

Key Findings

- In reassessing the Applicant's entitlement to youth allowance, an overpayment was calculated by Centrelink on the basis that the earnings from these two employers were apportioned over the relevant financial years [10].
- The Applicant provided payslips to the Tribunal [11].
- The Tribunal noted:

  The correct way to determine a person's entitlement to youth allowance for a period is to have regard to the gross amount earned, derived or received by the person in respect of each fortnight in the relevant period. The result can be very different if the gross earnings are apportioned equally over a financial year, as Centrelink has done in this case. Centrelink did not obtain details of [the Applicant's] gross income earned each fortnight and the Tribunal finds that the overpayment has not been correctly calculated [14].

- The Tribunal remitted the matter to Centrelink for reassessment [15].
- An amount was garnisheed from the Applicant's income tax return [19].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/B103163	CTH.3761.0006.0215	P White	4 January 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that the debt be recalculated in accordance with the Applicant's commencement of employment on 6 September 2012.

Key Findings

- The Tribunal noted that the ARO finalised their review without information from the Applicant about when she commenced her employment and the debt was calculated based on her averaged earnings from 11 July 2012, '…rather than the actual verified fortnightly earnings' [12].
- The Tribunal stated: 'In the view of the tribunal, Centrelink should use verified fortnightly earnings information when calculating the overpayment, now that the information is available' [15].
- The Tribunal did not find that any special circumstances existed to justify a write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/S098915; 2016/S098913	CTH.3039.0019.7031	T Bubutievski	4 January 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt on the basis of the Applicant's actual earning patterns.

Key Findings

- The Tribunal compared the income declared by Applicant 1 with the income shown by his employer and the income

maintained in the debt calculation [14].

- The Tribunal found that the Applicants were overpaid as they had under-declared Applicant 1's income as they only reported income for the second week of every fortnight rather than a consolidated amount. However, the Tribunal stated:

  …Nonetheless, the tribunal is not satisfied about the amount of the overpayment for a number of reasons - firstly, in the period ending 28 September 2012 [Applicant 1] only had gross earnings, including allowances, of $2,378.91. As the income cut out amount for a partnered person receiving age pension at that time was $2,597.60 per fortnight [the Applicants] would have had some entitlement that fortnight. Secondly, other than a single payment made in the week ending 15 May 2013 [Applicant 1] did not work and did not have income after 5 April 2013, but Centrelink has continued to maintain income of $3,396.70 per fortnight until 19 June 2013. [The Applicant's] would have been entitled to pension between 6 April 2013 and 19 June 2013. Thirdly, there is the issue of the allowances…[15].

- The Tribunal also stated that the amount of overpayments will need to be calculated 'as Centrelink has simply averaged [the Applicant's] grossed up taxable income over the full period rather than considering the pattern in which it was earned' [17].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/S100372	CTH.3761.0002.5242	D Benk	5 January 2017

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key Findings

- Centrelink averaged the income of each employer and applied it against each fortnight to determine whether an overpayment had been made using ATO records. The Tribunal stated: 'Whilst this approach is entirely legitimate it is not one favoured by the tribunal, particularly for casual employees' [6].
- The Tribunal independently checked the debt calculations and confirmed them to be correct [13]
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/A102266	CTH.3066.0003.2267	M Kennedy	10 January 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that there was no debt.

Key Findings

- In relation to the debts, the Tribunal stated:

  The debts are said to arise because Centrelink received data from the Australian Taxation Office (ATO) that may or may not have been consistent with accurate reporting by [the Applicant's] income from employment during those periods. Centrelink has recalculated [the Applicant's] entitlement to Youth Allowance during those periods on an assumption that [the Applicant] received income from employment from a number of sources in regular and equal amounts, and was working at all matched employers while in receipt of Youth Allowance. These assumptions are incorrect [3].

- The Tribunal also stated:

  …where a person fails to or inaccurately reports income from employment, overpayment of Youth Allowance is possible, with a consequential debt to the Commonwealth. Likewise, particularly in the case of students and causal workers, if taxation data of annual income amounts is relied upon and assumed to have been received in equal fortnightly

instalments across a financial year, the rate of Youth Allowance and consequential debts arising from that calculation process will almost inevitably be incorrect [6].

- Centrelink averaged the Applicant's income when calculating whether there was a debt. The debt amount was incorrect.
- The Tribunal stated:

  I will set Centrelink's decision aside on the basis that there is no debt demonstrated to my satisfaction on the evidence before me in light of the errors, inaccuracy and false assumptions I have identified in these reason [18].

- The Tribunal made no formal directions of Centrelink, and it remained open to Centrelink to take whatever steps it considered appropriate to reconsider the matter [19].

AAT Review Number	DOC ID	Member	Date
2016/M101037	CTH.3761.0005.6405	P White	13 January 2017
How it was decided and key facts			

Outcome

- The decisions under review were affirmed.

Key Findings

- The Tribunal noted that Centrelink undertook data matches throughout 2016 with the ATO, and had accepted the PAYG data match review as accurate. The Tribunal noted that Centrelink did not seek to obtain detailed payroll information from any of the Applicant's eight employers, but did ask the Applicant to respond to discrepancies which had been detected from the data match. The Applicant, however, failed to respond and did not provide any payslips [13].
- The Tribunal stated 'the income test for parenting payment and newstart allowance is a fortnightly income test and not an annual income test' [13].
- The Tribunal found that, not only did the Applicant underreport his earnings, he 'completely failed to report any earnings' at various times [14].
- The Tribunal stated:

  Centrelink has averaged the PAYG data in the absence of fortnightly payslips. That is a reasonable course of action because there is no other practical way to calculate the overpayments.

  ...

  The tribunal accepts the Centrelink case which posits that it is permissible to average the earnings from each employer over each fortnight in the debt period. Further, it may very well be the case that a recalculation on fortnightly earnings would result in higher debts [18]-[19].

- The Tribunal noted Centrelink used computer software to calculate the overpayments which included the use of the Casual Earning Apportionment Took, which apportioned the Applicant's averaged income into Centrelink pay fortnights. The Tribunal opined there was no data entry error and the Tribunal was entitled to rely on the computer software as there was '...no other way to calculate the overpayments' [21].
- The Tribunal did not find that any special circumstances existed to justify a write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M101497	CTH.3761.0005.6379	P Noonan	25 January 2017
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key Findings

- The Tribunal noted that Centrelink did not have access to the Applicant's payslips or earnings records for each relevant fortnight and his earnings were '...apportioned from the group certificate records held by the Australian Taxation Office on a daily basis for the period of employment with each of his employers' [12].

- The Tribunal considered '…the result of this approach, in this case, to be accurate when determining [the Applicant's] potential overpayment' and found the ARO had correctly calculated the overpayment amounts.
- The Tribunal did not find that any special circumstances existed to justify a write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/S101538	CTH.3761.0002.8206	P White	6 February 2017
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key Findings

- Centrelink raised the debt following a data match with ATO.
- An ARO affirmed the decision.
- The Tribunal decided against adjourning the review for the Applicant to obtain detailed fortnightly payslips noting:

  It is by no means certain that the debts would be reduced by the use of detailed fortnightly payroll information. Centrelink has certainly averaged some of the income over relevant pay fortnights, but [the Applicant] is able to take advantage of income free areas, with that type of methodology. Further he has promised to obtain this information and has failed to do so [12].

- The Tribunal accepted Centrelink's assertion that Centrelink had attempted to contact the Applicant but was unsuccessful [13].
- The Tribunal noted:

  It appears that Centrelink has used fortnightly income information where it is available, but has otherwise averaged the gross earnings over each of the relevant fortnights in which [the Applicant] worked for particular fortnights. In the view of the tribunal, that is an acceptable methodology in the absence of any information from [the Applicant] about specific fortnightly rates of pay [18].

- The Tribunal noted that Centrelink officers 'applied a great deal of care in the calculation of the debs and generally made favourable allowances for [the Applicant]' [20].
- The Tribunal concluded the debts were correctly calculated [24].
- The Tribunal found that no administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/B101737	CTH.3053.0140.3325	B Pickard	7 February 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink with redirections that:
  - Centrelink make reasonable efforts to obtain payroll information about the Applicant's income and recalculate the debt using this information.
  - if after reasonable efforts Centrelink was unable to obtain payroll or other information it should recalculate the debt by adopting an averaging method as it had done
  - if after recalculation there is a debt in the period 23 May 2011 to 24 August 2011, it must be waived.

Key Findings

- The Tribunal noted that Centrelink used annual income information from the ATO and averaged the income over the period in which the income was paid [7].
- The Tribunal cited with approval other Tribunal decisions where it was decided that averaging was found appropriate in the circumstances (Halls and Secretary, Department of Education, Employment and Workplace Relations [2012] AATA 802 and Provan and Secretary, Department of Families, Community Services and Indigenous Affairs [2006] AATA 831) [8].

- The Tribunal noted that Centrelink had requested the Applicant to provide pay information from 2011 but noted that:

  Unlike [the Applicant] the Department has statutory powers to require employers to provide this information. While it may be administratively convenient for the Department to use the information provided by the ATO the Department must make some reasonable effort to obtain payroll information from [the Applicant's] employers before adopting an averaging method to work out her fortnightly income. This is consistent with tribunal's approach in Halls and Provan that averaging should only be adopted where there is no other available information [9].

- The Tribunal found that there was administrative error which existed to justify the write off or waiver of a portion of the debt [15].

AAT Review Number	DOC ID	Member	Date
2016/H102408	CTH.3761.0006.1098	M Baulch	16 February 2017

How it was decided and key facts

Outcome

- The debt arising from the period 16 July 2010 to 30 June 2011 was set aside upon review and remitted back to Centrelink for reconsideration in accordance with directions that:
  - Centrelink obtain relevant payroll information from employers;
  - The debt be recalculated on receipt of obtained information; and
  - Any resulting debt be recovered from the Applicant.
- The debt arising from the period 10 July 2013 to 21 January 2014 was affirmed upon review.

Key Findings

- In relation to the debt arising from the period 16 July 2010 to 30 June 2011, the Tribunal noted that Centrelink calculated the debt by averaging the earnings from all of the Applicant's employers over the entire period covered by the debt, other than the periods where verified earnings had previously been recorded [17].
- The Tribunal found it 'was not persuaded that the debt amount calculated is correct' [16].
- The Tribunal noted that the Applicant had made

  reasonable attempts to obtain the information, but is not able to get sufficient information for an accurate debt calculation to be undertaken. Centrelink has powers under the social security law to gather the information that would be required. [The Applicant] has no such powers. I formed the view that the most reasonable approach would be for Centrelink to obtain information about [the Applicant's] earnings from his employers, and recalculate the debt on the basis of that information.

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/B102651	CTH.3761.0003.4940	P Jensen	16 February 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration.
- Centrelink was directed to issue a notice to the Applicant's employer to provide pay records and make reasonable efforts to ensure compliance with the notice, notify the Applicant if the employer fails to provide records and give her three weeks to provide bank statements showing her earnings, and failing both these options, to recalculate the debt on the basis that the Applicant earned $4,462 at a constant daily rate throughout the relevant period.
- Centrelink was further directed to provide the Applicant with apportioned earnings schedules, EANS screens, a MultiCal schedule, an Entitlement Calculations schedule and a Debt Report schedule in respect of the recalculated debt.
- Centrelink was directed that $500 of the recalculated debt was to be waived and the balance recovered.

Key Findings

- The Tribunal noted that Centrelink chose not to exercise its statutory powers to seek income information from the Applicant's employers but instead calculated the debt on the assumption that the Applicant had been paid at a constant

rate by her employers during the relevant period. The Tribunal noted that Centrelink: '…proceeded on that basis notwithstanding the fact that [the Applicant] had contemporaneously declared fluctuating earnings from each of those employers and she had not been employed by any of those employers throughout 2010-11' [4].

- The Tribunal noted, in relation to the first employer, that Centrelink did not provide the evidence it should have, including how it processed the earnings information that Applicant had provided them via an apportioned earnings schedule and earnings screen [5].
- The Tribunal accepted the Applicant's suggestion that if Centrelink was unable to obtain earnings information from her second employer and she was not able to provide bank statements demonstrating her earnings, Centrelink could calculate her debt on the basis of apportioned income. The Tribunal noted that '[i]t would be unusual to calculate a person's gross weekly earnings in that manner, but [the Applicant] wants Centrelink to calculate her debt correctly, and that is a reasonable request' [6].
- The Tribunal accepted earnings information in relation to the Applicant's third employer. The Tribunal stated that while it was clear the Applicant would owe a debt but the quantum of that debt was unclear [7].
- The Tribunal further criticised Centrelink's failure to provide information to the Applicant and to the Tribunal and noted:

  To date, Centrelink has not provided that information to [the Applicant], and it has not provided that information to this Tribunal. Centrelink provided [the Applicant] and the Tribunal with the debt apportionment schedules in support of the debt amount that Centrelink now submits is incorrect. It did not provide the debt appointment schedules in support of the debt amount that it now submits is correct. It did not provide earning screens, an Entitlement Calculations schedule or a Debt Report schedule… Put simply, Centrelink did not provide the information necessary to enable this Tribunal to conduct a meaningful review of the decision to raise a debt of $4,532.69. Further, throughout the entire process that has taken more than a year, Centrelink has not exercised its statutory power to obtain the information it needed to correctly calculate the debt amount [12].

  [The Applicant] stated, and I accept, that she has spent an enormous amount of time and effort trying to understand and check the factual basis of Centrelink's calculations and the calculations themselves. It is clear that Centrelink has never provided her with the information she needed to undertake that task, but she could not have known that at the time. Centrelink controlled the process. [The Applicant] was trying to understand the process. Worse still, Centrelink provided her with information that was simply confusing. For example, it provided her with an ADEX Debt Schedule Report (which is different to a Debt Report schedule) that bore no relationship to her circumstances. It transpired that Centrelink had given her someone else's ADEX Debt Schedule Report [13].

- The Tribunal found that 'Centrelink's ongoing failure to disclosure the information that was needed to undertake a meaningful review of its decision, including its failure to provide that information to [the] Tribunal, and the consequential wasting of [the Applicant's] time and effort' constituted special circumstances and warranted that $500 of the debt be waived [14].

AAT Review Number	DOC ID	Member	Date
2016/M102583	CTH.0032.0002.0020	R King	17 February 2017

How it was decided and key facts

Outcome

- The decision under review was set aside.
- The matter was remitted to Centrelink for recalculation of the debt.

Key Findings

- Debt was calculated and raised by obtaining ATO information and dividing the total income reported by the number of fortnights in the year (at [2]).
- The Tribunal found the applicant was entitled to the payment for most of the relevant period and Centrelink's calculations were therefore incorrect (at [12]-[14]).
- In relation to the period from 17 March 2015 to 16 June 2015, the Tribunal asked Centrelink to recalculate whether the applicant owed a debt as she had returned to part-time work (at [14]).
- If the applicant did incur a debt, it would have been the result of her failure to accurately report her income and a recovery fee would therefore apply in those circumstances (at [18]).
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt.

AAT Review Number	DOC ID	Member	Date
2016/B102594 & 2016/ B102595	CTH.3761.0001.0525	B Pickard	20 February 2017

How it was decided and key facts

Outcome

- The decision under review was affirmed.
- Centrelink used income averaging to determine whether there was a debt, in lieu of other information.

Key findings

- The Tribunal found that the Department's calculations were correct.
- In discussing whether the debt had been correctly calculated, and whether income averaging was appropriate, the Tribunal commented:

  The relevant income test modules for working out a person's newstart allowance or austudy payment entitlement start with using a person's income in a payment fortnight. Where this information is unavailable the averaging method can be adopted2. There is no evidence in the Department's documents that it has attempted to obtain payroll information from [the Applicant's] employers. It has a statutory power to do this. Ordinarily this should be done however the averaging method when applied to [the Applicant's] calculations results in small weekly amounts that have very little effect on the amount of overpayment of his newstart allowance and austudy payment. Using the actual fortnightly amounts obtained from the employers would in my view result in a decrease in [the Applicant's] entitlement and as such I consider the adoption of averaging in [the Applicant's] case should be in the circumstances preferred as it is beneficial to [the Applicant] [14].

- The Tribunal ultimately decided that income averaging could be used in this circumstance, as it was beneficial to the Applicant.
- The Tribunal did not find that any special circumstances existed to justify a waiver or the writing off of the debt.

AAT Review Number	DOC ID	Member	Date
2017/A105567	CTH.3066.0003.3286	S Cullimore	20 February 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted back to Centrelink for recalculation on the basis that the Applicant's income fluctuated over the debt period.

Key Findings

- The Applicant was a recipient of the DSP, mobility allowance and FTB.
- The Tribunal was satisfied that the Applicant's income had been averaged over the alleged debt period.
- No payslips were ever provided, however the Tribunal directed that Centrelink recalculate the Applicant's debt
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt [54].

AAT Review Number	DOC ID	Member	Date
2017/B105503	CTH.0032.0002.0135	P White	21 February 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with decision that debt was to be recalculated and recovered based on verified fortnightly earnings and that the 10% penalty fee was not to be applied.

Key Findings

- The Applicant had not declared any earnings to Centrelink but a data match with ATO revealed she had earned over $9,000 (at [7]-[9]).
- The income according to ATO was averaged over the debt periods and recalculated for some periods based on medical certificates provided by the Applicant. The ARO advised the applicant that the debt could be recalculated for the other periods based on verified income if she could provide payslips [(at [9]-[11]).
- The Tribunal stated:

  As the youth allowance income test is a fortnightly income test, Centrelink ought to recalculate the debt on the verified fortnightly income information, which is now available (at [12]).

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/B102850	CTH.3761.0005.8076	P White	27 February 2017
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key Findings

- The Tribunal noted 'Centrelink undertook a PAYG data match with the ATO' in 2016 and subsequently averaged out the Applicant's earnings over the debt period based on the data match amount [8], [10].
- At the hearing, the Applicant could not produce any payslips to evidence his precise fortnightly earnings during the debt period, which the Tribunal considered was 'understandable in view of the amount of time that has elapsed' [12].
- The Tribunal accepted the accuracy of the PAYG Summary held by the ATO as evidence of the fact that the Applicant earned $1,722.06 more in income than he declared to Centrelink and concluded the Applicant 'was probably overpaid' [14].
- The Tribunal found the PAYG Summary sourced from the ATO was the best and only evidence available and, in the absence of any information about fortnightly earnings, it was reasonable to average out the earnings over the debt period [15].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M103100	CTH.3761.0006.1274	R Anderson	28 February 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink with the direction to obtain dates and payroll information from the Applicant's employers and recalculate on receipt of that information, with the resultant debt to be recoverable.

Key Findings

- The Tribunal noted that, as a result of a data matching process in July 2016, Centrelink undertook a review of entitlements to NSA in the 2012/13 year. Consequently, Centrelink raised and recovered a NSA debt, which was later affirmed by an ARO [3]-[4].
- The Tribunal noted that the Applicant's employer had recorded a certain period of employment. The Tribunal considered this was likely due to inconvenience on the part of the employer and was unlikely to accurately reflect the actual period in which the Applicant worked [13].
- The Tribunal found that in the absence of information confirming the actual dates of employment the Tribunal was unable to accurately quantify the debt amount [14].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/H105450	CTH.3053.0143.7530	S Cullimore	28 February 2017

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key Findings

- Centrelink raised the debt following a data match with ATO.
- The debt was recalculated and reduced after the provision of payslips from one job [24]. An ARO affirmed the decision.
- The Applicant had worked three different jobs during the debt period.
- The Tribunal noted that the Applicant provided all relevant payslips for one job at the ARO stage which clearly identified what income he earned during what period [18]. The Tribunal noted that earnings for this job had not been averaged to create a robodebt [25]. The Tribunal was satisfied that the debt arising from this employment had been calculated correctly [37].
- The Applicant stated that he was unable to obtain payslips from two other employers [21]. In relation to one of these employers, the Tribunal noted:

  While the Tribunal cannot establish from the file exactly how that income has been used to produce that debt, over each fortnight, and it may well have been averaged over the whole of the relevant financial year, the Tribunal is not satisfied that there is any error in raising this debt in these circumstances [41].

- The Tribunal found that the Applicant had underreported and at times did not report at all [34], [42].
- The Tribunal concluded that it was reasonably satisfied that the debt was 'more likely than not to be correct' [43].
- The Tribunal found that no administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S105385	CTH.3039.0021.0734	K Dordevic	1 March 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted back to Centrelink on the basis that the there is a NSA debt and the debt is written off until the Applicant is in receipt of social security payment or employment income.
  Key Findings
- A data match with the ATO revealed a discrepancy in the income amounts that the Applicant had received.
- An ARO affirmed the debt amount on internal review.
- Centrelink apportioned the Applicant's income over the year, in lieu of payslip information.
- The Tribunal commented:

  The apportionment method involves an approximation of earnings in each fortnight and can be expected to produce reasonably accurate figures across a substantial period; one would expect that overestimates of income produced by the method in some fortnights would be more or less balanced by underestimates in others. However, the apportionment method treats the person as earning a constant amount every day in a wage fortnight and in [the Applicant]'s case, over the financial year. Actual working patterns are rarely so neat [13].

- The Tribunal was unable to ascertain any employment information as the Applicant did not retain any payslips, and the employer had been deregistered. In lieu of this the Tribunal had no other option but to use income averaging. In the circumstances, the Tribunal was satisfied that the calculations were correct.
- The Tribunal found that circumstances existed to justify a write off of the debt until the Applicant received a social security payment or employment income.

AAT Review Number	DOC ID	Member	Date
2016/M101233	CTH.3761.0003.1542	P Noonan	2 March 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the direction to recalculate the debt taking into account actual wage income shown on employer reports, with any resulting debt to be recoverable.

Key Findings

- The Tribunal noted that Centrelink had raised the debt according to the earnings information supplied by the ATO [18].
- The Applicant was not willing to supply Centrelink with his earnings information and would only submit tables that he had compiled [8].
- The Tribunal subsequently obtained detailed pay records from the Applicant's employers for the period in question, which showed that the Applicant did not receive income over certain periods [9].
- The Tribunal stated:

  Overall the tribunal was not satisfied that Centrelink has correctly calculated the debt in this case because there is now more accurate information about [the Applicant's] income from employment. Centrelink have apportioned income across the year and attributed income to fortnights when [the Applicant] was clearly not working. Centrelink will need to recalculate the overpayment taking into account the actual wage income shown on the employer reports [10].

- The Tribunal did not find that any sole administrative error or special circumstances existed to justify a waiver or the writing off of the debt.

AAT Review Number	DOC ID	Member	Date
2016/B103268	CTH.3761.0006.0202	N Foster	7 March 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration with directions that:
  - there was debt of NSA for entitlement period 1;
  - Centrelink was to verify the Applicant's income from employment for entitlement period 2 by directly requesting information from his employers; and
  - the Applicant's entitlement to parenting payment and NSA across entitlement period 1 and 2 be reassessed using his actual fortnightly income from each of his employers, rather than average income figures.

Key Findings

- The Tribunal noted that the Applicant expressed particular concern that Centrelink's current debt calculations were based on averaged income figures and included income that he had earned in periods when not receiving Centrelink payments. The Applicant advised he had previously raised this concern with Centrelink and was advised that needed to obtain a fortnightly breakdown from his employers, which he had been unable to do [4].
- The Tribunal was satisfied the debts were incorrect [6].
- The Tribunal observed that Centrelink had wide-reaching statutory powers that allow it to obtain income information from employers and such powers had been routinely used in the past to verify the income of its customers. The Tribunal therefore directed that Centrelink request the necessary income information from the Applicant's employers, 'rather than the onus be placed on [the Applicant]' [9].
- The Tribunal did not find that any special circumstances existed to justify a write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/S104681	CTH.3761.0001.0223	T Carney	8 March 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink to be redetermined in light of directions that:
  a) No debt or debt component is able to be founded on extrapolations from ATO records;
  b) The earnings components of any recalculated debts as may be raised must be based on and confined to any fortnightly salary records obtainable in the exercise of statutory powers to do so; and
  c) Debt amounts (if any) as so varied are recoverable debts (not able to be waived).

Key Findings

- The Tribunal noted that Centrelink for its part argued that in the absence of payslips kept by the Applicant, it is appropriate to extrapolate annual ATO earnings figures as average amounts of income in relevant YA rate calculation payment periods [2].
- The Tribunal referred to Centrelink's submission which noted relevantly:

  It is a normal part of the Department's responsibilities and processes to check to see if a recipient has fulfilled their obligation to advise of a change in circumstance.

  One way of doing this is through data matching with the ATO and this has been occurring since 1990.

  The department engages with recipients where there is a difference in the income the recipient reported to the department and the income recorded by the Australian Taxation Office.

  The responsibility to explain any differences between the income identified from data matching and the information held by the department is, and always has been, on the recipient in the first instance.

  Previously, where a recipient failed to respond or was unable to provide the required information, the department would request additional information from third parties on their behalf. Recipients now carry more of that responsibility. [31]

- The Tribunal found that the changed practice as outlined above did not absolve Centrelink from its legal obligation to obtain sufficient information to found a debt in the event that the 'first instance' contact with the recipient is unable to unearth the essential information about actual fortnightly earnings (italics in original) [33].

- The Tribunal noted:

  that it is a matter of record that when [the Applicant] did supply the information referred to in the final paragraph [payslips for July 2010 to July 2012], Centrelink has chosen not to change the decision, as it was able to do, instead urging me to find that information not to be material to the size of the debt [35].

- The Tribunal also noted the following from Centrelink's supplementary submission:

  … Further, when taking into account the Mcdonald ruling, the Tribunal should consider the material supplied at the hearing to determine if the decision is correct. The Applicant may provide further information which may result in a reassessment of the debt however, if this is not forthcoming the Tribunal can rely on income details provided by the ATO. As part of the reassessment and review process the department has indicated to [the Applicant] that if additional information is provided by her, this can be considered further in regard to the debt raised. [49]

- The Tribunal noted the above para properly reflects the 'model litigant' and the statutory obligation that decision-makers must use their 'best endeavours to assist the Tribunal to make its decision in relation to the proceeding.'
- The Tribunal noted that the overpayment 'methodology' – involving extrapolation of ATO employment income information over a period, divided to produce an average fortnightly, and then applied to YA payment periods to raise a debt – at best raises no more than 'sufficient doubt about the accuracy of past payments as to warrant the exercise of powers of enquiry held by Centrelink' [56].
- The Tribunal found that, on the present facts, Centrelink is unable to advance sufficiently convincing proofs of a debt or debt amount and no debt arises in law. The Tribunal reasoned that Centrelink has not established the proposition it was required to establish [52]. Accordingly, the failure to establish the overpayment leads to the default of no debt [59].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/A103546	CTH.0032.0002.0001	Y Webb	9 March 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with decision that there was no debt payable.

Key Findings

- Centrelink did not provide documents identifying the applicant's actual fortnightly income. Rather, it provided payment summaries provided by 11 of the applicant's employers that extended over a long period. The Tribunal found Centrelink attributed employment income from the 11 employers evenly over the period stated in the summaries (at [21]-[22]).
- The Tribunal was not satisfied that the above was an accurate calculation of fortnightly employment income (at [23]).
- The Tribunal concluded:

  …in considering the scant information Centrelink has provided, and the implausibility that the earnings attributed per fortnight per employer are accurate, the Tribunal cannot, on the calculations provided by Centrelink, be satisfied to any reasonable degree that [the Applicant] received employment income in the three fortnights that he received newstart allowance and the Tribunal so finds [27].

- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.
- The Tribunal concluded:

  …In conclusion, in considering the scant information Centrelink has provided, and the implausibility that the earnings attributed per fortnight per employer are accurate, the Tribunal cannot, on the calculations provided by Centrelink, be satisfied to any reasonable degree that [the Applicant] received employment income in the three fortnights that he received newstart allowance and the Tribunal so finds (at [27]. *emphasis added*).

AAT Review Number	DOC ID	Member	Date
2016/P103856	CTH.3039.0021.4371	W Budiselik	14 March 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted back to Centrelink for recalculation on the basis of the Applicant's verified fortnightly income.

Key Findings

- An ARO affirmed the debt amount on internal review.
- The Applicant did not dispute that she had been overpaid.
- The Tribunal commented:

  The amount of the debt proposed by Centrelink is based on the apportionment of Australian Taxation Office supplied information about [the Applicant]'s income from employment in the relevant period. [The Applicant] told the tribunal her income from employment varied by small amounts over the relevant period [8].

- The Tribunal commented that Centrelink will need to take further action to accurately determine the Applicant's debt based on verified fortnightly income.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.
- The Tribunal reiterated: 'She said she had been contacted by a debt collection agency and was fearful she would have to repay the debt as a lump sum' [29].

AAT Review Number	DOC ID	Member	Date
2016/S103893	CTH.0032.0002.0053	M Horsburgh	15 March 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that there was no debt.

Key Findings

- The Tribunal found, based on the information it was given, that it appeared that Centrelink had calculated the applicant's income by dividing his overall income that financial year into weekly amounts. If so, this was not compliant with s 1073 of the Social Security Act 1991 (Cth), 'which specifically excludes income from remunerative work from that way of calculating income' [8].
- Centrelink did not provide evidence that the Applicant had earnings in the period from 2 March 2011 to 11 June 2011. The Tribunal instead found that Centrelink's records revealed the applicant had been terminated on 6 May 2011 and did not undertake any remunerative work [13].
- The Tribunal commented:

  This evidence reveals that [the Applicant's] employment was terminated on 6 May 2011, so he had no possible earnings after that date. Apart from this, there is no evidence of any kind that [the Applicant] received remuneration from work with his former employer in the period from 2 March 2011 to 5 May 2011. On the contrary, the Centrelink file documents show that he did no remunerative work. I point out not only that the income claimed to have been earned by [the Applicant] apparently derives from a process not in accordance with section 1073 of the Act, but that the evidence to which I have referred was available to the authorised review officer in coming to her decision. I find that [the Applicant] has no debt. If any debt arises from the termination payments that he received, and I am not suggesting that there is any such debt, it will need to be calculated and raised separately [13].

- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/S103853	CTH.3761.0003.7162	W Kennedy	20 March 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt on the basis of further information provided by the Applicant.

Key Findings

- Centrelink raised the debt following a data match with the ATO which revealed a discrepancy between the Applicant's reported income and income declared to the ATO. The decision was affirmed by an ARO [2]-[3].
- The Tribunal accepted the Applicant's evidence that he reported his income as instructed by Centrelink [9].
- The Applicant accepted that he was overpaid, however, calculated his overpayment to be over $900 less than that calculated by Centrelink [14]. The Tribunal stated that the evidence provided by Centrelink was not sufficient to confirm the Applicant's claims as to why there were errors in its calculation, however, that there was a 'very good chance' he was correct in relation to all of them, including the claim that Centrelink had averaged his income for one period [15]-[16].
- In relation to averaging, the Tribunal stated:

  …it is not entirely clear that the Department applied an averaging strategy, however, given that it did not have access to fortnightly information it appears likely that it has done so. The debt calculation might have been more accurate if the information in the bank statements had been used, however, as noted above, this information is problematic because it provides only net payments rather than earnings. Given the lack of information the Department may have no choice but to apply an average across the period [18].

- The Tribunal found that it was obvious Centrelink had made some errors [21].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M103550	CTH.0032.0002.0026 CTH.3761.0002.6247 - Duplicate	A Treble	24 March 2017

How it was decided and key facts

Outcome

- The decision under review was set aside.
- Centrelink was directed to request pay records and recalculate any potential debt and recovery fee owed.

Key Findings

- The Tribunal found there was a:

  discrepancy between the declared income as shown on Centrelink records and on which payment of newstart allowance was based, and her actual income, as evidenced by her ATO records. These ATO records show that her income must have exceeded the amounts declared to Centrelink each fortnight during the relevant period [16].

- The Tribunal found, however, that the debt had not been calculated correctly:

  In this case, no effort has been made by Centrelink to obtain actual wage records from [employer], even though such records would very likely be readily available if requested. Instead it has simply been assumed that the total year earnings can be apportioned equally to each fortnight across the relevant financial year. However, that is not consistent with the requirements of the legislation. The actual pay records are critical to the p roper calculation of the overpayment [17].

- The Applicant claimed Centrelink's records were incorrect but the Tribunal did not accept this evidence. It is notable, however, that the Applicant said she attended quarterly meetings at Centrelink to provide payslips, etc as evidence that she still qualified for the benefit. While Centrelink records showed the Applicant attended these meetings, they claimed there was no evidence that payslips were provided (at [24]).
- The Tribunal concluded that 10% penalty was correctly imposed but is subject to change when Centrelink recalculate the debt [35].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M101914	CTH.3761.0006.1023	A Drucrou	24 March 2017

How it was decided and key facts

Outcome

- The Tribunal affirmed the decisions under review.

Key Findings

- It was noted the Centrelink documents showed that Centrelink apportioned the gross earnings amounts as advised by the ATO over the Centrelink instalment periods that fell within the ATO-advised employment periods. This resulted in constant levels of gross earnings being applied [13].
- The Applicant disputed that this method of apportionment calculated her fortnightly earnings accurately – her position was that her earnings were not consistent from fortnight to fortnight as her shifts, hours of work, and pay rates varied [13].
- The Applicant provided records from her employer that only showed the hours she worked and provided no details of pay received. She was unable to recall what her hourly pay rates were or what additional amounts she received for sleepovers or penalty rates [14].
- The Tribunal 'preferred the ATO-advised information as the best evidence available of [the Applicant's] earnings in the period under review' and noted the earnings she reported (as recorded in the EANS screens records) were a great deal lower than the total earnings identified by the ATO information. The Tribunal found this did 'not bear out [the Applicant's] claims that she always overestimated her earnings and is consistent with her earnings being under-reported

to Centrelink' [15].
- The Tribunal did not find that any special circumstances existed to justify a write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/P104316	CTH.3761.0005.7304	E Cornwell	28 March 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the Applicant's entitlement to NSA having regard to payslips, with any resulting overpayment to be recovered.

Key Findings

- The Tribunal noted:

  …the apportionment method involves an approximation of earnings in each fortnight of a particular period and treats the person as earning a constant amount every day in a wage fortnight. This was not necessarily the situation in [the Applicant's] case. This is what [the Applicant] considers to be unfair as he often did not have regular and constant amounts from his employers [30].

- The Tribunal also stated:

  …in circumstances where there is no documentary evidence as to a person's actual earnings during a particular period, the Tribunal accepts the apportionment method as the most appropriate method to be employed to determine the person's entitlement to newstart allowance during a relevant period [31].

- The Tribunal did not find that any special circumstances existed to justify a write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/B103477	CTH.0032.0002.0012 CTH.3761.0002.5677	B Pickard	30 March 2017

How it was decided and key facts

Outcome

- The decision under review was set aside.
- The matter was remitted to Centrelink for recalculation of debt.

Key Findings

- The Tribunal followed previous decisions which stated that income averaging can be used where that is the best information available (at [8]).
- The Tribunal, however, was not satisfied that the incoming averaging in this case was appropriate, at least in relation to one employer (at [7]-[9]). The Tribunal stated:

  While it appears that the Department has not sought payroll information from the employers I am satisfied were such information obtained there would be no difference to the average used by the Department in its calculations [8].

  In regard to the income used from [Employer],I am not satisfied that averaging of income is appropriate. I require the Department to either request the payroll information from the employer or alternatively accept the earnings as shown by the ATO match was received by [the Applicant]in the period 24 March 2011 to 5 April 2011 and recalculate [the Applicant's] entitlement to newstart allowance.

- The Tribunal found that the Applicant's conduct was at least reckless in relation to his reporting obligations and therefore refused to waive the 10% penalty (at [18]).
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M103139	CTH.3761.0006.1460	A Ducrou	30 March 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the directions that:
  - there was a debt in a certain amount arising out of a certain period;
  - part of the debt attributable to the payment received from Maribyrnong Council be waived; and
  - the balance of the debt was to be recoverable.

Key Findings

- The debt related to a lump sum payment that the Applicant had received as wages in arrears as well as a debt related to the Applicant's earnings from an employer.
- In relation to the earnings from an employer, the Tribunal accepted that the ATO information was 'the best available evidence of [the Applicant's] earnings' from one of her employers. It was noted the ATO-advised earnings were apportioned evenly over the relevant Centrelink instalment periods to produce fortnightly income to which the relevant income test was applied. The Tribunal considered this approach was appropriate having regard to the limited information available [16].
- The Tribunal was satisfied that waiver of the part of the debt attributable to the lump sum payment was appropriate [26]-[27].

AAT Review Number	DOC ID	Member	Date
2017/H107549	CTH.3761.0005.6773	M Baulch	4 April 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the directions that:
  - Centrelink obtain payroll information from the Applicant's employers;
  - Having regard to the payroll information obtained, Centrelink undertake a recalculation; and
  - Having regard to the recalculation, Centrelink make a fresh decision as to whether or not the Applicant has a debt that is required to be repaid.

Key Findings

- The Tribunal noted that it was Centrelink's assertion that data matches between its records and the records of the ATO demonstrated that the Applicant did not always fully declare her earnings from employment [12].
- The Tribunal stated:

  I accepted that [the Applicant's] earnings with both [Employer 1] and [Employer 2] were variable and not a constant amount each fortnight over the period during which Centrelink says she was overpaid. This means that the amount of the excess payment calculated by Centrelink – being $2,945.86 – where earnings have been averaged is unlikely to be correct. I therefore decided to set aside the decision under review, on the basis that the amount of the debt calculated by Centrelink cannot, on the balance of probabilities, be correct [24].

- The Tribunal stated that given the Applicant has attempted to obtain more accurate payroll information from both her employers and failed to do so, it would be reasonable for Centrelink to use its information gathering powers to obtain accurate information about earnings [25].
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

2017/A109142	DOC ID	Member	Date
2017/A109142	CTH.3044.0006.6614	J Strathearn	4 April 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and the debt was not to be repaid due to special circumstances.

Key Findings

- An ARO affirmed the decision on internal review.
- The Tribunal stated:

  As to waiver of recovery it was submitted that this debt was raised by averaging [the Applicant]'s earnings over two financial years as has been done with many other Centrelink customers, without obtaining actual verified earnings and dates. The way that ADEX has averaged out [the Applicant]'s declared earnings is inherently wrong. In view of the circumstances of how the debts arose it was submitted that there should be waiver under special circumstances in this case [20].

  ...

  The authorised review officer acknowledged that the method of calculation of the overpayment/ debt being part payslips and part apportioning was "not ideal" but this was considered a reasonable method of calculation of the overpayment. The Tribunal did not concur with that conclusion given the circumstances of this case [26].

6 April 2017	DOC ID	Member	Date
2017/P105366	CTH.0032.0002.0589	Terry Carney	6 April 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with a decision that any debt should be waived due to 'sole Centrelink error'.

Key Findings

- Centrelink advised the Applicant that he would be precluded from Newstart Allowance (NSA) because of a failure to supply documents (at [10]).
- The claim was then recorded as 'no longer current' because of the return of a letter seeking information (at [11]).
- A short time later, the application was granted because the information requested had been correctly provided by the Applicant but lost by Centrelink (at [12]).
- The Member did not find that the Applicant's failure to provide income information after the NSA had been cancelled was a failure to act in good faith, as expressed by the ARO (at [15]).
- In relation to the calculation of the debt, the Tribunal stated:

  I have used the words 'potentially attributable' advisedly. This is because on the information provided to me [the Applicant's] earnings appear to have been derived from tax records of annual income in the 2012-13 financial year... Because income can and does fluctuate, extrapolation of a fortnightly rate achieved by dividing the annual income by a number of fortnights fails to reach the required level of 'satisfaction' I am required to achieve in order to find a debt in the quantum suggested (at [19]).

  The short reason for this is that, while such tax office information more than justifies Centrelink in exercising its powers to require employers to supply fortnightly payment records, it is insufficient to establish a precise debt quantum as is required under the application of the Full Federal Court in McDonald and the High Court's "Briginshaw principle" (at [20]).

- The Tribunal also stated that it could not be satisfied that the debt had been accurately calculated because "in the absence of precise fortnightly earnings for the relevant payment fortnights I cannot put a figure on that overpayment debt" [32].

- Any overpayment was due to the 'sole error' of Centrelink (at [42]-[45]):

  ….having reviewed the chronology of action previously set out…I cannot find any contribution by [the Applicant] to the generation of the overpayment beyond the cumulative mistakes made by Centrelink (at [45]).

AAT Review Number	DOC ID	Member	Date
2017/S106148	CTH.0032.0002.0651	S Kinsley	6 April 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside.
- The matter was remitted to Centrelink for recalculation and Centrelink was directed to waive any debts arising from the recalculation.

Key Findings

- Several letters sent to the Applicant claiming he owed debts in the amount of $673.75, reassessed to $550,38, reassessed again to $0.00, reassessed again to $34,231.00 and finally reassessed to $311.21.
- An ARO confirmed the amount of $311.21 to be correct.
- The Tribunal found that the Applicant did not receive transparency or finality in the process and that the 5 different calculations themselves undermined confidence in the administrative processes (at [42]). This constituted special circumstances to justify a waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/S103458	CTH.3761.0002.5249	E Cornwell	06 April 2017
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key Findings

- The debt arose due to underreporting of income by the Applicant.
- The Applicant was employed on a casual basis with irregular hours.
- Centrelink conducted a data match with the ATO.
- Centrelink apportioned the Applicant's annual income over the reporting periods [11].
- The Applicant argued that the method of apportioning income used by Centrelink is mathematically incorrect and not lawful. He stated that Centrelink has not based the debts on fact but on assumption and opinion [13].
- The Tribunal found that the Applicant did not fully declare his income.
- The Tribunal further stated:

  The apportionment method involves an approximation of earnings in each fortnight of a particular period and treats the person as earning a constant amount every day in a wage fortnight. This was not necessarily the situation in [the Applicant's] case. This is what [the Applicant] considers to be unfair as he said that he often did not have regular and constant earnings from his employers [17]

  The tribunal explained to [the Applicant] at the hearing that, in circumstances where the ATO amount is different to the declared amount of income and there is no documentary evidence as to a person's actual earnings during a particular period, Centrelink uses the apportionment method as the most appropriate method to be employed to determine the person's entitlement to newstart allowance during a relevant period. [18]

  As [the Applicant] has not kept payslips or records, his employers have not been able to provide any details of [the Applicant's] pay during these periods and earnings were under-declared, the tribunal accepts that the apportionment method is the most appropriate method to determine [the Applicant's] earnings [19].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M108103	CTH.0032.0002.0364	N Campbell	11 April 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation.

Key Findings

- The Tribunal compared the Applicant's weekly earnings report, as provided by his employer, with the data used by Centrelink to raise the debt and was not satisfied that Centrelink used the correct figures (at [10]).
- However, the Tribunal also found that the Applicant was incorrectly reporting his income because he was reporting on a two-week delay basis. Additionally, because the reporting period was different to the Applicant's pay weeks, he would have needed to make the necessary adjustments (at [12]). The Tribunal was not satisfied that Centrelink's calculation included the correct gross earnings of the Applicant for each fortnight (at [13]).
- Accordingly, there would be some overpayment after the recalculation.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M105159	CTH.3761.0004.5110	F Hewson	18 April 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink.
- Centrelink was directed to recalculate the debt for the period from 16 June 2011 to 18 June 2012 with regard to the Applicant's actual earnings.
- Centrelink was also directed that 50% of the debt was to be waived.

Key Findings

- Centrelink raised the debt following a data match with the ATO [10].
- The Tribunal noted that it was not clear how the debt was calculated and why the Applicant's record was not amended to reflect a reduction in the debt, as calculated by a subject matter expert [11].
- The Tribunal noted that the earnings used by Centrelink did not accord with the Applicant's actual earnings, which varied [12].
- The Tribunal found that while there was likely an overpayment overall, this would need to be calculated taking into account the Applicant's actual earnings.
- The Tribunal found that the debt did not arise solely due to administrative error [20].
- The Tribunal found that special circumstances existed and waived 50% of the debt [29].

AAT Review Number	DOC ID	Member	Date
2017/M105673	CTH.3039.0021.7379	R King	19 April 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation on the basis of the Applicant's actual fortnightly earnings.

Key Findings

- The Applicant sought internal review of the decision by an ARO. The debt was affirmed.
- The Applicant incorrectly reported her after tax earnings and not her gross earnings. This explains the discrepancy.
- Despite this, income averaging was used by Centrelink to calculate the debt. The Tribunal directed Centrelink to

recalculate the debt on actual fortnightly earnings, per the payslips provided.

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/P105452	CTH.3039.0023.6163	M Martellota	19 April 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with a new decision that no debt is owed. Any amounts already recovered are to be remitted to the Applicant.

Key Findings

- The Applicant received parenting payments.
- An ARO reduced the debt on internal review.
- A data match with the ATO revealed a discrepancy and a debt was raised.
- The Applicant was unable to obtain historical pay records from her employer. She was given the option to obtain bank records, but because of the time that had lapsed the Applicant was likely to incur a cost.
- The Tribunal stated:

  Clearly the Department in calculating the date have taken income derived from ATO records and apportioned this amount over each fortnight of the debt period. This approach fails to take into account the actual earnings for each fortnight period and as such does not provide a precise or acceptable calculation of any alleged overpayment [19].

- The Tribunal was left in a state of doubt as to the existence of a debt. The Tribunal was satisfied that the Applicant had acted reasonably in her attempts to provide further information to Centrelink, but practical difficulties prevented her from doing so.
- The Tribunal commented at [22]-[24]:

  The tribunal notes that the Department in its role as decision maker has powers which would have allowed it to request information either from the former employer or to obtain copies of [the Applicant]'s bank statements in order to verify the disputed earnings. It appears (perhaps for policy reasons) the Department has chosen not to exercise these powers and instead has placed the onus upon [the Applicant] to produce evidence to counteract the debt the Department has calculated [22].

  …

  In this matter the tribunal does not consider an exercise of its own inquisitorial powers is an appropriate course of action, given the size of the debt and the time that has passed since the alleged overpayments [23].

  It appears to the tribunal that in not being satisfied as to the existence of the debt the tribunal can either set aside the decision under review and substitute it with a finding that there is no debt or set the decision aside and send it back to be re-determined in accordance with directions that require the Department to exercise its powers to obtain further information so as to allow a more precise calculation of any overpayment. This could be done by obtaining further information from her former employer or by requesting copies of [the Applicant]'s bank statements from her financial institution - these should show the net amount of earnings and upon grossing up those figures the Department could recalculate the debt [24].

AAT Review Number	DOC ID	Member	Date
2017/S106288	CTH.0032.0002.0659	J Leonard	20 April 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with decision that there was no debt.

Key Findings

- The Tribunal found that Centrelink did not obtain details of the Applicant's fortnightly income and there is no explanation for how her income was apportioned (at [10]).

- The Tribunal determined:

  The correct way to determine a person's entitlement to age pension for a period is to have regard to the gross amount earned, derived or received by the person in respect of each fortnight in the relevant period. The result can be very different if the gross earnings are apportioned over a period, as Centrelink appears to have done in this case (at [16]).

- The Tribunal found that the Applicant notified Centrelink of all necessary working arrangements, including her ceasing work after being diagnosed with breast cancer. It also noted that her declared income was lower in the relevant period than calculated by Centrelink and that, even so, she had been underpaid age pension for three fortnights (at [18]).

AAT Review Number	DOC ID	Member	Date
2016/S104394	CTH.3043.0039.6755	Terry Carney AO	20 April 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration with directions that:
  - No debt or debt component is able to be founded on extrapolations from ATO records;
  - The earnings component of any recalculated debts as may be raised must be based on and confined to any fortnightly salary records obtainable in the exercise of statutory powers to do so; and
  - Debt amounts (if any) as so varied are recoverable debts.

Key Findings

- The Tribunal noted the Applicant was engaged in episodic work with 13 different employers all of comparatively short duration [6].
- The Tribunal made note that the ARO had stated the Applicant 'agreed that the data match be used', to which the Applicant rejected saying this. The Tribunal accepted the Applicant's evidence and stated that 'applicants are not in a position to make informed decisions about the implications of any such "acceptance", so I would have put it to one side in any event' [12].
- The Tribunal found that, as Centrelink had calculated the debt on the basis of averages derived from the ATO, and had not utilised its powers to obtain fortnightly earnings figures, there is insufficient evidence to establish an overpayment debt or its size [6].
- The Tribunal noted that the papers provided to the Tribunal and the Applicant by Centrelink were 'simply awful' with a random mixture of font types and sizes that made it 'illegible' [13].
- The Tribunal found that, as the Applicant's income fluctuated from fortnight to fortnight, 'the extrapolation of a fortnightly rate achieved by dividing an ATO annual income figure by a number of fortnights fails to reach the required level of "satisfaction" I am required to achieve in order to find a debt in the quantum suggested by Centrelink' [17].
- The Tribunal opined the ATO information was insufficient to establish a precise debt quantum as required under the application of the Full Federal Court in McDonald and the High Court's Briginshaw principle [18].
- The Tribunal stated that in previous cases when 'asked to provide detailed submissions, Centrelink has accepted that while "the onus of proof lies with claimant however … this can be obscured by the duties required of the [then] Director-General"' (emphasis and italics in original). The Tribunal stated that the 'default outcome' is always a product of the legislation, whichever way it falls, and concluded that if Centrelink is unable to advance sufficiently convincing proofs of a debt or debt amount, then no debt arises in law [38]-[39].
- The Tribunal found no proven overpayment of any quantum [45].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S105317	CTH.0032.0002.0633	J Leonard	24 April 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with decision that there was no overpayment.

Key Findings

- The ARO claimed the Applicant did not report any earnings for the relevant fortnights, however, the Tribunal found the

online records provided do not support this finding (at [15]).
- The Tribunal found there was no explanation as to why Centrelink determined, for a particular period, that arrears were payable to the Applicant (at [16]-[17]).
- The Tribunal found:

  Centrelink did not obtain details of [the Applicant's] fortnightly earnings and in reassessing his entitlement to newstart allowance his earnings were averaged ($1,127.35 per fortnight). The correct way to determine a person's entitlement to newstart allowance for a period is to have regard to the gross amount earned, derived or received by the person in respect of each fortnight in the relevant period. The result can be very different if the gross earnings are apportioned over a period, as Centrelink has done in this case (at [19]).

AAT Review Number	DOC ID	Member	Date
2017/A105466	CTH.0032.0002.0060	K Millar	25 April 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation with the recommendation that further information be sought from the Applicant's employer.

Key Findings

- The primary issue was determining the decision under review as the Applicant's complaint was not that there was a debt but that it had been changed (at [5]).
- The Tribunal found Centrelink's responses were inconsistent with their records and further found it needed to request further information multiple times (at [6]-[11]).
- The Tribunal found that ATO information did not show when the Applicant had ceased work and information was needed in relation to the precise dates he worked and the amounts he earned (at [18]).
- The Tribunal found Centrelink did not provide any detail on how the debt was calculated or the period to which the overpayment relates. It did not seek information from the Applicant's employer. Accordingly, the Tribunal was not satisfied that general ATO information was sufficient to establish an overpayment (at [19]-[20]).
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S107168	CTH.0032.0002.0684	H Schuster	27 April 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt..

Key Findings

- The Applicant did not dispute that he may have a debt on the basis that he may have made reporting errors, however, argued that Centrelink had calculated his debt incorrectly by averaging the income data obtained from the ATO (at [12]).
- The Tribunal found the Applicant incorrectly reported his income (at [[18]]). It but also, however, found that:

  [the Applicant's] correct entitlement to NSA must be worked out under the rate calculator in section 1068 of the Act. The income test requires the department to work out [the Applicant's] ordinary income on a fortnightly basis. Section 1073B of the Act also requires that employment income earned over all or part of an instalment period is to be apportioned over each day in the instalment period (at [19]).

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B105933	CTH.3761.0005.8328 Family of documents with decision notice CTH.3761.0005.8338 - CTH.3761.0005.8355	K Juhasz	27 April 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with directions that:
  - Centrelink make reasonable efforts to obtain payroll or other information about the Applicant's income from his employers as shown in the data match information provided by the ATO and recalculate the amount of NSA payable;
  - If after reasonable efforts Centrelink was unable to obtain payroll or other information from the Applicant's employers, it should recalculate the amount of NSA to the Applicant adopting an averaging method for those employers as it has presently done.
  - If after recalculation of the amount of NSA payable to the Applicant there was an overpayment, the amount was a debt to the Commonwealth and must be repaid.
  - If there was a debt to the Commonwealth, Centrelink had satisfied the technical requirements of s 1233 and lawfully recovered any debt from the Applicant's tax refund.

Key Findings

- The Tribunal found Centrelink apportioned the Applicant's income even though they had not requested payslips or payroll information from the Applicant's employer for the entitlement periods under review [20].
- The Tribunal noted that the Applicant provided the Tribunal with copies of his bank records in the debt period. The Tribunal noted some issues with accepting this as a complete record because it was net figures and without payslips the Tribunal could not be satisfied this was the only income received by the Applicant [22].
- The Tribunal noted:
- Centrelink have the power to request the relevant payslips and perform a proper allocation of the Applicant's income across the alleged debt period. This would not be an arduous task; it would require the issuing of four pieces of correspondence and recalculating the debt with the relevant dates and amounts from when the Applicant was actually paid [24].
- In relation to garnishee action, the Tribunal stated that it only had jurisdiction to find whether there was any error of fact or law in the issuing of the garnishee notice [30].
- The Tribunal was satisfied that Centrelink had satisfied the technical requirements of s 1233 of the Social Security Act; however, the '…overpayment – its existence and correct calculation – still needs to be properly determined' [43].

AAT Review Number	DOC ID	Member	Date
2017/S107414	CTH.3039.0021.7804	K Dordevic	27 April 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and the matter was remitted to Centrelink for recalculation on the basis of the payslips provided by the employer.

Key Findings

- An ARO affirmed the decision on internal review.
- The debt was raised as a result of a data match with the ATO.
- The Tribunal is satisfied the Applicant was overpaid, but Centrelink should recalculate the exact amount of the debt based on the updated payslip information provided.
- The Tribunal was not satisfied that the general information from the ATO was sufficient to establish a debt, or that the debt had been correctly calculated.

AAT Review Number	DOC ID	Member	Date
2016/A101181 & 2016/ A101182	CTH.3761.0002.6200	S Cullimore	1 May 2017

How it was decided and key facts

Outcome

- The decisions under review were set aside and remitted to Centrelink for reconsideration.

Key findings

- Centrelink raised an AUST debt $6,475.35 for the period from 16 November 2012 to 27 June 2013 and a sickness allowance (SKA) debt of $1,490.81 for the period 28 August 2012 to 4 October 2012. The debt was calculated following a data match between Centrelink and the ATO, which disclosed gross income. Centrelink averaged the total income evenly over the whole financial year [8].
- The Applicant sought a review and ARO varied the decisions, reducing the debt to $3,740.34 and the SKA debt to $1,301.34 for the same debt periods.
- The Tribunal was satisfied that there is an error in the calculation of debts. Centrelink averaged the total income out evenly over the whole financial year [27]. All debts should be recalculated and then are recoverable.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B105307	CTH.3761.0002.5927	P Jensen	2 May 2017

How it was decided and key facts

Outcome

- The decision under review was set aside.
- The matter is remitted to the Centrelink for reconsideration in accordance with the directions contained in the Tribunal's reasons for decision.

Key findings

- The Applicant had three debts: 1) a parenting payment debt of $4,972.29; 2) a parenting payment debt of $1,612.47; 3) a Newstart allowance debt of $58.27. An ARO reviewed and affirmed the debts.
- The Applicant had 9 different employers. Centrelink apportioned earnings across its instalment periods. It is unclear if this was based on ATO information.
- The Tribunal stated:

  Centrelink has maintained that it calculated the debt amounts correctly notwithstanding its receipt of evidence which establishes the contrary. Centrelink was not required to maintain a position that it knew to be incorrect. Even at that late stage, Centrelink could have belatedly taken reasonable steps to correctly calculate the quantum of the debts. If it had taken those steps during the five months from when the authorised review officer made her decision until when the Tribunal was able to hear [the Applicant's] application for review it is highly likely that the application for review could have been finalised without further delay [18].

- The Tribunal was not satisfied with Centrelink's calculation of debt and directed it to be recalculated. The Tribunal stated that it may take Centrelink some time to obtain the evidence and it will then need to consider whether to waive recovery of some or all of the debts.
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M105456	CTH.3761.0002.3666 CTH.0032.0002.0271 – duplicate CTH.3761.0002.3672 (Letter from Centrelink to Applicant enclosing records including ARO decision, ARO notes, and calculation)	A Smith	3 May 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt based on the Tribunal's findings regarding the Applicant's gross earnings set.
- The decision to add a 10% penalty was set aside because the Tribunal was satisfied the Applicant had a reasonable excuse for declaring inaccurate earnings in the debt period.

Key Findings

- Centrelink initiated an online compliance intervention review of the Applicant's entitlement based on a discrepancy between the earnings declared to Centrelink and the earnings reported by PAYG summary to the ATO. The Applicant provided some payslips. The ARO decision added a 10% penalty.
- The Tribunal stated:

  The authorised review officer explained that gross earnings of $413 and $419 for the pay periods missing payslips was calculated in the following way: "by using bank statements provided the difference in the YTD income has been apportioned across the period". Centrelink did not provide copies of the payslips and bank statements used to calculate the debt; the Tribunal was unable to make sense of this explanation [18].

- However, the Tribunal was satisfied the 'Gross Pay Estimator' on the ATO website represented the best available method to estimate the Applicant's gross pay for the pay period's missing payslips [18].
- The Tribunal was satisfied the Applicant had a reasonable excuse for her failure to provide accurate earnings information and found that s 1228B, the additional 10% penalty, did not apply [30].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M105766	CTH.0032.0002.0277	F Hewson	4 May 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with decision that there was no debt.

Key Findings

- The Tribunal found the Applicant understood his reporting requirements well and it was clear that Centrelink's income averaging did not reflect his actual income on a fortnightly basis (at [13]).

AAT Review Number	DOC ID	Member	Date
2016/M103395	CTH.3036.0012.9506	J Nalpantidis	4 May 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration.
- Centrelink was directed to obtain actual payroll information from the Applicant's employers.

Key Findings

- An ARO affirmed the debt on internal review.
- Centrelink had used income averaging to determine the amount of the debt, despite the Applicant's income fluctuating each fortnight. The Tribunal was not satisfied these calculations were correct and remitted the decision back to Centrelink for recalculation.
- The Tribunal stated: 'the methodology applied by Centrelink, which simply averaged the ATO-advised income over the period advised by the ATO, cannot be relied upon as being correct' [25].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B105731	CTH.0032.0002.0139	P White	8 May 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and the matter remitted to Centrelink for recalculation of the debt on the basis that verified fortnightly earnings information be obtained by Centrelink

Key Findings

- Centrelink undertook data matches with the Australian Taxation Office (ATO) throughout 2016.
- Centrelink did not seek detailed payroll information from his two employers.
- Centrelink has averaged [the Applicant's] earnings from both employers over all the fortnights in the 2011 financial year.
- The Tribunal stated:

  [The Applicant] argues that Centrelink ought to use its coercive powers to obtain the relevant payroll information. He said that the debt has not been established with proper evidence. He alleges fraud and unfairness [10].

  [The Applicant] takes issue with Centrelink's methodology. In particular, he feels it is unfair to average out his earnings from [Employer], because he did not work for that company throughout most of the debt period. It is unclear if detailed payroll information can ever be obtained by Centrelink, even if a request is made. These debts go back several years. [11].

  The ARO commented that debts can only be calculated on the information currently available. According to the authorised review officer, the best method for working out [the Applicant's] fortnightly income is the averaging method [12].

- The Tribunal set aside the 10% penalty and further found:
- The tribunal will set aside the debt and direct that Centrelink recalculate the debt after making appropriate enquiries of the [the Applicant's] former employers. These types of matters have to be approached on a case by case basis. In the view of the tribunal, [the Applicant] is a Centrelink client who will not be satisfied with anything less than a calculation of the debt based on actual verified fortnightly payroll information. [17].
- The Tribunal did not consider whether circumstances existed to justify the write off of or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/S104630	CTH.3036.0013.0317	A Smith	8 May 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration with the direction that Centrelink obtain payroll records from the Applicant's employers.

Key Findings

- An ARO affirmed the debt on internal review.
- Centrelink had used income averaging to determine the amount of the debt. The Applicant had multiple employers throughout the period.
- Centrelink did not consider any specific information about earnings for individual pay periods during the entire year [17].
- The Tribunal commented:

  The tribunal appreciates that in this case there were a large number of employment periods and employers which were the subject of a matching of data between the Department and the ATO (33 data match instances in all). To obtain information about earnings for each fortnight for each employer over a five-year period will no doubt be administratively onerous. Nevertheless, that is not a reason to now misapply the law [26].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S107116	CTH.0032.0002.0672 CTH.3761.0001.5103 – duplicate	E Cornwell	9 May 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt.

Key Findings

- The Applicant did not dispute any debts raised in respect to one employer, accepting that he may have forgotten to report his income (at [11]).
- In relation to the second employer, however, the Applicant noted he was paid in "dribs and drabs" and was still owed over $3,800 in entitlements (at [13]). The nature of his work with this employer was very variable (at [14]).
- The Tribunal reasoned:

  However, Centrelink has calculated the amount of the overpayment by averaging [the Applicant's] earnings as reported to the Australian Taxation Office (ATO). The tribunal was not satisfied that this is an accurate reflection of the overpayment. The apportionment method involves an approximation of earnings in each fortnight of a particular period and treats the person as earning a constant amount every day in a wage fortnight. This was not the situation in [the Applicant's] case [17].

- The Tribunal found:

  Given that the calculation of the overpayment was sourced from information from the ATO, without any verification from [Employer] or without reference to payslips, the tribunal was not satisfied that the calculation accurately reflected the widely variable earnings of [the Applicant]. It is also unclear how [the Applicant's] allowances have been treated. Any direct reimbursement for travel and parking costs should not be included as part of gross earnings (at [19]).

- The Tribunal ordered that Centrelink recalculate the debt based on verified earnings data contained in the Applicant's submissions.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/S104893	CTH.3761.0003.7158	J Leonard	9 May 2017

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key Findings

- Centrelink, after a data match, determined the Applicant owed a debt of $12,815.14 and also decided to impose a 10% penalty. An ARO affirmed the decision.
- Centrelink apportioned the Applicant's income to calculate the debt, however, as the Applicant informed the Tribunal that he was working 38-40 hours per week even when employed casually, the Tribunal stated:

  …the Tribunal is satisfied that it is appropriate to apportion his earnings evenly over the relevant period as even if he was working slightly less than 38 hours in a given week, he would not be entitled to newstart allowance for that period. Based on his gross income of $1,717.06 per fortnight, the Tribunal determines [the Applicant] was not entitled to newstart allowance in this period [12].

- The Tribunal also found that the Applicant did not have a reasonable excuse for failing to report his income and the 10% penalty was correctly imposed [14].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt. The Tribunal found that the debt was not raised due to sole administrative error and the debt was recoverable as the Applicant was aware of his obligations but failed to fulfil them [17]-[21].

AAT Review Number	DOC ID	Member	Date
2016/B103351	CTH.3761.0002.5107	P White	9 May 2017

How it was decided and key facts

Outcome

- The decision under review in relation to the NSA debt was affirmed.
- The decision under review in relation to the FTB debts was set aside and substituted with a decision that that there were no FTB debts to the Commonwealth with respect to maintenance income retrospectively assessed by Centrelink.

Key Findings

- The Tribunal noted that in 2015 Centrelink started a review about the Applicant's correct rate of NSA and commenced that review by undertaking a data match with the ATO. This showed that the overall income declared to Centrelink was less than the gross income recorded by the ATO throughout the debt period.
- The Tribunal noted:

  … prior to the hearing, the tribunal's Case Manager approached [the Applicant] to ask if she could provide all of the relevant payslips The authorised review officer had commented that the debt had been partly raised on averaged earnings, but also calculated on fortnightly payslips, where that information was available. [The Applicant] told the tribunal that she does not have the payslips and could not provide them. She does not otherwise require Centrelink to recalculate the debt based on verified fortnightly payroll information [14].

- The Tribunal concluded that the debt had been correctly calculated [15] and should be recovered by modest instalments [23].
- The Tribunal was not satisfied that a debt existed in relation to the family tax benefit [40].

AAT Review Number	DOC ID	Member	Date
2017/S106504	CTH.3761.0002.8065	H Schuster	9 May 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision there was a debt but part of it was to be recalculated in accordance with the finding that averaging was inappropriate for those jobs where work was not undertaken for more than a day or two.
- Centrelink was directed to waive 25% of the debt due to special circumstances.

Key Findings

- Centrelink raised the debt following a data match with ATO. The data match revealed there were 41 employers matched to the Applicant [3].
- An ARO affirmed the decision but found that no recovery fee should be applied.
- The Applicant worked on a casual basis as an extra in television/advertising on one-off casual engagements [28].
- The Tribunal noted that Centrelink had apportioned income equally over the financial year for some jobs where group certificates did not confine the period of employment [25].
- The Tribunal found that the Applicant had underreported his earnings [26].
- The Tribunal observed that some employers provided dates spanning the entire financial year even though it was unlikely the Applicant worked more than a day or so [34].
- The Tribunal noted that:

  [T]he employment periods on the ATO data do not accurately reflect the dates over which [the Applicant] is likely to have derived the income. This also means that in calculating the debt, Centrelink's calculations are unlikely to reflect the correct entitlement of [the Applicant] [35].

- Even so, the Tribunal noted that:

  [W]here there has been an under declaration of income, it may be appropriate for Centrelink to rely on the best available evidence to make a retrospective decision about a person's correct entitlement to NSA. That is, where there is no dispute that an amount of income has been derived in a particular financial year or period, it is appropriate for earnings to be averaged over that period if there is no better evidence to more precisely place the dates worked.

- The Tribunal concluded that averaging was appropriate where it was reported that employment spanned an entire financial year and no better evidence was available about timing and frequency of payments [37].
- The Tribunal noted that for some other jobs, the commencement date of employment more likely reflected the date work was undertaken [28]. The Tribunal concluded the debt should be recalculated for these employers to reflect this rather than being averaged over a longer period in order [42].
- The Tribunal found that special circumstances existed to justify the waiver of 25% of the debt [64].

AAT Review Number	DOC ID	Member	Date
2017/M106187	CTH.0032.0002.0281	F Hewson	11 May 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt.

Key Findings

- The Tribunal found that along with the data matched earnings obtained from the ATO, Centrelink had an email from one of the Applicant's employers providing a breakdown of her actual earnings for each week in the review period and that this was not considered by the ARO (at [11]).
- The Tribunal was not satisfied the debt had been correctly calculated (at [13]).
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M106136	CTH.3761.0001.2435	N Campbell	11 May 2017

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key Findings

- The Applicant was receiving the pension during the period the alleged debt was raised. In assessing whether the Applicant had received the correct amount of benefits, Centrelink apportioned the data over each fortnight.
- The Applicant worked full time and his income did not vary each fortnight. The Tribunal was satisfied that the use of income averaging assisted Centrelink to correctly calculate the debt for the relevant period given that the Applicant's fortnightly earnings were consistent.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B106101	CTH.3761.0006.0763	P White	15 May 2017

How it was decided and key facts

Outcome

The decision under review was affirmed.

Key Findings

- The Tribunal noted that Centrelink had undertaken data matching with the ATO as a compliance measure throughout 2015/16, which showed that the Applicant was employed and received earnings over a period of time that were not declared to Centrelink. The ARO averaged these earnings across each fortnight and calculated the debt accordingly [8].
- The Tribunal included in its decision extracts of exchanges between the Applicant and the ARO as recorded in the ARO's notes, and stated:

  The concerning aspect to the above exchanges is that Centrelink is raising a debt against [the Applicant], but putting the onus on him to disprove it. There should be no onus in this context. On [the Applicant's] submissions, he was only with that putative employer for a few weeks and had earned no income. However, at hearing [the Applicant's father] conceded that there may or may not have been a cash payment, but he was uncertain [17].

  Centrelink has coercive powers to request information. [The Applicant] does not have any capacity to compel [the Employer] to provide information to him [18].

- The Tribunal also noted that, prior to the hearing, the Tribunal had given serious consideration to requiring Centrelink to request information from the Employer in the nature of payroll books, payslips, and detailed payroll information. However, this was not done as it appeared that the Employer could not be identified and his whereabouts were unknown [20].
- The Tribunal stated that Centrelink was using the best evidence available at this time, which was the official ATO public record. The Tribunal found it was reasonable to average those earnings over the debt period and the recovery of the debt should be affirmed [27].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B106492	CTH.3761.0002.6142	P Jensen	16 May 2017

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key Findings

- The Applicant declared income from various employers. Centrelink noticed discrepancies between the income that was declared and the ATO's data. Centrelink recalculated rates of Newstart allowance on the basis that she had received income reported at constant rates during her periods of employment [3].
- As the Applicant had not attempted to retrieve her payroll records, the Tribunal was satisfied that ATO's evidence was the most accurate available.
- The Tribunal was satisfied that debt calculation was correct and debts are recoverable.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M109517	CTH.3761.0005.6571	A Treble	16 May 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with directions that:
  - Centrelink request pay records from the Applicant's previous employers;
  - if any of the requests for pay records from the Applicant's employers were not satisfied, Centrelink use evidence from the Applicant's bank records to calculate her likely gross fortnightly income from that particular employer for the relevant period.
  - any overpayment of YA and NSA is to be recalculated in accordance with the pay records and/or bank statements.

Key Findings

- The Applicant told the Tribunal that she disagreed with the debt because Centrelink had apportioned her income, assuming that her earnings for each employer were constant over the period, when they were actually variable [9].
- The Tribunal pointed out that the ATO records showed that the wages the Applicant declared fortnightly were under-reported [10].
- The Tribunal noted the Applicant conceded she inadvertently declared net earnings, not gross earnings to Centrelink [11].
- The Tribunal found it was 'not satisfied that the debt had been correctly calculated' [14] and stated that 'no effort has been made by Centrelink to obtain actual wage records from the three employers' [15].
- The Tribunal found: 'Centrelink's approach to debt calculation in this case is entirely inconsistent with the requirements of the legislation. The actual pay records are critical to the proper calculation of the overpayment' [15].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B105204	CTH.3039.0022.2554	P Jensen	16 May 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and a new debt was raised.
- The debt was to be waived due to special circumstances.

Key Findings

- An ARO varied the debt on internal review.
- The Tribunal commented:

  …The utility of the hearing was undermined by Centrelink's failure to provide the documentation that would have allowed for a meaningful review of its calculation of the debt amount. In response to further requests, Centrelink ultimately provided that documentation. It also recalculated the debt amount to be $1,414.52 [1].

- Centrelink calculated the debt on the "unfounded assumption" that the Applicant earned a constant daily rate [7].
- The Tribunal further stated:

  Centrelink did not provide that documentation to [the Applicant] and when the matter was listed for hearing before the Tribunal some six months later, it did not provide that documentation to the Tribunal. It was only after the Tribunal hearing, and after the Tribunal specifically requested that documentation (which should have provided in the ordinary course), and after Centrelink had provided an inadequate response, and after the Tribunal had noted the inadequacy of that response and reiterated its request, that Centrelink provided that documentation, at which point it effectively conceded that hat its previous calculation had been incorrect [7].

- The Tribunal found that special circumstances existed to justify a waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S105621	CTH.0032.0002.0637	H Horsburg	18 May 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with a decision that there was no debt.
- Centrelink was directed to return any monies already paid in relation to the debt raised.

Key findings

- The Tribunal commented:

  I will comment here that, if the only information available to Centrelink was the annual amount as shown by the ATO, any recalculation of [the Applicant's] newstart allowance payments would require a mathematical apportionment over the year and not an attribution of income to each period in which it was earned. Such an apportionment would be in breach of sections 1072 and 1073 and, therefore, wrong, regardless of whether or not she had correctly declared her earnings in each period (at [9]).

- The Tribunal found that despite the ARO's claims, the debt could not have been calculated based on actual income information obtained from the Applicant's employer as Centrelink had not contacted the employer. The Tribunal concluded that the ARO's statement was 'at the least, misleading' and that 'information from the ATO is not information from [the Applicant's employer]' (at [10]).

AAT Review Number	DOC ID	Member	Date
2017/S107686	CTH.3761.0001.0274	H Schuster	18 May 2017

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key Findings

- The Tribunal considered the ARO's calculation of the debt, and was satisfied they were correct. Centrelink's debt calculations reflected the best available evidence regarding the amounts of income earned by the Applicant, and the periods during which she worked.
- The Applicant knowingly underdeclared her income on a number of occasions as she had no money for rent. The Applicant's other extenuating and difficult family situation were also acknowledged by the Tribunal.
- The Tribunal deferred making its decision until it could obtain further relevant documents. Centrelink and the Applicant both provided further documents in response to the Tribunals request.
- Ultimately the Tribunal affirmed the decision.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S105981	CTH.0032.0002.0648	S Letch	22 May 2017

How it was decided and key facts

Outcome

- The decision under review was set aside.
- Centrelink was directed to recalculate the debt and obtain any records from the Applicant's bank for the periods unavailable to him.

Key Findings

- The Tribunal found that Centrelink raised a debt beyond the date that the Applicant ceased work and noted that 'The averaging method applied by Centrelink is patently unfair' (at [4]).
- The Tribunal found that Centrelink did not accept the Applicant's bank statements despite the fact that debtors in 'robo-debt' matters were usually invited to provide bank statements and these were clearly the better evidence than the 'grossed up' net figures Centrelink seemingly relied on (at [5]-[6]).
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S107624	CTH.3761.0002.5208	W Kennedy	22 May 2017

How it was decided and key facts

Outcome

- The decision under review was set aside.
- The matter was sent back to Centrelink for reconsideration in accordance with the direction that the Applicant's entitlement be recalculated on the basis that her earnings from her employer for the period from 14 July 2012 to 22 March 2013 were $9,518.75.

Key Findings

- Following a data match with the ATO, Centrelink decided to raise and recover a debt of an overpayment of NSA. Centrelink averaged the Applicant's income over a period [10], [11].

- The Tribunal found:

  The flaw in both of these calculations is that they do not take into account the fact that a significant amount of [the Applicant's] income for the financial year was received after [the Applicant's] NSA was cancelled with effect from 23 March 2013. This is documented in the payroll report provided by [the Applicant] at folio A6. Of course the reason the Department's calculations do not take this crucial fact into account is because the information was not obtained by the Department and was not supplied by [the Applicant] prior to the original decision and the decision of the ARO [12].

- The Tribunal found that the Applicant did under-report her income and that the Department would need to recalculate the debt [13].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M104736	CTH.3761.0002.3757 CTH.0032.0002.0041	D Stevens	23 May 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that the Applicant had a YA debt of $1,778.49 for the relevant period.
- The Tribunal found that the 10% penalty did not apply.

Key Findings

- The review concerned whether the Applicant had a recoverable YA debt. The debt was raised because Centrelink determined using information from the ATO that the Applicant had received income from employment that was greater than the amounts considered by Centrelink when calculating the Applicant's YA entitlements during the debt period [2].
- The Tribunal accepted that the ATO figures should be used in calculating whether or not the Applicant had been overpaid YA [8].
- The Tribunal considered the debt calculations made by the ARO and was satisfied that the Applicant was overpaid YA of $1,778.49 during the debt period.
- The Tribunal was satisfied there were no special circumstances in the present case to justify waiving or writing off the debt.
- The Tribunal stated that, having had the benefit of discussing the matter with the Applicant at the hearing, the Tribunal was satisfied the Applicant had no intention of misleading Centrelink when reporting her income and found the 10% penalty should not be added to the debt [19].

23 May 2017	DOC ID	Member	Date
2017/S105887	CTH.3761.0006.0221 CTH.0032.0002.0641 – duplicate	E Cornwell	23 May 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration.
- Centrelink was directed to recalculate based on verified earnings from the Applicant's Employer.
- In recalculating the debt, Centrelink was directed that earnings from one of the employers must take into account the Applicant's termination date.
- The recalculated debt was to be recovered in full.

Key Findings

- The Tribunal noted the original debt was raised 'after conducting a data match with the Australian Taxation Office' at [2].
- The Tribunal also referred to the decision of the ARO to remove the 10% penalty fee at [3].
- The Tribunal found 'taxable income from [Employer] for the 2013/2014 year was apportioned equally over the full year

and does not take into account [the Applicant's] evidence that she worked for only a short time into the 2013/2014 financial year. On the evidence provided by [the Applicant], this assumption made by Centrelink and apportioning the earnings in this way is incorrect' at [12].

- The Tribunal stated:

  Given that the calculation of the overpayment was sourced from information from the ATO, without any verification from her employers or without reference to payslips, the tribunal was not satisfied that the calculation accurately reflected the earnings or the actual periods of time when [the Applicant] worked, in particular for [Employer]. Centrelink has also not made available to the tribunal any primary information (payslips) or secondary information (information from the ATO or earnings reported by [the Applicant]) in regard to earnings from [Employer] [13].

- The Tribunal agreed with the ARO that no recovery fee should be applied to the debt.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/A105770; 2017/A105773	CTH.3066.0003.6529	S Cullimore	23 May 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt.

Key Findings

- An ARO varied the debt on internal review.
- This decision concerned an age pension debt.
- The Tribunal commented:

  Tribunal finds that she did work consistently throughout the debt period, and so averaging her total income over 26 fortnights per financial year would not create injustice to her by "distorting" her income [27].

- A 'work bonus' was not taken into consideration in calculating the Applicant's entitlements to social security payments. Given this, the Tribunal was not satisfied the debts had been correctly calculated.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B106663	CTH.0032.0002.0152 CTH.3039.0022.4904 CTH.3007.0027.5218	R Bradley	24 May 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that the Applicant was overpaid DSP in a different amount over the relevant period and recovery of the recalculated debt was to be waived.

Key Findings

- The Tribunal noted that Centrelink used apportioned earnings to calculate the overpayment when payslips were not available.
- The Tribunal was satisfied the amount of DSP disability support pension overpaid to the Applicant over two particular periods were debts due to the Commonwealth in different amounts to that which Centrelink arrived at.
- The Tribunal noted that the reason the amount of the debt is higher than that calculated by Centrelink was because Centrelink did not have all the payslips and the payment summary from the Applicant's Employer.

- According to the Tribunal, the debt over a precise period arose because the Applicant did not report his income in time.
- The Tribunal found that no sole administrative error existed.
- The Tribunal found that special circumstances existed to justify the waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S106951	CTH.3761.0005.1354	Angela Smith	24 May 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt.
- Centrelink was directed to obtain earnings information from the Applicant's employers and recalculate the debt amount by 'correctly apportioning the applicant's earnings… according to law'.

Key Findings

- The debts were raised following a data match with the ATO. The Tribunal noted that while there were no payslips available, the number of hours the Applicant reported working each fortnight varied, as did her income [12].
- The Tribunal was satisfied that the Applicant had been overpaid as her declared income was less than it should have been. It was not, however, satisfied with the amount of the debt and stated:

  Nevertheless, the tribunal is not necessarily satisfied as to the amount of the debt said to be owed. This is because, in the Department's calculations, it has averaged [the Applicant's] income over longer periods than any single fortnightly instalment period. As the applicant's income/hours of work fluctuated each fortnight, the approach taken by the Department in calculating the debts is not the correct application of section 1073B of the Act [14].

  While it would certainly have been easier for the Department to obtain total income information from the ATO and average it, rather than obtaining specific weekly/fortnightly pay information from [the Applicant's] employers, administrative expedience is no reason to misapply the law [15].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M106697	CTH.0032.0002.0294	P Noonan	24 May 2017
How it was decided and key facts			

Outcome

- The decision under review was affirmed, however, the 10% recovery fee was set aside.

Key Findings

- The Tribunal was satisfied that Centrelink's application of averaging was reasonable [12].
- As Centrelink did not take the Applicant's ordinary income into account, the Tribunal was satisfied that there were overpayments in the amounts stipulated by Centrelink [13].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S109169	CTH.0032.0002.0708	A Schiwy	25 May 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside.
- The Tribunal agreed with the calculations but found that the Commonwealth's right to recover the debt was replaced by its right to prove the debt as the Applicant had declared bankruptcy.

Key findings

- Although the Applicant claimed that her hours varied fortnightly, she conceded she may have inadvertently reported her net income.
- The Tribunal was satisfied with the income averaging approach as the Applicant was unable to provide sufficient evidence of how much she earned each fortnight (at [18]).

AAT Review Number	DOC ID	Member	Date
2016/M104661	CTH.0032.0002.0034	A Smith	26 May 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and the debt remitted to Centrelink for recalculation.

Key Findings

- The Tribunal was not satisfied with the Applicant's credibility or her explanations for the discrepancies in her reported income.
- Equally, the Tribunal was not satisfied that Centrelink calculated the debt correctly as it did not obtain documents identifying the Applicant's fortnightly pay.
- The Tribunal found:

  The legislation requires a determination to be made about the employment income earned during each fortnightly instalment period; particularly in circumstances where earnings are variable, Centrelink's method of averaging the total earnings for a period identified in a PAYG summary is likely to lead to an inaccurate calculation of the debt (at [21]).

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/S105081	CTH.0032.0002.0057	D Benk	26 May 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside.
- The Tribunal found that there was no debt.

Key Findings

- The Tribunal found that while income averaging may be an appropriate method to use in some circumstances, it failed in this case as the Applicant worked casual hours and only worked for the relevant employer for five weeks. His payments ceased when he obtained full time employment. Accordingly, the process of income averaging was a 'formula that produce[d] a skewed outcome' (at [5]).
- The Tribunal noted Centrelink did not have the opportunity to cross- reference reported income with the Applicant's bank statements for an earlier resolution (at [7]).

AAT Review Number	DOC ID	Member	Date
2016/M100448	CTH.3761.0004.0345	A Treble	26 May 2017
How it was decided and key facts			

Outcome

- The decisions under review were set aside and remitted to Centrelink for recalculation of the debt.
- Centrelink was directed to obtain the Applicant's pay records from one employer and calculate the debt based on pay records for both employers.
- Centrelink was directed to use averaged income using ATO data 'if and only if' pay records could not be obtained.
- Centrelink was directed to calculate the 10% penalty similarly.

- The recalculated debt and penalty were recoverable.

Key Findings

- Centrelink raised a debt based on a data match with the ATO. The ATO data was used to calculate the debt, however, this amount was recalculated using the Applicant's payslip information once he provided it. Centrelink also decided to impose a 10% penalty of $1,643 [3].
- The Tribunal found that the debt had not been calculated correctly and stated:

  Nevertheless, the tribunal was not satisfied that the debt has been correctly calculated by Centrelink. The relevant income test for newstart allowance requires a person's income to be taken into account when it is first earned, derived or received. A fortnightly income test applies. In this case, no effort was made by Centrelink to obtain actual wage records from [Employer 1] or [Employer 2], even though such records would very likely be readily available if requested. Instead, it has simply been assumed that the total year earnings can be apportioned equally to each fortnight across the relevant period of employment. However, that is not consistent with the requirements of the legislation. The actual pay records are critical to the proper calculation of the overpayment. [The Applicant] has now provided payslips from [Employer 1]. Centrelink will need to take those payslips into account in determining his income in the relevant period and will need to request the pay records from [Employer 2] in order to arrive at a correct debt calculation. Only if payslips cannot be obtained would it be acceptable to apportion income equally for the period of employment [14].
- The Tribunal found that the mandatory pre-conditions to warrant a write-off were not met [19].
- The Tribunal found that the Applicant had knowingly failed to provide the correct information about his income to Centrelink and therefore waiver was not available [27].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt. The Tribunal found that there were no special circumstances warranting a waiver [26].
- The Tribunal found that the 10% penalty should be imposed as the Applicant failed to provide correct information about his earnings (based on payslip information) and did not provide an adequate explanation for significantly under-reporting his income. The Tribunal accordingly found that it 'could only conclude that [the Applicant] either knowingly or recklessly failed to comply with his obligation to provide the correct information to Centrelink in relation to his earnings' [31].

AAT Review Number	DOC ID	Member	Date
2017/B105809	CTH.3761.0002.5717	A Byers	26 May 2017
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key Findings

- The Applicant supplied some pay advices. For one portion, Centrelink apportioned applicant's YTD earnings. The Tribunal stated:

  In the absence of pay advices, Centrelink has evenly apportioned [the Applicant's] [employer] earnings from 1 July to 29 October 2014 using the year to date earnings figure on his pay advice for the fortnight ending 12 November 2014. I offered [the Applicant] the option of requiring Centrelink to obtain pay advices for this gap but he indicated a preparedness to proceed on the present information. I consider the apportionment reasonable in the circumstances as it appears [the Applicant] had consistent work during this period [10].
- The Tribunal found that the Applicant was overpaid austudy.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B106946	CTH.0032.0002.0170	S Letch	29 May 2017

How it was decided and key facts

Outcome

- The decision under review was set aside.
- The Tribunal found that there was no debt.

Key Findings

- The Tribunal commented:
- It appears Centrelink has taken information from the ATO about the annual sum paid by [Employer] to [the Applicant], and averaged it. There is no obvious record in the materials of any attempts by Centrelink to obtain information from the employer [9].
- The Tribunal was not satisfied the debt was accurate, or existed at all, and set aside the decision.

AAT Review Number	DOC ID	Member	Date
2017/S105219	CTH.0032.0002.0629	W Kennedy	29 May 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that there was no debt.

Key Findings

- The debt was raised due to income averaging, however the Tribunal did not explicitly discuss it except to say Centrelink did not provide adequate information regarding its calculations.
- The Tribunal noted that the Applicant was paid in cash and had no documentary evidence of his income, however on its calculations the ATO data was consistent with the Applicant's claims [10].
- The Tribunal noted that Centrelink provided insufficient information about the basis on which it decided the Applicant had been overpaid and the debt calculation method. Accordingly, it was unable to determine whether Centrelink made a transcriptive error or had incorrectly calculated the debt [11].
- The Tribunal found:

  …the Department has not provided sufficient evidence that [the Applicant's] earnings during the periods when he was in receipt of NSA were in excess of the amounts he declared. It has not provided an indication of the fortnightly income that it has assumed nor has it provided a clear calculation of the debt. Some of the numbers it has apparently relied upon or produced are clearly incorrect [13].

- The Tribunal found that there was no evidence the Applicant under-reported their income, and as a result had not been overpaid.

AAT Review Number	DOC ID	Member	Date
2017/S107131	CTH.0032.0002.0680	AJ Halstead	31 May 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation.
- Centrelink was directed that penalties did not apply but the debt was still recoverable.

Key Findings

- The Tribunal found Centrelink's use of income averaging in this situation satisfactory as the Applicant declined to provide payslips and gave evidence that his income was stable and consistent each week (at [7]-[8]). It further stated:
- There has been averaging of income to determine the debts (notwithstanding it seems on [the Applicant's] evidence

income did not tend to fluctuate), the relevant period commenced some seven years ago thereby creating a disadvantage for [the Applicant] with recalling events from then and there is scant contemporaneous evidence in the Centrelink records from that time related to reporting contacts [16].

- The Tribunal did, however, note that the relevant period for the debt commenced about seven years prior and this created a disadvantage for the Applicant in terms of having to recall events. The Tribunal also noted Centrelink had 'scant' records from that time related to reporting contacts (at [16][). It accordingly waived the penalties applied.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.
- The Tribunal found that the 10% penalty should not apply [16].

AAT Review Number	DOC ID	Member	Date
2017/M105559	CTH.3761.0008.0004	A Grant	31 May 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation on the basis of pay information provided by the Applicant.
- Any remaining debt from recalculation was recoverable
- No penalty fee as to be applied to any recalculated debt.

Key Findings

- The Tribunal noted the original debt had arisen
'after an income reconciliation was conducted with information obtained from the Australian TTaxation Office' with a 10% penalty fee applied at [1].
- The Tribunal noted the Applicant requested a review of the decision where the ARO affirmed the debt but 'decided that no recovery fee would be charged' at [2].
- The Tribunal found upon assessment of one period of employment using payslip information that it:

  …strongly indicates that it is not appropriate to use the annualised income declared by [Employer] to assess her parenting payments as this will lead to an unreliable assessment of her rate of entitlement on a fortnightly basis. The debt will need to be recalculated to properly attribute [the Applicant's] earnings from [Employer] across the fortnights they were earned. Nonetheless, [the Applicant] has not accurately declared her income from [Employer] and she may have been overpaid once the correct [Employer] income is used to reassess her rate of payment together with her other income information [16].

- In relation to one set of employment information, the Tribunal noted that actual earnings appear to have been added to apportioned earnings and the Applicant's income may have been double counted [17].
- In relation to another employer, the Tribunal noted that apportioning income would lead to an inaccurate assessment of the rate of parenting payment given that the applicant did not work every fortnight for this employer [20]. Similar findings were made in relation to a further employer at [24].
- The Tribunal found it likely that the Applicant would have a debt once the calculations are made in accordance with the decision [28].
- The Tribunal found that no 10% penalty fee was to be applied to the debt in this case [32].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/A106996	CTH.0032.0002.0071	Y Webb	1 June 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and the debt remitted to Centrelink for recalculation.
- Centrelink was directed that no debts existed for the second relevant period.

Key Findings

- For the first period, the Tribunal was satisfied that the Applicant underreported her income but was uncertain whether Centrelink's calculations were correct as their method was not clear (at [23]).
- For the second period, the Tribunal was unsure why Centrelink believed the Applicant owed a debt given they did not contend she was working during the period. The Tribunal noted the Applicant had been declaring her income and found it difficult to ascertain the basis on which Centrelink determined she owed a debt (at [24]).
- The Tribunal noted that Centrelink did not provide sufficient evidence to substantiate that the Applicant was overpaid NSA for the second period (at [26]).
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B107036	CTH.0032.0002.0173	P Jensen	2 June 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt.
- The debt was to be recovered.

Key Findings

- The Tribunal found that the Applicant's employment payment schedule and Centrelink's reporting schedule did not align. Centrelink apportioned the income at a daily rate, however, – but the Applicant worked irregular shifts which led to the raising of the debt.
- The Tribunal found:

  Centrelink has calculated the overpayment based on her apportioned fortnightly earnings because, in its submission, it is the best (but not the perfect) evidence on point . [7].

  I find that she did not accurately declare her earnings. I find that Centrelink's calculations of her earnings are the best evidence on point, subject to what follows. [12].

- The Applicant did not provide all payslips until after the hearing. The matter was remitted for recalculation on this the basis of this information. The Tribunal member considered it to be '"the best evidence on point'" [13].
- The Tribunal found there was no sole administrative error or special circumstances to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B109918	CTH.0032.0002.0215	P White	5 June 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt.

Key Findings

- The Tribunal found:

  …[the] calculation of the debt based on average earnings is not fair or reasonable in this case. Centrelink has also applied a 10% penalty amount because it alleges [the Applicant] recklessly provided incorrect information. This is simply not proven, because it is possible that [the Applicant] did properly declare his earnings for the periods in which he was receipt of newstart allowance (at [13]).

- The Tribunal also accepted the Applicant's evidence that he provided payslips to Centrelink at the time that he declared his income, however, that these were no longer held on his record and he was unable to obtain them from his employer as they were a small enterprise (at [12]).
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/H106797	CTH.0032.0002.0231	J Longo	6 June 2017

How it was decided and key facts

Outcome

- The decision under review was set aside.
- Centrelink was directed that no debt was owed.

Key Findings

- The Tribunal found itself unable to decide, on the evidence before it, whether Centrelink's calculations were correct. It noted that income averaging was used and also that there was no direct evidence that the Applicant had income greater than he had already disclosed to Centrelink for the relevant period (at [10]).
- The Tribunal also noted that:

  [n]o information has been provided by Centrelink to support the reliability and accuracy of the debt calculations. It is unclear, based on the evidence before it, what methodology was used to ascertain [the Applicant's] income in the calculation (at [10]).

AAT Review Number	DOC ID	Member	Date
2017/B107078	CTH.3761.0005.8801	M Amundsen	6 June 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the direction that Centrelink obtain employer payroll information.

Key Findings

- The Tribunal stated the Applicant described her employment as seasonal work and there are periods where she received no income [8].
- The Tribunal noted that:

  '…Centrelink has raised [the Applicant]'s debts relying on information received through data matching. While a number of the data matching reports in the Centrelink papers specifically relate to shorter periods, a relatively large number of them refer simply to the period of a particular financial year (that is, the earnings identified are expressed as relating to a period commencing 1 July of a year and ending 30 June of the following year). On the basis of [the Applicant]'s description of her employment, I do not consider it likely that that is an accurate reflection of [the Applicant]'s pattern of earnings from her employment. In light of the nature of the work undertaken by [the Applicant], the approach adopted by Centrelink seems likely to lead to conclusions that [the Applicant] incurred debts during periods in which she had no earnings. Given the information that is likely to be available to Centrelink but which has not yet been gathered (see discussion below), I consider that to be an unnecessary risk' [11].

- The Tribunal found apparent that Centrelink did not attempt to gather more accurate information about the Applicant's earnings and that Centrelink chose not to use its information gathering powers to obtain relevant information from institutions about the exact dates on which the Applicant worked and how much she was paid for such work [13].
- The Tribunal then concluded:

  '…unless the payslips that [the Applicant] has already supplied to Centrelink provide all of the information, Centrelink must seek to gather specific information about [the Applicant]'s periods of work (and related wages) from her employers. If necessary, that information when received could be combined with information from her bank statements in order to develop a more certain understanding of the periods in which [the Applicant] worked and what she was paid.

- The Tribunal directed Centrelink to gather relevant available information about the periods in which she was employed and what payments she received for that employment [17].
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S107916	CTH.0032.0002.0688	N Foster	7 June 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt.

Key Findings

- The Tribunal noted that Centrelink averaged the Applicant's income and the ARO refused to substantially as the Applicant was unable to provide evidence of his income across the relevant fortnights at the time. When the Applicant provided bank statements, he was directed to apply to the Tribunal (at [6]).
- Based on the Applicant's bank statements, the Tribunal concluded that the Applicant may have been repaid a small amount in respect of one employer and that 'it was wrong for Centrelink to average his income across the entire 2013/2014 year' (at [7]).
- The Tribunal made the same finding in respect of the second employer (at [8]).
- The Tribunal found that no 10% penalty was to be applied to any recalculated debt [10]-[11].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/A107570	CTH.0032.0002.0085	E Cornwell	7 June 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that there was no debt.

Key Findings

- The Tribunal was not satisfied that averaging the income as reported to the ATO, as Centrelink had done, was an accurate reflection of the overpayment. It found:
- The apportionment method involves an approximation of earnings in each fortnight of a particular period and treats the person as earning a constant amount every day in a wage fortnight. This was not the situation in [the Applicant's] case. [the Applicant] reported to the tribunal that in the early months of his work with Unitised, which included the debt period, he was working about one day and sometimes two days a week for the first three months (at [13]).

AAT Review Number	DOC ID	Member	Date
2017/M107804	CTH.3039.0022.6443	M Baulch	7 June 2017

How it was decided and key facts

Outcome

- The decision under review was varied to the extent that parenting payment debt is $2,429.15.

Key Findings

- An ARO reviewed the decision and reduced the debt.
- The Tribunal found that not all of the Applicant's earnings were taken into account by Centrelink [22].
- The Tribunal agreed with Centrelink's use of averaging:
- Information obtained by Centrelink from the Australian Taxation Office shows that [the Applicant's] gross salary was $18,458, with payments ending on 30 May 2012. In the absence of any evidence about [the Applicant] actually worked, it seems appropriate that this income be apportioned evenly over the period 11 October 2011 to 30 May 2012 [25].
- The Tribunal applied averaging income to determine that the Applicant was precluded from entitlement to parenting payment [26].

- The Tribunal did not include the Applicant's allowance in debt calculations as it was unclear what the allowance related to [27].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B107876	CTH.3761.0002.5199	P White	13 June 2017
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key Findings

- Centrelink undertook an ATO data match [11]. The Tribunal found that the Applicant effectively accepted the overpayments.
- The Tribunal decided that it was appropriate for Centrelink to average out the salary over all the fortnights in the 2012/2013 financial year [13].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/A107671	CTH.3761.0002.6133	B Harvey	14 June 2017
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key Findings

- The Applicant's debt was calculated on the basis of payment declared by the Applicant in his tax return. The Department had applied an assumption of a constant rate of income over a period. The Applicant agreed this was accurate and the Tribunal was satisfied the amount of the debt was correct.
- The Applicant did not dispute the debt but requested that some of it was waved due to special circumstances.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S108188	CTH.3039.0023.0488	A Smith	14 June 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and the Tribunal decided there was no debt.

Key Findings

- An ARO affirmed the debt amount on internal review.
- Centrelink used income averaging to calculate part of the debt. The Tribunal was not satisfied that the debt was correctly calculated.
- Other issues surrounding the correct identity of the Applicant were raised.
- The Tribunal considered the decision to raise a debt to be unsafe.

AAT Review Number	DOC ID	Member	Date
2017/M107369	CTH.0032.0002.0330	J Longo	15 June 2017

How it was decided and key facts

Outcome

The decision under review was set aside and remitted to Centrelink for recalculation of the debt.

Key Findings

- The Tribunal found that while the Applicant had been under-reporting her income by providing net rather than gross pay, Centrelink had also not calculated the debt correctly.
- The Tribunal noted Centrelink made no attempt to obtain actual wage records from the Applicant's employer but had assumed that the relevant fortnightly earnings could be apportioned equally in each fortnight across the relevant period despite being made aware that the Applicant's income varied each fortnight. This approach was 'entirely inconsistent with the requirements of the legislation' [14].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S107826	CTH.3761.0005.8914	K Juhasz	15 June 2017

How it was decided and key facts

Outcome

- The decision under review to raise and recover the NSA debt was affirmed.
- The Tribunal determined that the 10% penalty should not be applied.

Key Findings

- The Tribunal discussed whether the Applicant wished to have the matter remitted to Centrelink for the department to seek payslips from the Employer. The Applicant was advised there was always the potential for a debt to increase or decrease depending upon the figures ultimately provided. The Applicant said 'she did not want any more delay and just wanted to concentrate upon the debt penalty and waiving the debt on a special circumstances basis' [15].
- The Tribunal found income disclosed by the ATO had been apportioned evenly across the entitlement period at [17]-[18].
- The Tribunal found the 10% penalty had been improperly applied [26].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B107083	CTH.0032.0002.0178	S Letch	19 June 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration.
- Centrelink was directed to reconsider the decision in accordance with the Tribunal's reasons.

Key Findings

- The Tribunal noted that, following the hearing, the Tribunal sought further materials from Centrelink, and in particular, an explanation as to why Centrelink wrote to the Applicant on 6 Dec 2016 advising him that his debt had been recalculated to $0. Centrelink advised this event never took place [3].
- The Tribunal observed it assessed the Applicant as a very credible witness and had no hesitation accepting his evidence. The Tribunal accepted the Applicant's records (a detailed table setting out the hours he worked and his gross pay based on his own records) as accurate.

- The Tribunal noted that the Applicant's records plainly reveal problems in the Centrelink assessment of applying averages based on payslips [7].
- The Tribunal remitted the matter to Centrelink to recalculate the debt based on the Applicant's data setting out the days he worked and his gross payment for each day worked [9].
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M108568	CTH.3761.0005.8445	A Schiwy	22 June 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside.
- The Tribunal substituted a new decision that the matter is remitted back to Centrelink with the direction to recalculate the overpayment based on employer payroll information.

Key Findings

- The Tribunal noted that Centrelink obtained information from the ATO about the Applicant's employment earnings and apportioned the earnings evenly over the employment period stated on the payment summaries provided by the various employers to the ATO. The Applicant was unable to provide payslips.
- The Tribunal noted:

  A number of the employers gave the entire financial year as the pay period, whereas in fact [the Applicant] was generally only employed for a small part of the year and in some cases for one day only. Apportioning the earnings is likely to produce an inaccurate debt calculation as [the Applicant]'s earnings were 'lumpy' and some of the income was earned when she was not in receipt of income support. Other difficulties include the fact that the employer's name is different on the information provided to the ATO than that reported by [the Applicant] at [12]-[13].

- The Tribunal found 'that the amount of the overpayment calculation was incorrect and sends the matter back to Centrelink for the overpayment to be recalculated' [17].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/S104274	CTH.3043.0009.7569	M Hyman	23 June 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and was remitted to Centrelink for recalculation of the debt.

Key Findings

- An ARO varied the debt on internal review.
- Due to the nature of his casual employment, the Applicant did not always accurately report his income. The Tribunal was satisfied a debt existed.
- In light of pay slip information, Centrelink averaged out some of the Applicants earnings. The Tribunal concluded this was "a most unsatisfactory basis" for determining the Applicant's debt.
- The Tribunal remitted the decision to Centrelink for recalculation in accordance with the directions outlined in the Tribunal's reasons.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B108033	CTH.0032.0002.0182	S Letch	23 June 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation.
- Centrelink was directed that the debt was to be waived.

Key Findings

- The Applicant claimed she had been subject to the 'robo-debt' scheme [5].
- The Tribunal found that Centrelink's calculations assumed the Applicant had earned over $3,000 for the relevant period, however, this was not the case and calculated her gross sum was much lower [9].
- The Tribunal stated:

  In the Tribunal's assessment, there are exceptional factors here. [The Applicant] has presented medical evidence in respect of her psychiatric treatment, severely exacerbated by the "robo-debt". The Tribunal accepted Centrelink's actions had a profound adverse impact on [the Applicant's] mental health. Centrelink is pursuing a debt which occurred over five years ago despite its routine matching with the Australian Taxation Office; the excessive delay is inexplicable [19].

- The Tribunal found that special circumstances existed to justify a waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S108616	CTH.0032.0002.0699	H Horsburg	26 June 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt.

Key Findings

- The Tribunal found that, although the ARO did not note it, income averaging was used to identify and raise the debt; this was contrary to the requirements of the Social Security Act 1991 (Cth) s 1073B. In particular, the Tribunal found that apportioning income in this case 'produced artificial and arbitrary results' [9].
- The Tribunal found that 'special circumstances' existed to justify waiving any unrecovered balance that may ultimately exist.

AAT Review Number	DOC ID	Member	Date
2017/A106746	CTH.0032.0002.0064	B Harvey	28 June 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink with directions that:
  - the non-payment was to be dealt with correctly in relation to calculation of any debt;
  - the Applicant's earnings from one employer was to be determined on the basis of documented evidence; and
  - Centrelink was to consider whether to waive the debt on the basis of sole administrative error.

Key Findings

- Employer 1:
  - The Tribunal noted that the employer's pay records did not match Centrelink's fortnights and T Documents 'did not show how the Secretary had reached the findings as to amounts earned in each Centrelink fortnight. The Secretary remedied this lack after the hearing, in response to my request for clarification' [10].

- The Tribunal was satisfied the Centrelink's calculations were based on amounts substantiated by payslips and their apportionment was correct [10].
- The Tribunal noted an amount was withheld and there was no explanation as to why [12]-[13].

- Employer 2:
  - The Tribunal found the Secretary had made various assumptions about the Applicant's income and it was unclear on what these were based [25]-[26].
- Employer 3:
  - The Tribunal was satisfied that these calculations were based on payslip information [25].
- Employer 4:
  - The Tribunal was satisfied that these calculations were based on payslip information [27].

28 June 2017	DOC ID	Member	Date
2017/M107477	CTH.0032.0002.0348	A Grant	28 June 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that no debt was owed.

Key Findings

- The Tribunal found it was unsafe in this case to calculate the Applicant's entitlements based on an allocation of her annual income across an entire financial year as if it was earned equally over each relevant fortnight [15].
- The Tribunal also found there were fortnights where the Applicant may have been underpaid as she spent some weeks on no pay and in treatment and recovery from very serious illnesses in the period under review [15].

AAT Review Number	DOC ID	Member	Date
2017/M108268	CTH.3761.0001.7567	J Nalpantidis	30 June 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and the Tribunal remitted the decision back to Centrelink to recalculate the debt using payslip information.

Key Findings

- The debt amount was initially varied by the ARO on internal review.
- On review, the Tribunal found that the Applicant had not correctly declared all of the income she received from her two different employers. The Applicant received benefits she was not entitled to.
- Centrelink provided some payslip material in support of the raising of the debt, but it was incomplete.
- In regards to using income averaging, the Tribunal commented:

  Her earnings actually varied in the debt period, and there were some periods in which she did not have any earnings. Centrelink's method of averaging her earnings was therefore not reflective of her actual fortnightly earnings throughout the relevant period. The tribunal considers that the debt will need to be recalculated, in line with the tribunal's findings in relation to [the Applicant's] income in the relevant period [21].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/A108143	CTH.3761.0002.7316	J Strathearn	4 July 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that there were three newstart allowance debts and that the third amount of $1,459.62 was reduced by $1,479.62 to $378.53.

Key Findings

- Centrelink raised following a data match with the ATO [6].

The Applicant told the Tribunal that the debts did not make sense as the amounts reduced when he provided Centrelink with payslips [21]. The Applicant was, however, unable to provide all payslips [20].

- The Tribunal scrutinised Centrelink's calculations and in relation to the debt of $1,858.15 particularly found that:

  …the assertion by the authorised review officer based on ATO advice that [the Applicant] earned $14,765 from Randstad (less tool allowance – amount not stated) in the period from 15 February 2012 to 21 March 2012 to be implausible. This would have meant that [the Applicant] earned an amount of approximately $2,953 per week over a five week period. There is no group certificate or other evidence from the ATO about this amount [29].

  …that a debt calculation by Centrelink (pages 112 and 118 of the Tribunal papers) indicated that there was an overpayment during that 5-6 week period (15 February 2012 to 21 March 2012) of $493 per fortnight for two fortnights and $493.62 for one period, totalling an amount of $1,479.62. This was based on earnings in those three fortnights for [the Applicant] of approximately $3,000 to $6,000 per fortnight. The Tribunal finds these earnings amounts to be implausible [35].

  As a result of all of the Tribunal's findings set out above the Tribunal finds that the debt amount of $1,858.15 should be reduced by an amount of $1,479.62 to an amount of $378.53 [36].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S106098	CTH.3761.0001.2720	E Cornwell	5 July 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and the Tribunal remitted the decision back to Centrelink to recalculate the debt using payslip information.

Key Findings

- The Applicant was a recipient of the DSP during the period in question. Given his disabilities, his father was his representative, and was the person who had assisted the Applicant to report his earnings to Centrelink during the period.
- The Tribunal was not satisfied with the debt calculations provided by Centrelink, and concluded that income averaging was not appropriate in the circumstances.
- The Tribunal commented:

  Centrelink has calculated the debt by apportioning the total gross amount over the debt period. The apportionment method involves an approximation of earnings in each fortnight of a particular period and treats the person as earning a constant amount every day in a wage fortnight. As can be seen from the payslips provided to the Tribunal, [the Applicant's] gross earnings varied [21].

- Centrelink was directed to recalculate the debt, taking into account the Applicant's actual fortnightly gross income.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M108912	CTH.3761.0005.7224	M Baulch	6 July 2017

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key Findings

- Centrelink raised the debt following a data match with ATO.
- An ARO affirmed the decision.
- The Applicant did not contest Centrelink's calculation of the Applicant's fortnightly income based on ATO information. The Tribunal noted that there was no other evidence to suggest that a fortnightly income other than Centrelink's calculation should be preferred [15].
- The Tribunal examined Centrelink's calculations and determined no error [17].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S106864	CTH.3039.0023.7530	AJ Halstead	7 July 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt based on actual earnings.
- No 10% penalty was to be imposed.

Key Findings

- An ARO varied the debt amount on internal review.
- The Applicant worked for a number of employers.
- Not all payslips were available to the ARO on internal review.
- Centrelink applied averaging of income in lieu of pay slip information [16].
- The Tribunal was not satisfied the debts had been correctly calculated and remitted the decision for recalculation.

AAT Review Number	DOC ID	Member	Date
2017/P107899	CTH.0032.0002.0603 CTH.3761.0006.1529	W Budiselik	10 July 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt.
- The debt was to be written off for a period of three months from the date of the decision.

Key Findings

- The Tribunal noted that Centrelink calculated the debt using income averaging which did not take into account fortnightly fluctuations of income [8].
- The Tribunal was satisfied that there was a debt but was uncertain about the quantum [9].
- The Tribunal found that the Applicant lacked the capacity to repay the debt and accordingly wrote off the debt for a period of three months [16].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.
- The Tribunal found that the 10% penalty should not apply [25]-[26].

AAT Review Number	DOC ID	Member	Date
2017/S110185	CTH.3761.0005.6863	T Bubutievski	12 July 2017

How it was decided and key facts

Outcome

- The decision under review was varied to reduce the debt owed in accordance with Centrelink's recalculation, with any amount repaid in excess to be refunded by Centrelink.

Key Findings

- The Tribunal noted that the debt had been calculated on the basis of an 'average fortnightly earnings amount … based on total earnings for [the Applicant] for the financial year' as reported to the ATO by the Applicant's Employer. The Tribunal noted the calculation was made in the absence of the Applicant's payslips for the relevant period [7].
- The Applicant provided the Tribunal with payslips and the Tribunal stated it 'crosschecked these payslips with the net amounts deposited to [the Applicant's] bank account and was satisfied that they were an accurate representation of her earnings over the period' [8].
- The Tribunal returned the matter to Centrelink for recalculation on the basis of the payslips provided and Centrelink subsequently recalculated the debt based on the Applicant's 'actual earnings' [8].
- The Tribunal noted Centrelink's recalculation of the overpayment based on the Applicant's payslips reduced the debt by almost half, to an amount which was less than the Applicant's mother had already repaid to Centrelink on her daughter's behalf [24].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M106366	CTH.0032.0002.0285	A Ducrou	14 July 2017

How it was decided and key facts

Outcome

The decision under review was set aside and remitted to Centrelink with directions that the debt be recalculated. Centrelink was directed not to apply the 10% penalty and that the outstanding balance of the debt was to be waived.

Key Findings

- Debt was originally calculated based on ATO data.
- The Tribunal found the Applicant reported his income incorrectly for some fortnights:

  The tribunal acknowledged that is difficult for casual employees with varying hours of work to report earnings accurately and noted the particular difficulties that [the Applicant] faced due to the requirement his employer imposed on him to postpone the submission his timesheets [21].

- The Applicant believed that his income should not be apportioned over 14 days because he didn't work weekends and public holidays (application of s 1073B).

The Tribunal found discrepancies between the ATO-provided data and the Applicant's payslips and stated:

> …The reasons for the inconsistencies were not apparent from the payslips. However, a possible explanation is that not all of the payslips were made available to [the Applicant]. Having regard to the correlation between the payslip gross taxable salary amounts and the ATO-provided gross taxable salary figure the tribunal considered that the payslips were the best evidence that was available of the salary [the Applicant] received from [Employer] for the 2014/2015 financial year [14].

- The Tribunal undertook its own calculations using the Applicant's payslips and found some differences to Centrelink's calculations. It accordingly found that a recalculation of the debt would be required [15].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M109641	CTH.3761.0006.0312	J Moir	14 July 2017
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key Findings

- Centrelink received information from the ATO regarding the Applicant's earnings from employment over the relevant period. Centrelink apportioned the income over the six-month period and identified an overpayment when compared with the earnings the Applicant declared during the period. Centrelink also imposed a 10% penalty [2].
- The Tribunal noted:

  The debt under review was calculated based on an averaged income figure rather than on actual fortnightly income figures. As there is no information available from the employer about what [the Applicant] was paid fortnight to fortnight, it is not possible to apply the actual earnings to each fortnight. Centrelink has taken the total amount paid to [the Applicant] by [employer] in the fortnight period 17 July 2014 to 23 January 2015, ($25,535), and divided it into 12 equal amounts of $1,871 for each full fortnight in that period (pro rata) [12].

- The Tribunal stated in relation to income averaging:
- There can be problems with averaging income earned over a number of months or a year, rather than applying the actual income earned each fortnight, if the income is variable, particularly if sometimes the income is over declared and sometimes under declared. However in [the Applicant] case, the available evidence shows a nett under declaration of income in the period under review [13].
- The Tribunal was satisfied that the ARO's calculation of the debt was correct [14].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M108570	CTH.0032.0002.0375	J Longo	18 July 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that a debt was owed but was to be waived.

Key Findings

- The Tribunal found that the Applicant's earnings had not been fully taken into account in calculating her original rate of NSA [10].
- Centrelink apportioned the Applicant's pay for the relevant fortnights based on summary income information used to calculate her original allowance. The Tribunal noted there was a discrepancy between the amount of gross income the Applicant earned for the period, as apportioned by Centrelink for the fortnight, and the amount declared to Centrelink at the time [11].
- The Tribunal found that special circumstances existed to justify a waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/A107867	CTH.0032.0002.0090	J Bakas	18 July 2017
How it was decided and key facts			

Outcome

- The decisions under review (to raise a debt and apply a 10% penalty fee) were set aside and remitted to Centrelink for recalculation of the debt based on the Applicant's payslips.

Key Findings

- A data match revealed a discrepancy between ATO data and the Applicant's reported income [12].
- The Tribunal found that Centrelink had assumed the Applicant earned income for a number of periods for which payslip information confirmed he did not work. The Tribunal was therefore not satisfied that the debt had been calculated correctly [17]-[19].
- The Tribunal found:

  Apart from this last period of the debt, I find that Centrelink did not provide sufficient evidence so as to explain their calculations and why there is a debt in the fortnights where [the Applicant] does not appear to have earned any income (according to his pay slips). They have not done so in this case, despite being alerted to this issue in the request for further submissions [21].

- The Tribunal found that the 10% penalty should not apply [24]-[26].
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/A109006	CTH.3761.0006.1215	R Anderson	18 July 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with directions that:
  - there was no debt in respect of income support bonus payments;
  - payslips were to be obtained directly from the employer; and
  - all debts were to be recalculated attributing the earnings from particular employers to the respective fortnightly periods reflected on the payslips; and
  - earnings from other particular employers were to remain as currently attributed.

Key Findings

- The Tribunal noted the original debt was raised by Centrelink based on data matching and PAYG summaries from the ATO [2].
- The Tribunal was 'satisfied that the fortnightly earnings of [the Applicant] have been attributed evenly over the financial year, when according to her oral evidence, they were earned largely over a significantly lesser period' at [11].
- The Applicant submitted at hearing 'that she attempted to access payslips from all of her previous employers however, she was only successful with [Employer]' and that 'it is likely she only worked for up to five months of the year.' The Tribunal was not satisfied that the debt as calculated was correct. The Tribunal was also satisfied that there were periods where under-stating of declared income had occurred. [13].
- The Tribunal directed the Department to exercise its power to obtain pay information from Employer.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S109632	CTH.3761.0001.0658	E Cornwell	18 July 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that one half of the recalculated debt should be waived due to the existence of special circumstances.

Key Findings

- The Tribunal referenced Centrelink's calculations which showed a discrepancy between declared gross earnings and the earned gross payments reflected in the Applicant's ATO information [15].
- The Tribunal stated it was not satisfied that Centrelink had correctly calculated the debt because not all of the necessary information was available to it at the time, noting the Applicant had now provided details of monies paid into her bank

account by one of her employers, some payslips, PAYG payment summaries, and a list of net payments into her bank account relating to a different employer [19]-[20].
- The Tribunal directed Centrelink to use the above information to recalculate the debt [21].
- The Tribunal determined that one half of the recalculated be waived due to special circumstances [45].

AAT Review Number	DOC ID	Member	Date
2017/M107426	CTH.0032.0002.0344	T Hamilton-Noy	21 July 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with a decision that there was no debt.

Key Findings

- The Tribunal was not satisfied that the debt had been calculated correctly as Centrelink had used ATO data to apportion annual income rather than payslips provided by the Applicant [10]-[12].

AAT Review Number	DOC ID	Member	Date
2017/M108123	CTH.0032.0002.0370	A Treble	21 July 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that the Applicant did not owe a debt for NSA payments in respect of 2014/15.

Key Findings

- The Tribunal noted that in 2016 Centrelink undertook a data match with the ATO and concluded that the Applicant had been overpaid Newstart Allowance in 2014/15.
- The Tribunal noted that the ARO reviewed and changed Centrelink's initial decision, finding that a debt was owed for a precise period and no recovery fee should be imposed. The Tribunal noted that the change occurred because the ARO recalculated the debt using information from the Applicant's employers which showed actual dates worked and pay received [5].
- The Tribunal noted that as no pay information could be obtained from one of the Applicant's employers (the Applicant had three employers in total over the relevant period), the ARO apportioned earnings from that particular employer evenly across the financial year [10].
- Following provision of the Applicant's tax return to the Tribunal, the Tribunal found that the Applicant had declared the correct income to Centrelink. Accordingly, the Tribunal found there was no debt for this period or any other period [13].

AAT Review Number	DOC ID	Member	Date
2017/A108137	CTH.3761.0002.6494	J Strathearn	23 July 2017
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key Findings

- Centrelink raised the debt following a data match with the ATO.
- The Applicant was invited to provide earnings information, which she accepted. The Applicant did not, however, provide Centrelink with further information and the debt was calculated purely based on ATO information [6].
- The Applicant claimed that she was receiving income from her previous employer 'in dribs and drabs' and that she did not declare a large portion of her income as it was paid in arrears [19]. The Tribunal noted that the Applicant was invited to provide bank statements to verify this claim, however, she did not do so [19].

- The Tribunal found that the Applicant was further overpaid as she did not declare insurance payments from her superannuation fund [20]-[23].
- The Tribunal made findings about the Applicant's overpayment on the basis of evidence from the ATO and Centrelink [28].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S109980	CTH.3039.0024.1601	J Leonard	25 July 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt.

Key Findings

- An ARO affirmed the debt amount.
- The Applicant had a large number of employers.
- Centrelink apportioned the Applicant's income over the relevant financial years in lieu of payslip information.
- The Tribunal was not satisfied that the debt is correctly calculated and remits the decision to Centrelink for recalculation.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S109944	CTH.0032.0002.0724	AJ Halstead	26 July 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and the matter was remitted to Centrelink for recalculation of the debt.
- Centrelink was directed to exercise its powers to obtain earnings information.

Key Findings

- The Tribunal found that it was clear that income averaging was used as the Department had assumed the Applicant was employed throughout the 2010/11 financial year [12].
- The Tribunal noted:

  'The evidence is that [the Applicant] was not employed for most of the relevant period. The amount of debt determined for [the Applicant] for the relevant period was based upon a rate of NSA that had been incorrectly calculated' [13].

- The Tribunal further noted that payroll information needed to be obtained to determine the proper debt amount [14].
- The Tribunal noted the 10% penalty should not be applied.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B108461	CTH.0032.0002.0197	N Foster	27 July 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside.
- The Tribunal was not satisfied that the Applicant had been overpaid YA in the amount as calculated by Centrelink.

Key Findings

- The Tribunal noted that in arriving at the overpayment figure, Centrelink took the Applicant's annual gross income from her various employers and averaged it across a period (in most instances, the relevant financial year).
- With this averaged income, Centrelink had used a start or end date if it was known to it. For example, the earnings from [Employer] had been assessed from 21 March 2014 onwards. Where an end date for employment was not known, as was the case with [Employer], Centrelink had continued to assess income until the end of the financial year.
- The Tribunal stated:

  'given the identical income figures used by Centrelink and the arbitrary periods for which income has been averaged across, it is likely that the income used to calculate [the Applicant's] debt does not correspond with her actual earnings in given fortnights' [12].

- The Tribunal found that an accurate assessment of the Applicant's entitlements required verification of her actual income during the fortnights in question. The Tribunal noted that Centrelink had far-reaching statutory powers that allow it to obtain income information from employers and that Centrelink had routinely used such powers in the past to verify the income of social security recipients.
- The Tribunal directed Centrelink to request income information from the Applicant's various employers, and once this information was obtained, to reassess the Applicant's entitlement to youth allowance in light of her actual fortnightly income, rather than use average income figures.
- The Tribunal also directed that Centrelink reconsider the issue of whether a 10% penalty should apply after details of the actual fortnightly income have been obtained.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M109724	CTH.0032.0002.0408	A Schiwy	27 July 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside.
- The Tribunal was not satisfied with the amount calculated as the overpayment.

Key findings

- The Tribunal noted the debt was based on an averaging of the Applicant's taxable income evenly throughout the year.
- The Tribunal found that the Applicant reported less income than she received and appears to have made an error when determining what amount should be reported during the leave period.
- The Tribunal noted it had difficulty understanding how the authorised review officer calculated the debt and it was not clear where the earnings figure in the Multical calculations came from.
- The Tribunal was satisfied that the debt in this case was partly due to incorrect reporting of income as the total amount declared as earnings by the Applicant did not equate to the gross amount received.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M104872	CTH.3761.0004.4950	P Noonan	28 July 2017
How it was decided and key facts			

Outcome

- The decisions under review were affirmed.

Key Findings

- The debts were raised on the basis that the Applicant had not accurately reported his income. Centrelink used ATO information to calculate the debts [3].
- The Applicant provided further information in relation to the income he earned from some employers. An ARO subsequently increased the debt amounts [4].
- The Tribunal considered the ATO data, the Applicant's reported income and the income information available on his file

and found that the Applicant had significantly under-declared his gross income [12].
- The Tribunal further noted that any possible effect of income averaging was lessened by the fact that the Applicant worked consistently, even if on casual terms. The Tribunal noted that Centrelink also may not have averaged small amounts which would have been in the Applicant's favour. The Tribunal noted that the calculations have were checked thoroughly and were accurate [12].
- The Tribunal found that the debt could not be written off [16].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B109191	CTH.0032.0002.0210	P Jensen	31 July 2017

How it was decided and key facts

Outcome

- The decision under review was set aside.
- Centrelink was directed to raise and recover a NSA debt of $758.10 for the period from 17 July 2013 to 6 August 2013.
- Centrelink was directed to investigate whether the Applicant owed a debt for three specific fortnights in 2014.

Key Findings

- The Tribunal noted that Centrelink raised a portion of the debt on the basis the Applicant earned certain amounts of income over various fortnights, but the hearing papers did not include any evidence that she earned that income.
- Following the hearing, the Tribunal arranged for a request to be forwarded to Centrelink requesting evidence that she earned that income and failed to declare that income.
- The Tribunal noted that Centrelink responded by advising they have corrected the debt and it does not include the periods referred to as the customer did not earn any income during those periods.
- The Tribunal stated:

  'Centrelink appears to have submitted that its two inconsistent calculations of the overpayment are both correct. I am unable to reconcile those calculations and I consider them both to be unreliable' [15].

- The Tribunal also stated that the evidence provided by Centrelink was in an 'unsatisfactory state' [17].
- The Tribunal found that despite the debt being 'solely due' to administrative error, it could not be waived on this basis as the Applicant could not be found to have received the payments in good faith [19].
- The Tribunal found that no special circumstances existed to justify a waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/P109475	CTH.3761.0005.3288	W Kennedy	31 July 2017

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key Findings

- Centrelink raised the debt following a data match with the ATO [2]. The ARO recalculated the debt on the basis that one of the payment summaries provided by the ATO had been duplicated [3].
- The Tribunal found that in calculating the overpayment for the period from 1 July 2011 to 30 June 2012, Centrelink had apportioned the Applicant's income within the periods nominated on the payment summaries [9].
- It noted that the '…period form 1 July 2010 to 30 June 2011 [was] still more problematic…' because the Applicant was only granted newstart allowance from 7 December 2010 and thus the period prior to that was outside the debt period. The Tribunal determined that the only way to determine the Applicant's income from 7 December 2010 was via payslips/bank records, which the Applicant did not have [10].
- The Tribunal ultimately determined that, for at least part of the period, the Applicant was overpaid as Centrelink was not aware of his full income [11].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M109754	CTH.3761.0006.0248	C Breheny	1 August 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the basis that the Applicant's earnings in the 2013/14 financial year were as advised by the ATO.
- The Tribunal also directed the resulting debt remained recoverable.

Key Findings

- A debt was raised following a review of entitlement and data match with the ATO where it was discovered that not all of the Applicant's earnings from employment had been considered to calculate his rate of age pension [1].
- The Tribunal stated:

  It appears that the two payslips [the Applicant] provided when he was first granted the age pension (in 2010), amounted to $1,218.28 per fortnight and Centrelink then maintained this income amount throughout the period under review [9].

- The Applicant's annual income was averaged and apportioned over the Centrelink fortnightly pay periods [10].
- The Tribunal was not satisfied this was correct [14]. The Tribunal estimated there would still be an overpayment [14].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S109047; 2017/S109049	CTH.3761.0001.5035	AJ Halstead	3 August 2017

How it was decided and key facts

Outcome

- The decisions under review by the Tribunal were set aside and the Tribunal remitted the decisions back to Centrelink to recalculate the debt using correct payslip information.

Key Findings

- The ARO varied the debt slightly on internal review. The Tribunal subsequently set aside this decision and remitted the decision back to Centrelink for recalculation, given the calculations were not based on the Applicants' actual earnings each fortnight.
- The Tribunal commented:

  It is evident that in calculating the debt, the Department applied averaging of income received by [the Applicant] from the various employers through the 2012/13 and 2013/14 financial years. The effect has been that income was incorrectly attributed throughout the relevant period because [the Applicant's] actual income from employment was not apportioned as required by section 1073B of the Act [12].

  In such circumstances the Tribunal is satisfied the debts under review are not correct and need to be recalculated using payroll records of actual earnings for each fortnight during the relevant period [13].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S110155	CTH.3761.0001.6381	T Bubutievski	3 August 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt using payslip information.

Key Findings

- The ARO affirmed the decision on internal review.
- The Applicant said he had tried to get payslip information so that he could report his income, but was unsuccessful. The Applicant was aware that he had not declared his income accurately, and so received social security benefits that he was not entitled to. There was a basis for the debt.
- While the ARO had used income averaging to calculate the debt, the Tribunal was not satisfied that this was an appropriate method of calculation, as it did not take into account the Applicant's actual fortnightly earnings.
- The Tribunal further found:

  …Centrelink has averaged income from each employer over the period covered by each respective PAYG Summary. This means that [the Applicant's] has been attributed to have income at a constant daily rate for each employer. This totally disregards [the Applicant's] evidence about the variability of his employment. [11]

  …Centrelink must seek more detailed information from the relevant employers and recalculate the overpayment based on [the Applicant's] actual pattern of earnings. The methodology it has used to calculate the overpayment is a methodology of last resort, and could only be used if detailed information was not available. [13]

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M106730	CTH.3761.0003.5232	M Baulch	4 August 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and the matter remitted to the Chief Executive Centrelink for recalculation of the debt.
- Centrelink was directed to obtain the Applicant's payroll information from her employers, re-calculate her debt on the basis of that information and make a fresh decision as to whether or not the Applicant had a newstart allowance debt that was required to be repaid.

Key Findings

- The Tribunal noted that Centrelink determined the Applicant owed a debt on the basis of a data match with the ATO. It further noted that Centrelink appeared to have calculated the debt by averaging the Applicant's earnings from each employer over the relevant period and was not satisfied that this was correct [17].
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S105327	CTH.3036.0014.4670	AJ Halstead	4 August 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt.

Key Findings

- An ARO affirmed the debt amount.
- The Tribunal found that the Applicant did not always accurately report her income.
- Centrelink used income averaging in lieu of payslips. The Tribunal was not satisfied the debt had been correctly calculated.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/H108271	CTH.0032.0002.0240	N Campbell	7 August 2017

How it was decided and key facts

Outcome

- The decision under review is set aside.

Key findings

- Centrelink obtained the Applicant's income through a data match with the Australian Taxation Office and averaged the income he received over a certain period on a weekly basis and applied this weekly average to a separate period, thereby calculating the debt.
- The Tribunal has reviewed the time and wages records and has come to the conclusion that the averaging of the Applicant's income over the relevant period would not provide an accurate view of his income on a weekly basis for the purpose of the NSA income test.
- The Tribunal concluded that the overpayment calculation will would need to be recalculated on the basis of the weekly income information contained in the actual payroll report, which the Tribunal requested that Centrelink obtain from the Applicant's Employer.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B108136	CTH.3036.0014.7768	P Jensen	8 August 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt.

Key Findings

- A 10% penalty was imposed on the debt.
- An ARO affirmed the debt amount.
- Centrelink used income averaging to calculate the debt in lieu of actual payroll information.
- The Tribunal directed Centrelink, with the assistance of the Applicant to recalculate the debt.

AAT Review Number	DOC ID	Member	Date
2017/S110085	CTH.0032.0002.0728	J Leonard	10 August 2017

How it was decided and key facts

Outcome

- The decision under review was set aside.
- The matter was remitted to the Chief Executive Centrelink for reconsideration with directions to obtain details of the Applicant's fortnightly earned income and recalculate the Applicant's entitlements, with any resultant debt to be recovered.

Key findings

- The Tribunal noted that the overpayment was calculated by Centrelink on the basis that the gross annual income from the Applicant's two employers was apportioned evenly over the FY.
- The Tribunal stated that the correct way to determine a person's entitlement to youth allowance in accordance with the Rate Calculator is to have regard to the person's ordinary income on a fortnightly basis in the relevant period. The Tribunal noted 'the result can be very different if the gross earnings are apportioned equally over a financial year, as Centrelink has done in this case' [13].
- The Tribunal stated that as Centrelink did not obtain details of the Applicant's gross income earned each fortnight, the

Tribunal is not satisfied based on the Applicant's oral evidence that apportioning earnings over a financial year results in an accurate determination of his entitlement to youth allowance in the relevant period [13].

- The Tribunal was not satisfied that the overpayment was correctly calculated [13].

AAT Review Number	DOC ID	Member	Date
2017/M111808	CTH.3761.0002.5175	A Byers	11 August 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink with the direction that the debt be reinvestigated and recalculated having regard to the Tribunal's reasons.

Key Findings

- The decision concerned two debts. Debt 1 related to undisclosed weekly compensation and Debt 2 to understated earnings [10].
- The Tribunal found, in relation to Centrelink's calculations, that:

  Yet another issue with Centrelink's calculations is that it has apportioned [the Applicant's] [Employer] earnings over the entire 2010/11 tax year. However, [the Applicant] said she did not start work for [Employer] until February 2011 at the earliest [23].

- The Tribunal found that Debts 1 and 2 were wrongly calculated:

  Regarding [Employer], fortnightly earnings details should be obtained. [The Applicant] herself may have retained her pay advices but, if not, the details will need to be obtained from [Employer]. If neither option is possible, the better approach will be to apportion [the Applicant's] earnings across the actual periods worked for this employer [26].

- The extent of any overpayment of parenting payment was unclear and the debt should have been recalculated [28].
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B110402	CTH.3761.0002.4693	M Amundsen	15 August 2017

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key Findings

- The matter concerned whether the Applicant received amounts of NSA in excess of her entitlements.
- The Tribunal reported that the Applicant noted evidence at folio 121 of a data matching record which indicated she was paid $5,390.00 over the relevant period. The Tribunal stated: 'I discussed Centrelink's apportionment process, noting in particular situations where the data match information is the only information about a person's earnings' [9].
- The Tribunal 'did not identify any errors in Centrelink's calculation of the quantum of [the Applicant's] debt' [15].
- In relation to the 10% penalty, the Tribunal was satisfied that the Applicant recklessly provided false or misleading information to justify the 10% penalty being added to the debt [17].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S109162	CTH.0032.0002.0704	AJ Halstead	16 August 2017

How it was decided and key facts

Outcome

- The decision under review was set aside.
- The matter was remitted to the Secretary for reconsideration with the Secretary to obtain earnings information for the Applicant for the 2010/11 financial year.
- The debt was to be recalculated by correctly apportioning the Applicant's earnings in each instalment period.

Key Findings

- The Tribunal found that the amount of debt determined for the Applicant for the relevant period was based upon a rate of carer payment that had been incorrectly calculated for the purposes of s 1064 of the Act because averaging of income was used rather than the application of s 1073B to actual periodic income. In such circumstances, the Tribunal was satisfied the debt under review was not correct and needed to be recalculated [9].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M110831	CTH.0032.0002.0444	A Schiwy	17 August 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that the matter be remitted to the Chief Executive Centrelink to obtain further evidence about the Applicant's earnings and recalculate the overpayment.
- Any resulting overpayment was to be considered a recoverable debt.

Key Findings

- The Tribunal found that apportioning the earnings was likely to produce an inaccurate debt calculation as the Applicant's earnings were 'lumpy' [16].
- The Tribunal found that Centrelink should obtain information from these employers about the actual amounts paid in each reporting period and recalculate the overpayment, with the resulting overpayment to be a debt to the Commonwealth pursuant to s 1223 of the Act [16].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B112924	CTH.0032.0002.0226	S Letch	21 August 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for reconsideration in accordance with the direction that Centrelink obtain further information and reconsider the debt.

Key Findings

- The Tribunal observed that Centrelink appeared to have averaged financial information without attempting to obtain fortnightly pay information, payslips, or banking records. The documents supplied to the Tribunal revealed no obvious source for the pay information it applied [5].
- The Tribunal noted there was subsequently better evidence available (the Applicant's fortnightly payslips) and stated:

  There is now better evidence available. The matter will be remitted to Centrelink with a direction that it reconsider and recalculate any debt by seeking from [the Applicant] his payslips; although [the Applicant] indicated he has all relevant

payslips, to remove any doubt, if it transpires there is any missing information, the Tribunal will direct that Centrelink seek the information from [the Applicant's] employer, and failing that, seek from [the Applicant] his banking records. If [the Applicant] is unable to supply those records, Centrelink should use its information gathering powers to request such information directly from [the Applicant's] bank [6].

- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M109470	CTH.0032.0002.0393	H Schuster	21 August 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that the Applicant's debt be recalculated, taking into account the earnings set out at [40] in the decision, with the recalculated debt to be recovered in full.

Key Findings

- The Tribunal observed that Centrelink had recalculated the Applicant's entitlements in the debt period by averaging out incomes for those employers from whom no payroll records were available.
- The Tribunal agreed with the Applicant that averaging his gross income from one employer over the debt period overstated his earnings for the purpose of calculating the Newstart allowance debt.
- The Tribunal agreed that Centrelink officers made a decision based on the best available evidence.
- The Tribunal noted that, unless Centrelink is able to obtain more accurate information, the amounts deposited into the Applicant's bank account should be used.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B110467	CTH.0032.0002.0219	F Hewson, S De Bono	22 August 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside.
- The Applicant's entitlement to newstart allowance over a certain period was to be recalculated on the basis of the apportioned income set out in the table at [13].

Key Findings

- The Tribunal considered the details of the Applicant's earnings throughout the debt period and apportioned her income on the basis that she worked weekdays during school terms and did not work on public holidays or pupil free days.
- The Tribunal concluded that the amount of overpayment must be recalculated on the basis of the apportioned income.
- The Tribunal found that only the overpayment for the period between 6 July 2010 to 19 July could be waived due to sole administrative error.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S111844	CTH.0032.0002.0755	A Smith	22 August 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside.
- The matter was remitted to the Chief Executive Centrelink for reconsideration and recalculation, with the recalculated debt to remain recoverable.

Key Findings

- The Tribunal noted that Centrelink apportioned the Applicant's earnings from one of her employers by averaging the total amount reported to the ATO for the period identified by the Employer in the PAYG summary.
- Whilst the Tribunal recognised there was a discrepancy between the total amount apparently reported to the ATO and the amounts represented by the payslips plus the grossed-up net payments from her bank account, the Tribunal preferred the specific evidence from the payslips and bank account regarding the Applicant's earnings for the purposes of calculating her fortnightly rate of NSA.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M110256	CTH.3761.0006.1325	J Nalpantidis	22 August 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the basis of the Tribunal's findings regarding the Applicant's income.

Key Findings

- The Tribunal noted that, according to data match information provided to Centrelink by the ATO, the Applicant worked with a particular employer over a period of time and had gross earnings of a certain amount. The Applicant disputed he had this amount of gross earnings and told the Tribunal the 'disputed debt was over three years ago and it was difficult for him to get complete payslips' [16], [18].
- The Applicant did however source his final payslip which listed the year-to-date ordinary earnings and overtime, which the Applicant accepted as reflecting the 'best available evidence' of the Applicant's gross year to date earnings [18].
- The Tribunal found that Centrelink's method of averaging earnings was 'not reflective of his actual fortnightly earnings throughout the relevant period' and would need to be recalculated in line with the Tribunal's findings in relation to the Applicant's income in the relevant period [35].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B109333	CTH.3761.0002.5868	P Jensen	24 August 2017
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key Findings

- The Applicant received four NSA debts between 2010 and 2014.
- Centrelink obtained information from the ATO concerning the Applicant's earnings during particular financial years or parts of financial years and, in the absence of any further evidence on point, Centrelink assumed that she earned her wages at a constant daily rate throughout the relevant period [4]. Centrelink recalculated her rates of NSA accordingly.
- The Tribunal explained to the Applicant that it could remit the matter with directions to issue notices to employers and recalculate the debt but that it could increase or decrease and stated:

  I also alerted her to the fact that Centrelink had not imposed a 10% penalty in respect of any part of the overpayments (which was appropriate given the imprecise nature of the evidence that it used to calculate the overpayments), but if Centrelink was provided with more precise information, such as payroll records, it would have to reconsider whether to impose a penalty: section 1228B of the Act [5].

- The Tribunal accepted the debt calculations as correct [5].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M113469	CTH.0032.0002.0517	Terry Carney	25 August 2017

How it was decided and key facts

Outcome

- The decision under review was set aside.
- The matter was remitted to Centrelink for recalculation with directions that:
  - No debt or debt component is able to be founded on extrapolations of fortnightly earnings whether from ATO records or employer statements of unapportioned total earnings for a period of employment greater than a fortnight;
  - The earnings components of any recalculated debts as may be raised must be based on and confined to any payslip or bank records for precise fortnights obtainable in the exercise of statutory powers to do so.

Key Findings

- The Tribunal found that, as Centrelink had calculated the debt on the basis of averages derived from the ATO or unapportioned figures supplied by the Applicant and had not utilised its powers to obtain fortnightly earnings figures, there was insufficient evidence to establish an overpayment debt or its size [6].
- The Tribunal stated that, having found that the Applicant's income fluctuated from fortnight to fortnight, an extrapolation of a fortnightly rate achieved by dividing ATO annual or other income figures for a stated period by the number of fortnights in that period, failed to reach the required level of 'satisfaction' the Tribunal is required to achieve about the precise income earned in each individual fortnight, before being able to determine a debt in the quantum suggested by Centrelink [18].
- The Tribunal stated that:

  while such ATO information may more than justify Centrelink in exercising its powers to require employers (or banks) to supply fortnightly payment records, it is insufficient to establish a precise debt quantum as is required under the application of the Full Federal Court in McDonald and the High Court's 'Briginshaw principle' [19].
- The Tribunal further stated:

  I do not accept that the key changes introduced by Centrelink's online compliance intervention (OCI) for raising and recovering debts (as outlined in a recent Ombudsman's report) absolves Centrelink from its legal obligation to obtain sufficient information to found a debt in the event that its 'first instance' contact with the recipient is unable to earth the essential information about actual fortnightly earnings [23].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/A110058	CTH.0032.0002.0111	J Forgan	25 August 2017

How it was decided and key facts

Outcome

The decision under review was set aside and substituted with the decision that the Applicant was overpaid NSA in a different amount, with that debt to be recoverable.

Key Findings

- The Tribunal noted that a data match with the ATO indicated that the Applicant had declared less earnings than she had received.
- The Tribunal found the Applicant should not have had any earnings apportioned over a precise period, finding those earnings should have been recorded in a previous period when they were earned. The Tribunal accordingly found the debt calculations were incorrect over that period.

AAT Review Number	DOC ID	Member	Date
2017/S111370	CTH.3036.0014.8607	J Moir	25 August 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and was remitted back to Centrelink for recalculation.

Key Findings

- An ARO varied the debt on internal review.
- The Applicant declared net income instead of gross income.
- Centrelink did not calculate the debt based on the Applicant's actual fortnightly earnings. The Tribunal could not be satisfied that the debt amount was correct. The Tribunal stated:

  Centrelink did not obtain details of [the Applicant]'s gross income earned each fortnight and the Tribunal is not satisfied based on [the Applicant]'s oral evidence that apportioning earnings over a financial year results in an accurate determination of his entitlement to newstart allowance in the relevant period. The Tribunal was not satisfied that the overpayment was correctly calculated [14].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S111003	CTH.0032.0002.0751	M Horsburgh	30 August 2017

How it was decided and key facts

Outcome

- The decision under review was set aside.
- The matter was sent back to the Chief Executive Centrelink for reconsideration and recalculation of the debt, with the resulting debt to be recoverable.

Key Findings

- The Tribunal observed that, by using the taxable income contained in ATO records, Centrelink calculated a debt by apportioning the respective earnings equally over the periods of employment.
- The Tribunal noted that the authorised review officer did not refer to s 1073B of the Act in coming to the conclusion that a debt could arise from this method and stated that '[a]pportioning] earnings in that way is contrary to the provisions of that section and the Act supplies no alternative method such as that assumed by the authorised review officer' [9].
- The Tribunal stated the apportionment had 'produced artificial and arbitrary results' [9].
- The Tribunal was satisfied that the Applicant had a debt, but was not satisfied that it has been properly calculated in accordance with the provisions of the Act, noting a correct calculation required actual information about the Applicant's earnings that could be obtained only from his former employers [12].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M111025	CTH.0032.0002.0457	N Campbell	1 September 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink to be reconsidered in accordance with the direction that the Applicant's income and Centrelink entitlement is to be recalculated, with the recalculated debts to be recovered.

Key Findings

- The Tribunal was satisfied that, on the basis of an examination of further documents received from the Applicant's employers setting out her fortnightly pays, Centrelink's calculation of the Applicant's income during the relevant periods and, particularly, the allocation of the income to particular fortnights was incorrect.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B113164	CTH.3761.0002.5058	S Letch	1 September 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the basis of the Applicant's recently supplied payslip information.

Key Findings

- The Tribunal noted that, on 26 November 2015, following receipt of information about the Applicant's annual employment income from the ATO, Centrelink decided to raise and recover a ("robo") debt of youth allowance. According to Centrelink, the Applicant had not fully disclosed her casual earnings from her Employer [1].
- At the time when an ARO affirmed recovery of the debt, fortnightly income information was not available. Instead, in accordance with its usual procedures in the absence of better evidence, Centrelink averaged the Applicant's yearly income over the alleged debt period. Following the Applicant's application to the Tribunal, the Applicant's representative (her mother) provided the Tribunal with the Applicant's weekly payslips from her Employer [2].
- The Tribunal stated that, as new evidence not available to previous decisions was now available, the appropriate course was to remit the matter back to Centrelink to recalculate the debt on the basis of the Applicant's payslip information [4].
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/ M112147 & M112302	CTH.0032.0002.0471	Terry Carney	7 September 2017

How it was decided and key facts

Outcome

- The decision under review was set aside.
- The Tribunal directed that the matter be sent back to Centrelink for re-determination in light of directions that:
  a) No debt or debt component could be founded on extrapolations of fortnightly earnings whether from Australian Taxation Office records or employer statements of (unapportioned) total earnings for a period of employment greater than a fortnight;
  b) The earnings components of any recalculated debts as may be raised must have been based on and confined to any payslip (or back-calculations of gross earnings from bank records) for precise fortnights obtainable in the exercise of statutory powers to do so (if set in train);
  c) Debt amounts (if any) as so varied were not recoverable debts (due to waiver); and
  d) Any monies over-recovered were to be repaid.

The Parties' Submissions

- The Tribunal noted that the Applicant was of the view she should not owe any debts because she correctly advised Centrelink about all employment and earnings.
- The Tribunal noted that Centrelink disagreed with this view because the Applicant could not supply payslips, and also concluded that recovery of the debt amounts is not to be waived due to any Centrelink error or special circumstances.

Key Findings

- The Tribunal found that across the two alleged debt periods the Applicant was engaged in episodic or ongoing work with six different employers, of varying duration and employment conditions.
- As Centrelink had calculated the debt on the basis of averages derived from the ATO, and had not utilised its powers to obtain fortnightly earnings figures, the Tribunal found there was insufficient evidence to establish an overpayment debt or its size.

- The Tribunal found that any overpayment as may be found is to be waived due to special circumstances.
- The Tribunal stated:

  Because I have found that [the Applicant's] income fluctuated from fortnight to fortnight I find that extrapolation of a fortnightly rate achieved by dividing ATO annual or other income figures for a stated period by the number of fortnights in that period fails to reach the required level of 'satisfaction' I am required to achieve about the precise income earned in each individual fortnight, before being able to determine a debt in the quantum suggested by Centrelink [14].

- The Tribunal further stated:

  [W]hile such ATO information more than justifies Centrelink in exercising its powers to require employers (or banks) to supply fortnightly payment records, it is insufficient to establish a precise debt quantum as is required under the application of the Full Federal Court in McDonald and the High Court's 'Briginshaw principle [15].

- The Tribunal found the overpayment 'methodology' – involving extrapolation of ATO employment income information over a period, divided to produce an average fortnightly, and then applied to NSA payment periods to raise a debt – at best raised 'no more than the sufficient doubt about the accuracy of past payments as to warrant the exercise of powers of enquiry held by Centrelink'. The Tribunal noted '[i]t is too uncertain, and too slight a basis to satisfy the Briginshaw standard in a fortnightly rate debt matter such as the present' [44].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M112681	CTH.0032.0002.0491	S Hoffman	7 September 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside.
- The matter was sent back to the Chief Executive Centrelink for reconsideration in accordance with directions that the rate of newstart allowance be recalculated, with the resultant debt to be recoverable.

Key Findings

- The Tribunal stated that, in calculating any overpayment, earnings were to be allocated to the relevant fortnight and not apportioned over the debt period [23].
- The Tribunal observed that the Department allocated a particular payment across a certain period, when the Tribunal found the payment represented earnings for a particular fortnight.
- The Tribunal was satisfied that the Applicant under-declared her income during the debt period, and by application of s 1223 of the debt, that overpayment to be calculated by the Department would be a debt due to the Commonwealth [32].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S112884	CTH.2001.0009.3102	Terry Carney	7 September 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside.
- The matter was remitted to Centrelink for redetermination with directions that:
  a) No debt or debt component could be founded on extrapolations of fortnightly earnings whether from ATO records or employer statements of (unapportioned) total earnings for a period of employment greater than a fortnight;
  b) The earnings components of any recalculated debts as may be raised must have be based on and confined to any pay slip (or back-calculations of gross earnings from bank records) for precise fortnights obtainable from the Applicant or in the exercise of statutory powers to do so;

c) Debt amounts (if any) as so varied were recoverable debts (not able to be waived); but otherwise
d) Any monies over-recovered were to be repaid.

Key Findings

- The Tribunal found that during the alleged debt periods the Applicant was engaged in episodic or ongoing work with eight different employers of varying duration and employment conditions. As Centrelink had calculated the debt on the basis of averages derived from the ATO, and had not utilised its powers to obtain fortnightly earnings figures, there was insufficient evidence to establish an overpayment debt or its size [6].
- The Tribunal noted the key points the Applicant asked the Tribunal to accept (and which were accepted) were:
  a) That Centrelink incorrectly assumed that all 'end dates of employment' as advised by employers to the ATO were accurate representations of the actual end date of that employment.
  b) That Centrelink was wrong to claim that the Applicant's presumed earnings involved overlapping receipt of both actual earnings and NSA payments, when after-tax earnings records showed otherwise.
  c) That Centrelink was not correct in assuming that the Applicant's earnings were either from ongoing employment (it was often intermittent in character) or that the amount of fortnightly earnings was a constant figure (they fluctuated) [11].
- The Tribunal found that the extrapolation of a fortnightly rate achieved by dividing ATO annual or other income figures for a stated period by the number of fortnights failed to achieve the level of 'satisfaction' required to be reached in relation to the precise income earned in each individual fortnight, before being able to determine a debt in the quantum suggested by Centrelink [14].
- The Tribunal reasoned that, while such ATO information more than justified Centrelink exercising its powers to require employers (or banks) to supply fortnightly payment records, it was insufficient to establish a precise debt quantum as required under the application of the Full Federal Court decision in McDonald and the High Court's 'Briginshaw principle' [15].
- The Tribunal did not accept that the key changes introduced by Centrelink's OCI for raising and recovering debts absolved Centrelink from its legal obligation to obtain sufficient information to found a debt in the event that its 'first instance' contact with the recipient is unable to unearth the essential information about actual fortnightly earnings.
- The Tribunal stated that the overpayment 'methodology' is 'too uncertain, and too slight a basis to satisfy the Briginshaw standard in a fortnightly rate debt matter' [43]. It further stated that '[w]ithin] the terms of McDonald… the failure to establish the overpayment leads to the default of no debt' [45].
- The Tribunal noted that Centrelink relied on a methodology which was incapable, other than in rare instances of unchanging fortnightly income, of addressing the architecture of fortnightly rate payments [40].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S110997	CTH.3761.0002.7365	M Hyman	8 September 2017

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key Findings

- The decision under review for the Tribunal involved determining whether the Applicant was overpaid NSA [1].
- The Tribunal noted '[t]he hearing papers include data match information from the Australian Taxation Office (ATO). This data shows that [the Applicant] was paid by a range of different employers and organisations over the debt period' [13].
- The Tribunal stated that Centrelink had 'obtained detailed earnings information wherever possible from the multiple employers who engaged [the Applicant] from time to time. Her earnings were erratic and variable' and 'some averaging of income has been necessary, in the absence of detailed payslip information' [19].
- The Tribunal found the Applicant 'significantly under-reported her income; she did make a report in most fortnights, but on most occasions inaccurately reported zero earnings' [27].
- The Tribunal found the 10% penalty fee applied [29].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M107719	CTH.3761.0001.6781	A Grant and P Sperling	11 September 2017

How it was decided and key facts

Outcome

The decision under review was affirmed.

Key Findings

- The Applicant assumed that by declaring her income for FTBs, Centrelink would also take these into account for her fortnightly parenting payments. Given this was not the case, the Applicant received benefits she was not entitled to and a debt was raised.
- The Tribunal stated:

  [the Applicant] told the tribunal that she thought that by providing estimates each year for the purpose of determining her FTB entitlements, she was meeting the reporting requirements for her parenting payment. She believed that her annualised income estimates for FTB were then also used to assess and determine her fortnightly rate of parenting payment [13].

  In calculating the debt, Centrelink has used the information from the ATO to recalculate [the Applicant's] rate of parenting payment. The method used by Centrelink was to evenly allocate the income earned from each employer across the period for which she was declared to work for that employer [15].

  In the absence of more detailed evidence from [the Applicant] regarding the income earned during this period, the best information available to the tribunal is contained in the PAYG payment summaries. The tribunal therefore accepts Centrelink's apportionment of income sourced from the ATO as an acceptable estimate of income earned over this period and is satisfied that the correct apportionment was used and the overpayment is correctly calculated [18].
- The Tribunal was satisfied that the Applicant did not correctly report her income, and owed a debt.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/P111804	CTH.3761.0005.6140	J Nalpantidis	15 September 2017

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key Findings

- The Tribunal accepted the ATO data in relation to the Applicant's earnings and noted that Centrelink apportioned the Applicant's income throughout her employment period. The Applicant did not have payslips for the period [15].
- The Tribunal noted that the ARO provided the Applicant with an opportunity to provide information that evidencing the fact that the income was earned during periods where she was not in receipt of newstart allowance, however, the Applicant declined to do so. Accordingly, the ARO relied on ATO information [16].
- The Tribunal accepted Centrelink's calculations and was unable to find that the Applicant correctly declared her income [17-[19].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/H113510	CTH.3761.0005.8457	S Brakespeare	15 September 2017

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key Findings

- Centrelink raised a debt on the basis that the correct amount of the Applicant's income from employment had not been taken into account in setting her rate of parenting payment [3].
- The Tribunal found 'that there were a number of small discrepancies between the income [the Applicant] earned and the amount she declared' [14].
- The Tribunal stated

  The tribunal notes that in calculating the debt, the Department has averaged [the Applicant's]income from [Employer] over the period it was earned. Income should be attributed to the instalment fortnight in which it is actually earned; however as there was no information before the Department or the tribunal which shows that income on a weekly or fortnightly basis (e.g. pay advices) the tribunal accepts that averaging is the appropriate way of attributing the income to the period it was earned. [15]

- The Tribunal found that the Applicant was overpaid [16].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B112358; 2017/ B112359	CTH.3039.0024.5957	S Letch	18 September 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with directions that Centrelink reconsider the debts once Centrelink obtained fortnightly pay information from the Applicant's employers, and should that material be unavailable, Centrelink make reasonable efforts to obtain the Applicant's banking records.

Key Findings

- The Tribunal observed that, 'like "robo debts", Centrelink had taken data-matched Australian Taxation Office (ATO) information and averaged it over the purported work period'. The Tribunal noted that, of all the employers, the materials only contained fortnightly pay information from one particular employer and averages based on the limited information transmitted to Centrelink from ATO records were applied for the Applicant's four other employers [4].
- The Tribunal was not satisfied that the quantum of the debts was accurate in the absence of better evidence and directed that Centrelink obtain from the Applicant's alleged employers more detailed weekly or fortnightly pay information. The Tribunal noted that, should that material be unavailable, Centrelink was directed to make reasonable efforts to obtain the Applicant's banking records to "gross up" sums paid to the Applicant's account [5].
- The Tribunal did not consider whether circumstances existed to justify a write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M112011	CTH.3761.0004.0701	A Schiwy	18 September 2017

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key Findings

- Centrelink originally calculated the debt based on PAYG information obtained from the ATO, however, recalculated the debt based on payslip information from three of the Applicant's employers [13].
- No payslips were provided for two of the Applicant's employers and the payments were averaged over two reporting periods each [14].
- As the Applicant did not provide any further information, the Tribunal was satisfied with the calculations [15].
- As the Applicant was repaying the debt at $50 per fortnight, the Tribunal found the debt could not be written off [18].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M109711	CTH.0032.0002.0402	N Campbell	19 September 2017

How it was decided and key facts

Outcome

- The decision under review was set aside.
- The matter was sent back to the Chief Executive Centrelink for reconsideration in accordance with the direction that the Applicant's entitlement to NSA be recalculated in light of the Employment Declaration received from the Applicant's former employer, with any recalculated debt to be recovered.

Key Findings

- At an earlier hearing the Tribunal decided to defer making a decision to request that Centrelink obtain from the Applicant's former employer his time and wages records for the relevant period.
- The Tribunal noted that Centrelink initially obtained, through a data match with the ATO, the Applicant's gross income for the 2011/2012 FY and averaged this amount over the financial year.
- The ARO amended the amount of the debt on the basis of the Applicant's reported income in a set period and then averaged the remainder of the income, which Centrelink stated had not been reported, over the full financial year.
- The Tribunal was not satisfied that the averaging of income over the whole FY would accurately lead to the correct calculation of the Applicant's entitlement to NSA over the relevant period, and hence deferred making a decision until the former employer's time and wages records were received.
- The Tribunal was satisfied from the Employment Declaration provided by the Applicant's former employer that the averaging of the Applicant's income over the period of employment would not fairly reflect the income earnt in each fortnight [15].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M111430	CTH.3039.0024.5334	N Campbell	25 September 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the direction that the Applicant's entitlement to parenting payment in the relevant periods be recalculated pursuant to income details provided by, or to be provided by, her employers. Any recalculated debt is to be recoverable.

Key Findings

- The Tribunal noted that Centrelink had initially obtained, via a data match with the ATO, the Applicant's gross income for the relevant periods and averaged this income over these periods [12].
- Following the provision of payslips by the Applicant, the ARO amended the amounts of the debts and, where payslips were not provided, the ARO averaged the income over the remaining periods as reported on the data matches [12].
- The Tribunal was not satisfied that the averaging of income over periods when payslips were not provided by the Applicant accurately reflected the Applicant's income [15].
- The Tribunal noted it deferred making a decision to request Centrelink to obtain the Applicant's wage records from her relevant employers [7].
- As at 22 September 2017, the Tribunal had received a pay history report from one of the Applicant's employers, but no pay records had been received from two other employers [8].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/A112558	CTH.3039.0024.6207	K Millar	25 September 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and the matter was remitted to Centrelink for reconsideration in accordance with the direction that the debt be recalculated using information about the Applicant's income in the debt period contained in her bank account statements.

Key Findings

- The Tribunal noted that, following a data matching exercise with the ATO, a Centrelink Officer raised three separate debts of YA [2].
- The Applicant subsequently provided bank account statements for much, but not all, of the debt period [4].
- The Applicant was unable to obtain payslips as the owners of the businesses she worked for had moved offshore and the businesses no longer operate [12].
- The Applicant was satisfied there was an overpayment but was not satisfied the debt had been correctly calculated. The Tribunal found the appropriate course was to remit the matter back to Centrelink for reconsideration in accordance with the direction that the debt be recalculated using the Applicant's bank account details [13]-[14].
- The Tribunal noted it would be in the Applicant's interests to provide her bank account statements for any of the debt period not already provided [14].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M107079	CTH.0032.0002.0306	A Ducrou	6 October 2017
How it was decided and key facts			

Outcome

- The decisions under review were set aside.
- The matter was sent back to the Chief Executive Centrelink for reconsideration in accordance with directions that there was a debt overpaid to the Applicant, that the amount of the debt is to be recalculated, that recovery of the outstanding balance of the debt from a particular period is waived, and that a penalty of 10% is not to be applied to the debt once recalculated.

Key Findings

- The Tribunal noted that in its calculations Centrelink applied ATO-advised earnings across the relevant Centrelink instalment periods, except for a period of employment where payslips were available to Centrelink.
- The Applicant supplied documents to the Tribunal which included payslips from all of her employers during the period under review. These were not previously provided to Centrelink.

- The Tribunal accepted that the gross earnings shown in the payslips accurately reflected the Applicant's earnings, noting the payslip information was the best evidence available of what the Applicant earned during the period under review and it should be applied in determining the overpayment.
- The Tribunal found that special circumstances existed to justify a waiver of the remainder of the debt for the period between 17 November 2014 to 24 June 2015.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt.
- The Tribunal found that the 10% penalty should not apply.

AAT Review Number	DOC ID	Member	Date
2017/H113566	CTH.0032.0002.0261	N Foster	11 October 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that the Applicant did not have a debt for the period under review.

Key Findings

- The Tribunal observed that, in calculating the overpayment, Centrelink apportioned an average income figure from each of the Applicant's employers across the relevant fortnights.
- The Tribunal noted that whilst the Applicant had consistently maintained throughout the review process that average income figures used by Centrelink did not reflect his actual income for the fortnights in question, Centrelink had declined to change its decision in the absence of corroborating evidence [5].
- The Applicant had since provided the Tribunal with copies of his bank statements and submitted at the hearing that these bank statements corroborated his assertion that the averaged income figures used by Centrelink were incorrect.
- Having reviewed the bank statements, the Tribunal accepted the Applicant's submission.
- The Tribunal was satisfied that the averaged income figures used by Centrelink in determining that the Applicant was overpaid were incorrect [8].
- Given the Applicant declared income for all of the fortnights he actually worked and the total income he declared was more than he earned from both his employers, the Tribunal concluded there is likely to have been no overpayment. It followed that the Applicant did not have a debt for that period [9].

AAT Review Number	DOC ID	Member	Date
2017/H113531	CTH.0032.0002.0256	M Baulch	16 October 2017

How it was decided and key facts

Outcome

- The decision under review was set aside.
- The matter was sent back to the Chief Executive Centrelink for reconsideration in accordance with directions that:
  a) Centrelink use its information gathering powers under the SSA to obtain payroll information from the Applicant's employers for a particular period;
  b) Following receipt of that material, Centrelink undertake a re-calculation to determine if the Applicant was paid more than she was entitled to over the relevant period; and
  c) Having regard to that re-calculation, Centrelink to make a fresh decision as to whether or not the Applicant has a NSA debt.

Key Findings

- The Tribunal noted that the information upon which Centrelink had based its decision to raise and seek to recover a NSA debt was obtained through a data match with the ATO. Initially, Centrelink calculated the debt by averaging the Applicant's earnings from each employer over the period Centrelink asserted that they related to.
- Following the Applicant providing Centrelink with payslips and other evidence, the assessment of the Applicant's income from various employers had been adjusted and the amount of the debt amended. However, the earnings from the employers without payslips were being determined by averaging the Applicant's earnings from those employers over the period Centrelink asserted they related to.

- The Tribunal found no reason not to accept the Applicant's evidence that her earnings from various employers fluctuated over time and were not the same each fortnight. On this basis the Tribunal considered it more likely than not that Centrelink's assessment of these earnings used in the debt calculations were not correct.
- The Tribunal decided to set aside the decision under review, on the basis that the amount of the debt calculated by Centrelink could not, on the balance of probabilities, be correct.
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M112868	CTH.3761.0005.6607	P Glass	20 October 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the direction to recalculate two periods of entitlement: one where the Applicant did not work and the other where the Applicant's income was $69.51.

Key Findings

- The Applicant submitted that the calculations undertaken by the Department to average his income from payslips across days in each reporting period results in inaccuracies. The Tribunal noted:

  In the fortnight ending 1 October 2012, the Department have apportioned his income as $850.40 using that methodology. [the Applicant] gave evidence that did not work during that fortnight. That evidence is supported by a printout of [the Applicant's] shifts obtained from his employer and the relevant payslips. I accordingly find that in the fortnight ending 1 October 2012, [the Applicant's] income was nil [9].

- In relation to a separate fortnight which Centrelink apportioned the Applicant's earnings across, the Applicant gave evidence that he worked no shifts with that employer during that fortnight. This evidence was corroborated by the record of his shifts. Accordingly, the Tribunal accepted the Applicant's evidence as total payment for that fortnight [10].
- The Tribunal noted the Applicant:

  …submitted that the debt should not extend back to July 2012 as it did not initially form part of the period audited by the Department. He claimed to have not prepared to address the period from July to September 2012 at the hearing before the Tribunal. … [The Applicant] also gave evidence of the significant burden placed on him by having to obtain employment records from a period of time between three and five years ago [16].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S114013	CTH.3761.0001.5026	J Leonard	26 October 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt using payslip information.

Key Findings

- The Tribunal reviewed all of the Applicant's fortnightly income statements and the calculations made by Centrelink. Centrelink had not calculated the debt on the basis of the Applicant's actual fortnightly earnings, and so could not be satisfied that the debt was correctly calculated.
- The Tribunal specified the relevant pay periods where the Applicant may have been over or underpaid, and remitted the decision back to Centrelink for recalculation based on actual fortnightly earnings.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S110650	CTH.3761.0004.8486	M Hyman	9 November 2017

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key Findings

- Centrelink obtained payslip information from various employers of the Applicant which, the Tribunal stated, revealed that the Applicant was 'systematically under-declaring her earnings' [11].
- Additionally, the Tribunal found that the Applicant had informed Centrelink that she was still enrolled as a full-time student when she had withdrawn early in the semester. Therefore, the youth allowance paid to her in the semester on the basis that she was a full-time student was an overpayment [13].
- In relation to Centrelink's calculations, the Tribunal stated:

  The other two debts cover overlapping periods with multiple employers and data of varying kinds. Much of the debt is covered through pay slips, which allows the debt each fortnight to be determined with some precision. In some other cases, the available data is for earnings over a short period but without fortnight-by-fortnight detail, and some data appears to be annual data derived from tax records. This data has been averaged, in the absence of better data. On the basis of the available information, the best possible estimate of [the Applicant's] debt has been made, with great attention to detail and careful use of the data. A recovery fee has been included in the larger debt. [The Applicant] did not contest the calculation of the debts. I find that [the Applicant's] debts are $8,274.63 for the period 9 June 2009 to 11 January 2013; and $7,091.72 for the period 7 December 2010 to 2 May 2014 [16].

- The Tribunal found that there was no sole administrative error or special circumstances warranting the debt to be written off or waived.

AAT Review Number	DOC ID	Member	Date
2017/S112077	CTH.3039.0025.2472	M Hyman	15 November 2017

How it was decided and key facts

Outcome

- The decision under review was varied such that the debt increased in sum.

Key Findings

- The Tribunal noted the difference between reported and actual earnings came to light through data matching with the ATO [12].
- The Applicant subsequently obtained and submitted payslips, pay registers, lists of hours worked and rates paid, and emails verifying claims for payment [12].
- The Tribunal stated that the earnings information made available is not complete, as the payment records did not cover the entire period or were otherwise incomplete [13].
- The Tribunal stated:

  Where no detailed information is available the income reported by the ATO has been averaged over the period in which it was reported to have been earned; where the pay slips or other records are incomplete, earnings greater than those documented are averaged over the period that the records do not cover, or pay amounts for each fortnight have in some cases been derived from year-to-date figures [13].

- The Tribunal concluded that this approach had meant that for certain fortnights income had been averaged where pay information was incomplete. The Tribunal was satisfied that the calculations represented the best that could be done with the available data [14]-[15].
- The Tribunal found the debt should be increased by $650 to include the student start-up scholarship payment that she was not qualified to receive [21].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M115323	CTH.3761.0005.6615 CTH.0032.0002.0560	F Hewson	16 November 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt.

Key Findings

- The original decision to raise a debt was based on data match information received from the ATO as well as information from the Applicant's employers [8].
- The Applicant was employed by four different employers for the period of entitlement under review [8]. In relation to three employers, the Tribunal found the Applicant's income was averaged and apportioned over the period of his employment and applied to certain fortnights [11] – [14]. The Tribunal was not satisfied this accurately reflected the Applicant's entitlement [12].
- The Tribunal was satisfied that the Applicant was paid sickness allowance in excess of his entitlement, but concluded that the amount of the overpayment needs to be recalculated taking into account income earned, including actual income from one employer and the date of earnings from another [14].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M112748	CTH.0032.0002.0500	T Hamilton-Noy	28 November 2017

How it was decided and key facts

Outcome

- The decision under review was set aside. As the debt was unable to be quantified, the Tribunal found there was no recoverable debt.

Key findings

- The Applicant received newstart allowance from 2012-2013. She had no payslips, timesheets or superannuation.
- The Applicant disputed the apportionment of earnings calculated by Centrelink, stating that she did not earn this amount in the fortnights in question [10].
- The Tribunal stated:

  The apportioned earnings by Centrelink were taken from averaging [the Applicant's] total earnings in the period under review. The tribunal notes that entitlement to, and the rate of, newstart allowance is based on a fortnightly calculation of income and assets and did not accept the approach taken by Centrelink has resulted in an accurate amount of overpayment being calculated [11].

- The Applicant and Centrelink both tried to seek extra information, with no success.
- The Tribunal concluded that:

  …the actual earnings of [the Applicant] on a fortnightly basis in the period 5 July 2012 to 17 June 2013 are unable to be ascertained. The tribunal did not consider that averaging [the Applicant's] annual income was an appropriate approach considering the manner in which fortnightly entitlement to newstart allowance is calculated. As a result, the tribunal concluded that it could not be satisfied on the evidence before it of the amount of overpayment in this case [13].

AAT Review Number	DOC ID	Member	Date
2017/S115070	CTH.0032.0002.0787	K Dordevic	28 November 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that there was no overpayment.

Key Findings

- The Tribunal found that that ATO data was used to apportion her earnings from a particular employer [13].
- The Tribunal stated:

  Of course, the best evidence would be [the Applicant's] payslips. It is most unfortunate that there is no available documentation regarding [the Applicant's] actual income during the relevant period. However, the Department's starting point appears to be an assumption that [the Applicant] did not meet her obligation to accurately report her employment income. In the tribunal's view this flies in the face of the principles of natural justice. The evidence from the ATO does not indicate that she did under-report during this period, though it is a possibility as her reporting was not verified. However, there is insufficient evidence to suggest that she in fact under-reported [15].

- The Tribunal did not consider issues of special circumstances or sole administrative error.

AAT Review Number	DOC ID	Member	Date
2017/M113994	CTH.0032.0002.0533	A Schiwy	30 November 2017

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with a decision that the matter be remitted to Centrelink for recalculation of the overpayment and that half the debt was to be waived pursuant to special circumstances.
- The matter was remitted for recalculation, with 50% of the debt to be waived.

Key findings

- The Applicant was paid bi-monthly rather than fortnightly, as recorded by Centrelink. This led to errors in calculating parenting payments accurately.
- The Tribunal stated:

  Centrelink did not provide any information about the deposits made to [the Applicant's] bank account. They also did not provide any documents indicating what [the Applicant's] taxable income was from [the Employer] during the debt period. The authorised review officer stated that they relied on information from the ATO but this information was not provided to the tribunal [16].

- 50% of the debt was waived. The Tribunal found that special circumstances existed to justify a waiver of 50% of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S114722	CTH.0032.0002.0781	M Horsburgh	5 December 2017

How it was decided and key facts

Outcome

- The decision under review was set aside.
- The matter was remitted for recalculation, with the debt to be recovered.

Key findings

- The Tribunal stated:

  Using the taxable income contained in the ATO records, Centrelink calculated a debt by apportioning the respective

earnings equally over the periods of the debt… Apportioning earnings in that way is contrary to the provisions of that section and the Act supplies no alternative method such as that assumed by the authorised review officer. Moreover, the apportionment has produced artificial and arbitrary results [9].

Given that the calculation of the debt under review was done without reference to, and contrary to, the provisions of the legislation, I am satisfied that [the Applicant]does not have the debt as calculated by Centrelink [10].

- The Tribunal found that the debt was to be recalculated and that the 10% penalty should not be applied.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M114073	CTH.3761.0004.0450	A Grant	6 December 2017
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key Findings

- In relation to the first debt, the Tribunal noted that Centrelink had considered employment information from the Applicant's employer to calculate any overpayment [11].
- In relation to the second debt, the Tribunal found that Centrelink had used ATO information and compared it to the Applicant's declared income for the relevant period [14].
- The Tribunal was satisfied with Centrelink's calculations and found that they were based on the best available information [15].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt [18]-[22].

AAT Review Number	DOC ID	Member	Date
2017/B112274	CTH.3761.0005.7714	K Juhasz	11 December 2017
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key findings

- The Tribunal noted the Applicant's debt was not raised or calculated as a result of data matching from the ATO, 'a process coined a "robo-debt"'[18]-[19]. However the Tribunal noted:

  …the income declared by [the Applicant] did not match the income provided by the ATO and employer. There were a number of employers on the match data that had not been declared at all by [the Applicant]' [20].

- The Tribunal stated 'it was the employers who provided the dates worked and the specific amounts' the Applicant was paid [19]. The Tribunal noted the Applicant:

  …worked for 20 employers in the alleged debt period, and it was the employers who provided the dates worked and the specific amounts she was paid. Often the periods the Applicant worked for these employers was quite brief – under a month. The longest period she worked for a single employer was for … approximately six and a half months. The shortest was [Employer] where she worked for one day' [19].

- The Tribunal noted that this was not a circumstance where requesting payslips would remedy the Applicant's complaint given the Applicant stated that numerous employers had misrepresented her income to the ATO [23].
- The Tribunal stated:

  [The Applicant]'s information provided as to dates worked has been used by Centrelink to distribute her earnings over the period she specified. In these circumstances where there is no objective evidence of employers making

misrepresentations to the tax office concerning [The Applicant]'s income, the income used by Centrelink to determine her DSP rate is correct [24].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S113150	CTH.3043.0012.5982	T Hamilton-Noy	11 December 2017
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that there was a debt for overpayment of YA arising from a certain period, but that the entirety of the debt was to be waived.

Key Findings

- The Tribunal noted that Centrelink raised a debt in this matter based on ATO information [9].
- The Tribunal expressed some concerns about the averaging of income over particular periods and considered that this was 'a not inappropriate approach in the circumstances of this particular case' [13].
- The Tribunal accepted the findings of Centrelink that there had been some incorrect declaration of income and the Applicant had been overpaid [13].
- The Tribunal found that no sole administrative error existed, but was satisfied that special circumstances existed to justify waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M112926	CTH.3761.0003.4407	A Ducrou	12 December 2017
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key Findings

- The Applicant confirmed that she did not report her earnings in relation to one employer and accepted that she was overpaid youth allowance due to this. However, the Applicant was concerned her Centrelink had apportioned her gross earnings evenly over the debt period rather than using payslip information to calculate the overpayment as the original debt amount was greater than the payments the Applicant had received [10].
- As the Applicant did not provide payslips from her employer and the Applicant did not keep a record of her gross earnings during the relevant period, the Tribunal considered that the ATO information was the best evidence that was available of her income from this employer and arrived at the same calculations as the ARO [19].
- The Tribunal ultimately found that because the Applicant's reported gross earnings were lower than her actual gross earnings, she was overpaid youth allowance [22].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt [31].
- The Tribunal found that the garnishee procedures were correctly followed [33].

AAT Review Number	DOC ID	Member	Date
2017/M112496	CTH.3761.0002.7890	P Glass	15 December 2017
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key Findings

- The Tribunal noted that the Applicant had been unable to obtain payslips for the relevant period and stated that, by 'averaging [the Applicant's] annual earnings for the financial year ending 30 June 2014 and accepting he accurately reported his earnings for the fortnight ending 5 July 2013', it was possible to arrive at the Applicant's total income across this period [8].
- The Tribunal found that the Applicant had underreported his income and was overpaid NSA [9].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M113954	CTH.3761.0006.0228	A Grant	2 January 2018
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key findings

- The Tribunal noted:

  [The Applicant] believed that an examination of the last payslip before he ceased Austudy (which he had provided to Centrelink) clearly demonstrates that the debt has been over-assessed using income too high because of the annualisation and allocation process used by Centrelink. He undertook to provide that payslip to the tribunal and subsequently did so [12].

- The Tribunal noted that, according to the debt calculations and the matched information provided, the ATO reported that the Applicant earned $40,537 in the FY year 1 July 2010 to 30 June 2011. This was then divided into 26 fortnightly payments of $1,554.84 and allocated across the Centrelink fortnights to reassess his entitlements because the Applicant did not provide payslips over this period [13].
- The Tribunal 'affirmed the existence and recovery of the debt' from the Applicant, noting the income covered by the payslip provided by the Applicant reached the same outcome as the debt decision 'despite the difference in income information used to reach that conclusion' [15].
- The Tribunal also affirmed the decision to garnishee against the Applicant's tax return [29].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S115335	CTH.3761.0005.6960	AJ Halstead	3 January 2018
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with directions that Centrelink exercise its powers to obtain earnings and payroll information from two of the Applicant's employers for separate periods and recalculate the debts by 'correctly apportioning' the Applicant's earnings 'in each instalment period according to law'.
- Any recalculated debts were to be recoverable.

Key Findings

- The Tribunal noted that Centrelink obtained financial records from the ATO for the Applicant for the 2011/12, 2012/13, and 2013/14 FYs and conducted a data-match exercise [2].
- The Tribunal stated:

  … [it was] clear and undisputed that in calculating the debts, the Department applied an averaging of the income received by [the Applicant]. The effect has been that income was incorrectly attributed throughout the relevant period because [the Applicant's] actual income from employment was not apportioned as required by section 1073B of the Act.

- The Tribunal stated the Applicant's earnings were not the same from one period to the next and so an averaging of her annual income did not reflect her actual income for each social security payment period [12].

- The Tribunal was satisfied the debts under review were not correct and needed to be recalculated [12].
- The Tribunal stated the Department must obtain payroll records from the Applicant's employers for the relevant periods [13].

AAT Review Number	DOC ID	Member	Date
2017/M116306	CTH.3761.0006.0635	T Hamilton-Noy	5 January 2018

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key findings

- The Applicant advised the Tribunal that she was not working with a particular employer for the full amount of time indicated on the PAYG summary. She stated she was undertaking reception work for a law firm and was paid but not provided with payslips [9].
- The Tribunal did not accept on the evidence before it that the Applicant was only employed for a six-week period with her employer and found that the 'best evidence before it was the PAYG information' provided by the ATO to Centrelink about the Applicant's gross earnings [11].
- The Tribunal was satisfied that the 10% penalty was correctly applied to the Applicant's debt and affirmed this aspect of the decision [26].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B116799	CTH.3761.0002.5051	M Amundsen	9 January 2018

How it was decided and key facts

Outcome

- The decisions under review to raise and recover two austudy payment debts for separate periods were affirmed.
- The decision under review concerning the NSA debt for a particular period was set aside and remitted to Centrelink for reconsideration using the correct payslip information.

Key findings

- The Tribunal noted that, while the Applicant reported earnings to Centrelink during the relevant periods, information received by Centrelink from the ATO indicated that the full amount of her earnings was more than had been notified to Centrelink. On that basis, Centrelink raised various debts. Those debts were varied when further information (for example, payslips and bank account statements) were received by Centrelink [8].
- The Applicant advised the Tribunal that she was not disputing that an overpayment had occurred but did dispute that the overpayment was her fault.
- In relation to the NSA debt, the Tribunal considered it reasonable to assume that the total of amounts used in Centrelink's calculations should correspond with the year-to-date figure appearing in the Applicant's payslips. As that was not the case, the Tribunal was not satisfied that the figures used by Centrelink in its apportionment table were accurate. The Tribunal stated that Centrelink will need to recalculate this debt after first ensuring that the correct information is used in the calculations [15].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/P116289	CTH.3039.0025.7507	W Budiselik	9 January 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the direction that employment income data be obtained from the Applicant's employer over a certain period so the Applicant's DSP debt can be accurately determined, with the resulting debt to be recoverable.

Key Findings

- The Tribunal noted that, following a data match between the ATO and Centrelink, Centrelink determined the Applicant had under-reported his employment income from his employer over a certain period [7].
- The Tribunal noted it explained to the Applicant the following:

  Centrelink offers people who appear to have debts because of under reported income following data matches with the ATO an opportunity to obtain payslips from their former employer(s) so the data from the payslips can be used to verify the debt. In the absence of employer data Centrelink averages the income advised to it by the ATO and determines a debt based on the averaged data [10].

- The Tribunal also stated it 'appreciates Centrelink utilises the ATO provided information as the "best" information available in the absence of employer provided payslips' [16].
- The Tribunal cited two paragraphs from the Commonwealth Ombudsman's report stating to the effect that the debts raised by OCI are accurate based on the information available to DHS at the time the decision is made [17].
- The Tribunal found it was evident from the ARO's notes that it was probable the debt calculation was not accurate due to the way the Applicant's allowances have been treated and as the debt period was 'possibly too short' [18].
- The Tribunal was satisfied the Applicant received overpayments of DSP and concluded it would be preferable if Centrelink contacted the Applicant's employer to obtain the Applicant's pay records for a certain period, 'so that the applicant's debt could be calculated on the basis of his actual income in that period, and that his allowances be properly considered' [21].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/A114684	CTH.0032.0002.0120	J Forgan	19 January 2018

How it was decided and key facts

Outcome

- The decision under review was varied (to a different debt amount).
- The decision to impose a 10% was set aside and substituted with a decision that a penalty should not be imposed.

Key findings

- The Tribunal found that a data match and subsequent receipt of further payroll details indicated that not all the income from employment was declared by the Applicant. As a result he was paid more newstart allowance than he was entitled to receive.
- The Tribunal noted that the Applicant had assisted in providing Centrelink with payslips so that his entitlement to newstart allowance can be calculated based on fortnightly earnings rather than an average taken from ATO records. Centrelink had made several calculations and variations to the debt amount since the initial decision to raise a debt due to more accurate information becoming available.
- The Applicant was not disputing the income amounts that had been recorded for the majority of his earnings where he had payslips. The Applicant did not agree with the averaging that has occurred over some fortnights when he only worked for several days in some periods.
- The Tribunal stated that whilst the Applicant did not agree that some earnings that had been averaged over a fortnightly pay period accurately reflected his casual dates of work, he acknowledged that he did not have the details of actual dates of work. The Tribunal was satisfied that the method of apportionment best represented the available evidence [25].

The debt was varied slightly to reflect where the Tribunal was not satisfied that Centrelink's calculations were correct.
The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/M117540	CTH.3039.0025.8837	S Letch	19 January 2018
How it was decided and key facts			

Outcome

The decisions under review in relation to the NSA debt for the period 16 March 2013 to 16 July 2013 and the YA debt were set aside in accordance with the direction that Centrelink reconsiders these debts after obtaining fortnightly income information from the Applicant's employers.
The decision under review in relation to the NSA debt for the period 13 March 2013 to 9 April 2013 was set aside in accordance with the direction that Centrelink reconsiders the debt in accordance after obtaining fortnightly income information from the Applicant's employers.

Key Findings

The Tribunal stated:

> The Centrelink materials do not contain any employer reports detailing fortnightly income, nor [the Applicant's] bank statements. Rather, it seems Centrelink has, consistent with its initial "robo debt" procedures, averaged the income information from the Australian Taxation Office across financial years [7]
>
> In the absence of more accurate information about [the Applicant's] fortnightly income, the Tribunal is not satisfied she misreported her income, or that debts exist in the calculated sums [8].
>
> The best evidence of [the Applicant's] income would be in the form of information supplied by her employers. There is no evidence Centrelink took any steps to attempt to obtain such information [9].
>
> …

- The Tribunal directed Centrelink to write to the Applicant's employers to obtain information about the Applicant's fortnightly income and recalculate the alleged debts. Further, in the absence of information directly obtained from any particular employer, Centrelink was directed to obtain the Applicant's bank records. In the event the Applicant did not have bank records for the entire period covering all employers, Centrelink was directed to obtain information directly from the Applicant's bank [9].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B117529	CTH.3761.0005.8377	K Juhasz	01 February 2018
How it was decided and key facts			

Outcome

- The decision under review was set aside.
- The matter was remitted to Centrelink for reconsideration in accordance with directions that:
  - there is no overpayment arising out of one entitlement period
  - the other debts to be recalculated (including the 10% penalty fee) using the relevant bank statement and payslips obtained by the Applicant or sought from Employers

Any resulting debt from the recalculation was to be recovered.

Key Findings

- The Tribunal stated the Applicant was a recipient of Newstart allowance in three discrete periods. Following information provided by the ATO, Centrelink determined the Applicant had under-declared her income [1].

The Applicant submitted:

> for one of the debts she had not worked in the period specified, and for the others she had been employed over an inconsistent period and had declared some of her earnings rather than equally distributed income as calculated by Centrelink [3].

- The Tribunal stated that for one employer the Applicant:

  > had obtained payslips and demonstrated her earnings were not equally distributed over the six month period she worked there. She had varying shifts and had worked overtime in this period so her earnings changed week to week [11].

- The Tribunal further stated:

  > Although it is usual practice for Centrelink to rely on ATO records to determine an income a person was paid there are serious issues with accepting that [the Applicant]'s earnings were properly advised to the ATO by her employers, [Employer]. There is clear evidence that her employers failed to pay her superannuation as the ATO were pursuing this debt on [the Applicant]'s behalf [16].

- The Tribunal found that parts of the Applicant's income was not earned equally across the debt period and the matter should be sent back to Centrelink to calculate the debt using accurate data [19].
- The Tribunal was not satisfied that the Applicant had a reasonable excuse for failing to disclose the correct income she earned from these employers and the 10% recovery fee (on any final debt amount calculated) is to be imposed [25].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S117817	DSS.5042.0001.0079	AJ Halstead	7 February 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with directions that:
  - Centrelink obtain earnings and any payroll information for the Applicant from the Applicant's employer;
  - The debt be recalculated *'by correctly apportioning the applicant's earnings in each instalment period according to law';*
  - Should the earnings information be unable to be obtained, then the income from that employer attributed to the Applicant for the 2005/06 year is to be disregarded in recalculating the debt; and
  - The recalculated debt is to be recovered from the Applicant.

Key findings

- The Tribunal noted that the Department obtained payroll information from one of the Applicant's employers as well as taxation records from the ATO for the 2005/06 FYs and conducted a data-match exercise [2].
- The Tribunal noted that payroll information was not received from one of the Applicant's employers [2].
- The Tribunal stated it was clear from the earnings apportionment record and ARO notes that in calculating the debts under review the Department had applied 'an averaging of the [Employer] income for the 2005/06 year' with the result being that 'income was incorrectly attributed throughout the relevant period because [the Applicant's] actual income from employment for each fortnight was not apportioned as required by section 1073B of the Act' [10].
- The Tribunal was satisfied the debt under review was not correct and needed to be recalculated [12].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/S116516	CTH.0032.0002.0791	AJ Halstead	14 February 2018

How it was decided and key facts

Outcome

- The decision under review was set aside.
- The matter was remitted for reconsideration, with Centrelink to obtain earnings and payroll information.
- The debt is to be recalculated by correctly apportioning the Applicant's earnings in each instalment period according to law.

Key findings

- The Applicant received Austudy and NSA, and had casual employment.
- The Tribunal stated:

  It is evident that in calculating the debts, the Department applied an averaging of the annual income received by [the Applicant]. The effect has been that income was incorrectly attributed throughout the relevant period because [the Applicant's]actual income from employment each fortnight was not apportioned as required by section 1073B of the Act [11].

- In relation to s 1073B of the Act, the Tribunal stated:

  the recipient of a social security payment is taken to have earned one-fourteenth of the total amount they receive from employment income during a fortnightly instalment period on each day of that period. This is referred to as the daily apportionment of earnings [8].

- The amount of debt had been incorrectly calculated because the Applicant's earnings were not the same from one period to the next. Averaging her annual income does not reflect her actual income [12].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/B112261	CTH.3039.0026.2036	E Kidston and S Letch	14 February 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the direction to contact the Applicant's husband's employer and obtain details of his fortnightly earning income over the relevant period.

Key Findings

- The Tribunal noted that data matching carried out between Centrelink and the ATO revealed that the taxable income reported by the Applicant's husband significantly exceeded the income that had been used to calculate the Applicant's DSP payments [2].
- The Tribunal considered it appropriate for Centrelink to reconsider the matter in accordance with directions that:
  - Centrelink take all reasonable steps to contact the Applicant's husband's employer and obtain details of his fortnightly earning income for the relevant period;
  - Centrelink reconsider the Applicant's husband's notices of amended assessment for the 2013 and 2014 financial years in light of any additional information received from the Applicant's husband's employer; and
  - If the result of (a) or (b) above is that the Applicant owes a debt of DSP, Centrelink consider whether s 1237AAD applies to the debt or any part [19].
- The Tribunal did not consider issues of sole administrative error or special circumstances.

AAT Review Number	DOC ID	Member	Date
2017/B117090	CTH.3761.0005.6602 CTH.3039.0026.2094	P Hall	20 February 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that the Applicant had a recoverable debt but that any amount due was waived.

Key findings

- The Tribunal found:

  The Centrelink papers were so poorly structured as to be opaque about how much the Applicant was alleged to have under-reported his earnings. There is no evidence of what he declared per fortnight in the period under review. There are no payslips. There are no notations of web/telephone contacts from the Applicant or hard copy earnings reports on file. There is a statement that he declared $6,528 in earnings to Centrelink during the 2010/11 financial year but no references as to where this figure was derived. In addition the payslips cannot be obtained retrospectively as the employer is no longer in business [10].

- The Tribunal also found 'the simple averaging of his annual taxable income … is clearly incorrect as the papers at least confirm that for a large period he was in receipt of full disability support pension because he was so sick' [13].
- The Tribunal concluded 'that the amount of the debt calculated by Centrelink cannot, on the balance of probabilities, be correct' [13].
- The Tribunal found the Applicant to be a 'witness of truth' [19].
- The Tribunal found there were exceptional factors in the Applicant's case and made the following remarks:

  [The Applicant] has a psychiatric condition, exacerbated by the "robo-debt", for which he requires ongoing treatment. Centrelink's actions had a profound adverse impact on his mental health. … Centrelink is pursuing a debt which occurred over seven years ago despite its routine matching with the Australian Taxation Office; the excessive delay is inexplicable [22].

  …

  When these statements are included in the context of poor Centrelink records of what he actually declared as income, and the incorrect use of averaging as an acceptable method of calculating a fortnightly payment, the Tribunal cannot be satisfied that Centrelink has calculated or raised this debt correctly [23].

- The Tribunal found special circumstances existed to justify a waiver of any part of the debt above $2,700 [25].

AAT Review Number	DOC ID	Member	Date
2017/P109027	CTH.0032.0002.0608	H Schuster	22 February 2018

How it was decided and key facts

Outcome

- The decision under review was set aside, with Centrelink directed to recalculate the debt on the basis of the income received by the Applicant in the reporting period [42] (in relation to each reporting date the income to be assessed was the income the Applicant received in the relevant reporting period which relates to the reporting date).

Key findings

- The Applicant accumulated the debt while receiving Newstart Allowance. He worked part-time and reported his earnings from time to time.
- The Tribunal stated:

  Centrelink did not properly explain to him how the debt was determined and the information provided in the documents did not assist him because it was impossible to interpret which documents represented the calculations, and how they were undertaken [28].

- The debt total had been amended about four times and the latest figure was over $8,000 less than the original amount. The Applicant had no confidence at all in Centrelink's final calculation and simply no longer believed he owed Centrelink any money [29].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt. No special circumstances were found [55].
- The Tribunal stated:

  It would have been preferable for Centrelink to have given [the Applicant] more time or else sought to obtain the payroll records from [the Applicant's] employers before determining the debt initially. Particularly so because [the Applicant] was working full time for significant periods. This fact alone should have caused the earnings to be investigated more fully before a debt was calculated [52].

AAT Review Number	DOC ID	Member	Date
2017/C117568	CTH.3761.0002.6394	M Hyman	23 February 2018
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt.

Key Findings

- Centrelink raised the debt following a data match with the ATO.
- The Tribunal found that apart from the Applicant's bursary from one employer and two university scholarships, the debt had been 'calculated using a certain amount of averaging' [19].
- The Tribunal found that detailed payslip information from [Employer 1] had otherwise been used to calculate the largest part of the debt.
- The Tribunal found:

  I have checked the calculation carefully; although it would clearly be better to recalculate the debt using detailed and accurate earnings information for each fortnight, it appears to me that in the absence of that detailed information the approach adopted regarding earnings from the [Employer] and [Employer] is unlikely to produce any gross errors in the debt calculation [20].

  The debt is to be recalculated as follows:

  - income from the [Employer 2] is to be averaged over the period from early July to late November 2011; and
  - earnings from other sources are to be assigned as in the hearing papers [21].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/S102473	CTH.3761.0005.1790	E Cornwell	28 February 2018
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key Findings

- The Tribunal noted that the Applicant had objected to Centrelink apportioning a lump sum leave payment she received over one year as she had been working on and off at the employer and the payment related to 9 of the 20 years the Applicant had been working there [16].
- The Tribunal found that as there was no way of apportioning this income over 9 years, Centrelink's approach of apportioning it over 52 weeks was correct [17].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/P118203	CTH.0032.0002.0826	C Kannis	2 March 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and the debt was waived.
- Monies recovered were to be refunded to the Applicant.

Key findings

- The debt arose due to a youth allowance overpayment.
- The Tribunal accepted the Applicant's evidence that the undeclared income of $9,983 was likely to have been earned during the period he was not in receipt of youth allowance.
- The Tribunal could not be satisfied that the Applicant earned $882.22 per fortnight during the review period.
- Accordingly, the Tribunal was not satisfied that the debt calculations were correct or that the Applicant had been overpaid.
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2017/A117356	CTH.0032.0002.0128	S Cullimore	2 March 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted Centrelink with directions that the debt be recalculated, with the recalculated debt to be recovered.

Key findings

- The Tribunal noted that, in raising the original debt, Centrelink appears to have 'averaged out' the Applicant's income for the 2013/14 financial year over the whole of that financial year. This meant that she was treated as having an income of $551.76 per fortnight when in fact she had no employment at all for those five months (causing a so called 'robo-debt') [19].
- The Tribunal noted that Centrelink conducted two further recalculations of the debt after the Applicant produced relevant payslips and that the reason for the considerable difference between the amount of the debts is not readily apparent to the Tribunal.
- The Tribunal was not satisfied that the Applicant's casual income has been correctly taken into account, and so was not satisfied that the debt had been correctly calculated. The Tribunal stated that the Applicant's income used in the debt calculations for each fortnight of the debt period needed to be carefully rechecked against the payslip evidence [33].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/M118320	CTH.0032.0002.0817	J Nalpantidis	9 March 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration, in accordance with the direction that Centrelink make reasonable efforts to obtain correct payroll information and recalculate the debt.

Key findings

- The Applicant's debt was raised in relation to a youth allowance debt, over which time she was working two casual jobs.
- She has been disadvantaged by Centrelink raising the debt some seven years after the relevant period because she has

not been able to obtain pay records from her employers to show what she actually earned in the relevant fortnights [21].

- Centrelink had applied an averaging method to work out the Applicant's fortnightly income rather than obtain payroll information from her employers [23]. The Tribunal stated:

  The tribunal has previously noted that it is not always possible to obtain evidence of a person's weekly or fortnightly income and in such instances the approach has been to average the income amounts across all fortnights in the period covered by the amount [25].

  [the Applicant's]case differs from those above. Other than asking [the Applicant]to produce pay advice from her employers going back to 2010 there is no evidence that Centrelink has done anything about requesting information from employers about the weekly/fortnightly payments to [the Applicant]over the period of the debt. Unlike [the Applicant]Centrelink have statutory powers to require employers to provide this information. It may be administratively convenient for Centrelink to use the information provided by the data match. However, given the variable nature of [the Applicant's]income and the apparent prospective adverse effect on the calculation of [the Applicant's]entitlement, Centrelink must make some reasonable effort to obtain payroll information from [the Applicant's]employers before adopting an averaging method to work out her fortnightly income [26].

- It further stated that if, after reasonable efforts:

  …Centrelink cannot obtain payroll evidence from an employer the use of an averaging method can be adopted as was the case in Halls and Provan. Given that in some cases there is variability in [the Applicant's]fortnightly income it would be fairer to apportion the difference in actual income and reported income over the period in which that income was received, rather than averaging the total actual income over the period. Adopting this method should produce a fairer result that will reflect [the Applicant's]variable income" [27].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt. No special circumstances were found and the debt was not waived.

AAT Review Number	DOC ID	Member	Date
2017/S111576	CTH.3761.0003.7169	M Hyman	16 March 2018
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key Findings

- Centrelink raised the debt following a data match with the ATO which showed that he earned income from a significant number of employers and his total earnings for the year were significantly higher than he reported [9].
- The Tribunal noted that Centrelink accepted the Applicant's reported incomes as accurate and averaged other unreported earnings over the entire year or over a shorter period if the ATO data identified the need [11].
- The Tribunal offered the Applicant an opportunity to provide bank statements/information about his accounts to enable Centrelink or the Tribunal to obtain further information to enable a more accurate calculation, however, the Applicant ceased communicating with the Tribunal and failed to provide the necessary documentation [12].
- The Tribunal ultimately concluded:

  In all the circumstances I can reach no conclusions other than that [the Applicant] earned more in the year than he reported; that I have no satisfactory evidentiary basis for assigning his earnings to periods when he was not being paid newstart; and that therefore, on the balance of probabilities, he was overpaid newstart. The amount of that overpayment is a debt due to the Commonwealth [14].

- The Tribunal found no error in Centrelink's calculations based on the information available [15].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt [17]-[20].

AAT Review Number	DOC ID	Member	Date
2018/B118942	CTH.0032.0002.0803	M Amundsen	22 March 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and the matter remitted to Centrelink for reconsideration.

Key findings

- The Applicant disputed the approach taken by Centrelink in determining that he had been overpaid and the quantum of any overpayment.
- The Tribunal stated:

  [the Applicant] noted that the payslips in the Centrelink papers show that his earnings varied widely and he accordingly submits that the approach taken by Centrelink to determine whether he has been overpaid is flawed [19].

  I accept that there are times when the apportionment approach adopted by Centrelink will be reasonable and appropriate. However, Centrelink has specific information gathering powers under the legislation. In my view, prior to adopting the apportionment approach, Centrelink should make all reasonable efforts to gather any more accurate information that might be available. Once accurate information is obtained, Centrelink will be able to reconsider whether [the Applicant] has a debt. If [Employer] no longer has relevant records, then I would accept the apportionment approach as being reasonable in the circumstances [20].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.
- The Tribunal stated:

  [the Applicant] noted that the payslips in the Centrelink papers show that his earnings varied widely and he accordingly submits that the approach taken by Centrelink to determine whether he has been overpaid is flawed [19].

  I accept that there are times when the apportionment approach adopted by Centrelink will be reasonable and appropriate. However, Centrelink has specific information gathering powers under the legislation. In my view, prior to adopting the apportionment approach, Centrelink should make all reasonable efforts to gather any more accurate information that might be available. Once accurate information is obtained, Centrelink will be able to reconsider whether [the Applicant] has a debt. If [Employer] no longer has relevant records, then I would accept the apportionment approach as being reasonable in the circumstances [20].

AAT Review Number	DOC ID	Member	Date
2018/A119281	CTH.3066.0005.1717	M Manetta	11 April 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink with a recommendation that the Applicant's entitlement be recalculated by reference to copies of payslips or 'such equivalent primary evidence as may be obtained'.

Key Findings

- The Tribunal noted that Centrelink raised a debt against the Applicant based on the results of an ATO data match [5].
- The Tribunal identified there had been a delay in performing the data match that:

  …may have been unavoidable but, either way, that delay has meant that critical evidence that would otherwise have been available has been destroyed. As a consequence, [the Applicant] has been deprived of the opportunity to test the accuracy of the Department's allegation of misreporting against evidence appropriate for that purpose - an opportunity which she took unusual steps to protect.

- The Tribunal stated 'the decision to raise the debt is vitiated by procedural unfairness of a kind which cannot be remedied unless the payslips or equivalent primary evidence for the alleged debt can be located and the debt

recalculated on the basis of that evidence' [9].
- The Tribunal found the decision to raise the debt was invalid by reason of procedural unfairness and '[u]nless the primary evidence can be obtained and the debts recalculated using that evidence, the unfairness is incurable' [10].

AAT Review Number	DOC ID	Member	Date
2018/M120137	CTH.3039.0026.6511	S De Bono	24 April 2018
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that the Applicant had an NSA debt to the Commonwealth, with 50% of the above debt to be waived due to special circumstances.

Key Findings

- The Tribunal noted that matched data from the ATO received by Centrelink indicated the Applicant received more income than was declared to Centrelink [9].
- The Applicant agreed with the income amounts that Centrelink had used in calculating the debt and the Tribunal was satisfied that the debt was calculated correctly [10].
- The Tribunal was satisfied that the Applicant had been overpaid in the amount calculated by the ARO [12].
- The Tribunal found that special circumstances existed to justify waiver of half of the debt.

AAT Review Number	DOC ID	Member	Date
2018/M120544	CTH.3039.0026.6506	D Benk	1 May 2018
How it was decided and key facts			

Outcome

- The Tribunal set aside the decision under review and substituted the decision that the Applicant had no debt, with any monies recovered to be repaid to the Applicant.

Key Findings

- The Tribunal stated:

  What is clear is that income in this case has been apportioned by Centrelink using data provided by the Australian Taxation Office. This is generally an appropriate method of assessing overpayments, however fails in this particular case as [the Applicant] was a casual employee, working flexible hours and only worked for the employer in question for a period until the end of April 2014. She did not work until the end of the financial year and so the process of averaging income across the balance of the financial year is a formula that produces a skewed outcome [6].

- The Tribunal was satisfied on the basis of contemporaneous file notes, NSA declaration forms, and bank statements that the Applicant ceased her employment on a specific date and so had not been overpaid benefits over a certain period (as she was unemployed) [9].
- The Tribunal was satisfied that no debt exists [10].
- The Tribunal did not consider issues of sole administrative error or special circumstances.

AAT Review Number	DOC ID	Member	Date
2018/A119369	CTH.3025.0007.5277	M Manetta	4 May 2018
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation otherwise than by resort to the averaging of his income.

Key findings

- The Tribunal noted that, as a consequence of a data match inquiry with the ATO, the Department formed the view that the Applicant had under-reported his income over the period and decided to raise debts against him [2].
- The Tribunal referenced an extract from the Department's letter of 23 October 2015 which set out the Applicant's annual gross income from each employer as per the ATO data match and noted 'the income … is divided to give a daily rate then averaged to each fortnight in the financial year. This is then applied to your record for any period that you were current' [7].
- The Applicant stated he had not retained and was unable to obtain copies of all the payslips; however, he was able to provide bank statements showing the receipt of net income from each employer [8].
- The Tribunal concluded that averaging of income was not authorised by the Social Security Act and the debts raised against the Applicant had not been validly calculated [15], [17].
- The Tribunal referenced the commentary of Professor Terry Carney AO in an article titled 'The New Digital Future for Welfare Debts without Legal Proofs or Moral Authority?' [2018] UNSW Journal Forum 1, pages 6-7 [17].

AAT Review Number	DOC ID	Member	Date
2018/B120251	CTH.3039.0026.8545	N Foster	22 May 2018
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that the Applicant did not have a debt to the Commonwealth for the relevant period.

Key Findings

- The Tribunal noted that, in the absence of any evidence about the particular periods which the Applicant received the income identified by way of Centrelink data-match in, Centrelink had averaged the sum across the entire 2012/13 year [5].
- The Tribunal stated:

  Given that [the Applicant] only received newstart allowance from October 2012 to April 2013 – half the 2012/2013 year – and given that, by its own admission, Centrelink has arbitrarily averaged income across the year, this raises the question whether [the Applicant] actually has a debt to the Commonwealth [8].

- The Tribunal was satisfied on the evidence before it that the Applicant did not receive any income during the relevant period and 'certainly did not receive the averaged income figures used by Centrelink in determining that she was overpaid newstart allowance' [11].
- The Tribunal did not consider whether circumstances existed to justify a write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/M118345	CTH.3761.0001.6600	R Perton	1 June 2018
How it was decided and key facts			

Outcome

- Decision under review was affirmed.

Key findings

- The Applicant did not report all income to Centrelink correctly as she had multiple casual jobs, so was overpaid. She did not dispute that she had a debt, but was concerned with the passage of time that had passed, and the closure of some employers meant she was unable to obtain evidence of the details of her income.
- The Applicant submitted that her tax return may have been garnished, but this was not directly addressed by the Tribunal.
- The Tribunal commented:

  The Tribunal accepts the calculations that Centrelink has undertaken as to the amount of the overpayment are likely, on the balance of probabilities, to be correct. It notes, however, that the lack of payslips and the time that has passed

since then makes it very difficult, and in some cases impossible, to assess the exact amount for each employer for each fortnight [18].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/M121029	CTH.3761.0002.5226	P Sperling	6 June 2018
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt based on pay records.

Key findings

- The Tribunal found that the debt was calculated by averaging the Applicant's employment income and that the problem with this was that her employment was not continuous [12].
- The Applicant obtained further pay records which were not taken into account by Centrelink in calculating any overpayment [13].
- The Tribunal found that the overpayment and consequential debt requires recalculation taking into account the Applicant's pay records [13].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/B120280	CTH.3761.0002.5747	DC McKelvey	15 June 2018
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt.

Key findings

- Centrelink raised the debt following a data match with the ATO and calculated the debt using ATO information [10]-[11].
- The Applicant sought a review of a parenting payment debt of $17,720.60. An ARO affirmed this decision.
- In relation to Centrelink's calculations, the Tribunal found:

  On the basis of the declared income to the ATO and in particular earnings from [Employer], Centrelink calculated an overpayment of parenting payment by averaging [the Applicant's] employment income over each fortnight of the financial year in which it was earned. The problem with this is that [the Applicant's] employment was not continuous. She worked in the fortnights during teaching semesters but outside of this she had no income in particular fortnights. Given the income test for parenting payment is based on fortnightly income, this can have a substantial affect on any overpayment calculation. [the Applicant] obtained pay records from the university to establish her employment and fortnightly earnings, but there was delay in her obtaining the by then archived records. The records were uploaded by [the Applicant] online to Centrelink but either before their receipt or unaware of their receipt, the debt decision was affirmed by the authorised review [12].

  The pay records now form part of the Centrelink file. It means there is highly relevant pay information that has not been taken into account in calcul ating any overpayment. The overpayment and consequential debt requires recalculation taking into account [the Applicant] pay records [13].

- Tribunal determined that the debt required recalculation taking into account pay records.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/M121597	CTH.3761.0002.8374 Family of documents: CTH.3761.0002.8449	N Pope	21 June 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and the matter was remitted to Centrelink for recalculation of the debt for the relevant period on the basis of additional payslips and bank statements provided to the Tribunal.
- The resulting debt and recovery fee were recoverable.

Key findings

- The Tribunal noted there was no evidence in the Centrelink documents that the Applicant had discussed or sent evidence to Centrelink of his earnings during the debt period [10].
- Following the hearing, the Applicant provided 14 payslips to the Tribunal (A1 to A70). This information was not available to Centrelink at the time when the Applicant's entitlements were calculated, and the Tribunal considered that the further documentation now provided is required to be needed to be assessed and the Applicant's entitlements to be recalculated [16].
- The Tribunal found that the 10% penalty should apply as the Applicant failed to provide information about income [18]. In relation to the 10% penalty, the Tribunal found that as the Applicant failed to provide information about income, a debt recovery fee should be applied [18].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/M122152	CTH.3761.0002.3774	T Hamilton-Noy	29 June 2018

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key findings

- The Tribunal noted that Centrelink's efforts to obtain payslips from the employer in question had been unsuccessful.
- The Tribunal accepted that, in the circumstances of this particular case, it was appropriate to apportion earnings across the months of July 2014 to March 2015 in the absence of the employer providing the information requested [11].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/B121607	CTH.3761.0005.8542	DC Kelvey	3 July 2018

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key findings

- The Tribunal noted that the overpayment alleged by Centrelink was revealed by a data match with the ATO [3].
- Centrelink conceded that the debt for continuing payments was caused solely by administrative error, but submitted that the payments were not received in good faith [3].
- The Tribunal was satisfied that the overpayment had been correctly calculated by Centrelink [15].

- The Tribunal found there had been a crossover of entitlement when the Applicant was subsequently successful for temporary incapacity benefits pursuant to her superannuation fund [11], but Centrelink failed to adjust the Applicant's entitlements until the ATO data match occurred [13].
- There is no mention in the decision of any other evidence used by the Centrelink or provided by the Applicant (such as payslips or wage records) to assist with calculations.
- Although the Tribunal acknowledged there had been significant administrative error and the Applicant has a debilitating condition, it was not persuaded there were circumstances to support a conclusion that she should retain the payments which she was not entitled to [33].

AAT Review Number	DOC ID	Member	Date
2018/H122113	CTH.3761.0005.6158	A Schiwy	6 July 2018
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that the matter be remitted to the Chief Executive Centrelink for recalculation of the debt on the basis of the Applicant's declared income.
- Centrelink was directed that half of the recalculated debt was to be waived due to special circumstances.

Key Findings

- The Tribunal found that Centrelink had payslips for all but 2 employers. For the two employers, Centrelink 'annualised' (apportioned) the Applicant's gross earnings across the period of employment stated by the employers [15].
- The Applicant was unable to recall the periods during which she worked for these employers and was unable to obtain bank statements [16].
- The Tribunal noted that as the Applicant's income from her primary employer was high enough that she was not being paid benefits for a significant period, it was likely that she was not recording casual income during this time. However, the Tribunal also stated:

  [the Applicant]did declare the correct amount of her casual earnings from [Employer 1] and [Employer 2]L and the debt is to be recalculated on the basis that she earned nil income from these employers during the fortnights ended 19 August 2010, 16 September 2010, 10 June 2011 and 24 June 2011. For the fortnights ended 7 January 2011, 21 January 2011 and 4 February 2011 the income to be included from [Employer] should be as declared by [the Applicant] ($155, $365 and $216 respectively) [16].

- The Tribunal found that there were 7 fortnights where the Applicant had not correctly declared her income based on payslips and this resulted in an overpayment [17]-[21].
- The Tribunal found that the debt could not be written off but found that special circumstances existed to justify a waiver of half of the recalculated debt.

AAT Review Number	DOC ID	Member	Date
2018/M121929	CTH.3761.0001.2113	S De Bono	9 July 2018
How it was decided and key facts			

Outcome

- The decision under review was set aside and the matter remitted to Centrelink for reconsideration.
- The debt was to be recalculated by correctly apportioning the applicant's actual earnings in each period.

Key findings

- Centrelink used income averaging to calculate the debt.
- The Applicant did not dispute that he may have a debt, but he disputed the apportionment of his income over the whole financial year, given the sporadic nature of his work in the film industry as a freelancer. The Applicant provided payslips for the debt period to the Tribunal.
- Given the Tribunal was not satisfied with Centrelink's calculation method, Centrelink was to obtain earnings and payroll information for the Applicant from the relevant employers and recalculate the debt.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/M121119	CTH.3761.0002.0313	S De Bono	9 July 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and the matter remitted to Centrelink for reconsideration. The debt was to be recalculated by correctly apportioning the applicant's actual earnings in each period.
- 75% of the debt was to be waived due to special circumstances.

Key findings

- The ARO varied the debt amount on internal review.
- The Tribunal ultimately found that in calculating the debt, Centrelink made a number of apportionment errors and the debt amount was incorrect.
- The Tribunal was unable to specify exactly how much the debt is, because there are clearly errors in the income attributable to each employer.
- The debt was to be recalculated by correctly apportioning the applicant's actual earnings in each period.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder if the debt.

AAT Review Number	DOC ID	Member	Date
2018/P122531;2018/ P122699	CTH.3039.0027.3292	W Budiselik	16 July 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that the Applicant did not have a parenting payment (single) debt or NSA debt over the relevant periods, with any money reclaimed to be reimbursed to the Applicant.

Key Findings

- The Tribunal deferred its decision-making process to enable the Applicant to locate a payslip relevant to the period, which was provided after the hearing. Although the Tribunal found the evidence was not relevant for the debt period, it found the payslip corroborated the Applicant's evidence about the way he was paid [7].
- The Tribunal stated its understanding was that, in the absence of evidence from the debtor (payslips or bank entries), Centrelink averaged the income recorded by the ATO over the period advised by the ATO and calculated the person's debt as if the employment income had been earned regularly throughout the period [14].
- The Tribunal noted that it seems probable that averaging the Applicant's employment income disadvantaged him and may have created a debt where one does not exist [17].
- The Tribunal deferred its decision-making process to enable the Applicant to seek information from his bank about payments into his account from his employer [23].
- The Tribunal found that, based on the Applicant's evidence and its analysis of Centrelink's papers, the Applicant's employment with a particular employer preceded his claim for NSA and he was not required to report income from that employer. Therefore, he was not overpaid NSA [25].

AAT Review Number	DOC ID	Member	Date
2018/B120282 & 2018/ B121969	CTH.3761.0006.0587	N Foster	17 July 2018

How it was decided and key facts

Outcome

- The decisions under review in relation to the NSA debt of $9,565.38 and carer payment debt were varied.
- The decision relating to NSA debt of $2,581.08 was set aside and remitted to Centrelink with the directions that the overpayment for the period under review was to be recalculated to exclude any NSA repaid by the Applicant as the result of previous NSA debts.
- Centrelink was directed that recovery of the debt was to be written off until 17 July 2019.

Key Findings

- The Tribunal did not specify the material or methodology for which Centrelink used to raise the debt other than the Applicant 'had under-declared her earnings from various different employers' [2].
- The Tribunal stated:

  Centrelink has since reassessed [the Applicant]'s entitlement using payslips provided by [the Applicant] or, where these were not available, by using average fortnightly income amounts derived from her annual income from her employers [4].

- The Applicant told the Tribunal that she did not dispute Centrelink's calculations that she had been overpaid because she did not understand the debt paperwork and could not tell if errors had been made or not.
- The Tribunal examined the Centrelink calculations and identified one potential error in relation to the calculation of the NSA debt which indicated Centrelink did not consider debts previously paid [5].
- The Tribunal found that the Applicant did not have capacity to replay a debt and so it was appropriate to write off the debts for a period equalling 12 months [15].

AAT Review Number	DOC ID	Member	Date
2018/B121728	CTH.3761.0002.5045	S Letch	17 August 2018

How it was decided and key facts

Outcome

- The decisions under review were affirmed.

Key findings

- The Applicant's nominee and grandfather applied for review by the Tribunal and attended the hearing in-person on behalf of the Applicant.
- The Tribunal noted there was no dispute about the existence of debts. The Tribunal discussed with the Applicant's grandfather during the hearing Centrelink's calculation of the income-related debt, and its application of an average based on annual income (rather than obtaining more detailed information about fortnightly pay from the Applicant's employers). The Tribunal explained that, depending where the numbers fell, a calculation based on more detailed fortnightly earnings information could potentially result in the debt increasing, not decreasing. The Tribunal noted [the Applicant] expressed no strong view about Centrelink's calculation methodology [13].
- In this particular case, the Tribunal was prepared to accept the broader approach applied by Centrelink and was satisfied that Centrelink satisfactorily calculated all three debts [14].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt [24].

AAT Review Number	DOC ID	Member	Date
2018/M124186	CTH.3039.0027.5558	C Breheny	21 August 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that entitlement to NSA is to be recalculated based on payslips from the Applicant's employer, with any resulting debt to be recoverable without the imposition of a recovery fee.

Key Findings

- The Tribunal noted that on 10 August 2016 Centrelink commenced a review of entitlement (online compliance intervention), including data matching with the ATO, and it was discovered that not all income from employment had been declared [3].
- The Applicant subsequently provided payroll information from her employers as requested by Centrelink and her debt was subsequently reduced to a debt amount plus a 10% penalty [4].
- The Tribunal noted the Applicant was a seasonal employee in agriculture and her work hours were very irregular and there would have been times when she earned more and had no income [9].
- The Tribunal stated:

  Centrelink averaged her earnings over the three-month periods, but there would have been times that she did not have any income within each BAS period. Thus, averaging the income over the three-month period is not an accurate reflection of her actual earnings for each of the Centrelink fortnightly pay periods [12].

- The Applicant advised the Tribunal that she has now been able to locate payslips from one of her employers which she previously was unable to locate. The Tribunal concluded it was 'fair to recalculate [the Applicant's] entitlement to newstart allowance in the period under review again, based on pay information to be obtained from her' [17].
- The Tribunal found that the Applicant did not refuse or fail to provide her income from work, did not deliberately misrepresent her income, and was not reckless in reporting her income – therefore, the Tribunal found no 10% penalty fee was to be imposed [19].
- The Tribunal did not consider issues of sole administrative error or special circumstances.

AAT Review Number	DOC ID	Member	Date
2018/P123848	CTH.3039.0027.6377	M Martellotta	21 August 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with directions that:
  - The debt is to be recalculated taking into account 'verified income for the relevant periods';
  - The debt is to be fully recovered if, upon recalculation, there remains a debt;
  - If there is a recoverable debt, the 10% penalty is not to be applied;
  - Any repayments are to be remitted to the Applicant if it is found she has not been overpaid NSA.

Key Findings

- The Tribunal noted that the Department based its conclusions as to overpayment upon the data matching information it received from the ATO [11].
- The Tribunal stated that the Department had:

  taken [the Applicant's] earnings from [Employer] and apportioned this over 365 days, resulting in a working week income calculation of $1,024.11. According to the Department documents, the earnings utilised by the Department had not been verified [16].

- The Tribunal stated:

  In the absence of evidence verifying [the Applicant's] actual income and relevant dates of earning, the Department has taken income derived from ATO records and apportioned this amount over each fortnight of the debt period to calculate

the debt. In the tribunal's view this approach fails to take into account the actual earnings for each fortnight period; the actual periods that [the Applicant] was actually employed and the actual periods that she was actually in receipt of newstart allowance and required to report. As such the debt amount does not reflect a precise or acceptable calculation of any alleged overpayment [18].

- The Tribunal stated that, in order to ensure a proper calculation of any overpayment, the Department should 'exercise its powers to obtain relevant information either from her former employer or by requesting relevant copies of her bank statements in order to ensure a more acceptable calculation of any alleged overpayment' [21].
- Should there be a debt upon recalculation, the Tribunal was not satisfied that the provisions of the Act re application of the 10% penalty were met [24].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt (should there be a debt once recalculated).

AAT Review Number	DOC ID	Member	Date
2018/S123586	CTH.3761.0005.7847	E Cornwell	28 August 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the directions that:
  - there was no debt of NSA for the relevant entitlement period; and
  - there was a NSA debt for a separate entitlement period but the debt is to be waived on the basis of special circumstances.

Key findings

- The Tribunal noted 'the basis for all three debts was that the correct amount of earnings was not taken into account in the payments made to [the Applicant]' [5].
- The Tribunal noted the Applicant submitted she should not have been required to keep payslips and bank account details given the debt associated with her work with one particular employer had occurred such a long time ago. The Tribunal stated the Applicant had '…on numerous occasions, offered to give her authority to Centrelink to try to obtain the payroll details' and struggled with homelessness [20].
- The Tribunal noted that a 'data-matching exercise … compared the actual income provided to Centrelink by the ATO with the income declared by the Applicant' [17]-[18].
- The Applicant gave evidence:

  …that she disputed the income amounts given by an employer on the final group certificate. In relation to the last group certificate given, she had challenged them saying that the amount listed was not correct. However, by that stage her relationship with them was breaking down and nothing was done about it. She had also raised it with her accountant but he was of the view that unless it could be changed by the employer, the ATO would record what the employer said [24].

- The Tribunal accepted the Applicant's evidence about the unusual arrangements at her former workplace for 'depositing monies into her account, her variable work hours there and her approach to her employer about what she considered was an overinflated income amount submitted to the ATO' [26]
- The Tribunal noted that:

  Centrelink did not calculate the debt using payslips or grossed up amounts from bank accounts and [the Applicant] has not been able to obtain payroll details or bank details. The tribunal was not satisfied that Centrelink's calculation accurately reflected the overpayment [27].

  …

  On the basis that Centrelink has evenly apportioned the earnings over the debt period without regard to payslips, and given her variable hours and the unusual business practices outlined at the hearing, Centrelink's calculation is not correct [29].

  In relation to the lesser debt, the Tribunal also found it was faced with the same problem of not having payroll data or bank statements showing payments which can be grossed up. The Tribunal concluded that 'even if the debt was sent

back for recalculation on the basis that the listed earnings were from the other employer, not all of the debt amount will be accounted for' [32].

- The Tribunal was satisfied there were special circumstances in the Applicant's case to justify a waiver of remainder of the debt outstanding at the date of the hearing [50].

AAT Review Number	DOC ID	Member	Date
2018/M124273	CTH.3761.0006.0162	S De Bono	3 September 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that the Applicant has a debt but the debt is waived due to sole administrative error.

Key Findings

- The issue for the Tribunal was whether the honorarium the Applicant received was income for the purposes of calculating his rate of NSA during the relevant period [5].
- The Tribunal noted that

  While honorarium is not included in the definition of income in the Act it is included in the Social Security Guide (the guide); the guide is the policy guide that is used by Centrelink and is referred to if the policy is not inconsistent with the objectives of the Act. The tribunal will also apply the guidelines unless there are cogent reasons for not doing so (see Re Drake and Minister for Immigration and Ethnic Affairs (No 2) (1979) 2 ALD 634 at 639-645) [10].

- The Tribunal stated it was '…unclear on how the debt was apportioned over the financial years and why the debt was' from a certain period [15].
- The Applicant submitted that he sought advice from Centrelink in relation to whether his honorarium was income and was told that it was not. The Tribunal found that the debt was attributable solely to administrative error and was satisfied that he received the overpayments in good faith. The Tribunal thereby waived the debt [28].

AAT Review Number	DOC ID	Member	Date
2018M124921	CTH.3761.0002.0344	J Nalpantidis	7 September 2018

How it was decided and key facts

Outcome

- The decision under review to raise a carers payment and newstart allowance debts were affirmed.
- The decision to recover the debts was waived on the basis of special circumstances.

Key Findings

- The ARO affirmed the original debt amount.
- The Applicant did not correctly notify Centrelink of his income during the relevant period, and so received more benefits than they were entitled to.
- In lieu of evidence of the Applicant's actual periodic earnings, Centrelink apportioned his income over the relevant fortnights.
- In setting aside the decision, the Tribunal commented:

  To correctly quantify the debt, Centrelink requires information about [the Applicant's] actual periodic earnings rather than using an 'averaging' approach. Nevertheless, the tribunal accepts [the Applicant] was paid more than his correct entitlement (the specific amount yet to be quantified) and this overpayment constitutes a debt owed to the Commonwealth [21].

- The debts were ultimately waived on the basis of the Applicant's special circumstances.

AAT Review Number	DOC ID	Member	Date
2018/H124716	CTH.3761.0005.6421	M Manetta	12 September 2018

How it was decided and key facts

Outcome

The decision under review was affirmed.

Key findings

- The Tribunal noted that Centrelink, following having already raised two previous debts against the Applicant during the period of 2010 to 2011, completed a data-match with records from the ATO and took the view that the Applicant had further under-declared his income. Centrelink raised a third debt against him [3].
- The Tribunal noted that the debt was calculated by taking the Applicant's yearly earnings over the period and averaging them across the fortnights during which he worked and received DSP. The Tribunal stated:

  For some social security benefits averaging is not a permissible method of calculating entitlements, but it is permissible — indeed, it is mandated — for calculating DSP entitlement. For example, whilst, in the case of youth allowance, section 1067G of the Act sets out how it is to be calculated and provides, in Point 1067G – H23 of Module H in that section, that, generally speaking, ordinary income is to be taken into account in the fortnight in which it is first earned, derived or received. Thus youth allowance cannot normally be averaged. Similar provision is made in relation to newstart allowance in section 1068, Module G of the Act.

- The Tribunal also noted the commentary of Professor Terry Carney AO in an article titled 'The New Digital Future for Welfare Debts without Legal Proofs or Moral Authority?' where Professor Carney impugned the validity of averaging both from a mathematical and legal perspective [13].
- The Tribunal stated, however, that:

  DSP is treated differently by the legislation. Whereas Step 1 in the relevant module containing the income test for youth allowance and newstart allowance calculations is: Work out the amount of the person's ordinary income on a fortnightly basis. The same step in the DSP calculation, found in section 1066A, Module F1 of the Act (for persons under 21) is: Work out the amount of the person's ordinary income on a yearly basis. The stipulation is the same for persons over 21 (section 1064). Sections 1073A and 1073B then mandate the averaging of that income.

- The Tribunal concluded that it was lawful and proper of Centrelink to calculate the Applicant's entitlement for a relevant period 'by reference to his annual earnings averaged over the period' [15].
- The Tribunal was satisfied that the debt was validly raised [15].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/M124204	CTH.3039.0028.0575	A Schiwy	24 September 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that the matter be remitted to Centrelink to obtain further evidence about the Applicant's earnings and recalculate the overpayment, with the resulting debt to be recoverable.

Key Findings

- The Tribunal noted Centrelink received information from the ATO about the Applicant's employment income from a number of employers and decided to raise and recover a debt [3].
- The Tribunal noted that Centrelink obtained payroll details from one of the Applicant's employers, [Employer], but only requested information for the 2012-13 year. The Tribunal stated the debt 'appears to have been calculated on the income figures being prorated across the relevant pay periods (apart from the 2012-13 [Employer] income)' [14].
- The Tribunal found that 'apportioning the earnings evenly is likely to produce an inaccurate debt calculation as [the Applicant's] earnings were "lumpy"' [16].
- The Tribunal decided that Centrelink should obtain information from all of the Applicant's employers about the 'actual

amounts paid in each reporting period and recalculate the overpayment' and, if the payslips cannot be obtained from the employers, Centrelink are to obtain the Applicant's bank statements and gross up the payments from the amounts she received into her bank account [16].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/P125056	CTH.3039.0028.1072	S Brakespeare	25 September 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the direction that Centrelink reconsider the debts in accordance with para 2 of the reasons.

Key Findings

- The Tribunal noted that the matter first came to light as a result of a data match with the ATO for the 2012/13 to 2015/16 income years, which indicated that the Applicant had worked for 16 different employers during that period and the Applicant earned more than the sums he declared to Centrelink [16].
- The Tribunal noted that, with the exception of one employer, Centrelink had calculated the debt using ATO information to average the Applicant's income over the period he worked for each employer as advised to the ATO [17].
- The Tribunal was not satisfied the debts had been correctly calculated 'because the actual gross income [the Applicant] has earned in respect of each week or fortnight has not been established' [20].
- The Tribunal stated:

  Centrelink did give [the Applicant] the opportunity to provide evidence of the income he earned during the period, but he has not provided that evidence. In the tribunal's view Centrelink's job in establishing a debt is not yet complete. It is not appropriate (or legally correct) for Centrelink to raise a debt based on incomplete data and then to require the applicant to disprove that debt amount. Centrelink has powers which allow it to gather information from third parties, such as employers. There appears to have been no effort made by Centrelink to exercise those powers, once the evidence was not forthcoming from [the Applicant] [20].

- The Tribunal noted that, should Centrelink contact the Applicant's employers and be unable to obtain more accurate weekly or fortnightly wage information, the Tribunal will direct that Centrelink make reasonable efforts to obtain the Applicant's banking records to "gross up" sums paid to his account to calculate his gross weekly or fortnightly income [22].
- The Tribunal also stated:

  If information regarding weekly or fortnightly income cannot be obtained, firstly from the relevant employer or secondly from [the Applicant's] banking records, then (and only then) it is open to Centrelink to rely on the ATO information in respect of that particular employer and to average the gross income paid over the period advised by the ATO [22].

- The Tribunal did not consider issues of sole administrative error or special circumstances.

AAT Review Number	DOC ID	Member	Date
2018/A125318	CTH.3066.0006.1296	M Manetta	25 September 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that the whole of the Applicant's DSP debt be waived due to the existence of sole administrative error.

Key Findings

- The Tribunal noted that data match records from the ATO contain their own 'inexplicable discrepancies' including that

  [o]ne gives $771 as gross payments to [the Applicant] between 3 December 2010 and 30 June 2011, which cannot be right since he commenced employment with [Employer] in April 2011. The same record then gives the figure of $5,876 as the amount declared to Centrelink. A further statement gives $4,958 as gross pay between 14 March 2011 and 30

June 2011, and the same figure of $5,876 as the declared amount (Tribunal Papers, page 86). Another gives $12,636 gross pay for the 2012/13 financial year and $25 as the amount declared [11].

- The Tribunal found it was not plausible that those discrepancies corresponded to actual misreporting and not plausible that Centrelink, having understood the Applicant to be in long-term secure employment, would not query a failure to report any income. The Tribunal stated they do, however, raise a 'plausible inference of administrative error' [12].
- The Tribunal found that the overpayment was due to administrative error in failing to properly record the Applicant's reported earnings [13].
- The Tribunal found it was not necessary to consider the question whether the debt should be waived in any event due to special circumstances [14].

AAT Review Number	DOC ID	Member	Date
2018/S125306	CTH.3761.0005.5428	H Schuster	28 September 2018
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key Findings

- Centrelink raised the debt following a data match with the ATO [6].
- The Tribunal found that the best evidence available to Centrelink was the Applicant's gross income as provided by the ATO and was consequently satisfied with Centrelink's calculations of the debt [34]-[37].
- The Tribunal noted that the Applicant was asked by an ARO to provide payslips/other information to assess whether she received income irregularly [40]. Ultimately, the Tribunal found that:

  …[the Applicant's]income free area in each fortnight of the debt period was already exhausted by the declared income and she never received sufficient income to lose her entitlement altogether. That means, every additional dollar received in the period would be excess income [42].

- Based on this evidence, the Tribunal was satisfied that even if [the Applicant's] earnings had fluctuated slightly from week to week in the debt period this would not have affected the overall debt amount. In other words, [the Applicant's] payslips were not required for Centrelink to calculate her correct entitlement, as the information needed to do that was available in other forms. In other words, [the Applicant's] debt was 50% of the additional income amount of $2,487.47 which had not been declared to Centrelink [43].
- The Tribunal is satisfied that [the Applicant] was overpaid $1,243.73 from 2 July 2011 to 10 February 2012 and that this is a debt to the Commonwealth under section 1223 of the Act [44].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2016/M095744	CTH.3039.0017.2960	J Bakas	30 September 2018
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debts in accordance with income information received from the Applicant's employers.

Key Findings

- Centrelink raised and calculated the debts based on information provided by the ATO [15]. The Tribunal stated:

  It appears to me that Centrelink obtained annual income amounts from the ATO and averaged these amounts for the relevant debt periods. However, I find that the pay information provided by [Employer] is inconsistent with the annual totals provided by the ATO and further, as the fortnightly pay amounts varied from one fortnight to the other, I cannot be satisfied that the debt calculations provided by Centrelink are accurate [19].

...

In any event, the hearing papers indicate that an annual income amount from [Employer] as reported from the ATO was averaged over the 2011 to 2012 financial year to calculate the debt for that period [21].

Given the information recently provided by [Employer] to Centrelink, I cannot be satisfied that the debt has been correctly calculated [22].

This apparent averaging of the ATO data match does not allow for an accurate debt calculation where the fortnightly amounts paid are not the same [23].

- The Tribunal did not consider whether special circumstances existed to justify a write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/M125807	CTH.3761.0006.1485	J Strathearn	02 October 2018

How it was decided and key facts

Outcome

- The decision under review was affirmed

Key Findings

- Centrelink raised a debt based on overpayment of YA and NSA.
- The debt used information provided by the ATO [6].
- The Tribunal stated the Applicant conceded at the hearing that while he probably did not fully inform Centrelink about his earnings during the debt period, however, he:

  ...was not prepared for Centrelink to garnishee his tax return to offset the debt [the Applicant] was concerned that Centrelink may have over recovered the debt amount as his tax return was garnished for two years [18]-[19].

- The Applicant was unable to access payslips and/or bank statements and was not sure that the information from the ATO was correct. He was frustrated at being unable to dispute it as he the information as he did not have written evidence [20]-[21].
- The Tribunal accepted the ATO information in the absence of any other evidence to dispute the amounts of earnings and the periods during which they were earned [24].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.
- The Tribunal found that the debt had been recovered or nearly fully recovered by way of garnishee of the Applicant's tax returns.

AAT Review Number	DOC ID	Member	Date
???????	CTH.3761.0003.3366	H Schuster	2 October 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that the debt be recalculated in accordance with directions that the Tribunal consider further evidence as outlined in the reasons.

Key findings

- The Tribunal noted that Centrelink had received PAYG data-matching information from the ATO for the 2012/2013 FY with gross earnings from seven different schools and an employment agency and subsequently wrote to the Applicant asking her to confirm the information provided by the ATO [5].
- The Applicant did not have payslips from all employers but provided her bank statements for the period into an account which her income was paid and was able to find out from different schools the number of hours she worked for them in that year. The Tribunal noted that '[u]sing that information, Centrelink reassessed [the Applicant's] entitlement for the debt period' [7].

- The Tribunal found:

  Centrelink's assessment appears to be based on the instalment period in which an income amount was received which is not how [the Applicant] was required to report her income. In other words, Centrelink's assessment is, in part, comparing apples and oranges.

  … A more correct assessment would be to assess each receipt of income as income having been derived in the fortnight ending at least a day before the pay day [43]-[44].

- The Tribunal found it could not be satisfied that the Applicant had a debt given the Applicant had 'provided new information and there are concerns about the apportionment of [the Applicant's] income in the debt period' [47].
- The Tribunal did not consider the issues of waiver or write off by way of sole administrative error or special circumstances, except to say that the Applicant agreed that repayment of a debt would not cause her undue hardship [49].

AAT Review Number	DOC ID	Member	Date
2018/M125347	CTH.3039.0028.1233	M Amundsen	2 October 2018

How it was decided and key facts

Outcome

The NSA debt decision for the period 31 January 2015 to 9 March 2015 is affirmed and recoverable.
The other decisions under review are set aside and remitted to Centrelink for reconsideration in accordance with directions that:

- Centrelink make enquiries with the Applicant's employers to obtain more specific earnings information;
- Once that earnings information is obtained, Centrelink is to reconsider whether the Applicant has been overpaid and, if so, in what amount;
- Any debt arising due to her unreported earnings from a particular employer was 'clearly incurred by fraud and must be recovered' [37];
- In relation to any other debt arising, Centrelink will need to determine whether they have been incurred by fraud (taking into account all information that is then available) and if the answer to that question is "yes" then those debts must be recovered. If the answer is "no" then those debts could be written off as irrecoverable at law [37].

Key Findings

- The Tribunal noted that the Centrelink papers included data matching information from the ATO which advised that the Applicant was paid particular arounds by specified employers over stated periods [7].
- The Tribunal stated:

  Centrelink apportioned those earnings into fortnightly periods over the periods advised by the ATO. Centrelink then applied the income test using those fortnightly apportioned amounts and raised Debt No1 to Debt No3. In the decision below I refer to that approach as the "apportionment approach" [8].

- The Tribunal noted that the ARO advised that the Applicant was declared bankrupt on 20 February 2015 and was discharged from bankruptcy on 21 February 2018 [10].
- The Tribunal was satisfied that the Applicant received amounts of social security payments in excess of her entitlements, but was not satisfied that Centrelink had correctly calculated the quantum of the other three debts. The Tribunal stated that Centrelink had

  … [a]dopted the apportionment approach when calculating those debts. I accept that there will be times when that approach will be reasonable and appropriate. Significantly however, Centrelink has specific information gathering powers under the legislation.

  … [p]rior to adopting the apportionment approach, Centrelink should make all reasonable efforts to gather any more accurate information that might be available.

  … Of course, if any of the employers no longer have relevant records, then I would accept that the apportionment approach would be a reasonable and appropriate approach in relation to [the Applicant's] earnings from that employer [18].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/M125595	CTH.3039.0028.1401	R Anderson	9 October 2018

How it was decided and key facts

Outcome

The decision under review was set aside and remitted to Centrelink with directions that:
- fortnightly payslips be acquired from the Applicant's employers and the Applicant's DSP and age pension debt be recalculated accordingly
- the recalculated debt was due to the Commonwealth and
- the value of the recalculated debt was to be reduced by the amount already repaid, with the balance of the debt waived due to special circumstances.

Key Findings

- The Tribunal noted that, following receipt of electronic data from the ATO, a review of entitlement took place in February 2016 indicating the Applicant had received a greater amount of income than that declared to Centrelink [3].
- The Tribunal noted soon after the Applicant asked for the initial debt decision to be reviewed it became evident that Centrelink had 'duplicated the earnings' of the Applicant, resulting in Centrelink's second decision to amend the DSP and age pension debt [4].
- The Tribunal noted that the Applicant did not dispute the gross income recorded on the PAYG Summaries received by the Department through the data match process. The Tribunal stated:

  In the period 29 June 2011 to 25 June 2013, the Department has attributed 1/26th of those sums over each of the 26 fortnights in the financial year. The tribunal is not satisfied that this method results in an accurate calculation of [the Applicant] entitlement to DSP, given that there are clearly periods throughout the year where he would receive little if any payment from [Employer] [15].

  …

  In order to accurately calculate the DSP and age pension entitlement of [the Applicant], it is necessary to access his fortnightly payslips from [Employer] in the relevant period [16].

- The Tribunal found that special circumstances existed to justify a waiver of the debt [39].

AAT Review Number	DOC ID	Member	Date
2018/B123804	CTH.3761.0005.8761	E Kidston	11 October 2018

How it was decided and key facts

Outcome

- The decision under review was set aside.
- The matter was remitted to Centrelink for reconsideration with direction to obtain payroll details from the Applicant's employers.

Key Findings

- A debt was raised on the basis that certain income earned by the Applicant, identified from the records of the ATO as part of Centrelink's data matching, had not been properly taken into account in calculating the amount of benefits paid to him [6].
- The Tribunal found that the Applicant worked on a casual basis, his earnings varied each fortnight and he did not actually earn the averaged amount each fortnight. The earnings had not been verified by Centrelink via payslips or by employers at [25].
- The Tribunal subsequently directed Centrelink to obtain the Applicant's correct earnings from his Employers against the figures provided by the Applicant to the Tribunal at [33].
- The Tribunal found the Applicant's income was averaged over the entitlement period and stated:

  If averages of income over larger periods are used then the result generated by the rate calculator is likely to be erroneous. The error will be compounded when one takes into account that income bank credits or debits are

generated by the rate calculator each fortnight and then applied to the running balance of the income bank (or working credits, as the case may be) [31].

- The Tribunal stated that it was:

  …not in a position to calculate the correct amount of any debt and for that reason it is appropriate that the matter be remitted to Centrelink so that the correct amount of any overpayment during the relevant period may be verified or calculated on the basis of [the Applicant]'s fortnightly earnings [43].

- The Tribunal made no findings on special circumstances.

AAT Review Number	DOC ID	Member	Date
2018/A125919	CTH.3761.0002.7681	J Strathearn	16 October 2018
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key findings

- The issues for consideration included whether the Applicant was overpaid Disability Support Pension for the period from 28 March 2012 to 17 June 2014.
- The Tribunal noted 'Centrelink received information from the Australian Taxation Office (ATO) that the Applicant had received gross payments' in certain amounts from his employer [4].
- The Tribunal:

  examined the Centrelink Multical debt calculations in the Tribunal papers and noted that the summary and detail of the calculations shows that [the Applicant] was paid $41,324.70 in disability support pension payments and was entitled to $27,028.07.

  16. The Tribunal noted that the debt amount totals for each of the three years are consistent with the increasing undeclared amounts as indicated by ATO information compared with Centrelink records [15]-[16].

- The Tribunal found it 'could see no discrepancy in the Multical debt calculations' and found 'on the available evidence that [the Applicant] has been overpaid disability support payments in the debt period as stated by the authorised review officer' [17] – [18].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/S125598	CTH.3040.0022.3573	D Benk	22 October 2018
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key Findings

- The Tribunal noted that, after receiving information from the ATO in 2018, a data match was undertaken which confirmed the Applicant's income was higher than that applied in the assessment of entitlements [3].
- An internal review identified that annual leave and maternity leave payments were not taken into account at the time of the claim for parenting payment, resulting in an overpayment [3].
- The Tribunal found Centrelink's calculation to be correct [5].
- The Applicant asked the Tribunal to waive the debt either due to sole administrative error (maintaining she gave Centrelink all of the information required at the time of her claim) and/or the special circumstances of the case [4].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/A126336	CTH.3761.0002.6471	K Dordevic	25 October 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink with the direction that the Applicant's entitlement is recalculated based on payslips with any recalculated debt to be recovered in full and payments made in excess to be refunded.

Key Findings

- The debt was initially determined after a data match with ATO and on the basis of averaging earnings during the 2011 financial year.
- The Tribunal found that there was only a small discrepancy ($1.62) between the payslips and the earnings declared by the Applicant, and therefore it was unlikely there was an overpayment.
- The Tribunal noted that the Applicant provided payslips to Centrelink after the ARO's decision but his request for review was refused.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/P126375	CTH.3761.0006.1540	M Manetta	25 October 2018

How it was decided and key facts

Outcome

The decision under review was set aside and with the decision that:

- the NSA debt for the period between 30 July 2012 and 30 November 2013 be waived; and
- the NSA overpayments for the period between 29 November 2014 and 19 February 2015, be remitted to Centrelink for recalculation of the debt having regard to payroll information.

Key Findings

- The Tribunal noted following a review prompted by information received from the ATO, Centrelink formed the view that the Applicant had under-declared his income [1].
- In relation to the Applicant's employment with a particular employer, the Tribunal noted that the Department had 'erroneously found that this employment occurred in the subsequent financial year' and had also averaged the Applicant's earnings from the Employer across the whole 2011/12 financial year 'when he was in fact only working for a fraction of that year' [7].
- In relation to the NSA debt arising between 30 July 2012 and 30 November 2013, the Tribunal was satisfied that the payment of NSA was solely attributable to administrative error and the payments were received in good faith. Accordingly, the Tribunal found the debt must be waived [14].
- In relation to the debt between December 2014 and February 2015, Centrelink relied on information obtained through the ATO to prove that the Applicant derived certain income during that period. The Tribunal noted that the information obtained from this particular Employer was a business record extracted from its payroll which records fortnightly payments to the Applicant and there was no record of these having been declared [15].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt [20].

AAT Review Number	DOC ID	Member	Date
2018/B125637	CTH.3036.0022.5871	K Juhasz	1 November 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration with the direction that Centrelink recalculate the debt after using their information-gathering powers to request records.

Key Findings

- Centrelink raised the debt following a data match with the ATO.
- Centrelink had calculated the debt by redistributing the Applicant's income from payslips except for a six-month period where apportionment was used as there were no payslips from the Applicant.
- The Tribunal criticised the apportionment method:

  Centrelink have the legislative power to request the relevant missing payslips from this employer and undertake the correct apportionment of [the Applicant's] income. Prior to adopting the apportionment approach, Centrelink should make all reasonable efforts to gather any more accurate information that might be available. Once that information is obtained, Centrelink will be able to accurately calculate the amounts that [the Applicant] was overpaid. Of course, if any of the employers no longer have relevant records, then it would be accepted that the apportionment approach would be reasonable and appropriate however until all reasonable steps are exhausted the current calculations are incorrect [18].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/M126228	CTH.3761.0001.7982	J Nalpantidis	12 November 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation by correctly apportioning the applicant's actual earnings in each period.
- Any outstanding debt was to be recovered from the Applicant.

Key findings

- The Applicant disputed some of the evidence provided to the Tribunal relating to his income from respective his employers.
- The Tribunal commented:

  The rate calculator for newstart allowance requires the calculation of income on a fortnightly basis and according to section 1073 of the Act ordinary income is to be taken into account in the fortnight in which it is first earned, derived or received. Incorrectly assigning income to a different fortnight can result in a skewing of the rate payable and as a consequence any debt. The tribunal has previously noted that it is not always possible to obtain evidence of a person's weekly or fortnightly income and in such instances the approach has been to average the income amounts across all fortnights in the period covered by the amount. In Halls and Secretary, Department of Education, Employment and Workplace Relations [2012] AATA 802 (Halls) the tribunal considered that it was appropriate for Centrelink (the relevant department's delivery agency) to use an averaging method to calculate fortnightly income because in the circumstances it was the best available information that could be provided by the employer and the applicant. In Provan and Secretary, Department of Families, Community Services and Indigenous Affairs [2006] AATA 831 (Provan) the issue of averaging fortnightly income was considered appropriate however this was in circumstances where the employer had shut down and Mr Provan did not have any pay advice or other information that would assist in working out his periodic income [26].

The averaging method applied by Centrelink in this case is potentially unreliable as [the Applicant's] fortnightly earnings may have varied throughout the relevant period, and the "averaging" approach applied by Centrelink may not have reflected [the Applicant's] actual earnings… [27]

On the best available information, noting [the Applicant's] was not able to provide any further information about variations in his fortnightly income from [employer], the tribunal accepts the averaging method applied by Centrelink [28].

The tribunal considers that the debt will need to be recalculated, in line with the tribunal's findings in relation to [the Applicant's] income from [the Employer] being $286 per fortnight in the relevant period [29].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/B123874	CTH.3761.0005.7982	K Juhasz	21 November 2018
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key findings

- The Tribunal noted the Applicant was very disappointed that it had taken Centrelink so long to raise the debts as he had recently destroyed all records he held, such as work diaries [10].
- The Tribunal noted that the decision of the ARO clearly set out what Centrelink have on the record for earnings declared by the Applicant in comparison to the relevant PAYG data and found:

  There is a discrepancy between the amounts declared and [the Applicant's] corroborated earnings. [The Applicant] did not deny he earned those amounts, his issue was raised with the unlikelihood that he would have under declared to the extent suggested by Centrelink and the suggestion of Commonwealth error [17].

- The Tribunal checked the debt as 'comprehensively reassessed by the ARO' and did not find any error in those calculations [18].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/B126253	CTH.3761.0005.6658	Professor J Devereux	29 November 2018
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debts as directed paragraphs 10-12 of the reasons.

Key findings

- The Tribunal found the Applicant's debt was 'required to be recalculated using the actual income the Applicant received during the debt period' [10].
- The Tribunal directed Centrelink to follow up with the employer to confirm the Applicant's cessation date and once confirmed the debt should be recalculated using the actual income figures provided by the employer within the Tribunal papers [12].
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/M128032	2018/M128032	S De Bono	5 December 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt with the direction that Centrelink obtain payslips or bank accounts for the relevant periods.

Key Findings

- Centrelink raised the debt following a data match with the ATO and then averaged the Applicant's income over the debt period.
- The Tribunal was not satisfied that the debt amount was correct as the Applicant worked casual jobs and there was an absence of specific information including payslips and new debt calculations from Centrelink [14].
- The Tribunal stated:

  The tribunal does not accept the apportionment of income in relation to this matter based on data matching from the ATO. The tribunal accepts that the evidence from [the Applicant] is a correct reflection of her income during this period. The tribunal is unable to determine the precise amount of the debt; this is because there was enough evidence presented by [the Applicant] to indicate that apportioning income in the way that Centrelink has, at least in the first debt calculations (folio 18) is not fair or reasonable. Centrelink's recalculated debt apportionments, once income from [Employer 1] and the [Employer 2] were included, were not provided to the tribunal for the tribunal to check the debt calculations. Finally, in the absence of precise fortnightly income for the relevant payment fortnights the tribunal is unable to determine that an overpayment amount if any, is correct [16].

- The Tribunal found that there was no administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/M128133 and 2018/M128137	CTH.3761.0001.7138	A Ducrou	7 December 2018

How it was decided and key facts

Outcome

- Decision under review was affirmed. The Tribunal was satisfied with the ARO's debt calculations.

Key findings

- This matter was previously appealed to the AAT in 2016. In 2016, the Tribunal remitted the decision back to Centrelink for recalculation. The Applicants are now reviewing the 2016 decision.
- The Applicants claim that Centrelink provided incorrect information following the previous AAT review.
- The Applicants disputed all of the income material provided by the relevant employers, and claimed that the information provided by Centrelink and the employers was falsified. The Tribunal did not accept this argument.
- The Tribunal approved the use of income averaging, in circumstances where it is the best information available. Some of the Tribunal's comments included:

  … the tribunal considered that the information that the ATO provided about [the Applicant's] employment and earnings from these entities was reliable and was the best evidence that was available [33].

  …The tribunal compared the information from the labour hire firms and employers and the ATO-provided information with the authorised review officer's findings regarding [the Applicant's] employment and his earnings. The tribunal also compared Centrelink's apportionment of [the Applicant's] earnings over the debt periods with the labour hire, employer and ATO-provided information. The tribunal agreed with the authorised review officers findings with two exceptions [34].

- The Tribunal was ultimately satisfied that:

  …the information that Centrelink obtained was correctly applied in calculating the overpayments and that the matters

that member Amundsen raised for further investigation were resolved [35].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt.

AAT Review Number	DOC ID	Member	Date
2018/A126934	CTH.3066.0006.5056	J Strathearn	08 December 2018
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key Findings

- The Applicant's debt was raised on the basis the Applicant did not report her full earnings when compared to ATO information. An ARO affirmed the decision.
- The Tribunal found that Centrelink had apportioned earnings for three consecutive fortnights and endorsed this approach:

  Whilst is was submitted that on page 76 of the Tribunal papers, apportioned earnings for three consecutive fortnights ending 28 November 2011, 13 December 2011 and 27 December 2011 appeared to be exaggerated compared with actual earnings, the Tribunal compared apportioned earnings compared with actual income for those fortnights together with three preceding fortnights and two later fortnights. This revealed that actual and apportioned income was similar ($5,056.19 compared with $5,026.74). The Tribunal having compared apportioned and actual earnings over a longer period, is satisfied that those for the three identified fortnights are not exaggerated [29].

- The Tribunal did not contest with the submission that the information from ATO and the figures from Centrelink's apportioning were different:

  Further it was submitted that the ATO amount of $5,530 for three employers during that 2011-2012 is less than the apportioned amount of $7,151.15, and that indicates that the Centrelink amounts are incorrect. The Tribunal noted that there are potentially a variety of reasons why these amounts could differ [30].

- The Tribunal concluded that the debt calculations were correct based on the finding that apportioned earnings matched actual earnings:

  The Tribunal has found on the evidence available that the apportioned earnings match the actual earnings for this period. As detail of ATO figures is not available it is not possible to scrutinise these further. As stated the Tribunal accepts that the apportioned earnings calculated by Centrelink reflect the actual earnings for that period [31].

AAT Review Number	DOC ID	Member	Date
2018/M128092	CTH.3761.0004.6580	H Moreland	10 December 2018
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key Findings

- Centrelink raised the debt following a data match with the ATO and calculated the debt using apportioned income. However, the Tribunal was satisfied with Centrelink's calculations and that apportionment was appropriate [11].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/S127443	CTH.3761.0001.8069	D Tucker	14 December 2018

How it was decided and key facts

Outcome

- The decision under review was set aside, and the debt is written off for a period of two years.
- A 10% recovery fee was applied, but was waived by the Tribunal on review.

Key findings

- The ARO recalculated and reduced the Applicant's debt on internal review.
- The Applicant conceded that she did not always report her income accurately, and may have been overpaid in the period in which she received Centrelink benefits.
- The Tribunal commented:

  [the Applicant's] overpayment came to light as the result of data matching between Centrelink and the Australian Taxation Office (ATO). Initially, Centrelink calculated [the Applicant's] debt by apportioning her annual income, as recorded by the ATO, across the relevant period. [The Applicant] subsequently supplied payroll information from her employer about her fortnightly earnings which allowed Centrelink to more accurately calculate her debt… [12].

- The Tribunal was ultimately satisfied that Centrelink's revised calculations were correct.
- The Applicant was found to have special circumstances due to severe financial hardship and the debt was written off for a period of two years.

AAT Review Number	DOC ID	Member	Date
2018/M124923	CTH.3053.0151.7576	H Moreland	16 December 2018

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that the Applicant does have a debt, but it needed to be recalculated using payslip information, with the recalculated debt to be recoverable.

Key Findings

- The Tribunal noted evidence in the Centrelink papers of ATO match information regarding the Applicant's earnings from three different employers, payslip information from one of his employers, and the Applicant's bank statements [11].
- The Tribunal asked Centrelink to confirm whether the Applicant's payslip information was used to calculate the debt on a fortnightly basis based on what was earned each fortnight or whether his annual income was averaged across the year. The Tribunal noted Centrelink's response was:

  [Employer 1]: The period of the debt from 10/02/12 to 05/04/12 is calculated from Bank Statements supplied by the customer during the appeal process, the customer said he did not have payslips for this period. (Per DOC 19/07/18 and Multical for this period is scanned 16/07/18 - please see pages 461 and 349 - 353 of the s37 papers).

  [Employer 2]: From Customer First/Activities Tab/PAYG/Notes Tab: "Customer advised of payslip details: No, Bank statements uploaded but not all are readable. Recipient verbally provided earnings from bank statements"

  [Employer 3]: From Customer First/Activities Tab/PAYG/Notes Tab: "Customer advised of payslip details: Yes and recipient verbally provided earnings from payslips"

  [Employer 4]: From Customer First/Activities Tab/PAYG/Notes Tab: "Customer advised of payslip details: No, Bank statements uploaded but not all are readable. Recipient verbally provided earnings from bank statements" [12].

- The Tribunal stated in relation to employer 4 that Centrelink noted there was a $314.09 discrepancy arising over a date period that 'CO accepts as it is below 5% of ATO match data' and, over a different date period, Centrelink noted that a 'discrepancy of $427.68 over' was 'deemed acceptable between ATO match' [13].
- The Tribunal was satisfied that the debt calculations reflected the income the Applicant reported, but was not satisfied

that Centrelink had correctly input and apportioned the Applicant's income 'because of the allowed margins of error' noted above [15].
- The Tribunal asked Centrelink to obtain payslips from the Applicant's employers during the relevant period as there were still payslips outstanding [16].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/S127131	CTH.3036.0023.4894	D Tucker	17 December 2018
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink with a direction that the debt is recalculated on the basis of bank records.

Key Findings

- Centrelink raised the debt following a data match with the ATO.
- As the debt was raised for the period between 3 March 2012 and 22 June 2012, the Applicant did not have any payslips given the passage of time.
- Centrelink calculated her debt by averaging the income reported by the ATO.
- After an ARO affirmed the decision, the Applicant provided bank statements.
- The Tribunal found that there was a discrepancy between the bank records evidencing her income and Centrelink's information [7].
- The Tribunal concluded that Centrelink must recalculate the debt using the Applicant's bank records [7].

AAT Review Number	DOC ID	Member	Date
2018/A127679	CTH.3054.0011.3757	S Cullimore	18 December 2018
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that the debt was written off until 1 September 2019.

Key Findings

- Centrelink raised the debt following a data match with the ATO.
- The Tribunal was satisfied that Centrelink did not use income averaging but had worked out the actual gross income per Centrelink fortnight, except for income from casual employment with a recruitment agency in 2014/2015 as there was no evidence as to when the income was precisely earned [21].
- The Tribunal found that the Applicant had not declared any income for 2014/2015 [26], as well as 2015/2016 period [30].
- The Tribunal was satisfied that Centrelink had calculated the debt correctly [32].
- The Tribunal concluded that any debt was written off until 1 September 2019 due to proven incapacity to repay the debt [45].

AAT Review Number	DOC ID	Member	Date
2018/M127624	CTH.3036.0023.6466	S De Bono	07 January 2019
How it was decided and key facts			

Outcome

The decision under review was set aside and substituted with the decision that the debt was waived.

Key Findings

- Centrelink raised the debt following a data match with the ATO.
- Centrelink raised debts in two separate periods.
- The applicant had provided some payslips for one employer but did not provide any payslips from other employers.
- Centrelink used some bank statements to determine periods worked as well as net income.
- For the first period, the Tribunal was not satisfied that the debt calculation was correct as it was unclear how Centrelink had apportioned income over a Centrelink fortnight [15, 16 and 19].
- For the second period, the Tribunal was not satisfied there was a debt given the absence of payslip information and banks statements, and even though the Applicant had over-reported her income. The Tribunal found that there was no debt for this period. [18].
- The Tribunal noted that any debt needed to be recalculated using actual payslip information [19].
- The Tribunal found that special circumstances existed to justify a waiver of the remainder of the debt.

AAT Review Number	DOC ID	Member	Date
2018/P128488	CTH.3761.0005.6192	M Marellotta	10 January 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink to obtain verified income information for the Applicant and recalculate the debt on this basis.
- Centrelink was directed not to apply the 10% penalty.

Key Findings

- The Tribunal noted the following in relation to Centrelink's calculations:

  According to the Department they have calculated the debt by taking the amounts reported by the ATO and '…in the absence of any information regarding the exact days worked …the amounts have been apportioned…'1 On this basis the Department concluded that [the Applicant] had been paid $30,515.53 when only entitled to $10,213.57. This approach fails to take into account the actual earnings for each fortnight period and as such does not provide a precise or acceptable calculation of any alleged overpayment [12].

- It was not apparent to the Tribunal what attempts the Department have made to verify actual earnings either through obtaining copies of [the Applicant's] payslips from his former employers or by obtaining relevant bank statements. The Department in its role as decision maker has the power to request this information [13].
- The Tribunal found that the debt could not be waived on the basis of sole administrative error as the Applicant had contributed to the debt by not advising of the relevant changes in his income as required [26].
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.
- The Tribunal found that the 10% recovery should not be applied as it 'made little sense to the tribunal that a person who was correctly reporting under one payment would take it upon themselves to directly or recklessly not so comply in relation to another payment' [31].

AAT Review Number	DOC ID	Member	Date
2018/B126855	CTH.3040.0027.3856	R Bradley	11 January 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that the debt was be recalculated to take into account the Tribunal's findings on Centrelink's calculations and actual gross earnings from payslips.

Key Findings

- The Applicant held numerous jobs. The Applicant could only produce payroll information for some jobs.
- The Tribunal disagreed with Centrelink's approach to apportion some income solely on ATO information:

  Centrelink has relied on the information provided by the ATO to apportion the income from the other employers which refer to periods from 1 July to 30 June in the relevant financial years. On the basis of that information Centrelink has assumed that [the Applicant] earned a consistent daily rate of earnings from those employers over the whole financial

year. The Tribunal was satisfied that did not occur because [the Applicant] worked as a casual teacher with intermittent earnings [20].

- The Tribunal noted that averaging was appropriate where the Applicant did not know when she worked in that role:

  As the date of employment is not known the Tribunal was satisfied that the income of $352 reported as being earned in the period 1 July 2010 to 30 June 2011 is to be apportioned across the whole of the year which equates to a daily rate of $0.9643 as shown in Centrelink's apportionment calculations on page 43 of the documents. Only the apportioned income from 4 March 2011 to 30 June 2011 is taken into account.

- The Tribunal found that as the Applicant provided payroll details, Centrelink's should take into account the actual gross earnings in the period they were earned for recalculation [22].
- The Tribunal found that the debt should be recalculated to take into account any adjustments to the accrual and depletion of working credit [23].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt.

AAT Review Number	DOC ID	Member	Date
2018/M127032	CTH.3761.0006.0061	J Green	16 January 2019

How it was decided and key facts

It was not clear whether income averaging was applied to calculate the debt that was affirmed on review.

Outcome

- The decision under review was affirmed.

Key Findings

- The issue for the Tribunal to determine in this matter related to whether the Applicant was overpaid Newstart allowance whilst working for two separate employers for the period of entitlement under review [1].
- The Tribunal stated the Applicant 'conceded that he had not always declared his income to Centrelink' and accepted the calculations made by the ARO which was based on payslips and data matching information received from the ATO [6].
- The Tribunal found that the Applicant was paid more than he was entitled due to false and misleading information provided by him and a 10% penalty applied [7].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/M127871 and 2018/M130103	CTH.3761.0002.7358	A Smith	17 January 2019

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key Findings

- Centrelink raised the debt following a data match with the ATO [2].
- In relation to the debt calculations, the Tribunal noted:

  Centrelink's use of PAYG information from the ATO to calculate the debt was discussed at the hearing. [the Applicant] raised a concern that her earnings were averaged over the PAYG periods. The Tribunal explained that a request could be made to Centrelink to use its powers to request payslip or payroll information from her employers; however, it is unknown how more accurate information from the payslips would affect the amount of the debt. At her request, the Tribunal allowed [the Applicant] time after the hearing to decide whether she wished to pursue further payslip or payroll evidence from her employers. [the Applicant] advised registry staff that she did not wish to pursue obtaining payslip or payroll evidence. Accordingly, the ATO information showing that her employment income was more than the amounts

she declared to Centrelink is not disputed. On that basis, [the Applicant] agrees that a debt arises under the law and that the debt is not attributable to administrative error [13].

- In relation to a garnishee notice sent to the Applicant's employer in respect of her wages, the Tribunal found that Centrelink first sought to recover the debt via a payment arrangement, however, that the Applicant failed to enter into such an arrangement. The Tribunal referred to evidence that the Applicant 'advised that she did not receive correspondence about the online compliance review (employment income confirmation letters) sent to an address in Spotswood] [35]. Accordingly, the garnishee notice was issued to correctly [38].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/P128899	CTH.3036.0023.8350	M Martellotta	17 January 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that there was no debt.

Key Findings

- Centrelink raised a debt following a data match with the ATO.
- An ARO affirmed the debt but removed the recovery fee from using the following method:

  …the debt has been calculated by using ATO data match…however customer did provide a payslip…this payslip is outside of the debt period. Subtracting this amount from the data match results in a fortnightly income of $1,412.18 instead of $1,457.84 used from the data match…decided to remove the recovery fee rather than send for debt to be re-calculated….I am satisfied that these amounts roughly offset each other [14].

- The Tribunal criticised the ARO's approach:

  The Department further notes that it has taken this approach because [the Applicant] has failed to provide them with payslips so at allow actual income amounts to be verified. As a result the Department have apportioned income over the debt period. In the tribunal's view the approach taken by the Department to 'roughly' work out the debt amount and then on the basis of this to remove the recovery fee as a means to roughly offset amounts is not appropriate. It fails to take into account the actual earnings for each fortnight period and as such fails to provide a precise or acceptable calculation of any alleged overpayment. This approach also fails to properly address the criteria relevant to the application of a recovery fee under section 1228B of the Act [15].

- The Tribunal found that Centrelink had based the debt on an incorrect finding that the Applicant worked for a period when she didn't. The Tribunal noted:

  It is apparent that the Department has not taken any acceptable steps to verify actual earnings in this matter, clearly in its role as a decision maker the Department has the power to request relevant information either from [the Applicant's] employers or by obtaining copies of her bank statements [16].

AAT Review Number	DOC ID	Member	Date
2018/P128698	CTH.3054.0011.5321	C Kannis	18 January 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration with the direction that Centrelink establish that there was a debt.

Key Findings

- Centrelink raised a debt following a data match with ATO.
- The Tribunal noted that Centrelink calculated the debt by using the ATO information to average the Applicant's income over the period she worked for each employer [14].

- The Tribunal was not satisfied that the debt was correctly calculated as the actual gross income the Applicant earned in respect of each week or fortnight had not been established [21].
- The Tribunal criticised Centrelink's role in obtaining evidence:

  In the tribunal's view the Department's job in establishing a debt is not yet complete. It is not appropriate (or legally correct) for the Department to raise a debt based on incomplete data and then to require the applicant to disprove that debt amount. The Department has powers which allow it to gather information from third parties, such as employers. There appears to have been no effort made by the Department to exercise those powers once the evidence was not forthcoming from [the Applicant] [21].

AAT Review Number	DOC ID	Member	Date
2018/A129114	CTH.3066.0006.6752	M Manetta	22 January 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that no debt was proven.

Key Findings

- Centrelink raised a debt following a data match with ATO.
- The debt was reduced and the recovery fee was waived after the Applicant provided payslips.
- The Tribunal criticised Centrelink's approach in apportioning the Applicant's annual income over the whole year:

  This form of apportionment is not permitted by section 1068 which requires income to be brought to account in the fortnight in which it is earned and the payslips provided by [the Applicant] confirm, as one would expect, that her income varied significantly from fortnight to fortnight [7].

- The Tribunal found that there was a contradiction in Centrelink's own figures for the Applicant's reporting which meant that it was not satisfied the Applicant under-declared her income [8].

AAT Review Number	DOC ID	Member	Date
2018/P129182	CTH.3054.0011.5329	W Budiselik	22 January 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink with the direction that Centrelink obtain the Applicant's pay information from their former employer.

Key Findings

- Centrelink raised a debt following a data match with ATO.
- The Tribunal considered the Commonwealth Ombudsman's report, including the statement by the Ombudsman that incomplete information may affect the debt amount [12].
- The Tribunal found that the Applicant had been 'disadvantaged by the method used by Centrelink to calculate his debt, because it presumed his 2012/2013 annual earnings of $24,187 could be averaged out to $927.72 per fortnight' [13].
- The Tribunal found that the Applicant's income varied significantly from fortnight to fortnight due to study [13].
- The Tribunal agreed with the ARO's decision that if a debt was found for one period, then it should be waived due to sole administrative error [18].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt.

AAT Review Number	DOC ID	Member	Date
2018/M123988	CTH.3761.0005.8386	DC McKelvey	25 January 2019
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key Findings

- The Applicant's debt was calculated using income apportioned from ATO data. The Tribunal stated:

  The debts as originally calculated and raised by the Secretary involved the equal apportionment of income per fortnight over the employment periods declared by the two employers in the ATO data match. In the absence of any other information, the Tribunal considers this a legitimate approach.

  …

  Where other employment and income information is available, and in particular payment information for particular fortnights, this must be taken into account. This ensures that income is not apportioned by [Centrelink] over fortnights in which there was in fact no earnings, or reduced earnings [15].

- The Tribunal was satisfied that the calculations were correct.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/M128880	CTH.3036.0023.9009	P Sperling	29 January 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink with the direction that debt should be recalculated on the basis of the bank statements.

Key Findings

- Centrelink raised a debt following a data match with ATO and on the basis of two payslips.
- The Applicant did not dispute the Centrelink's method of averaging her annual income as she earned a regular amount each fortnight, except for some irregular additional overtime payments [15].
- The Tribunal was not satisfied with the averaging used by Centrelink as the applicant's bank statements indicated that she did not receive the same net pay each week [17].
- The Tribunal concluded that there were now bank statements available which provided actual information about the Applicant's net pay [18].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/M129555	CTH.3761.0002.5738	H Schuster	4 February 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the basis of information to be obtained from the Applicant's employers or bank statements.

Key findings

- The Applicant sought review of a decision made by the Department to seek recovery of debt raised using ATO information, which include a 10% penalty.
- The Applicant was aware of the cut-off point for earnings in a fortnight, and at times reported less than he received.
- The Tribunal found that the Applicant was overpaid in some periods [43]-[44]. It, however, stated:

  However, that is not to say that the Tribunal can be satisfied that Centrelink's debt calculation was correct. Centrelink retrospectively determined [the Applicant's] correct entitlement on the basis that in the 2013/14 and 2014/15 tax years his income from [Employer] was earned at a regular rate over relevant periods of employment. That is, the income was averaged over those periods in which Centrelink determined [the Applicant] had worked. Centrelink exempted a period from February to June 2015 for which [the Applicant] had provided a medical certificate. However, [the Applicant] did not receive any social security payments on five of the fortnights in question and only received small amounts on other fortnights [48].

- The Tribunal noted there was no evidence that Centrelink attempted to seek payroll information from two employers [49].
- The Tribunal further stated:

  The Tribunal agrees with [the Applicant] that, given his irregular work pattern, an averaging of his income over an entire year is inappropriate and not reflective of the manner in which he was required to report his income. It is not a fair way to assess his correct entitlement to NSA in the debt period [50].

- The Tribunal found that although it could only conclude that the Applicant did not correctly declare all of his employment income to Centrelink, it could not be satisfied that the debt was correctly calculated [52].
- The Tribunal found that Centrelink should obtain further information to correctly determine the Applicant's entitlement and how much debt he owed [53].
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/M129757	CTH.3036.0024.1983	J Strathearn	5 February 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink with directions that the debt is to recalculated to include income where the Applicant failed to report and to not include irrelevant income.

Key Findings

- The Tribunal noted the ARO apportioned ATO income over the financial year of 2010 to 2011 [6].
- The ARO affirmed the decision on the basis the Applicant worked for four employers during the debt period.
- The Tribunal found that the income from [Employer 1] is to be taken into account as the Applicant failed to report these earnings. The Tribunal did not dispute Centrelink's apportionment method [28].
- The Tribunal found that the income from [Employer 2] should not be included as the Applicant commenced employment after Centrelink payments ceased [30].
- The Tribunal found that the income from [Employer 3] is not to be taken into account as the income and dates had not been verified by Centrelink and the Applicant stated he never earned income from th [37].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/S129563	CTH.3761.0001.0007	AJ Halstead	6 February 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt by correctly apportioning the applicant's actual earnings in each period.
- Centrelink was directed to obtain earnings and payroll information for the applicant from the relevant employers.

Key findings

- A $6,000 debt was raised on the basis of ATO data matching. The Applicant was deaf, so a social worker assisted him during the period in question to report his fortnightly earnings, which often fluctuated.
- The Tribunal was not satisfied that income averaging was an appropriate method of calculation in the circumstances, as it did not properly reflect the Applicant's actual fortnightly earnings.
- The Tribunal stated:

  While averaging of that income over the relevant period may approximate his earnings, that method is not an accurate measure for the purposes of section 1064 (the carer payment rate calculator) because the income was not apportioned as required by section 1073B for each fortnightly social security payment period [10].

  In calculating the debt, the Department applied an averaging of the income received by [the Applicant] from his employers for the relevant period. The effect has been that income was incorrectly attributed throughout the relevant period because [the Applicant's] actual income from employment was not always consistent [11].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/S13003	CTH.3761.0001.0549	J Leonard	14 February 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink with the direction that the debt was to be recalculated taking into account the Applicant's employment income and 50% of the debt is to be waived.

Key Findings

- Centrelink raised the debt following a data match with the ATO.
- The Tribunal noted that after the Applicant provided bank statements Centrelink calculated her income for a period by 'grossing up' her net income [11].
- The Tribunal noted that Centrelink apportioned the Applicant's annual gross payment evenly over a period where there were no bank statements [11]. The Tribunal noted that the Applicant had provided evidence of her net income for this period during the hearing and concluded the matter should be remitted to Centrelink to take this information into account [12].
- The Tribunal found that special circumstances existed to justify the waiver of 50% of the debt [29].

AAT Review Number	DOC ID	Member	Date
2018/M130056	CTH.3036.0024.1707	A Carson	15 February 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink with the direction that the debt was to be recalculated taking into account the Applicant's bank statements and that Centrelink obtain proof of earnings from former employers.

Key Findings

- The Applicant was employed casually and worked irregular hours.
- The Applicant contested that income needed to be reviewed on a fortnightly basis rather than averaging [18].
- The Tribunal suspected there was a debt after comparing the Applicant's pay statements with reported income, acknowledging the Applicant's difficulties in reporting as a casual worker [24].
- The Tribunal noted that it was unable to reconcile some of the income amounts used by Centrelink with the Applicant's pay statements [25].
- The Tribunal concluded that there was a substantial amount of documentation from which an actual fortnight amount could be ascertained and obtained by Centrelink using their powers [25].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/M129908	CTH.3036.0024.5100	A Smith	18 February 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink with the direction that the debt was recalculated based on verified earnings in payslips.

Key Findings

- Centrelink raised a debt after a data match with ATO.
- The debt arose due to a lump sum payment of arrears of employment income due to the Applicant's employer underpaying her.
- Centrelink had asked the Applicant to determine what her adjusted fortnightly earnings would have been if she had been paid at the correct rate. Based on these adjusted earnings, Centrelink first raised the debt by assessing the earnings when they were first earned [18].
- The Tribunal took issue with the ARO's method of apportioning the arrears evenly across the period. The Tribunal noted that there was no legislative basis to apportion the arrears in this way [19].
- The Tribunal concluded it was necessary to recalculate the debt in accordance with the verified earnings set out in payslips and must also include relevant proportions for arrears [24].

AAT Review Number	DOC ID	Member	Date
2018/P128918	CTH.3069.0042.2481	M Martellotta	28 February 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink with directions that it obtain verified income information so as to allow for a more precise calculation of any overpayment and a recovery fee is not to be applied.

Key Findings

- The Applicant stated that he provided payslips when the debt was first raised [14].
- The Applicant was employed on a casual basis so his income would vary from fortnight to fortnight [14].
- The Tribunal criticised Centrelink's use of income averaging to raise the debt:

  This approach fails to take into account the actual earnings for each fortnight period and as such does not provide a precise or acceptable calculation of any alleged overpayment. According to the Department they say they took this approach because [the Applicant] failed to provide evidence of his actual income however if he now provides that evidence then the Department will recalculate the debt [15].

- The Tribunal cited with approval Re SDFHCSIA and George [2011] AATA 91 which considered the requisite standard of proof to determine whether a debt was owed [16]. Applying this case, the Tribunal concluded it was 'left in a state of doubt as to the correct calculation of the debt' [17].
- The Tribunal concluded that Centrelink can obtain further information from the Applicant or his former employers or by requesting copies of bank statements [17].
- The Tribunal found that no administrative error or special circumstances existed to justify the write off or waiver of the debt.
- The Tribunal rejected the applicability of the recovery fee as it was not satisfied the Applicant knowingly or recklessly failed to declare his income [25].

AAT Review Number	DOC ID	Member	Date
2018/S130797	CTH.3761.0002.5343	M Horsburgh AM	07 March 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt.

Key findings

- The Tribunal found Centrelink calculated part of the Applicant's debt by apportioning the Applicant's income as notified by the ATO, evenly across all the relevant weeks [9]. It stated: 'This is contrary to the provisions of 1073B of the Act and I cannot affirm a debt calculated on that basis. Other parts of her debt have been calculated properly using her payslips' [9].
- The Tribunal found that the Applicant had a debt. However, the Tribunal ordered that the debt be recalculated. As the Applicant was willing to repay the debt after it is correctly calculated, the debt was not waived [16].

AAT Review Number	DOC ID	Member	Date
2018/S130763	CTH.3761.0002.7096	M Horsburgh	8 March 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that the balance of the debt unpaid as at 30 August 2018 was waived.

Key Findings

- Centrelink raised the debt and applied a 10% penalty following a data match with the ATO [8].
- Centrelink used payslips provided by the Applicant to recalculate part of the Applicant's debt. Where payslips were unavailable, however, Centrelink apportioned the income according to the ATO information across the whole year. The Tribunal found that:

  This process is contrary to the provisions in sections 1073B and 1073C of the Act. This casts into doubt the calculation for the 2010/2011 year. It may be that [the Applicant] has a debt for this period, but it will not be the debt calculated by this faulty method [9].

- The Tribunal concluded that while the Applicant owed a debt, Centrelink was unable to satisfy itself as to the amount [10].
- The Tribunal found that special circumstances existed to justify a waiver of the remainder of the debt as at 30 August 2018.

AAT Review Number	DOC ID	Member	Date
2019/M131557	CTH.3036.0025.4109	A Schiwy	14 March 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision there is a sickness allowance debt but 50% is waived.

Key Findings

- The Applicant was in receipt of sickness allowance. The debt arose due to the Applicant failing to inform Centrelink of increases in his superannuation payments and his income from [Employer].
- The Applicant provided PAYG summaries from his superannuation payments. The Tribunal noted:
- It was clear from the PAYG summaries that [the Applicant's] AIA payments increased over the years. Centrelink averaged out the gross payments shown on the PAYG summaries over the periods they were earned. This would not provide an accurate result as the dates of the increases in payments are not known; however the tribunal was satisfied that

obtaining the actual payments per fortnight would not substantially affect the debt calculations [13].
- The Applicant also received $1,395 over a four-week period from [Employer]. The Tribunal concluded that averaging issues did not arise as the income was only over two fortnights [14].
- The Tribunal found that the calculation was correct [16].
- The Tribunal found that special circumstances existed to justify the write off or waiver of half of the debt.

AAT Review Number	DOC ID	Member	Date
2018/M131061	CTH.3761.0003.1102	J Nalpantidis	15 March 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted back to Centrelink for reconsideration in accordance with the direction that the debt be recalculated in line with paragraph 15 of its reasons, with the recalculated debt to be recoverable.

Key findings

- The Tribunal noted that, prior to the hearing, the Applicant provided further information to the Tribunal, including a Statement of Financial Circumstances, a submission, a PAYG payment summary and payslips from one employer, and an earnings history report from another employer [6].
- The Tribunal asked the Applicant if she could provide payslips for the entire period under review and she said this would be difficult because at the relevant time payslips provided by her employer were hardcopies and not available online. She said there may be payslips filed away in her previous home, but she did not have access to that home to look for them. The Tribunal noted the Applicant advised it was likely that fortnightly earnings were in the order of the amount as 'averaged' by Centrelink [14].
- The Tribunal found that the Applicant did not correctly notify Centrelink of her income throughout the relevant period and she was paid more than her correct entitlement [18].
- The Tribunal found:

  The averaging method applied by Centrelink in this case is potentially unreliable as [the Applicant's] fortnightly earnings may have varied throughout the relevant period, and the average figure applied by Centrelink may not have reflected [the Applicant's] actual earnings [21].

- The Tribunal however accepted the averaged figure applied by Centrelink as the Applicant did not dispute it [21].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/M123296 & 2018/M130319	CTH.3761.0006.0893	S De Bono	21 March 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the basis of payslips from Commonwealth Bank.
- Centrelink was directed to refund any over-recovered monies to the Applicant.
- The Tribunal affirmed the decision to garnishee the Applicant's tax return.

Key findings

- The Tribunal noted that match data with the ATO was obtained by Centrelink for the 2013/14 and 2014/15 financial years, and following the matching of ATO financial year income with the income that the Applicant reported to Centrelink while receiving NSA Centrelink determined that the Applicant was overpaid NSA [6].
- The Tribunal found:

  …apportioning income can, at times, be an inaccurate way of determining income for a period. Apportioning may cause income to appear higher than what the person actually earnt within a given Centrelink fortnight [12].

- The Tribunal was not satisfied that apportioning the income from ATO information, 'given the ad hoc nature of [the Applicant's] work up until he commenced employment with Evolution Traffic Control is an accurate reflection of his income and therefore the debt amount' [20].
- The Tribunal stated:

  …withholding [the Applicant's] tax return was particularly harsh in the circumstances when the debt was being reviewed and was actually reduced once [the Applicant] provided some of his payslips for Evolution Traffic Control [37].

- The Tribunal, however, found that as it was likely that the Applicant would have a debt and outstanding debt amounts to be recovered, it was appropriate that this money not be refunded to the Applicant [38].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/S131459	CTH.3036.0025.8770	J D'Arcy	25 March 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the basis of the Applicant's payslips.
- The recalculated debt was recoverable.

Key Findings

- Following a data match with ATO records, Centrelink raised a debt against the Applicant arising from overpayment of Youth Allowance due to the match showing the Applicant had understated her income [3]-4]. The debt was affirmed by the ARO upon internal review [6].
- The Tribunal stated:

  Where payslips are not available for the period under review Centrelink has used the gross annual income provided by the ATO and calculated the rate payable by averaging the income amounts across all fortnights in the period covered by the ATO income [16].

- The Applicant provided payslips, bank statements and her calculations of the debt to the Tribunal [11]. The Tribunal noted the Applicant did not dispute the existence of a debt but disputed the amount calculated by Centrelink using the averaging method [21]. The Applicant's evidence indicated that she did not work consistently every fortnight and did not earn income for some periods [20].
- The Tribunal stated: 'Consequently the averaging method used by Centrelink to calculate the rate payable to her has produced an inaccurate result' [20].
- The Tribunal found that there was evidence that the Applicant had been overpaid youth allowance but that the rate of payment should be recalculated on the basis of her actual payslips [22].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/B131329	CTH.3761.0002.5887	J Longo	29 March 2019
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key findings

- The Applicant received a parenting payment debt of $11,167.06. This decision was reviewed and affirmed by an ARO.
- The Applicant stated that she was required to estimate income for some of the period as Centrelink fortnights did not align with her paid work. Her income varied during the period and she was not earning the same amount every fortnight [7]. The Applicant did not think that she had been overpaid during the period and that she had reported correctly. She did not believe the data matching process accounted for the variations of income during the period [9].

- The Tribunal stated:

  'In the absence of more detailed evidence from [the Applicant] regarding the income earned during this period, the tribunal accepts Centrelink's apportionment methodology applied to the total income earned, as set out in each of the relevant years' tax return, as an acceptable estimate of fortnightly income earned over the period' [10].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M132008	CTH.3036.0025.5662	M Baulch	1 April 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink with the direction that Centrelink obtain dates and payroll information from the Applicant's employers and recalculate on receipt of that information, with the resultant debt to be recoverable.

Key Findings

- A debt was raised by Centrelink following ATO information which showed the Applicant may not have always fully declared his income whilst in receipt of NSA. The Tribunal noted this was not in dispute by the Applicant [15].
- The Tribunal examined the debt calculations by Centrelink and noted the debt was calculated on the basis of payslips from one of the Applicant's employers and the averaging of earnings reported by the ATO for two more employers [16].
- The Tribunal found that the debt amount calculated by Centrelink could not be correct [18].
- The Tribunal stated:

  [The Applicant's] evidence was that he worked for [Employer] for a period of only 10 days. [The Applicant] also stated that he worked for [Employer 2] on an ad hoc basis, when cover was required, and this would have averaged only one day of work each month. Clearly, Centrelink's calculations based upon an average of the earnings from [Employer 1 and Employer 2] over the specified periods cannot be correct. [The Applicant] told me that he had made efforts to obtain payslips or other payroll information from [Employer 1 and Employer 2], but had been unsuccessful [17].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/B130639	CTH.3761.0002.4923	M Amundsen	2 April 2019

How it was decided and key facts

Outcome

- The decisions under review were varied so that the Applicant had a debt totalling $6,491.09 and the debt was written off pursuant to s 1236 of the Social Security Act 1991 until Centrelink determines that the Applicant has the capacity to repay the debt.

Key findings

- The Tribunal noted the use of ATO information:

  The ATO advised Centrelink that the Applicant had employment income of $31,518 for the period 1 July 2011 to 30 June 2012 from [employer]. As there was no specific information about when that income was earned, it was appropriate to apportion it over the full financial year, resulting in a fortnightly income amount of $1,205.61 (the apportioned income) [7].

- The Tribunal noted to the Applicant that information in the Centrelink papers indicated that he had been asked to provide bank statements covering the relevant period but had failed to do so. The Applicant provided the Tribunal with copies of some bank statements which had pages missing (only odd numbered pages were provided).
- The Tribunal noted that it was evident that the Applicant's gross payments from his Employer exceeded the apportioned income as calculated by Centrelink and was satisfied that the apportionment approach adopted by Centrelink is the most appropriate method for determining whether the Applicant had been overpaid. Using that approach the Tribunal

was satisfied that the Applicant received amounts of NSA in excess of his entitlements and found that the Applicant had the debt as calculated by Centrelink [19].
- The Tribunal was satisfied that the Applicant failed to provide full information to Centrelink about his earnings and, accordingly, found that the 10% penalty must be applied [20].
- The Tribunal found there were no special circumstances in the Applicant's case to justify the waiving of his debt [33]-[34].
- The Tribunal noted the Applicant's evidence at the hearing was that he had no source of income and found that he did not have capacity to repay the debt. Accordingly, the Tribunal concluded that the debt should be written off until such time as Centrelink determined that he has the capacity to repay the debt [35].

AAT Review Number	DOC ID	Member	Date
2019/B131814	CTH.3761.0002.7866	M Amundsen	2 April 2019

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key Findings

- The Tribunal determined the application on the papers.
- Centrelink raised a debt following a data match with ATO.
- The Tribunal noted that Centrelink had apportioned the ATO income over the relevant period [11].
- The Applicant then provided her bank statements to Centrelink [12].
- The Tribunal opined that the Applicant's bank statements do not paint 'a clear and certain picture of [the Applicant's] earnings' [16]. The Tribunal noted that there were a number of cheque/cash deposits into the Applicant's account but there was no information to explain the source of the payments [15].
- The Tribunal accepted Centrelink's income averaging method:

  In determining whether [the Applicant] has been overpaid, the ideal situation would obviously be that her precise employment details would be available. However, as that is not available, I am satisfied that the apportionment approach adopted by Centrelink is the most appropriate method for determining whether [the Applicant] has been overpaid. Using that approach I am satisfied that [the Applicant] received amounts of YA in excess of her entitlements [17].

- The Tribunal found that no administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/C129968	CTH.3036.0025.6165	F Staden	3 April 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that there was no debt.

Key Fin dings

- Following an ATO data matching process in October 2018, Centrelink undertook a review of the Applicant's entitlement to NSA. This was undertaken on the basis that the data match showed earnings from employment were not properly taken into account for the period 10 July 2010 to 5 September 2016. Centrelink raised two NSA debts, which were later affirmed by an ARO [3]-[4].
- The Applicant undertook casual employment, mostly as a Teacher for the period 10 July 2010 to 5 September 2016 with some periods of no work and nil earnings or periods where the Applicant was not in receipt of NA but were still included [25].
- The Tribunal identified there were further variables in the calculation of the Applicant's income as a teacher including casual days of employment pay more than short term contract days [37] and delay in the [Employer's] payment of casual teachers demonstrated by the Applicant's payslips [16].
- The Tribunal commented:

ATO data-matching enables the identification of gross earnings from a particular employer which have either not been declared to Centrelink or not fully declared to Centrelink. A person's entitlement to a payment is then reviewed and an overpayment may be identified. Where actual earnings are not available for an employer, Centrelink entitlement reviews use an average fortnightly earnings figure calculated by dividing a person's gross earnings by the number of days the person worked, using information from the group certificate [12].

- The Tribunal found on five occasions, there was no evidence the Applicant under declared his earnings and no evidence he was overpaid NA over the 2010/2011 - 2016/2017 financial years [15], [21], [27], [32], [38], [41].

AAT Review Number	DOC ID	Member	Date
2018/M129207	CTH.3036.0025.8326	T Hamilton-Noy	3 April 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that there was no debt and no penalty be imposed.

Key Findings

- A debt was raised by Centrelink in May 2018 following ATO earnings information which showed the Applicant may have been overpaid Sickness Allowance whilst employed as a Teacher for the 2015/2016 financial year [3].
- The debt was affirmed by an ARO [4].
- The Tribunal stated:

  Centrelink has apportioned the earnings over the debt period and found that [The Applicant] has a legally recoverable debt to the Commonwealth totalling $5,206.54 and, further, that because of him failing to declare his income, a 10% penalty totalling $520.65 should also be imposed [10].

- The Applicant submitted to the Tribunal that he had not earned income in the period under review. The Tribunal noted that this was consistent with submissions and information he had previously provided to Centrelink [11].
- The Tribunal took into account the Statement of Service provided by the Applicant [13] and the information requested from the Applicant's Employer for the period of nil income claimed by the Applicant.
- The Tribunal concluded:

  Based on the further information provided by the [Employer], the Tribunal found that the best evidence before it was that [the Applicant] did not earn income from the [Employer] between 23 September 2015 and 28 June 2016. The decision to apportion his total income for the financial year across the debt period is set aside and the Tribunal substitutes its decision that there is no debt of sickness allowance in this period. As the decision to impose a penalty is reliant on the debt itself, the decision to impose the 10% penalty is also set aside [15]

AAT Review Number	DOC ID	Member	Date
2019/A132303	CTH.3067.0011.1064	Y Webb	9 April 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the basis of the Applicant's payslips and working credits, with the recalculated debt to be recoverable.
- Centrelink was directed that no 10% penalty was to be applied, and any repayments in excess of the recalculated debt be repaid to the Applicant.

Key Findings

- Following information received from the ATO, Centrelink raised a debt in October 2016 as it was discovered that the Applicant's earnings had not been taken into account in calculating NSA [5]. Centrelink adjusted the overpayment amount to $1,737.86 and added a 10% recovery fee to the debt [6]. The Applicant's income tax return refund was garnisheed and the debt was repaid in full [8].
- The Tribunal noted:

It is evident in the earnings scr ntrelink averaged [the Applicant's] income from [Employer] over the duration of his employment. The authorised review officer also confirmed that earnings were averaged over the group certificate period [21].

- The Tribunal considered payslips provided by the Applicant [21].
- The Tribunal found:

  In [the Applicant's] case the Tribunal is not satisfied that averaging his income over the duration of his employment with [Employer] was an accurate method of determining his income on a fortnightly basis. The Tribunal accepts [the Applicant's] statements that his income fluctuated from week to week depending on the number of hours worked and whether he was required to work away from home or not. The payslips provided reinforce his statements about the fluctuating hours worked and thus the variable gross income he earned each week [25].

- The Tribunal found that it was likely that the Applicant had been overpaid but not to the extent Centrelink contended [26]. The Tribunal directed Centrelink to reassess the overpayment based on the Applicant's actual earnings as detailed in his payslips [26].
- In relation to the 10% penalty fee, the Tribunal found that the Applicant:

  … was cooperative with Centrelink processes and that he provided payslips in an attempt to resolve the overpayment issue. Therefore, the Tribunal finds that a recovery fee should not be added to the debt [29].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M132440	CTH.3761.0005.6460	S Cullimore (Presiding) D Cox	12 April 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the direction that overpayment of NSA be recalculated by apportioning and assessing the Applicant's earnings as directed.
- Any remaining overpayment was a debt to be recovered in full.

Key findings

- The Tribunal noted that the debt was raised after a data match of the Applicant's assessed taxable income for the 2010/11 tax year, and as seven years had elapsed since then the Applicant was unable to obtain and supply either payslips or bank statements [4], [6].
- The Tribunal noted that 'historic data matching presents some challenges where the timeframe is such that the applicant cannot provide payslips or bank statements to verify the timing of earnings' [12].
- The Tribunal noted that '[t]he ARO himself expresses some uncertainty about the accuracy of the apportionment' [12].
- The Tribunal also noted '[t]he ARO found flaws in the original calculation of the overpayment as a result of double counting of earnings from two employers and reduced the overpayment' [18].
- The Tribunal noted it had received evidence from the Applicant that justifies a further recalculation of any overpayment of NSA as follows:
  a) Income from [Employer 1] should be apportioned over the period 21 July 2010 to 13 February 2011 and assessed. The data match gave this figure as $3,489;
  b) Income from [Employer 2] ($200) should be assessed as being received on 2 October 2010; and
  c) Income from [Employer 3] should be apportioned over the period 14 February 2011 to 30 June 2011 but only the income so apportioned between 16 February 2011 and 11 May 2011 should be assessed, because [the Applicant's] newstart allowance was cancelled on 12 May 2011. This figure is $4,329.06, as calculated by Centrelink at page 14 of the papers (the data match figure of $6,817 at page 103 was her income from this employer for the whole of the 2010/11 financial year).
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/P131786	CTH.3067.0011.1725	H Schuster	15 April 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted a decision that the Applicant's entitlement be recalculated on the basis of the Applicant's payslips.

Key Findings

- Centrelink calculated and raised a YA debt against the Applicant in October 2018 on basis of information provided by the ATO [4].
- In relation the ATO information, the Tribunal stated:

  However, periods of employment declared to the ATO are not always reliable in relation to casual employees: many employers nominate the whole financial year even if the earnings are earned over discrete periods. That, of course, is one of the reasons why Centrelink asks recipients of social security payments to review and advise whether the information from the ATO is correct [28].

- The Tribunal noted that the Applicant provided payslips from his employer however the debt was not recalculated by Centrelink on the basis of the new pay information provided [8]. The Tribunal noted that the Applicant said an officer from Centrelink had told him his debt could not be recalculated because the matter had already been reviewed by an ARO [23].
- The Tribunal commented in relation to apportioning income:

  The Tribunal finds that it is inappropriate to apportion the income from [Employer] over the entire 2011/12 financial year and is satisfied that Centrelink's latest debt calculations incorrectly assume the income was earned over the entire financial year. This, again, will require a recalculation to determine [the Applicant's] correct entitlement [41].

- The Tribunal was satisfied the applicant had been overpaid parts of the debt period but that the debt was likely significantly smaller than the amount calculated by Centrelink [43].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/B131804	CTH.3761.0002.8281	A Ducrou	18 April 2019

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key Findings

- The Tribunal noted that Centrelink initially calculated the debt by taking into account information form the ATO and the Applicant's bank statements [3].
- The Tribunal noted that, following the hearing, the Applicant provided documents to the Tribunal including PAYG payment summaries and records from his tax agent. The Tribunal noted the information in these documents corresponded with the information that Centrelink received from the ATO and confirmed he had received a superannuation lump sum of $10,000 in 2015 [13].
- The Tribunal noted that Centrelink did not take the lump sum superannuation into account when calculating the overpayment.
- The Tribunal found that the earnings that the Applicant reported to Centrelink did not correspond with the ATO-advised income, and for some Centrelink instalment periods the Applicant over-reported his earnings, while for others he under-reported or did not report any earnings [15].
- The Tribunal noted it was evident from Centrelink's records that 'Centrelink used both ATO and bank statement information' and, for periods where the Applicant had not been able to provide bank statements, 'ATO information was used' [16].

- The Tribunal noted that Centrelink had asked the Applicant to provide payslips but he was not able to do so.
- In the circumstances the Tribunal found that the ATO-provided information and the bank statement information (where provided) was the 'best evidence that was available of [the Applicant's] ordinary income from his employment and of the long service leave he received' [16].
- The Tribunal did not find that any sole administrative error or special circumstances existed to justify a waiver or the writing off of the debt.

AAT Review Number	DOC ID	Member	Date
2018/H129592	CTH.3761.0006.0738	R Perton	26 April 2019
How it was decided and key facts			

Outcome

- The decisions under review in relation to the three debts were affirmed.
- In relation to the debt arising from the period 21 December 2012 to 27 June 2014, the Tribunal set aside the decision under review and substituted the decision that the Applicant did not incur a debt for this period.

Key findings

- The Tribunal noted that, according to the ATO data match contained in the Centrelink material, the Applicant worked for a number of employers in the relevant period [10].
- The Tribunal noted in relation to a particular debt that Centrelink had apportioned earnings over the financial year and his actual earnings for each fortnight had not been provided [11].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/P133386	CTH.3036.0026.4727	J Green	1 May 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the direction that the Applicant was overpaid during the period from 4 April 2014 to 21 July 2014.

Key Findings

- The PPS debt was calculated following a data match with the ATO showing the Applicant's gross income earned from relief and contract teaching [2], [6].
- The initial PPS debt was calculated at $5,499.30 then varied to $5,235.18 and varied again by the ARO to $5,328.57 [2].
- The Tribunal stated: 'In making its calculations Centrelink has apportioned the income equally over each fortnight during the period it was earned according to the ATO records' [12].
- The Tribunal found there was an overpayment, but only as it relates to income of $8,459 earned during the period 4 April 2014 to 21 July 2014 which was not taken into account by Centrelink when calculating the Applicant's rate of payment [15].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/S133010	CTH.3761.0002.8050	E Kidston	1 May 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink with the direction that it obtain payroll information from one former employer.

Key Findings

- Centrelink raised the debt following a data match with the ATO.
- The debt was recalculated and reduced multiple times after the Applicant provided payroll statements and payslips.
- The Applicant worked four different jobs during the relevant period.
- The Tribunal noted that for part of the debt, Centrelink used income averaging. The Tribunal noted, '[i]t is possible that the apportioning of the income does not accurately reflect [the Applicant's] actual earnings in the relevant period' [37].
- The Tribunal noted that Centrelink was entitled to rely on ATO evidence absent evidence from the Applicant about actual irregular earnings [38].
- The Tribunal raised concern with an unknown document. The Tribunal concluded that the debt should be recalculated because of this document and the apportioning issue [39].
- The Tribunal found that no administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/B131925	CTH.3761.0005.8669	K Juhasz	2 May 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt.
- Centrelink was directed to make relevant enquiries of the Applicant's employers with a view to gathering more specific information about his earnings.

Key findings

- The Tribunal noted there was a clear disparity between the Applicant's income as declared to Centrelink and the income held on record by the ATO. The Tribunal noted this 'may be attributable to error in the disclosure of "in the hand" income rather than gross' [14].
- The Tribunal noted that within the hearing papers there was no evidence of any attempt by Centrelink to obtain a more accurate estimate of when the Applicant's income was earned within the particular Centrelink fortnights. The Tribunal stated:

  [Employers] (contracting for the ATO) are major employers' and 'one would infer that working as contractors for the ATO, it would be relatively simple for Centrelink to obtain details of what [the Applicant] was paid in the relevant Centrelink fortnights to satisfy itself of the accuracy of the debt [18].

- The Tribunal noted its intention to remit the matter to Centrelink with a direction that Centrelink request payslip and/or earnings and then recalculate the debt by using figures received, recalculated within the Centrelink fortnights. It further stated:

  Of course, if after enquiries are made the relevant employers advise that this information is not in existence, then the ATO data can be used as this will be the best means of calculation available to Centrelink [19].

- In considering the issue of sole administrative error, the Tribunal stated the circumstances were not ones that would raise waiver in that context, as following the ATO data match, the 'onus is on the individual declaring their earnings to do so accurately and if the ATO records record a higher income, the resultant debt cannot be found to be at the error of the Commonwealth' [25].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/S133105	CTH.3036.0026.4718	F Staden	2 May 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that there was a debt but the recalculated debt be waived.

Key Findings

- Following a data match with the ATO, Centrelink raised a NSA debt of $4,395.19 as the information showed the Applicant's earnings were not properly taken into account between 25 October 2012 and 21 June 2013 [3]. Centrelink subsequently revised and reduced the debt amount to $2,976.97. The ARO affirmed the debt but further revised the debt amount to $1,388.86 [5].
- In relation to income averaging generally, the Tribunal stated:

  ATO data matching enables the identification of gross earnings from a particular employer which have either not been declared to Centrelink or not fully declared to Centrelink. A person's entitlement to a payment is then reviewed and an overpayment may be identified. Where actual earnings are not available for an employer, Centrelink entitlement reviews use average fortnightly earnings. This is calculated by dividing a person's gross earnings by the number of days the person worked, using information in the group certificate [12].

- The Tribunal found:

  Centrelink initially averaged [the Applicant's] earnings from [Employer] across the period 1 July 2012 to 30 June 2013. Subsequently, her earnings were averaged over the period 1 July 2012 to 9 November 2012 [16].

- The Tribunal stated:

  There is insufficient evidence available to do anything other than average [the applicant's] earnings over the period of her employment, 19 November 2012 to 12 December 2012 which affects the three Centrelink fortnights between 10 November 2012 and 21 December 2012 [22].

- The Tribunal also took into consideration the Applicant's bank statement and payslips [17]-[18].
- The Tribunal found the Applicant underdeclared her income for the period 25 October 2012 to 7 November 2012 and 19 November to 12 December 2012, and the amount of that overpayment, around $50, was to be recalculated [24].
- The Tribunal found that the criteria for waiver under Subsection 1237AAA(1) was met given that the recalculated debt was or was likely to be less than $200 and further action to recover the debt was not cost effective [29].

AAT Review Number	DOC ID	Member	Date
2019/S132361	CTH.3067.0068.0715	S De Bono	2 May 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation on the basis of payslips to be obtained from the employer and payslips before the Tribunal. The Tribunal directed 50% of the resultant debts be waived and the balance recoverable without penalty. The Tribunal directed if payslips could not be obtained for the period 11 August 2014 to 16 June 2015, no debt existed.

Key Findings

- Centrelink raised two DSP debts after a data match with the ATO showed the Applicant did not report all income received from casual employment during the period 11 August 2014 to 16 June 2015 and 20 September 2018 to 25 October 2018 [1], [5]-[6], [10].
- Centrelink apportioned the Applicant's income to calculate the debt [7] and stated:

  The tribunal is not satisfied that apportioning income from all employers in the way that Centrelink has done has resulted in the correct debt amount being raised for this period; it is the tribunal's view based on the evidence before it that if payslips are obtained for this period then the debt in all likelihood will be less than the apportioned debt [11].

- The Tribunal stated it was not satisfied that a debt penalty fee should be imposed given the Applicant's health condition was a reasonable excuse as to not always being aware of reporting requirements [15].
- The Tribunal noted it was not satisfied Centrelink apportioned the Applicant's verbal reporting of income for the period 20 September 2018 to 25 October 2018, and directed Centrelink to recalculate on the basis of the payslips provided [16]-[18].
- The Tribunal found special circumstances existed to justify the part waiver of the debts.

AAT Review Number	DOC ID	Member	Date
2019/M132481	CTH.3761.0003.7430	J Nalpantidis	3 May 2019

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key Findings

- Centrelink raised the debt following a data match with the ATO. Centrelink used the Applicant's payslips for periods where she could provide them, however, where she was unable to, Centrelink apportioned her income using the ATO data [17].
- The Tribunal found that it was appropriate for Centrelink to use income averaging in the circumstances as it was the best available information [18], [21].
- The Tribunal found that there was no sole administrative error or special circumstances warranting the recalculated debt to be written off or waived.

AAT Review Number	DOC ID	Member	Date
2019/M133211	CTH.3036.0026.4763	H Moreland	6 May 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that there is a debt to be recalculated on the basis of payslips, with the recalculated debt recoverable with no penalty imposed.

Key Findings

- Centrelink raised two debts in respect of PPS totalling $22,286.99 for the period 10 June 2010 to 16 January 2013, and NSA totalling $32,172.59 for the period 20 January 2013 to 29 June 2016, including a penalty fee of $3,125.04 [2]. The debts and application of penalty fee were affirmed by the ARO upon internal review [3].
- The Applicant was employed by four separate education institutions during the debt periods under review [10].
- The Tribunal stated:

  Centrelink became aware that there may have been an overpayment of parenting payment and newstart allowance to [the Applicant] as a result of a data matching exercise with the Australian Taxation Office (ATO) and that the overpayment was subsequently calculated using a combination of [the Applicant's] payslip data and ATO matching data [11].

  The tribunal is satisfied that Centrelink's calculations of the overpayment of parenting payment and newstart allowance to [the Applicant] are roughly correct because they are based on ATO data, however, it would be more accurate to use payslip data to ensure any debt amount is correct [12].

- The Tribunal considered the financial circumstances of the Applicant and found that a penalty is not to be imposed [35].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/P131851	CTH.3761.0005.7570	M Sutherland	7 May 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the directions that:
  - Centrelink obtain and utilise the Applicant's actual fortnightly incomes in determining whether the Applicant had a YA debt for the entitlement period under review; and
  - If a debt resulted from the recalculation, it was to be recovered.

Key findings

- The Tribunal referenced the Commonwealth Ombudsman's report 'into the raising of debts in the way this debt was raised' and included the following extract:

  We are also satisfied that if the customer can collect their employment income information and enter it properly into the system, or provide it to DHS to enter, the OCI can accurately calculate the debt. After examination of the business rules underpinning the system, we are satisfied the debts raised by the OCI are accurate, based on the information which is available to DHS at the time the decision is made.

  However, if the information available to DHS is incomplete, the debt amount may be affected. It is important for the system design for customers to respond to information requests from DHS so decisions are made on all available information [11].

- The Tribunal noted that the Applicant and her representative advised the Tribunal that they:

  … could not pair the employment income the applicant received (i.e. into her bank account) and that amount attributed to her by Centrelink. They appreciated the applicant might have under-reported income on occasions when she was paid late and estimated her income. They also appreciated the way income is apportioned by Centrelink.

- The Tribunal sought additional information from Centrelink which advised the overpayment/debt was calculated in part by averaging the ATO data and noted the debt could only be calculated accurately by using the Applicant's actual fortnightly incomes. The Tribunal also stated that:

  It concluded further information is required about the applicant's actual fortnightly income throughout the relevant period before the overpayment debt can be calculated accurately. It is open to Centrelink to use its statutory powers to obtain pay records from past employers or the applicant's bank statements [13].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/S132144	CTH.3040.0087.8182	J D'Arcy	7 May 2019
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key Findings

- Centrelink determined that the applicant was overpaid NSA totalling $372.23 following a data match with the ATO. A comparison of the income data showed a discrepancy in declared earnings compared to the Applicant's payslips. An ARO affirmed this decision on 6 February 2019 [4].
- In determining whether there was a debt of NSA, the Tribunal stated:

  The Rate Calculator for newstart allowance requires the recipient to provide income on a fortnightly basis. A recipient will usually provide that income based on payslips received for the fortnight. Where payslips are not available for the period under review, Centrelink has used the gross annual income provided by the ATO and calculated the rate payable by averaging the income amounts across all fortnights in the period covered by the ATO income [9].

- The Tribunal was satisfied that the Applicant had been overpaid NSA because the amounts declared by the Applicant were less than the amount earned due to the difference in reporting periods [12].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/S132731	CTH.3036.0026.4921	J D'Arcy	7 May 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that the debt for the period 30 August 2014 to 30 June 2015 be waived and no debt exists for the period 1 July 2015 to 18 December 2015.

Key Findings

- Centrelink raised a YA debt of $2,083.03 as a data match from the ATO indicated the Applicant under-declared her income during the relevant periods [3]-[5].
- The Tribunal noted the debt for the period 30 August 2014 to 30 June 2015 was calculated on the basis of payslips, and payslips and deposits of net income for the period 1 July 2015 to 18 December 2015 [4].
- The Tribunal stated:

  The Rate Calculator for youth allowance requires the recipient to provide income on a fortnightly basis. A recipient will usually provide that income based on payslips received for the fortnight. Where payslips are not available for the period under review, Centrelink has used the gross annual income provided by the ATO and calculated the rate payable by averaging the income amounts across all fortnights in the period covered by the ATO income. In [the Applicant's] case where payslips have not been available, Centrelink has reconstructed the gross amount earned from the net amounts as stated in her bank statements [15].

- The Applicant did not dispute the debt but advised that she now understands that the debt was caused by the difference between her reporting periods and her earnings periods [17].
- The Tribunal found it could not be satisfied:

  …that there is a debt for the period 1 July 2015 to 18 December 2015 in the absence of the source documents which Centrelink has used to determine [the Applicant's] gross income for that period. Centrelink advised the tribunal that bank statements for the following period could not be located [19].

- The Tribunal found there is no debt for the period 1 July 2015 to 18 December 2015.
- The Tribunal found that special circumstances existed to justify the waiver of the debt for the period 30 August 2014 to 30 June 2015 [30]-[31].

AAT Review Number	DOC ID	Member	Date
2019/M134427	CTH.3761.0006.0344	AJ Halstead	8 May 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with directions that:
  - Centrelink obtain earnings and payroll information from the Applicant's employers;
  - the event payroll information was unavailable, banking records were to be obtained to identify employment income and a grossed-up amount for each instalment period was to be applied;
  - the debt was to be recalculated by correctly apportioning the Applicant's earnings in each instalment period according to law;
  - any recalculated debt was to be recovered from the Applicant.

Key findings

- The Tribunal noted that the Department obtained taxation records for the Applicant from the ATO and then used that information to determine the debts now under review. The Tribunal stated it was clear that in calculating the debts, the Department applied an averaging of the income received by the Applicant, with the effect being that income was incorrectly attributed throughout the relevant period because the Applicant's actual income from employment was not apportioned as required by s 1073B of the Act [10].
- The Tribunal found that the amount of the debt determined for the Applicant for the relevant period was based upon a rate of YA that had been incorrectly calculated in accordance with s 1067G of the Act. The Tribunal stated: '[t]his is

because her earnings were not the same from one period to the next and so an averaging of annual income does not reflect her actual income for each social security payment period' [11].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/B133034	CTH.3761.0005.8312	A Byers	16 May 2019

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key findings

- The Tribunal noted that, following a data match with the ATO (which included the 2012/13 tax year), Centrelink became aware that the Applicant had a taxable income of a certain amount for a certain period. The Applicant accepted the figure as correct [7].
- The Applicant advised the Tribunal that she worked consistently over this period, although her earnings may have varied if she worked extra hours.
- The Tribunal noted that Centrelink had not been able to obtain more specific fortnightly earnings data; however, the Applicant did not challenge the fact that Centrelink had apportioned her earnings over the period. The Tribunal considered it a reasonable approach in the circumstances [8].
- The Tribunal found that as the Applicant had variable earnings and did not have relevant pay advices when she had to declare her earnings, she needed to calculate (or estimate) her earnings. The Applicant conceded she may have made errors in that process [9].
- The Tribunal found that the Applicant's earnings were understated and accepted Centrelink's calculations [9].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2018/B129239	CTH.3036.0026.8302	K Juhasz	22 May 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink with the direction that Centrelink recalculate the debt taking into account the Tribunal's findings.

Key Findings

- Centrelink raised the debt following a data match with ATO.
- The Applicant worked multiple different jobs during the relevant period.
- The Tribunal requested Centrelink obtain the Applicant's work diary from one previous employer to provide more detail than the monthly payslips provided [6]. The documents were no longer held on file by the former employer due to the passage of time [7]. The Tribunal concluded:

  Unfortunately in these circumstances although the income distribution will not be unequivocally accurate the Tribunal must apply the system best available to it after exhausting all practical avenues to achieve the preferable result [29].

- The Applicant contended that Centrelink had 'changed and varied the debts so many times that she had serious doubts as to the accuracy of their final calculations' [11].
- The Tribunal found that one part of the debt did not exist as the Applicant ceased work during that period [27].
- The Tribunal found that Centrelink failed to apply a termination payment for one job [41].
- The Tribunal found that no administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/H134154	CTH.3761.0003.5433	A Schiwy	24 May 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt.
- Centrelink was directed to obtain payroll information for the Applicant and recalculate the debt on the basis of that information.
- Any resulting debt would be recoverable.

Key Findings

- The Tribunal noted that Centrelink calculated the Applicant's debt by apportioning her income, as stated by ATO data, on the basis that it was earned evenly over the payment periods notified by the employer [11]. The Tribunal stated:

  Given the irregular nature of [the Applicant's] income, the tribunal decided that the debt calculation was likely to be significantly flawed and the correct pay information should be obtained from [the Applicant's] employers by Centrelink [13].

- The Tribunal found that as the debt was due to the Applicant incorrectly reporting her income, there was no basis for a waiver.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt [23].

AAT Review Number	DOC ID	Member	Date
2019/S131660	CTH.3043.0023.9368	D Tucker	27 May 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the basis of bank statements with the recalculated debt to be recoverable.

Key Findings

- Centrelink raised four separate NSA debts against the Applicant within the period from 9 August 2011 to 18 May 2015 [1]. The debts totalled $4,556.79 and were calculated on the basis of data matching between Centrelink and the ATO [2]. An ARO affirmed the decision on 9 February 2017 [3].
- The Tribunal commented the Applicant noted Centrelink had calculated his debt on the basis of apportioning ATO income and the Applicant expressed this was not likely to be an accurate estimate of any overpayment he received [6].
- The Tribunal noted the Applicant found it difficult to obtain payslips and provided the Tribunal with bank statements [7].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/S133937	CTH.3043.0023.9957	Dr L Bygrave	27 May 2019

How it was decided and key facts

Outcome

- The decision was set aside and remitted to Centrelink for recalculation on the basis of confirmed payslips and study period.

Key Findings

- Centrelink raised an austudy debt for the period of 25 February 2012 to 14 December 2012 on the basis of information received from an ATO data match [1].

- Following the data match, the Applicant provided Centrelink with payslips and bank statements displaying net income but subsequently advised the Applicant in a letter to report gross earnings. Centrelink calculated the debt on the basis of the Applicant's payslips [10].
- The Tribunal commented the Applicant did not dispute the existence of a debt, confirming difficulties in reporting accurately on gross income with late payslips and income deposits [11]-[12].
- The Tribunal stated:

  the Tribunal cannot be satisfied that the amount of [the Applicant's] Austudy debt as calculated by Centrelink for the period from 25 February 2012 to 14 December 2012 is correct. This is because Centrelink's calculation for weeks where [the Applicant] was unable to provide a payslip is based on an average of her weekly earnings over the whole of the financial year from 1 July 2011 to 30 June 2012 [15].

- The Tribunal found that it was appropriate, and accurate, for Centrelink to recalculate the Applicant's average weekly earnings based on her known earnings over the period [16].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/S133963	CTH.3761.0006.0065	K Dordevic	30 May 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with directions that:
  - the Applicant's entitlement to NSA be recalculated on the basis he was not employed by one particular employer; and
  - only amounts received from a different employer from a specific period are considered.

Key findings

- The Applicant provided bank statements which indicated the dates that deposits were made into his account from his employers. The Tribunal noted the Department calculated his entitlement to NSA on the basis of these statements, but as the bank statements did not include deposits from two of his employers, the income that the Applicant received from those employers was apportioned over the financial year [10].
- The Tribunal found that a liquidator was appointed to two of the Applicant's employers and therefore it was not possible for the Applicant, or the Tribunal, to access payslips from these employers [11].
- Prior to the hearing, the Applicant provided his bank statements for the period 9 May 2012 to 8 Jan 2013. The Tribunal found these portions must be grossed up and entitlement to NSA recalculated on this basis [15].
- The Tribunal stated that as the Applicant's bank statements for the 2013 FY did not directly refer to income received from a particular employer, it was appropriate for the Department to annualise the income over the FY, apportioning $1.21 per fortnight income for the period between 23 January to 19 March 2013 [16].
- The Tribunal concluded that the Applicant did not fully declare his employment income during the relevant period and was satisfied there would be an overpayment of NSA during the relevant period [17].
- The Tribunal determined that only waiver in the special circumstances of the case is of possible application in the matter and concluded that none existed to justify the write off or waiver of the debt [24].

AAT Review Number	DOC ID	Member	Date
2019/M134283	CTH.3761.0006.0168	S De Bono M Reid	12 June 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt using payslip data.
- Centrelink was directed that 50% of the recalculated debt was to be waived on the basis of special circumstances.
- Centrelink was directed that the interest charge was not to be applied.
- Centrelink was directed that the remainder of the debt was to be written off until 30 June 2020.

Key findings

- The Tribunal was 'not satisfied that the amounts earned were earnt in the period that the income has been apportioned to' and, based on the information from the Applicant, that the calculations contained in Centrelink's ADEX Debt Schedule Report were correct [11].
- The Tribunal found there were 'fundamental flaws in apportioning income in this manner' [17].
- The Tribunal noted that while it would not go through each apportionment calculation separately, it was not satisfied with the calculation of the debt or the debt amount [19]. The Tribunal found that the debt needs to be recalculated using actual payslip data to ensure the debt is correctly calculated [24].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt [37]-[38].
- The Tribunal found the decision to apply an interest charge to the debt was incorrect [46].

AAT Review Number	DOC ID	Member	Date
2019/A135404	CTH.3761.0005.7589	M Manetta	20 June 2019
How it was decided and key facts			

Outcome

- The decision under review was varied so that:
  - the applicant's debt was reduced to a specified amount;
  - no 10% penalty was imposed; and
  - no interest charge was imposed.

Key findings

- The Tribunal noted that the Applicant had provided a copy of his bank statement to the Tribunal that had record of individual payments redacted 'for reasons the Tribunal does not understand'. The Tribunal noted that it appeared the Applicant considered it was up to Centrelink to prove the amount of his earnings [10].
- The Tribunal stated:

  In view of the fact that [the Applicant] has withheld more precise information about his salary, the Tribunal is entitled according to ordinary rules of proof, to apportion the aggregate over the period of employment according to the Australian Taxation Office [10].

- The Tribunal found there was no basis to assign a 10% penalty to the figure for the following reasons:

  (a) because the Department's calculation of the debt was too high and
  (b) because the lack of any explanation as to how the debt was arrived justified the Applicant's attempts to query the calculation. So far as concerns the Applicant's failure to report his earnings, the Tribunal is mindful of the complaint the Applicant made at the time of having trouble reporting online as well as the fact that, at the time he was paid his salary (29 July 2016), his allowance had been cancelled and he had not yet been paid any allowance in respect of the period of earning - so he was technically not obliged to report. Of course, that changed a month later, when he was paid arrears of allowance, but it means that it is not appropriate for any penalty to be applied. The same reasoning applies to the imposition of the interest charge. The Tribunal is satisfied that it is reasonable to exempt the Applicant from both of these imposts [19].

- The Tribunal noted the same reasoning applied to the imposition of the interest charge [19].

AAT Review Number	DOC ID	Member	Date
2019/S135012	CTH.3761.0005.1153	A Byers	27 June 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that the NSA debt was revoked.

Key Findings

- Centrelink raised the debt following a data match with the ATO. While the Tribunal found that the ATO's data in relation to the Applicant's income was correct, it noted that:

…Centrelink has simply apportioned [the Applicant's] earnings over the entire tax year and effectively imposed a misplaced onus on her to establish why this approach is unsuitable. One would have thought that, in circumstances where [the Applicant] was in receipt of newstart allowance for only eight months of the tax year and her explanation was that she stopped her newstart allowance because her wage had significantly increased, Centrelink would have been more cautious [7].

- The Tribunal found that the Applicant accurately declared her income during the relevant period and that '…Centrelink's apportionment approach in this instance [was] defective' [12].

AAT Review Number	DOC ID	Member	Date
2019/M134588	CTH.3761.0005.5755	J Nalpantidis	28 June 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt for the period from 24 July 2014 to 20 November 2015 on the basis of the Applicant's income, as identified in the decision.
- Centrelink was directed that the debt for the period between 24 July 2014 to 17 August 2014 was waived.
- The balance of the debt was recoverable.

Key Findings

- The Tribunal found that Centrelink based its debt calculations on ATO data by averaging the Applicant's gross income to fortnightly amounts and applying those amounts evenly across the relevant period [21].
- The Applicant's evidence was that he worked on a casual part-time basis and his income was variable. The Tribunal further found that Centrelink did not use the Applicant's correct income to determine his youth allowance [23].
- The Tribunal further noted:

  The "averaging" method applied by Centrelink in its original debt calculations is potentially unreliable as [the Applicant's] fortnightly earnings varied throughout the relevant period, and the "average" figure applied by Centrelink evenly across each fortnight in the relevant period may not have reflected his actual earnings [25].

  The bank statements show the actual deposits made into [the Applicant's] bank account by his employers and show his net earnings vary from fortnight to fortnight. Clearly [the Applicant's] income varies from that determined by Centrelink using the "averaging" method. Nevertheless, the tribunal accepts [the Applicant's] youth allowance was not calculated using his correct income throughout the relevant period [27].

- The Tribunal found that Centrelink's failure to place the Applicant on reporting for the period of 24 July 2014 to 15 August 2014 caused the debt for that period to result solely from administrative error and waived that portion of the debt on that basis [41].
- The Tribunal found that there was no sole administrative error or special circumstances warranting the recalculated debt to be written off or waived

AAT Review Number	DOC ID	Member	Date
2019/B135052	CTH.3761.0002.6104	M Amundsen	9 July 2019

How it was decided and key facts

Outcome

- The decisions under review were affirmed.

Key findings

- Two debts were raised following a data matching information received from the ATO.
- The Applicant argued that Centrelink included allowances (e.g. travel allowances) when calculating his debt. Centrelink confirmed that allowances were not included in their calculation [9].
- The Applicant stated that during the debt period, he had multiple employers and may have incorrectly declared income.
- The Tribunal found that, in the absence of any more certain information, the apportionment approach was appropriate in the absence of 'more certain information' [11].

- The Tribunal was satisfied that Centrelink has correctly calculated the amounts of the Applicant's debts [14].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/A136295	CTH.3761.0002.6401	D Cox	11 July 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt.
- The Tribunal recommended the Centrelink consider the Applicant's 2011 austudy entitlements having regard to the 2010, 2011 and 2012 employment periods stated in the statement of service by [the Employer].

Key Findings

- Centrelink raised the debt following a data match with the ATO [2].
- The Applicant objected to Centrelink's apportionment of his taxable income in the debt calculations [7]. The Tribunal accordingly invited the Applicant to provide payslips or bank statements to allow Centrelink to verify the timing of his earnings and apportion them accurately across the relevant fortnights [9].
- The Tribunal directed Centrelink to recalculate the debt taking into account a statement of service from the Applicant's employer stating the Applicant was employed with them in 2010, 2011 and 2012 [11].
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/B135788	CTH.3761.0006.0001	M Amundsen	16 July 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the following conclusions reached in the Tribunal's reasons:
  - In relation to the 2013/14 debt, Centrelink must seek to obtain accurate earnings information over the relevant time from the Applicant's employers and recalculate on the basis of this information;
  - In relation to the 2016/17 debt, the debt is to be recalculated in accordance with the Tribunal's findings. Should the Applicant fail to provide bank statements within 21 days, Centrelink is entitled to re-calculate the 2016/17 debt using the apportionment approach.

Key findings

- The Tribunal noted that Centrelink had apportioned earnings amounts across periods specified by the ATO to conclude that the Applicant had been overpaid NSA [7].
- The Tribunal noted to the Applicant that, despite being asked by Centrelink on three different occasions to provide copies of payslips or bank statements so his debt could be calculated as accurately as possible, he had failed to provide any additional information. In response the Applicant commented he considered it illegal for Centrelink to ask him to provide information from so long ago [9].
- The Tribunal found that 'prior to adopting the apportionment approach, Centrelink should make all reasonable efforts to gather any more accurate information that might be available'. The Tribunal considered it appropriate to set aside the 2013/14 debt decision and require Centrelink to seek to obtain accurate information about the Applicant's earnings over the relevant time from his employers [10].
- In relation to the 2016/17 debt, the Tribunal found it was unlikely that payslips could be obtained from the Applicant's employers as both employers were no longer operational. The Applicant did not provide bank statements because of the cost and as he did not consider the information gleaned would 'result in an accurate picture for the purposes of determining whether he had been overpaid' [18]. The Tribunal did not consider the cost of obtaining same would be particularly onerous and stated:

  While I acknowledge that bank statements might not provide as accurate a picture as payslips, in the absence of those latter documents, bank statements are likely to provide the most accurate information available [19].

- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M133289	CTH.3761.0006.1127	R Perton	18 July 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt.

Key Findings

- The decision under review for the Tribunal involved determining whether the Applicant was a University Student undertaking casual employment and a debt was raised for overpayment of Youth Allowance following a data match between Centrelink and the ATO [2].
- The Applicant sought review as he believed averaging had been used the calculate the amount he earnt each week [13]. The Tribunal gave the Applicant time to gather additional records for his earnings, which he did not provide [18].
- The Tribunal accepts that the Applicant was paid more in youth allowance than his entitlement during the relevant period [20].
- The Tribunal was satisfied that the Applicant had a debt to the Commonwealth but the actual amount of the debt still remains unclear [21]
- The Tribunal found 'the imposition of a debt where a person's earnings from casual employment are variable is not unusual. The tax information indicates that earnings were greater than the figures that Centrelink had in its records' [29].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/A136967	CTH.3066.0007.5800	M Manetta	18 July 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that no debt had been proved.

Key Findings

- After obtaining data match information from the ATO, Centrelink raised a YA debt of $5,001.65 on the basis that the match showed Applicant had under-declared his income between 27 August 2016 and 16 June 2017 [1]. An internal review affirmed the debt in May 2019 [2].
- The Tribunal stated and found in regards to the calculation of the debt:

  [The Applicant] told the Tribunal that he worked on a casual basis and his hours varied significantly. He was concerned that the Department had averaged his income across the whole of the year. It is apparent from the Department's recalculation, at Tribunal papers, page 23 under the column headed Apportioned Actual Income, that this is indeed what the Department has done [5].

- The Tribunal noted that the Act does not authorise the calculation of youth allowance by reference to the averaging of income in this case [7].
- The Tribunal referred to Professor Terry Carney's viewpoint on the validity of averaging, noting:

  In this regard, the Tribunal notes the commentary of Professor Terry Carney AO in the following article: The New Digital Future for Welfare: Debts Without Legal Proofs or Moral Authority? [2018] UNSW Law Journal Forum 1, especially at pages 6–7, where Professor Carney impugns the validity of averaging both from a mathematical and legal viewpoint. Clearly, with regard to casual employees on fluctuating wages, the averaging of income can produce distortions in the calculation of social security entitlements so as to give rise to phantom debt balances, when no overpayment has actually been made [7].

- The Tribunal found that the calculation had not been properly performed and that a debt was not validly raised [8].

AAT Review Number	DOC ID	Member	Date
2019/P136286	CTH.3761.0005.8510	C Kannis	19 July 2019

How it was decided and key facts

Outcome

- The decision under review was set aside.
- The matter remitted to Centrelink for reconsideration with a direction to obtain payroll information from the Applicant's employer and to recalculate the debt.

Key Findings

- Centrelink raised the debt following a data match with the ATO.
- The Tribunal stated:

  [The Applicant] did not provide bank statements and/or pay slips to verify her employment for the whole of the review period and the authorised review officer stated:

  > Please be advised that the debt amount, as it stands, has been reassessed by applying the ATO reported annual income for periods where you have not provided any verification of income.

  The Centrelink debt calculations appear to have apportioned an amount per fortnight for the periods where [the Applicant] has not verified her income [16]-[17].

- The Tribunal found it likely that the Applicant had been overpaid however was not satisfied that the debt has been correctly calculated:

  This is because the actual gross income [the Applicant] earned, if any, in respect of each week or fortnight has not been established. Centrelink has relied in part on averaging gross income, as advised by the ATO for periods where [the Applicant] has not verified her income. It appears Centrelink have treated this income as fortnightly income and apportioned it as described in paragraph 11 when it was commission income which should be apportioned over 52 weeks rather than fortnightly. The tribunal finds that apportioning income according to the ATO data does not accurately reflect when [the Applicant]'s income by commission was earned at [22].

- The Tribunal directed Centrelink to use powers to obtain pay information from employers and banking records [24].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/A136967	CTH.3051.0045.8342	M Amundsen	23 July 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted for reconsideration on the basis Centrelink seek to obtain pay information from the Applicant's employers for recalculation.

Key Findings

- Following a data-match with the ATO, the information showed the Applicant was paid by more than 10 specified employers during the debt period [10].
- Centrelink subsequently raised a NSA debt of $4,382.63 for the period from 12 December 2014 to 10 February 2016. An ARO affirmed the debt [1].
- The Tribunal stated it was apparent Centrelink used the ATO information to apportion, on a daily basis, the Applicant's earnings over the period [11].
- The Tribunal found:

  …it was unlikely in the extreme that the apportioned daily amounts referred to could possibly affect the Applicant's true earnings situation. There must be some doubt about Centrelink's underlying assumption that the income reported to the ATO was received at a constant rate for the periods identified by the ATO. Moreover, Centrelink's ultimate conclusions based on that assumption (namely, that [the Applicant] was earning such daily amounts as $1.86 and $14.26) are unsustainable as a matter of fact [14].

- The Tribunal commented in instances where the apportionment would be appropriate:

  In Halls and Secretary, Department of Education, Employment and Workplace Relations [2012] AATA 802 the tribunal considered that it was appropriate for Centrelink to use an averaging method to calculate fortnightly income because in the circumstances it was the best available information that could be provided by the employer and the applicant. In Provan and Secretary, Department of Families, Community Services and Indigenous Affairs [2006] AATA 831 the issue of averaging fortnightly income was considered appropriate; however this was in circumstances where the employer had shut down and Mr Provan did not have any pay advice or other information that would assist in working out his periodic income [12].

- The Tribunal found prior to adopting the apportionment approach, Centrelink should make reasonable efforts to gather pay information on the basis of their information obtaining powers [16]. The Tribunal also stated it was not yet satisfied of the debt as calculated by Centrelink [19].

AAT Review Number	DOC ID	Member	Date
2019/M136550	CTH.3761.0006.1491	M Baulch	24 July 2019
How it was decided and key facts			

Outcome

- The decision under review was varied such that the debt was written off for a period of 6 months.

Key findings

- A debt was raised based on the overpayment of Newstart Allowance following a data match with the ATO [13].
- The Tribunal examined Centrelink's calculations and did not identify any errors [14].
- The Tribunal stated the Applicant submitted medical opinion she was 'severely impacted' and 'receiving treatment' for an ongoing health issue for the duration of the entitlement period under review [28].
- The Tribunal found appropriate under the Applicant's circumstances to write off the debt for a period of six months [29].

AAT Review Number	DOC ID	Member	Date
2019/S136742	CTH.3761.0006.1120	K Dordevic	26 July 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that any NSA debt outstanding as at the date of the hearing be waived.

Key findings

- The Tribunal noted 'the calculations of the debt are on the basis of the averaging of income advice received from the Australian Taxation Office (ATO)' [11].
- At the hearing, the Applicant explained that she no longer has any payslips given she was forced to move home due to poor health and her Employer was now in liquidation so had no opportunity to regain access to them [11].
- The Tribunal carefully checked the Department's debt calculations and was satisfied they were correct but noted:

  Of course, it is possible that the debt may be somewhat less if there was evidence regarding the Applicant's actual (and not average) income during the relevant period. However, as this evidence is not available the tribunal is satisfied that the best available evidence required averaging her employment income over the relevant period [13].

- The Tribunal found that special circumstances existed to justify a waiver of the remainder of the debt as at the date of the decision [17], [24].

AAT Review Number	DOC ID	Member	Date
2019/M135859	CTH.3039.0028.2280	D Lambden	26 July 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the basis of bank statements, with the recalculated debt to be recoverable.

Key Findings

- After obtaining data match information from the ATO, Centrelink raised a YA debt of $5,033.47 on the basis that the Applicant's earnings had not been taken into account between 4 July 2014 to 19 June 2016. Centrelink also applied a 10% penalty fee raising the debt to $5,522.59 [1]. An ARO affirmed the debt [2].
- The Tribunal found:

  Centrelink apportioned [The Applicant's] annual income, as reported by the ATO, to the fortnights when youth allowance was potentially payable to [the Applicant] and found that she had been overpaid $5033.47 during the debt period.

  Fortnightly apportionment of annual income provides an estimate of fortnightly earnings, however actual fortnightly earnings may be different, especially when employment is casual and hours of work vary from fortnight to fortnight [15]-[16].

- The Tribunal stated:

  The account statements provided by [the Applicant] record deposits from her employers during the period under review. The tribunal accepts that these deposits are a complete record of [the Applicant's] earnings during the debt period [19].

  The tribunal is of the view that [the Applicant] is entitled to have her overpayment recalculated, having reference to her actual fortnightly earnings and not apportioned earnings [20].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M136326	CTH.3761.0001.0881	M Baulch	29 July 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink to recalculate the debt using payslip information (to be obtained by Centrelink).

Key findings

- The Applicant did not report her income accurately and therefore received benefits she was not entitled to.
- Centrelink calculated the Applicant's debts in reliance on the net amounts received in the Applicant's bank account, and not the gross income figures. Centrelink used income averaging to calculate the debts in lieu of payslips.
- The Tribunal commented in relation to Centrelink's calculation methods:

  Centrelink's method of calculating gross earnings from net amounts disclosed by bank statements appears to be inherently problematic. Amounts below the threshold at which tax becomes payable have, nevertheless, been "grossed up" and overall, those calculations appear to have either overestimated or underestimated [the Applicant's] gross earnings from employment. Inaccuracies in Centrelink's assessment of [the Applicant's] ordinary income during the relevant periods will, more likely than not, lead to inaccuracies in the debt calculations [39].

  Centrelink expects accuracy in the reporting of ordinary income from those who are in receipt of income support payments. In my view, it is only reasonable to expect a similar level of accuracy from Centrelink where it asserts debts are owed [40].

- The Tribunal was not satisfied with Centrelink's calculations, as they were not based on the Applicants actual fortnightly income.
- Given this, the Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M136410	CTH.3761.0002.8305	D Cox	29 July 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and the matter was remitted to Centrelink for reconsideration in accordance with the recommendation that Centrelink give due consideration to the additional information provided to the Tribunal by the Applicant, and if appropriate, recalculate the debt.

Key findings

- The Tribunal noted that the Applicant had provided Centrelink with a limited number of payslips to assist its review and the ARO had said they were unable to use them because they were photocopies of parts of the payslips and did not include the Applicant's name [9].
- The ARO's letter to the Applicant had stated: 'Without evidence to the contrary, your employment income has been averaged and applied as per the payment summary information as advised by the ATO' [10].
- The Applicant subsequently provided the Tribunal with seven payslips from the relevant employer [12].
- The Applicant said he could obtain bank statements for the relevant period but this was complicated because he had changed banks, the account was closed, and it had been in joint names with his former partner [13].
- The Tribunal told the Applicant it was reluctant to wait until August and suggested he ring them. At the date of the decision he had not provided the bank statements. Follow up calls by the Tribunal produced the following response:

  'Applicant returned missed call. He advised that Member Cox can proceed to make decision. He is leaving for QLD and will be trying to get additional statements but doesn't want to hold up the process' [14].

- The Tribunal found there was an overpayment of NSA but there was additional information and it would be desirable for Centrelink to consider that information and, if appropriate, recalculate the overpayment [15].
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/B136983 and 2019/B137071	CTH.3761.0002.5696	Y Webb	29 July 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with a decision that
- The Applicant incurred an austudy payment/NSA debt of $6,260 for the period 3 July 2010 to 28 June 2015.
- The Tribunal found the 10% penalty fee was not to be applied.
- The Tribunal affirmed the decision to recover the Applicant's debt by way of garnishee action of his income tax return.

Key findi ngs

- Centrelink received information from the ATO in relation to the Applicant's gross income from employment from 2010 to the end of 2014/2015 financial year [6]. Centrelink equally apportioned the income amounts from each of the employers between the dates of employment as advised by the ATO [7].
- The Tribunal noted that the Applicant did not take issue with the income amounts which the ATO confirmed. He also did not dispute that he may have, on occasions, accidentally reported an incorrect amount of employment income [21].
- The Tribunal noted that the Applicant stated he no longer has any of the payslips from the period between 2010 and 2015 because it was 'such a long time ago'. The Applicant provided bank statements from 2015 to Centrelink but stated he did not know whether they were considered or not [22].

- The Tribunal stated the information provided by Centrelink:

  …was not very helpful because although Centrelink provided a document showing the newstart allowance and austudy payment received by [the Applicant] in the relevant period this did not appear to tally completely with the revised ADEX document [23].

- Although the Tribunal found that the income information from the ATO was correct regarding the Applicant's income, the Tribunal found there was insufficient evidence about what income was being declared to Centrelink over the period from 2010. The Tribunal noted that Centrelink had not provided information about the Applicant's reporting other than the occasional notes in the contact notes that the Applicant has reported [24].
- The Tribunal also stated that, while there was apparently a significant disparity between the income earned by the Applicant (according to the ATO figures) and the total amount declared, the Tribunal was mindful there 'were very significant periods of time during this approximate five year period when [the Applicant] was not receiving any income support payments' [25].
- The Tribunal found:

  Centrelink's method of calculation ignores the fluctuating income of [the Applicant] and has the potential to reduce his entitlements to newstart allowance by ascribing income to fortnights when he may not have earned any or only a small amount of income. However, because Centrelink has not provided clear evidence of [the Applicant's] fortnightly reporting of his income it is not possible for the Tribunal to determine whether the "equal apportionment" method has disadvantaged [the Applicant] or not [26].

- The Tribunal also stated that, in the absence of 'compelling evidence about [the Applicant's] reported income and when exactly (in which fortnights) it was earned', the Tribunal considered it reasonable to determine that, in addition to the $1,260 overpayment (due to the WorkCover payments), the Tribunal should add a modest estimated overpayment amount of $1,000 per year to take account of the inaccuracies in the Applicant's reporting of his income [27].
- In relation to the 10% penalty fee, the Tribunal was not persuaded that the Applicant failed or refused to provide information regarding his employment income and concluded that the 10% penalty fee was not payable [29].
- In relation to Centrelink's decision to request that the ATO garnishee his income tax refund in repayment of the debt, the Tribunal stated it did not have the power to determine the merits of the garnishee action, but could only decide whether there was any error in the issuing of the garnishee notice [35]. The Tribunal concluded that recovery by way of garnishment was lawful and that the garnishee action proceeded in compliance with the Social Security Act [48].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/S137347	CTH.3761.0002.0569	AJ Halstead	31 July 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink to recalculate the debt using payslip information (to be obtained by Centrelink).

Key findings

- The Applicant's debt amount was affirmed by an ARO on internal review.
- The tribunal stated:

  Averaging income throughout the relevant period does not accurately reflect his periodic income in the circumstances [9].

  It is not correct to apply averaged fortnightly income in the calculation of youth allowance payments for the period [the Applicant] was employed by [employer]. The effect of using averaging is that income was incorrectly attributed throughout the relevant period. As a result, the income was not apportioned as required by section 1073B of the Act [10].

- The Tribunal was not satisfied the calculations were correct, because it was not based on the Applicant's actual fortnightly earnings. The Tribunal remitted the decision back to Centrelink for recalculation.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/A136964	CTH.3066.0007.6037	D Cox	31 July 2019

How it was decided and key facts

Outcome

- The decision was set aside and the debt was waived.

Key Findings

- The Tribunal noted Centrelink had initially obtained, via a data match with the ATO, the Applicant's gross income for the 2015/2016 FY and subsequently raised an NSA debt of $2,974.38 for the period 14 July 2015 to 11 July 2016 [3]. Centrelink amended the debt to $1,350.76 on the basis of payslips provided by the Applicant [4]-[6].
- An ARO affirmed the debt and amended the amount to $1,103.52 [7].
- The Tribunal referenced the following ARO note on the calculation of the debt in their reasons for decision:

  In her letter informing [the Applicant] of her decision the authorised review officer said: As you could not provide the relevant payslips or bank statements for the entire period under review, the debt was calculated utilising the payslip details you did provide and gross earnings as noted on your group certificates. For periods in which you did not provide payslips, your earnings were apportioned equally over the period [10].

- The Tribunal was satisfied that on the basis of further pay and bank information provided by the Applicant that the Applicant had a debt and that the debt was calculated incorrectly [13]-[14].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/A136938	CTH.3041.0145.1586	S Cullimore	31 July 2019

How it was decided and key facts

Outcome

- The decision was set aside and remitted to Centrelink for reconsideration and recalculation of the debt.

Key Findings

- Centrelink raised two NSA and YA debts totalling $2,414.24 following an ATO data match for the period from 15 September 2012 to 25 April 2014. A 10% penalty was also applied [2]. An ARO varied the debt, waiving part of the debt amount and removing the 10% penalty [3].
- The Tribunal noted the Applicant had three casual jobs in the first debt period and another two in the second debt period, including periods of no income or erratic hours [27]-[28]. The Tribunal stated Centrelink's income free arears also changed in the debt period [30].
- The Tribunal noted that the NSA debt was not a Robodebt but the original debt raised had been a Robodebt calculated in the absence of other pay information provided by the Applicant [21].
- The Tribunal also stated the revised calculation was incorrect, noting:

  Even allowing for the apportionment of income over a Centrelink fortnight, which could create some disparity between actual earnings and apportioned earnings, there should not be a large disparity between the actual earnings as disclosed by a data match and the total earnings used in the debt calculations [25].

- The Tribunal gave specific directions for recalculation of the debt, including that income be averaged over entire financial years [33].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/A137290	CTH.3066.0007.6062	M Manetta	01 August 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that the debt be waived.

Key Findings

- Following a data match with the ATO, Centrelink raised a YA debt of $2,765.32 on the basis that the Applicant incorrectly declared income for the period 25 July 2011 and 24 February 2014 [1]. Centrelink reassessed and recalculated the debt to $3,011.64 [2]. Centrelink reassessed and reduced the debt to $2,489.37, imposing a 10% penalty fee [3]. An ARO affirmed the debt but removed the 10% penalty [4].
- The Applicant regularly over reported his income to Centrelink whilst in receipt of YA [7]. The Tribunal stated in regards to Centrelink's calculation of the debt:

  Moreover, with many of these items – in fact more often than not – the amount reported by [the Applicant] is actually higher than the amount said by the Department to be properly attributable to the relevant cycle. It is in large part by redistributing the overdeclared income to other fortnights that the Department has generated underdeclared income in those fortnights and so created debts where none were before [8].

- The Tribunal commented in relation to Centrelink's distribution of income in calculating debt:

  This Tribunal is not equipped to determine whether the adjusted cycle adopted by the Department is the correct way to distribute [the Applicant's] income, but assuming that it is technically correct, there emerges an obvious problem in the Department making these adjustments years down the track, because insignificant discrepancies accumulate over time and can, as here, produce a significant and unfair burden on the debtor when demand is not made for the accumulated debt until after eight years have passed [10].

- The Tribunal found special circumstances existed to justify the waiver of the debt, where the Tribunal was satisfied in this case that the debt was not proved and would cause the Act to operate contrary to its intent or otherwise unfairly including towards the Applicant [14], [16]-[17].

AAT Review Number	DOC ID	Member	Date
2019/M136944	CTH.3761.0004.6559	S De Bono	5 August 2019

How it was decided and key facts

Outcome

- The decision in relation to the start-up scholarship was affirmed.
- The decision in relation to the youth allowance, NSA and austudy debts were set aside and remitted to Centrelink.
- Centrelink was directed to obtain pay records from each employer listed and recalculate the debts based on the Applicant's fortnightly income. Where pay records could not be obtained, Centrelink was directed to calculate the debt firstly based on the Applicant's reported income for that fortnight, and where the Applicant failed to report his income, the ATO data matched income minus any income reported by the Applicant. The balance was to be apportioned over the relevant financial year and applied to the relevant fortnight.
- Centrelink was directed to exclude income from two employers in its calculations.
- Centrelink was directed to apply the 10% penalty to any debt calculated, including the student start-up scholarship debt.
- The recalculated debts were recoverable.

Key Findings

- Centrelink raised the debt following a data match with the ATO [7].
- The Tribunal was satisfied that the Applicant's income had been apportioned from employers where there was limited information as to the fortnightly period in which the income was earned [23].
- Ultimately the Tribunal found:

  It is evident that [the Applicant] earnt income throughout the relevant periods as evidenced from the ATO income matched data. It also seems that at times this income was higher than the amounts [the Applicant] reported to Centrelink. However, the tribunal is not satisfied that all of the income apportioned on the basis of ATO income

matching was earned in the fortnights that this income has been apportioned to. As income reported by the ATO is more than income reported by [the Applicant] it is highly probable that [the Applicant] has debts due to income that was not included when calculating his rates of youth allowance, newstart allowance and austudy [33].

- The Tribunal found that the debt in relation to the student start-up scholarship was valid as the Applicant withdrew from full-time study and no longer met the pre-conditions for the scholarship [43].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.
- The Tribunal was '…satisfied that the debts arose wholly or partly because [the Applicant] either refused or failed to provide information in relation to his income from personal exertion…' and did not accept this as a reasonable excuse to not properly declare his income or provide further information when requested. Accordingly, it concluded that the 10% penalty was to be applied to any recalculated debt [62].

AAT Review Number	DOC ID	Member	Date
2019/B137153	CTH.3761.0005.8141	E Kidston	5 August 2019
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key Findings

- The decision was made on the basis that certain income earned by the Applicant during the period and identified from the records of the ATO, as part of Centrelink's data matching, had not been properly taken into account in calculating the amount of disability support pension paid to him [9].
- An issue of confusion identified by the Tribunal in the original cancellation and subsequent restart of the Applicant's receipt of entitlement to DSP involved a separation certificate from one Employer to clarify the Applicant's earnings and cessation of employment [4]-[7].
- The Tribunal stated it was 'not in dispute that Centrelink erred in disregarding the notation' in a separate instance by reinstalling payments where the Applicant clearly communicated he 'no longer wanted the DSP' [21].
- The Tribunal found that during the relevant the Applicant received the disability support pension payments as recorded by Centrelink and was overpaid disability support pension at [39]-[40].
- The Tribunal stated: '[a]bsent evidence of earnings from [the Applicant], Centrelink was entitled to rely on the evidence it obtained from the ATO [42].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/S136210	CTH.3761.0003.5446	AJ Halstead	7 August 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt.
- Centrelink was directed to obtain bank statements or payroll information for the Applicant and recalculate the dent 'by correctly apportioning the applicant's income in each instalment period according to law'.
- Any debt was to be recovered.

Key Findings

- The Tribunal noted that income averaging was used by Centrelink to determine the Applicant's earnings for fortnights where bank statements were not available. 'Grossed-up income determined from the bank statement evidence and the income averaged amounts were applied to assess the rate of austudy and newstart allowance for [the Applicant] during the relevant periods' [7].
- The Tribunal noted that according to the Applicant's evidence, her income varied significantly from week to week [8]. It found that:

  The application of averaged income does not accurately reflect [the Applicant's] actual fortnightly income in the

circumstances. It is not correct to apply averaged fortnightly income in the calculation of austudy or newstart allowance payments for the periods [the Applicant] was employed. The effect of using averaging is that income will be incorrectly attributed, which means [the Applicant's] actual income is not apportioned as required by section 1073B of the Act [9].

- The Tribunal found that while debts would exist, their amount was unclear and could not 'be ascertained prior to a complete reassessment of entitlement using either payroll or grossed-up earnings information for the periods where averaging [had] been applied' [15].
- The Tribunal found that there was no sole administrative error or special circumstances warranting the recalculated debt to be written off or waived.

AAT Review Number	DOC ID	Member	Date
2019/S136925; 2019/S136708	CTH.3761.0002.8039	J Strathearn	7 August 2019

How it was decided and key facts

Outcome

- The debt decision 2019/S136925 under review was set aside and substituted with the decision that there was no NSA debt to repay.
- The debt decision 2019/S136708 under review was affirmed.

Key Findings

- The Tribunal noted that the ATO had provided Centrelink with initial information about the Applicant's annual income in the relevant years [23].
- The Tribunal noted that the Applicant stated that he provided information to Centrelink to challenge the original debt amounts which had been calculated from ATO information, but does not have that information now [20].
- The Tribunal stated it considered the debt calculations and found they were not reliable for the following reasons:
  - The payslips provided to Centrelink were not in the Centrelink papers and the Tribunal did not have access to them;
  - The Multical Debt Calculation Entitlement Schedule page 12 has one of the relevant fortnights missing thus reducing transparency and scrutiny;
  - The income listed on page 14 does not match the amounts listed in the Multical schedule; and
  - The impact of any Working Credits is not explained by the ARO [25].
- In relation to debt decision 2019/S13692, the Tribunal was not satisfied the debt amount was correct [26].
- In relation to debt decision 2019/S136708, the Tribunal decided that overall the debt calculations appear to be correct [28].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/S138145	CTH.3761.0005.2724	K Dordevic	13 August 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and the matter remitted to the Chief Executive Centrelink with the direction that the outstanding debt as at the date of the hearing was waived.

Key Findings

- Centrelink raised the debt following a data match with the ATO.
- It used payslips where the Applicant was able to provide them but apportioned her gross income where payslips were unavailable. The Tribunal, however, found that the calculations were incorrect and if apportioned correctly, the quantum of the youth allowance debt would increase [11].
- The Tribunal found that the Applicant had incurred a NSA debt as she failed to fully declare her income [13].
- The Tribunal noted, in relation to Centrelink's conduct:

[the Applicant's] submissions and testimony at hearing centred on the difficulties that she has experienced with the Department, not limited to the fact that the quantum of the debt has changed on numerous occasions without adequate explanation given to her in addition to the failure of the Department to forward her requests for review to an authorised review officer. When this review finally occurred, the authorised review officer's decision was overturned in a matter of days [23].

- The Tribunal found that special circumstances existed to justify the waiver of the debt [24].

AAT Review Number	DOC ID	Member	Date
2019/M137289	CTH.3761.0004.2955	S De Bono	14 August 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink to be recalculated with the direction that any recalculated debt owing was waived.

Key Findings

- The debt was raised following a data match with the ATO.
- The debt was increased once calculated and the Tribunal noted that this was apparently due to the identification of further amounts not taken into account when the original debt was calculated [11].
- The Tribunal found that the apportioned income in relation to one employer were not accurate and should have been calculated using payslip information [18]. The Tribunal was unable to gauge the accuracy of the calculations in relation to the second employer due to the poor quality of the payslips [18].
- The Tribunal found that that allowances were to be deducted from the calculation of the Applicant's gross income in relation to the first employer, and the debt recalculated accordingly [18].
- The Tribunal further stated:

  The tribunal is satisfied that any overpayment or underpayment has resulted from trying to work out income for casual work that is sporadic and fluctuating and that any variations in actual income earnt and income reported occurred in [the Applicant's] case for two reasons. Firstly, she was working casually for three employers and [the Applicant] was reporting income for work that she had to "fit" into the Centrelink benefit fortnight. Secondly, for some of her work she had to estimate her income for a period for which she may have been paid for a number of weeks after she actually worked [28].

- The Tribunal was not satisfied that the debt arose due to an error by Centrelink and therefore did not waive the debt on this basis [22].
- The Tribunal found that special circumstances existed to justify a waiver of the debt [32]-[33].

AAT Review Number	DOC ID	Member	Date
2019/M137730	CTH.3761.0005.6627	L Rieper	16 August 2019
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key findings

- The Tribunal noted that unfortunately none of the payslips in the documents before the Tribunal match the above dates and so the Tribunal could not verify the accuracy of the amounts reported by the Applicant on those occasions against any original records [15].
- The Tribunal found it was 'left with Centrelink's debt calculations … based on data received from the Australian Taxation Office' [16].
- The Tribunal was satisfied that the Applicant 'was paid more parenting payment than she was entitled to receive' [18].
- The Tribunal found it did 'not have any evidence before it to contradict that calculation' [17].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M137180	CTH.3761.0001.6328	H Moreland	19 August 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt using payslip information (to be obtained by Centrelink).
- Any resulting debt was to be waived or reimbursed to the Applicant.

Key findings

- The debt amount was partially varied by an ARO on internal review.
- The Applicant did not report his income accurately and a debt was raised. Centrelink used ATO data instead of payslip data to raise the debt, so it was not based off the Applicant's actual fortnightly earnings.
- The Tribunal commented:

  The tribunal is not satisfied that an overpayment of a social security debt can be accurately calculated using ATO data and that while such data may be useful for identifying cases that warrant closer investigation, the data alone should not be relied upon unless more specific evidence (such as payslips) is unable to be obtained [10].

  In the event that there are no payslips available, as noted by the tribunal previously, it is not always possible to obtain evidence of a person's weekly or fortnightly income and in such instances the approach has been to average the income amounts across all fortnights in the period covered by the amount. In Halls and Secretary, Department of Education, Employment and Workplace Relations [2012] AATA 802 the tribunal considered that it was appropriate for Centrelink (the relevant department's delivery agency) to use an averaging method to calculate fortnightly income because in the circumstances it was the best available information that could be provided by the employer and the applicant. In Provan and Secretary, Department of Families, Community Services and Indigenous Affairs [2006] AATA 831 the issue of averaging fortnightly income was considered appropriate however this was in circumstances where the employer had shut down and Mr Provan did not have any pay advice or other information that would assist in working out his periodic income [13].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M137619	CTH.3039.0028.4644	S De Bono	19 August 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the basis of employer payslips and summaries, with the recalculated debt to be recoverable.

Key Findings

- The Tribunal noted Centrelink had initially obtained, via a data match with the ATO, the Applicant's gross income from 5 different employers during the 2015/2016 financial year [6].
- Centrelink raised an NSA debt of $821.31 for the period of 20 June 2015 to 21 June 2016 on the basis of over payment. An ARO affirmed the debt but increased the debt to $1,039.87 [1].
- The Tribunal found it was not satisfied the bank statements provided by the Applicant were sufficient evidence to determine the amount of debt because it was not clear from the statements what fortnight the Applicant earnt the income from Employment [17]. The Tribunal stated:

  For example, it seems to the tribunal that [the Applicant] was paid fortnightly but it is unclear the period of the fortnight. This is important as it allows for an accurate apportionment of income from a particular pay period for one employer to be worked out in accordance with the Centrelink benefit fortnights. A debt amount cannot be entirely accurate without this information [17].

- The Tribunal accepted that the Applicant may have a debt, but any debt needs to be recalculated on the basis of payslip or payment summary information from all employers throughout the debt period which are to be obtained by Centrelink [21].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M137348	CTH.3761.0006.1137	P Sperling	20 August 2019
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key findings

- The Tribunal noted that the final income details that Centrelink used to calculate the Applicant's entitlements included a combination of:
  - ATO total FY data;
  - Payslip information where available;
  - Grossed up net payment details extracted from relevant bank statements;
  - Calculation of missing fortnightly income based on year to date details from available payslips; and
  - A small amount of apportionment of residual income not covered in payslips or bank statements but included in ATO total FY data from employers [27].
- The Tribunal was satisfied Centrelink's calculations were correct [29].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M137233	CTH.3039.0028.4674	S De Bono	21 August 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the basis of obtaining employer payslips, with the recalculated debt to be recoverable.

Key Findings

- Centrelink raised a NSA debt of $5,695.25 for the period 1 August 2017 to 24 November 2018 on the basis of overpayment. An ARO affirmed the debt [1].
- The Tribunal noted matched income data from the ATO was not provided to the tribunal but accepted it showed gross income for the 2017/2018 FY [12].
- The Tribunal noted the debt was calculated on the basis of some payslips provided by the Applicant but stated 'part of the debt was apportioned according to information contained in the Centrelink documents in the absence of payslip information' [13].
- The Tribunal states in regards to apportionment:

  The tribunal does not accept the apportionment of income in the absence of payslips or payment summary information is an accurate way to calculate a debt and therefore the tribunal is not satisfied that the debt amount is correct [16].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/S138775	CTH.3761.0005.6178	N Foster	4 September 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink.
- Centrelink was directed to request the Applicant's employers for information to verify the Applicant's income in the period between 13 July 2014 to 21 May 2016 and recalculate his entitlement to newstart allowance on this basis.
- Centrelink was directed not to apply a 10% penalty fee.
- Any debt was to be recovered in full.

Key Findings

- The Tribunal noted that Centrelink apportioned the Applicant's fortnightly income figures for each employer across the employment periods advised by the ATO [4].
- The Tribunal found:

  Having closely examined the Centrelink overpayment calculations, the tribunal shares [the Applicant's] concerns about their accuracy… Given that [the Applicant] reported significant income in certain fortnights and much less in others, the tribunal accepts that Centrelink's averaging is likely to create overpayments in fortnights where no overpayment in fact occurred [7].

- The Tribunal noted that Centrelink has information-gathering powers and these are not limited in the legislation as they are by internal policy. It accordingly found that Centrelink should request the Applicant's earnings information from his various employers [8].
- The Tribunal found that there was no evidence suggesting 'culpable or reckless under-declaration' of income by the Applicant and therefore that the 10% penalty should not have been applied [13].
- As the Applicant stated he had no issue in repaying a legitimate debt, the Tribunal found that the Applicant should repay any recalculated debt amount [14].

AAT Review Number	DOC ID	Member	Date
2019/M138305	CTH.3039.0028.8541	H Moreland	5 September 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that 50% of the debt be waived.

Key Findings

- Following a data match with the ATO [9], Centrelink raised a raised a DSP debt of $4,529.32 for the period from 6 July 2016 to 19 June 2018 [2]. An ARO affirmed the decision [3].
- The data match showed the Applicant was employed by four separate employers during the period [9].
- The Tribunal found the Applicant incurred a debt but the debt was to be calculated using payslip data and directed Centrelink to obtain this information from the Applicant's employers in order to recalculate the debt [11].
- The Tribunal commented:

  In the event that there are no payslips available, as noted by the tribunal previously, it is not always possible to obtain evidence of a person's weekly or fortnightly income and in such instances the approach has been to average the income amounts across all fortnights in the period covered by the amount. In Halls and Secretary, Department of Education, Employment and Workplace Relations [2012] AATA 802 the tribunal considered that it was appropriate for Centrelink to use an averaging method to calculate fortnightly income because in the circumstances it was the best available information that could be provided by the employer and the applicant. In Provan and Secretary, Department of Families, Community Services and Indigenous Affairs [2006] AATA 831 the issue of averaging fortnightly income was considered appropriate; however this was in circumstances where the employer had shut down and Mr Provan did not have any pay advice or other information that would assist in working out his periodic income [12].

- The Tribunal stated that once any resulting debt was calculated, for Centrelink to communicate this to the Applicant and to include an explanation of how, if in the event, her income was apportioned in that recalculation [13].
- The Tribunal found that special circumstances existed to justify 50% waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M138304	CTH.3761.0001.2108	N Foster	6 September 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and the Tribunal remitted the decision back to Centrelink to recalculate the debt using payslip information (to be obtained by Centrelink).

Key Findings

- The Tribunal commented:

  Having examined the Centrelink calculations, the Tribunal notes that the current overpayment figure of $18,315.33 has been arrived at by averaging [the Applicant's] annual income from her two employers across every fortnight that she received newstart allowance. Centrelink has used this approach as it did not have access to a fortnightly breakdown of [the Applicant's] income. While the Tribunal appreciates the practicalities behind this method, the matters raised by [the Applicant]at the hearing suggest that the arbitrary averaging of her income across fortnights does not accurately reflect how her income was actually earned. In particular, the averaging process used by Centrelink is likely to have attributed [the Applicant] with income for some fortnights when she earned no income at all [7].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/H137902	CTH.3041.0078.3725	M Baulch	11 September 2019

How it was decided and key facts

Outcome

The decisions under review were affirmed.

Key Findings

- Centrelink raised two debts in relation to parenting payment and NSA for the periods 24 June 2010 to 2 January 2013 and 28 March 2013 to 8 April 2015 [3]. An ARO affirmed the debts [4].
- The Tribunal notes in regards to the calculation undertaken by Centrelink: For the one financial year for which it does not have a data match from the ATO, Centrelink has used the earnings actually reported by [the Applicant] in the calculations of the debt amounts [16].
- The Tribunal noted the Applicant disputed the accuracy of averaging in Centrelink's calculation of the debt as her earnings would vary each fortnight or some where she would not be paid at all [17].
- The Tribunal noted that the Applicant was given the opportunity to provide payslips as evidence of her actual pattern of earnings but declined to do so [18].
- The Tribunal found it was satisfied that the averaging method used by Centrelink was not unreasonable, stating:

  In the absence of [the Applicant] being willing to provide further evidence to prove the inaccuracy of Centrelink's calculations, I was satisfied that the method used by Centrelink to calculate the amount of the excess payments, by averaging [the Applicant] earnings from [Employer] over the particular financial year to which they relate, is not unreasonable. I examined those calculations and did not identify any errors. [22].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/A138913	CTH.3761.0006.0331	L Rieper	17 September 2019

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key findings

- The Tribunal noted that Centrelink asserted the Applicant did not declare all of his earnings from two separate employers whilst in receipt of YA. It came to Centrelink's attention when notified at a later date by the ATO [12].
- The Applicant advised the Tribunal that he was not arguing against averaging in relation to the debt under review but had done so in respect of the previous debt [15].
- The Tribunal found that, having regard to Centrelink's contemporaneous records and the records of the Applicant's income from the ATO, it was satisfied that the Applicant did not declare all of his earnings from employment as he was required to do [16].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/S138893	CTH.3041.0023.2180	D Lambden	18 September 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted that no debt was proved.

Key Findings

- Following a data-match with the ATO in May 2019, Centrelink requested further pay information from the Applicant for the 2013/2014 FY for his time in receipt of YA as a casual employee at [Employer] [3].
- Centrelink raised a YA debt of $11,078.17 on the basis the Applicant under declared his income for the period 13 July 2013 and 26 June 2015 [5]. An ARO varied the debt to $11,296.77 [6].
- The Tribunal stated:

  In short, the Act does not authorise the calculation of youth allowance by reference to averaging of income in this case. Clearly, with regard to casual employees on fluctuating wages, the averaging of income can produce distortions in the calculation of social security entitlements so as to give rise to phantom debt balances, when no overpayment has actually been made [11].

- The Tribunal noted the Applicant disagreed with Centrelink's calculations but was unable to provide Centrelink with payslips or bank information as he was no longer able to access either material [12]-[13].
- The Tribunal examined the Apportioned Actual Income column of the ADEX Debt Schedule Report and found:

  is not satisfied that the calculations are made on the basis of actual fortnightly income earned by [the Applicant] during the period under review. The debt is therefore not proved [14]-[15].

AAT Review Number	DOC ID	Member	Date
2019/H138892	CTH.3761.0003.7212	A Schiwy	19 September 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt.
- Centrelink was directed that the Applicant had a youth allowance debt in the amount of $1,046.02 for the period between 3 April 2013 to 25 June 2013 but that Centrelink was to use its information-gathering powers to obtain payroll information for the Applicant for the period from 1 July 2014 to 30 June 2016 and recalculate the debt for this period having regard to the payroll information.

Key Findings

- The debt was raised following a data match with the ATO.
- The Tribunal was satisfied in relation to Centrelink's calculations where payslip information was used to determine the debt amount [11]-[12].
- The Applicant was unable to provide payslips for all employers, however, the Tribunal stated:

  Given the irregular nature of [the Applicant's] income, the tribunal decided that the debt calculation was likely to be flawed and the correct pay information should be obtained from [the Applicant's] employers … by Centrelink [15].

- The Tribunal found that there was no sole administrative error or special circumstances warranting the recalculated debt to be written off or waived [20]-[22].

AAT Review Number	DOC ID	Member	Date
2019/B137315	CTH.3761.0006.0778	D Cox	19 September 2019
How it was decided and key facts			

Outcome

- The decision under review was affirmed.

Key findings

- The decision under review involved determining whether the Applicant was overpaid Newstart Allowance and Disability Allowance after four separate debts were raised by Centrelink following a data match with the ATO [1]-[3].
- The Tribunal stated that the Applicant provided Centrelink with pay information including 'a Separation certificate, payslip, a WorkCover payment report and a time and attendance report' [13].
- The Tribunal found:

  Had [the Applicant] attended the hearing the Tribunal would have invited him to provide his bank statements so that his earnings could be accurately apportioned to Centrelink pay fortnights and the debts recalculated [15].

  [the Applicant] has the option, if he so wishes, to provide his bank statements as evidence in a level two appeal to the Tribunal [16].

  Without additional evidence the Tribunal has no basis for requiring a recalculation of the overpayments and accepts that they have been correctly calculated on the basis of the information currently available to Centrelink [17].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/S138515	CTH.3041.0024.6793	E Kidston	19 September 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink to recalculate the correct amount of overpayment in relation to the Applicant's actual earnings as corroborated by the bank account statements.

Key Findings

- The Applicant was engaged in part-time or casual employment with a number of employers over the relevant period.
- Two debts were raised against the Applicant for overpayment of youth allowance based on a data match from the ATO [4].
- An ARO reviewed the decision on 30 June 2017. The first debt was reduced, and the second debt was increased.
- The Applicant provided bank account statements to Centrelink in July 2019 [20].
- The Tribunal deferred making a decision to obtain further financial information from the Commonwealth Bank of Australia [11].
- The Applicant advised that the income reported may not have aligned with her pay periods and Centrelink instalment periods. The Applicant advised she did not receive payslips in a timely manner from her employers [12].

- The Applicant submitted the debt was raised over a period of time in which she worked casually and received inconsistent payments of income that have been apportioned across the debt period. The Applicant submitted that she went for periods unemployed not earning any income during the periods of the debts and that the apportionment of the income determined from the ATO is not sufficiently accurate [12].
- The Tribunal asked the Applicant why she had not obtained bank account statements for the period prior to May 2012. The Applicant advised she was told by CBA she would have to pay a fee for statements dating back more than 7 years [21].
- The Tribunal stated:

  The Tribunal notes that in calculating the current debts under the amended decision, Centrelink has relied mostly on the ATO data match information which has not been verified [29].

  The issue of what amounts have been earned by [the Applicant] and for what period assumes greater significance in light of the evidence that her income varied significantly throughout the debt periods and that she was unemployed for certain periods. Because of that, it is likely that the apportioning of the income does not accurately reflect [the Applicant's] actual earnings in the relevant period [30].

  …Absent evidence from [the Applicant], Centrelink was entitled to rely on the evidence it obtained from the ATO. However, as [the Applicant] rightly expects any overpayment of youth allowance ought to be calculated as accurately and fairly as possible, the Tribunal considers that better financial information for all of the relevant period is now at hand and that it is desirable that the amount of [the Applicant's] debts be recalculated as verified by the CBA account statements [31].
- The Tribunal did not make a finding in relation to sole administrative error or special circumstances. The Tribunal provided direction back to Centrelink to consider this at the time of reassessing any overpayment during the relevant period. The Tribunal indicated that Centrelink ought to consider the Statement of Financial Circumstances and written submissions to the Tribunal [40].

AAT Review Number	DOC ID	Member	Date
2019/M139187	CTH.3761.0001.0835 Supporting Docs: CTH.3761.0001.0846	H Moreland	23 September 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt using payslip information (to be obtained by Centrelink).

Key findings

- The Tribunal instructed Centrelink to request payslips for the relevant period. If no evidence of the Applicant's income was available, income averaging could be used as a last resort, if it was the best available information in the circumstances.
- The Tribunal did not find that any special circumstances existed to justify a waiver or the writing off of the debt.The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M139289	CTH.3761.0003.0681	S De Bono	24 September 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt.

Any recalculated debts are written off.

Key findings

- An ARO affirmed the debt amount on internal review.
- The Tribunal found:

  [the Applicant] said no one had explained to him how to report his income for newstart reporting purposes and he could not remember how he worked out his income for Centrelink reporting purposes [12].

  From the EANS screen the tribunal notes that generally income has been apportioned in accordance with matched income information from the ATO [14].

  The tribunal accepts that there may have been periods in which [the Applicant] reported his income and other periods, in which he may have worked and did not report any income. However, based on the evidence before it the tribunal cannot be certain this has occurred. The tribunal does not accept that the apportionment calculations for various employers have resulted in the correct debt amounts being raised [17].

- The Tribunal directs Centrelink to obtain payslip summary information or bank account statements.
- Debt was written off for a period of two years.

AAT Review Number	DOC ID	Member	Date
2019/S139282	CTH.3761.0005.2196	T Bubutievski	24 September 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink.
- Centrelink was directed that there was a debt of $417.77 which could be recovered.

Key Findings

- The Applicant's overpayment of youth allowance was calculated on the basis of ATO information [2].
- The Tribunal noted that the Applicant supplied payslips from one employer for part of the relevant period which were used to calculate the overpayment of $417.77 for that period [8]. It found, however, that Centrelink had apportioned the Applicants earnings based on year-to-date amounts from the payslips for the rest of the financial year despite it being extremely unlikely that the Applicant earned the same amount each fortnight [9].
- Importantly, the Tribunal stated:

  This is a so-called "robodebt". This occurs when Centrelink averages the income declared to the ATO over the financial year so that the income is the same in each fortnight. This is clearly not the case for [the Applicant]. Due to the income free area the pattern of earnings can make a significant difference to a debt amount, as can periods when a person was not in receipt of Centrelink benefits [10].

  In cases such as this, the onus is on Centrelink to establish that a person has been overpaid, and also the amount of the overpayment. Centrelink has only made a very rudimentary attempt at determining the correct amount of this overpayment and a calculation based on a steady amount of income each fortnight cannot possibly be right when considered against what can be deduced about [the Applicant's] pattern of earnings. Other than for the period between 7 April 2014 and 11 May 2014 the tribunal cannot find that the overpayment has been correctly calculated, or that the amount of the overpayment is correct [11].

- The Tribunal found that Centrelink would need to obtain details of the Applicant's actual income if it wished to raised a debt for the period between 20 July 2013 and 20 June 2014 [13].
- It also found that that no 10% penalty could be applied as it could not be established that one instance of an incorrect declaration was reckless or misleading [14].
- Ultimately, the Tribunal found:

  As noted above, the tribunal has no confidence in the debt amount as determined by Centrelink, but there is still a smaller debt. The tribunal does not have any evidence that [the Applicant's] circumstances are sufficiently unusual or uncommon that the special circumstances discretions contained in section 1237AAD of the Act should be exercised in this case to waive recovery of the debt. The debt as varied may be recovered from [the Applicant] [25].

AAT Review Number	DOC ID	Member	Date
2019/B138786	CTH.3761.0006.0678	J Devereux	26 September 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink with the direction that it establish the 'actual amounts' the Applicant earned during each fortnight of the debt period, with any debt resulting from the recalculation to be recovered.

Key findings

- The Applicant confirmed that, during the debt period, she received income from 3-6 employers and advised the Tribunal she lodged her payslips with Centrelink in a timely fashion [8].
- The Tribunal noted that in the file was a bank statement which the Applicant provided to Centrelink since the payslip was not available for that period. The Tribunal stated that payments made into her bank account were her nett pay while Centrelink was required to calculate her rate of payments using gross pay.
- The Tribunal found that '[g]iven the uncertainty, the Tribunal thinks the fairest thing to do is to refer the matter back to Centrelink to ensure that the fortnightly income figures used by them to calculate the debt, are accurate' [13].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/C138926	CTH.3761.0001.4530	F Staden	27 September 2019

How it was decided and key facts

Outcome

- The Part of the debt was affirmed.
- The Tribunal recalculated the other emainder of the debt and it was subsequently waived.

Key findings

- The Applicant did not report her income accurately and a debt was raised following a data matching exercise with the ATO.
- The Tribunal recalculated part of the debt based on actual earnings.
- The resulting debt was waived as it was less than $200.

AAT Review Number	DOC ID	Member	Date
2019/S135482, 2019/S138422 and 2019/S140150	CTH.3761.0001.6369	F Staden	2 October 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that there were two debts, one of which was affirmed.
- The second debt was waived as it was less than $200.

Key Findings

- The Applicant did not report her income accurately, and so she received benefits that she was not entitled to. Centrelink raised a debt following a data matching exercise with the ATO and the Applicant's tax refund was garnished.
- The Tribunal accepted the overpayments as calculated by Centrelink.
- The Tribunal found that the 10% penalty was properly applied.
- The Tribunal concluded that Centrelink had correctly garnisheed the Applicant's tax return.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M140149	CTH.3039.0029.0219	A Carson	7 October 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink to ascertain the Applicant's actual income to recalculate whether the Applicant was overpaid newstart allowance.

Key Findings

- On 24 April 2019, Centrelink raised three newstart allowance debts [1].
- On 28 June 2019, an ARO affirmed the debts [2].
- The Tribunal noted:

  The Tribunal considered the data matching information provided by Centrelink and their use of this information (pages 70-103) and was not satisfied that the apportioning of the income amounts provided through the ATO produced an accurate comparison of income earned during the periods for which debts were raised and the income declared by [the Applicant] to Centrelink. On the evidence presented the Tribunal was not satisfied as to the extent, if any, [the Applicant] was overpaid newstart allowance for the periods 20 August 2012 to 1 February 2013, 1 December 2014 to 20 February 2015 and 16 December 2015 to 9 February 2016. In [the Applicant's] case where there were various employers, providing varying income over varying periods, the apportioning of income over periods of employment, unemployment and under-employment produces an inaccurate assessment of overpayments. Actual earnings for the periods were needed to accurately assess the extent of any overpayments [11].

- If a debt was determined based on actual income, the Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt [15 and 19].

AAT Review Number	DOC ID	Member	Date
2019/M140146	CTH.3761.0006.1187	T Hamilton-Noy	14 October 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that there was a debt but that 50% of the debt was waived.

Key findings

- The decision under review for the Tribunal involved determining whether the Applicant was overpaid Newstart Allowance at [1]. The debts were raised following information received by the ATO and apportioned by Centrelink [9], [11]. The Tribunal found that the Applicant was overpaid [11].
- The Tribunal stated the Applicant reported mobile reporting issues to Centrelink as well as in person 'accepting that administrative error contributed to the debt in this case, in that the Centrelink app was not working and Centrelink were aware it was not working and were unable to resolve the issue during the debt period' [16].
- The Tribunal found the special circumstances existed to justify a waiver of 50% of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M139148	CTH.3761.0002.7382	A Carson	21 October 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration with directions to obtain further information from the Applicant's employers.
- The Tribunal also recommended that Centrelink consider then waiving any resultant debt.

Key findings

- The Tribunal found:

  … [a]veraging the PAYG income amounts over the period set out under the PAYG Payment Summaries would not in the current circumstances produce an accurate assessment of [the Applicant's] entitlement to newstart allowance and later to disability support pension for each of the fortnights [13].

- The Tribunal stated it was open to Centrelink to seek further documentation from the Applicant's three employers to identify how much she was paid each fortnight [13].
- On the evidence presented, the Tribunal was not satisfied that the amounts calculated by Centrelink were correct [13].
- The Tribunal noted it did not need to consider the write off and waiver provisions, but did note there was sufficient evidence to conclude there were special circumstances that made it desirable to waive any debt amount [14].

AAT Review Number	DOC ID	Member	Date
2019/S139382	CTH.3053.0151.8689	J D'Arcy	23 October 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the direction that the NSA debt be recalculated after consideration of the new material supplied by the Applicant and recovery of the balance of any debt owing (after recalculation) to be waived due to the existence of special circumstances.

Key Findings

- The Tribunal noted that a data match between Centrelink and the ATO triggered a review of the Applicant's NSA and Centrelink subsequently raised a debt on the basis of this information [3]-[4].
- The Applicant provided PAYG payment summaries for 2012, 2013 and 2014 from each of his employers and also provided a detailed payroll report from one of his employers [16].
- The Tribunal noted that given the additional evidence that had been provided the Tribunal anticipated that the Applicant's debt would reduce [29].
- The Tribunal directed that if, after recalculation of the overpayment by Centrelink, a debt balance exists, it must be waived due to the existence of special circumstances [32].

AAT Review Number	DOC ID	Member	Date
2019/S140063	CTH.3043.0031.7198	AJ Halstead	30 October 2019
How it was decided and key facts			

Outcome

- The decision in relation to austudy was affirmed.
- The decision in relation to newstart allowance was set aside and remitted to Centrelink with directions that the Secretary obtain earnings and payroll information from the Applicant's employers, and that part of the debt to be recalculated by apportioning the applicant's income with reference to his actual income.

Key Findings

- A data match occurred with the ATO [1].
- On 20 December 2016, DHS raised a debt for newstart allowance [2].
- On 4 June 2019, DHS reassessed and reduced the newstart debt using bank statement information provided by the Applicant [2].
- On 14 February 2019, DHS decided to recover a debt for austudy due to employment income [3].
- On 7 June 2019, the austudy debt was reassessed using bank statement records [3].
- An ARO affirmed both debt decisions in the reassessed amounts, and the decision about a recovery penalty was set aside to remove that penalty [3].
- The Tribunal noted:

  The effect of section 1073B of the Act is that the recipient of a social security payment is taken to have earned one-fourteenth of the total amount they receive from employment income during a fortnightly instalment period on each

day of that period. This is referred to as the daily apportionment of earnings and allows the rate of austudy to be calculated based on a daily earnings amount [7].

- The Tribunal noted:

  It is not accepted that averaging income throughout the period from 5 November 2010 to 5 August 2011 would accurately reflect periodic income in circumstances where his earnings regularly changed. The effect of using averaging is that income was very likely attributed incorrectly during that period. As a result, the income was not apportioned as required by section 1073B of the Act [12].

- The Tribunal found that the Department needed to obtain payroll records for 5 November 2010 to 5 August 2011, or if that information is not available, the grossed-up amounts assessed from bank statement records may be used [14].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt [18-19].

AAT Review Number	DOC ID	Member	Date
2019/H137763	CTH.3067.0015.2238	P Jensen	1 November 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and the matter is remitted to Centrelink for recalculation.

Key Findings

- An ARO affirmed the debt on internal review.
- Centrelink had incorrectly classified the Applicant's payment type as newstart allowance, when it should have been youth allowance.
- The Tribunal stated at [5]:

  Centrelink recalculated [the Applicant's] entitlements to youth allowance and newstart allowance on an assumption that she earned her annual incomes at constant daily rates. Centrelink's assumption was not based on any evidence; indeed, it was contrary to all the available evidence.

- The Tribunal was critical of Centrelink's failure to use its information gathering powers to obtain relevant documentation [7].
- The Tribunal stated at [12]:

  Throughout 2010-11, [the Applicant] declared fluctuating earnings, and I am satisfied that, broadly speaking, her earnings fluctuated in the manner that she reported. In light of Centrelink's election to not take reasonable steps to ascertain [the Applicant's] actual fortnightly earnings…

- The 10% penalty was applied by Centrelink but ultimately set aside by the Tribunal.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/B138984	CTH.3040.0032.3437	N Foster	1 November 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and the matter is remitted to Centrelink for recalculation on the basis of actual fortnightly income.

Key Findings

- An ARO affirmed the debt on internal review.
- Centrelink used income averaging to determine the Applicant's fortnightly income and subsequently raise a debt.
- The Tribunal was not satisfied this calculation was correct, as the Applicant's income substantially increased over the period in question.
- The Tribunal remitted the decision to Centrelink for recalculation on the basis of the payslip information provided.

AAT Review Number	DOC ID	Member	Date
2019/P140184	CTH.3761.0005.8751	W Budiselik	5 November 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the period of entitlement on the basis of income data from the Applicant's employer Centrelink was to obtain.
- Centrelink was directed to apply a 10% penalty to the resultant debt.

Key Findings

- Following a data match with ATO, Centrelink determined the applicant had under reported employment income in the relevant period and that as a consequence she was overpaid NSA [9]
- The Tribunal stated that it was:

  …concerned that the applicant's overpayment/debt amount had been determined on the basis of averaged Australian Taxation Office data about the applicant's employment income in the relevant period. That is, the tribunal is of the view the applicant's debt can be calculated accurately only if accurate fortnightly employment income is used for the calculation of the overpayment and debt. The tribunal decided it is necessary for Centrelink to use its statutory powers to obtain employment income data from the applicant's former employer, so actual fortnightly employment income is used rather than income averaged over the period [18].

- The Tribunal found the applicant did not offer an excuse for failing to declare employment income in the relevant period' [31] and 'the 10% penalty should be applied [32].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/P141090 & 2019/P141279	CTH.3761.0005.8468	W Budiselik	12 November 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the basis of fortnightly information contained in the Applicant's payslips Centrelink was directed to obtain using its statutory powers.
- The decision under review to garnishee the Applicant's tax refund was affirmed.

Key findings

- The Tribunal noted that following a data match with the ATO, Centrelink identified discrepancies between the Applicant's employment income and declared earnings [10].
- The Applicant explained that after she received the letters from Centrelink she contacted her previous employers to obtain pay data but was unable to obtain all the data [13].
- The Tribunal stated that 'an overpayment and consequently a debt cannot be accurately calculated by averaging ATO data' and concluded that the Centrelink must obtain accurate fortnightly information about the Applicant's employment from past employers [15].
- The Tribunal included the following extract of the Ombudsman's report 'into the way Centrelink raised debts following data matches with the ATO':

  We are also satisfied that if the customer can collect their employment income information and enter it properly into the system, or provide it to DHS to enter, the OCI can accurately calculate the debt. After examination of the business rules underpinning the system, we are satisfied the debts raised by the OCI are accurate, based on the information which is available to DHS at the time the decision is made.

  However, if the information available to DHS is incomplete, the debt amount may be affected. It is important for the system design for customers to respond to information requests from DHS so decisions are made on all available

information. We have therefore concentrated on the accessibility, usability, and transparency of the system, including quality of service delivery and procedural fairness in this report [16].

- The Tribunal was satisfied the Applicant has YA and Austudy debts but until the debt calculation is conducted 'using verified fortnightly income the tribunal is not satisfied the debt amount is accurately calculated' [19].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.
- The Tribunal was satisfied the action to garnishee the Applicant's tax refund complied with legal requirements [50].

AAT Review Number	DOC ID	Member	Date
2019/A140999	CTH.3761.0002.6646	W Budiselik	18 November 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt on the basis of verified fortnightly income information Centrelink was to obtain from the Applicant's past employers or via bank statements.
- Centrelink was directed to waive recovery of the debt for a period of two months.
- Centrelink was directed not to apply a 10% penalty.

Key Findings

- Centrelink raised the debt following a data match with the ATO [7].
- While the Applicant accepted she may not have accurately reported her income for a period due to illness, she was concerned about the accuracy of the debt amount as '[the] Applicant's representative was well informed about the problems associated with overpayment/debt calculations based on averaged ATO data' [10].
- In relation to income averaging and its potential impacts in the Applicant's case, the Tribunal stated:
- The tribunal considered the Commonwealth Ombudsman's report into the raising of debts in the way this debt was raised. The report entitled: "Centrelink's automated debt raising and recovery system: A report about the Department of Human Services' online compliance intervention system for debt raising and recovery" stated:

> We are also satisfied that if the customer can collect their employment income information and enter it properly into the system, or provide it to DHS to enter, the OCI can accurately calculate the debt. After examination of the business rules underpinning the system, we are satisfied the debts raised by the OCI are accurate, based on the information which is available to DHS at the time the decision is made.
>
> However, if the information available to DHS is incomplete, the debt amount may be affected It is important for the system design for customers to respond to information requests from DHS so decisions are made on all available information [11].

The tribunal concluded the applicant's debt needed to be recalculated based on the applicant's fortnightly gross income over the relevant period. Centrelink has the statutory authority to obtain employment income data from the applicant's past employers or by obtaining relevant bank statements [12].

- The Tribunal found that the debt should be written off for a period of two months to allow the Applicant to provide Centrelink with a Statement of Financial Circumstances to allow it to calculate an appropriate rate of recovery [16].
- The Tribunal was satisfied that, in this case, if a debt arose, it was because the Applicant did not report or under-reported her income and this was not Centrelink's fault [19].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/A139397	CTH.3036.0029.5629	S Cullimore	18 November 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted back to Centrelink for recalculation of a portion of the debt. The balance of the debt is correctly calculated.

Key Findings

- An ARO affirmed the debt on internal review.
- The Applicant's income fluctuated in his two casual jobs.
- The initial debt used apportioned income data. It was subsequently recalculated using a combination of payslip and bank account statements.
- The Applicant did not correctly report his income, and sometimes failed to report at all.
- The Tribunal appeared to use payslips and ATO income averaging to calculate the correct amount. The Tribunal was not satisfied that the portion of the debt for the casual income was correct [34]. The decision was remitted for recalculation, and the Tribunal determined the income per fortnight for the period in question.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/S140181	CTH.3761.0002.8255	S Lewis	18 November 2019

How it was decided and key facts

Outcome

- The decision under review as set aside and remitted to the Chief Executive Centrelink for recalculation of the debt in accordance with various directions.
- The debts were recoverable.

Key Findings

- The Tribunal found, based on verified earnings data for Employer 1, that the Applicant was paid NSA at an incorrect rate during the periods identified for Debts A, C and D. The Tribunal reviewed the ARO's calculations and the evidence on which they were based and was satisfied with the ARO's calculations [13].
- In relation to Debt B, the Tribunal noted that the Applicant did not provide evidence of his hospital admission and interaction with his workers compensation insurer in relation to compensation payments paid to Employer 2. In this circumstance, the Tribunal preferred ATO information and accepted that Centrelink did not take the Applicant's earnings from Employer 2 into account in the calculation of his rate of NSA [12]. The Tribunal found that the debt would need to be recalculated on the basis that the income from Employer 2 would need to be apportioned over a different period [14].
- The Tribunal also noted that the Applicant did not dispute that his reporting may have been inaccurate as he 'did not consider it necessary to report what he considered to be a low level of earnings from Employer 2 [15].
- The Tribunal found that no sole administrative error or special circumstances existed to justify a write off or waiver of the recalculated debt.

AAT Review Number	DOC ID	Member	Date
2019/P141716	CTH.3067.0015.4091	M Martellotta	19 November 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and the matter is remitted to Centrelink for recalculation on the basis of actual fortnightly income.

Key Findings

- An ARO varied the debt on internal review.
- The Applicant's submissions at [12] were:

  [The Applicant] says that he thinks that the Department has taken annual income amounts based on Australian Taxation Office (ATO) information and applied this figure across a financial year without making allowance for the fact that there were periods that he was not in receipt of youth allowance or other periods when he was not working. This has led to an incorrect debt amount being raised. He says in effect that his uncertainty is exacerbated by the Department providing different debt amounts at different times which is confusing and does not generate confidence in their process and that the Department has not been able to provide him with a comprehensible explanation of the debt amounts.

- Centrelink used income averaging to determine the amount of the debt. The Tribunal was not satisfied that these calculations were correct.
- The Tribunal commented at [23]:

  The question of what is the required standard of proof to determine whether a debt is owing was considered by the Administrative Appeals Tribunal in Re: SDFHCSIA and George. Relevant authorities were reviewed in that decision:

  > Careful regard must be paid to the totality of the evidence and material before the Tribunal before determining the question as to what finding should properly be made out or what inference should be reasonably drawn in the circumstances of the particular case. The case for a party out is not made out by a party if the decision maker is left in a substantial state of doubt as to whether a matter or conclusion has been proven or where a finding advanced is a matter of speculation or guesswork see McDonald v Director-General of Social Security (1984) 6ALD 6 at 11…

- The Tribunal also commented at [24]:

  The tribunal has found the evidence relied upon by the Department to explain their calculation of the debt amounts problematic and confusing. As a starting point the Department has sought to reconstruct [the Applicant's] actual income based upon net amounts deposited into his bank account then applying a formula to arrive at the gross amount. Whilst in some instances this may be an acceptable approach, in this particular case the tribunal was not provided with the primary documents which the Department has relied upon and instead the tribunal relied upon documents provided by [the Applicant].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M140993	CTH.3761.0006.0573	H Moreland	21 November 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt using of the Applicant's actual fortnightly income on the basis of payslip information.

Key findings

- The decision under review for the Tribunal involved determining whether the Applicant was overpaid NSA when working as a casual employee at [1] and [15].
- The Tribunal noted Centrelink originally raised four separate NSA debts for the period of entitlement under review [2], however, upon reassessment the Tribunal expressed concern three separate debts were raised with one debt in review being a combination of the original second and third debts [3].
- The Tribunal stated the evidence used to raise and calculate the debt bar the employer payroll data was 'inadequate' and included ATO data match information and ATO PAYG summaries at [11]-[12].
- The Tribunal found:

  'that the only way it can be satisfied that a debt is calculated correctly is based on payroll data because averaging of income does not provide sufficient accuracy because it, by definition, cannot show the fortnights where someone worked much more than others' [17].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/H141952	CTH.3761.0005.6295	M Baulch	25 November 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that the Applicant had an NSA debt in an amount that she was required to pay, and the FTB entitlement owed to the Applicant is not to be offset against that debt and is to be paid to the Applicant.

Key findings

- The Tribunal noted the Applicant reported fortnightly but did not always report correct income from three part-time jobs [14].
- The Tribunal was satisfied that the ARO correctly recalculated the debt [15].
- The Tribunal found it was 'inappropriate that the discretion provided for in section 8A of the FA Act should be exercised to offset the Applicant's FTB entitlement against the newstart allowance debt' [37].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M141449	CTH.3761.0003.7917	S De Bono	26 November 2019
How it was decided and key facts			

Outcome

- The decisions under review were set aside and remitted to Centrelink for recalculation of the debt.
- Centrelink was directed that the recalculated debt was recoverable and any moneys paid by the Applicant in excess of the recalculated debt were to be refunded to him.

Key Findings

- The Tribunal noted that the Applicant's income had been apportioned according to payslip information provided by him [9].
- The Tribunal specifically distinguished this case to averaged income using ATO data and stated:

  To apportion income according to payslips Centrelink calculated this by dividing the gross income amount earnt by the days in the pay period. They then work out how many days aligned in the Centrelink benefit fortnight and then multiply the daily income rate by the number of days in a particular Centrelink fortnight. This is different to averaging income from Australian Tax Office matched data which takes income for a period and divides this equally over the Centrelink benefit fortnights (this has commonly been referred to as a "robo debt"). Apportioning income is not averaging income and involves manual input of gross income earnt in order to work out how this income aligns with the Centrelink benefit fortnights [13].

- The Tribunal, however, was not satisfied that Centrelink's calculations were correct because the payslips from two employers showed the days he actually worked and therefore Centrelink should not have apportioned his income across the period [14]-[17].
- The Tribunal found that there was no sole administrative error or special circumstances warranting the recalculated debt to be written off or waived [20].
- The Tribunal found that it was highly likely that the debt amount would be reduced upon recalculation [21].

AAT Review Number	DOC ID	Member	Date
2019/S140266	CTH.3043.0032.5490	J Leonard	26 November 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and the matter is remitted to Centrelink for recalculation on the basis of actual fortnightly income.

Key Findings

- An ARO affirmed the debt on internal review.
- In attempting to calculate the debt, Centrelink only obtained some evidence of the Applicant's actual fortnightly income. In lieu of this, Centrelink apportioned the Applicant's income over the period.
- The Tribunal remitted the decision back to Centrelink for recalculation.

AAT Review Number	DOC ID	Member	Date
2019/M141319	CTH.3761.0006.0374	R Perton	27 November 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the basis of the Applicant's actual fortnightly income Centrelink was directed to obtain.

Key findings

- The decision under review for the Tribunal involved determining whether the Applicant was overpaid Disability Support Pension (DSP) following a data match with information obtained from ATO [1]-[2].
- The Tribunal found:

  It was not in the position to accurately determine what [the Applicant]'s fortnightly earnings were in the debt period and therefore if the debt calculations are correct. His income had been averaged over part of the relevant period and there is no indication of when shift or other allowances were paid or for how long he was off work when he suffered his back injury and if he was paid during that time [22].

  Further information is needed before an accurate recalculation of the debt can be undertaken [23].

- The Tribunal stated:

  Further investigations such as accessing employer records may provide appropriate information. The use of the Secretary's legislative powers will hopefully yield further relevant evidence [32]

- The Tribunal did not think it appropriate to waive any or all of the debt while the level of debt is unclear [31].

AAT Review Number	DOC ID	Member	Date
2019/M141911	CTH.3761.0004.1438	R Perton	28 November 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt following a further investigation of his fortnightly income.

Key Findings

- The debt was raised following a data match with the ATO.
- The Tribunal stated that it was not in a position to accurately determine the Applicant's fortnightly earnings but noted that averaging had been used even where there was evidence of variability of income [19]-[20]. It stated, however, that:

  The Tribunal is satisfied that [the Applicant] has not deliberately under-declared his income. The Tribunal notes, however, that the imposition of a debt where a person's earnings are variable have not been fully reported is not unusual [27].

  At this stage, while the level of debt is unclear, the Tribunal does not believe it is appropriate to waive any or all of the debts [28].

- Accordingly, further information was needed before an accurate recalculation of the debt could be undertaken [20].
- The Tribunal found that the debt could not be written off [21].
- The Tribunal found that there was no sole administrative error or special circumstances warranting the recalculated debt to be written off or waived [22]-[29].

AAT Review Number	DOC ID	Member	Date
2019/S140728	CTH.3761.0002.7743	A Beckett	28 November 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink with the direction that it recalculate the debt based on earnings information provided by the Applicant.

Key Findings

- Centrelink raised the debt following a data match with ATO.
- The Applicant worked for various employers during the relevant period.
- The Tribunal noted that, save for one job, Centrelink had apportioned the total ATO income over the employment period [12].
- The Tribunal noted that the Applicant could provide payslips and bank statements which Centrelink should use to recalculate the debt [13], [15].
- The Tribunal found that no administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M141236, 2019/ M141237, 2019/ M141240	CTH.3025.0105.7263	H Moreland	28 November 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt using payslip information which Centrelink was directed to obtain.
- The recalculated debts were recoverable.
- No interest was to be applied to the debts.

Key Findings

- The Tribunal stated: '[having] reviewed the Centrelink papers, the tribunal is not satisfied that all of the debts have been calculated using payslip or equivalent information' [11].
- The Tribunal was not satisfied with the calculations based on averaging of ATO information obtained via a data match and also stated that 'payment information derived from bank statements cannot provide sufficient accuracy as it is not always clear what non-assessable items…are included…' [14]-[15], [19].
- The Tribunal also stated:

  The tribunal finds that the only way it can be satisfied that a debt is calculated correctly is based on payroll data because, in addition to the aforementioned reasons, the averaging of income does not provide sufficient accuracy because it cannot show the fortnights where someone worked much more than others [22].

- The Tribunal was accordingly directed to obtain payslips from the Applicant's employers and recalculate the debt [23].
- The Tribunal found that no sole administrative error or special circumstances existed to justify a write off or waiver of the debt.
- The Tribunal also found that it was inappropriate to for interest charges to be applied given the Applicant was awaiting the outcome of the AAT review [39].

AAT Review Number	DOC ID	Member	Date
2019/A142421	CTH.3761.0002.7281	J Bakas	3 December 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that there was no debt.

Key Findings

- Centrelink raised the debt and imposed a 10% penalty following a data match with the ATO [3].
- The Tribunal found it difficult to establish whether there was a basis for concluding that the Applicant had been overpaid as the only data available as to the debt amounts for each fortnight was the ATO information and without pay records or bank statements, the 'debt calculations relied on by Centrelink [could] only be regarded as no more than "guestimates"' [15].
- In particular, the Tribunal found:

  The apparent approach in apportioning income over financial years is not consistent with the rate calculation process provided for by the Act for newstart allowance. The purported placement of an onus on a former recipient of social security to disprove the existence of a debt runs contrary to general administrative law principles and the existence of specific information gathering powers within Centrelink. The assumption that income reported to the ATO for a financial year was received at a constant rate over a financial year can rarely be sustained as a matter of fact in the context of a recipient of a social security benefit [16].

- The Tribunal was ultimately not convinced that the Applicant owed a debt as suggested by Centrelink but noted that it remained open to Centrelink to use its information-gathering powers to investigate whether the Applicant owed a debt based on 'probative evidence and social security law' [17]-[18].
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M142370	CTH.3761.0003.2053	P Sperling	3 December 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with directions that:
  - Centrelink obtain payslips from the Applicant's employer;
  - Centrelink recalculate the relevant period of entitlement on the basis of payslips provided;
  - Any recalculated debt was to be offset by the underpayment of youth allowance, in determining what, if any, debt is owed to the Commonwealth; and
  - Any amounts already recovered in respect of the debt to be refunded to the Applicant.

Key findings

- The Tribunal noted an 'apportionment methodology (in which the total amount earned by [the Applicant] in the financial year was assumed to have been earned in equal fortnights' was used to calculate the Applicant's income for the majority of the relevant period [24].
- The Tribunal found there was 'no evidence before the tribunal to support the assumption that [the Applicant] earned the same fortnightly income amounts in every fortnight of the relevant period. Indeed the evidence before the tribunal regarding [the Applicant's] reported earnings indicates that he did not' [24].
- The Tribunal was satisfied that, apart from the first three weeks of the relevant period for which payslips were available, there was insufficient information about the Applicant's actual income to support the reliability and accuracy of the debt calculation [25].
- The Tribunal found that any amounts previously recovered by Centrelink from the garnisheeing of the Applicant's tax return and application of an additional interest charge is to be refunded, with Centrelink to renegotiate repayment arrangements if, and when, any revised debt is recalculated [31].
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/A142601	CTH.3041.0061.3454	M Manetta	3 December 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that the debt under review has not been proved.

Key findings

- The Tribunal noted that, after obtaining data-match information from the ATO, the Department decided to raise a debt against the Applicant on account of overpaid YA [1].
- The Applicant was casually employed by a school to coordinate a netball program and was paid a lump sum of $3,311. The Department decided to attribute the lump sum payment evenly to each of the days preceding the payment in the same FY [5].
- The Tribunal noted that s 1067G of the Social Security Act requires that YA be calculated by reference to income actually earned in each fortnight and '[d]oes not authorise the averaging of income, even where, due to the passage of time and the consequence loss of records and memory, precise evidence of actual earnings no longer exists' [5].
- The Tribunal stated that the calculations performed by the Department were 'erroneous' [7].
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/A142546	CTH.3066.0010.8623	J Bakas	03 December 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and the matter is remitted to Centrelink for recalculation on the basis of actual fortnightly income.

Key Findings

- An ARO varied the debt on internal review.
- The Applicant received a parenting payment.
- The Tribunal commented at [13]:

  The approach in apportioning income over a financial year is not consistent with the rate calculation process provided for by the Act for parenting payment. The purported placement of an onus on a former recipient of social security to disprove the existence of a debt runs contrary to general administrative law principles and the existence of specific information gathering powers within Centrelink. The assumption that income reported to the ATO for a financial year was received at a constant rate over a financial year can rarely be sustained as a matter of fact in the context of a recipient of a social security benefit. As such I find that this apportioned income cannot be included in the debt calculations.

- The Tribunal was not satisfied that Centrelink's calculations were correct and remitted the decision for recalculation on the basis of actual income.

AAT Review Number	DOC ID	Member	Date
2019/M140302 and 2019/M140303	CTH.3761.0001.3541	H Moreland	4 December 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt using payslips (to be obtained by Centrelink).

- The Tribunal decided that only 50% of the resulting debt was recoverable from the Applicant on the basis of special circumstances.
- No 10% penalty was to be applied.

Key findings

- The Tribunal commented:
- The Tribunal concludes that much of the evidence used by Centrelink to calculate [the Applicant's] rate of parenting payment during the relevant period is inadequate because there is insufficient specificity for her rate of payment to be calculated accurately [9].
- The Tribunal further commented:

  The Tribunal finds that the only way it can be satisfied that a debt is calculated correctly is based on payroll data because averaging of income does not provide sufficient accuracy because it, by definition, cannot show the fortnights where someone worked much more than in other fortnights. Similarly, the Tribunal finds that payment information derived from bank statements generally cannot provide sufficient accuracy as it is not always clear what non-assessable items (such as uniform, meal and travel allowances) are included [11].

- Centrelink were instructed to contact the Applicant's employers to obtain payslips so that the debt could be calculated on the basis of the Applicant's actual earnings.
- The Tribunal also directed that no penalty fee was to be applied.
- 50% of the debt was waived by the Tribunal.

AAT Review Number	DOC ID	Member	Date
2019/A142558	CTH.3066.0011.2612	D Lambden	4 December 2019
How it was decided and key facts			

Outcome

- The decision under review was varied and the Tribunal substitutes new debt amounts.

Key Findings

- The ATO provided information to Centrelink in relation to the Applicant's income [2]. The Applicant provided copies of her bank statements to Centrelink [3]. An ARO affirmed one debt and varied the other debt on internal review.
- The Tribunal stated:

  In short, the Act does not authorise the calculation of youth allowance or newstart allowance by reference to averaging of income in this case. Clearly, with regard to employees on fluctuating wages, the averaging of income can produce distortions in the calculation of social security entitlements so as to give rise to phantom debt balances, when no overpayment has actually been made. [12]

- The Applicant was unable to provide payslips to verify her actual earnings.
- The Tribunal was not satisfied that the calculations were made on the basis of actual fortnightly income earned during the period under review [15], and substituted its own decisions and debt amounts.

AAT Review Number	DOC ID	Member	Date
2019/H142112	CTH.3067.0015.7695	M Baulch	4 December 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and the matter was remitted to Centrelink for recalculation on the basis that Centrelink obtain evidence of actual fortnightly income.

Key Findings

- An ARO affirmed the debt on internal review.
- Centrelink apportioned the earnings over the entire periods in question, "which is only reasonable if [the Applicant] is working each day during the period" [21].

- The Tribunal stated that the apportionment of income over the period was "inappropriate" [21].
- The Tribunal was not satisfied that Centrelink's calculations were correct and remitted the decision for recalculation on the basis of actual income.

AAT Review Number	DOC ID	Member	Date
2019/M142097	CTH.3761.0005.8733	R Perton	5 December 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink recalculation of the debt on the basis of the Applicant's actual fortnightly income Centrelink was directed to obtain via further investigations.

Key findings

- The Tribunal noted that, following a reconciliation of records of earnings held by the ATO with Centrelink records, Centrelink determined that the Applicant had been overpaid social security benefits [2].
- Following the notification of the overpayment and debt, the Applicant was able to provide bank statements from the Bank of Queensland for some of the periods, but was unable to obtain bank records for an earlier period when she was banking with Westpac [3].
- The Tribunal found:

  …[it was] not in the position to accurately determine what [the Applicant's] fortnightly earnings were in the debt period and therefore if the debt calculations are correct. Some of the calculations appear to have involved averaging out income rather than taking account of variable income [19].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M142298	CTH.3761.0006.0198	A Schiwy	05 December 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the basis of payroll records Centrelink was directed to obtain from the Applicant's employers.
- The recalculated debt was recoverable.

Key findings

- The Tribunal noted that the Applicant stated that she did provide Centrelink with a lot of payslips; however, the Centrelink debt calculations are based on averaging the gross income over the debt period [13].
- The Tribunal found 'the debt calculation was likely to be flawed and the correct pay information should be obtained from the Applicant's employers by Centrelink' [14].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M141038	CTH.3053.0149.8120	R Perton	6 December 2019
How it was decided and key facts			

Outcome

The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the basis of the Applicant's actual fortnightly income.

Key Findings

- Centrelink raised the debt following a data match with the ATO. The Tribunal noted: '[the] calculations had been partly based on payslips but partly on averaging income for periods in which no payslips or bank records were available' [3].
- The Applicant gave evidence that she was unable to obtain payslips and bank records for the missing periods. The Tribunal noted that the Applicant requested time to obtain payslips, however, made no contact with the Tribunal subsequent to the request [13]-[14].
- The Tribunal stated:

  '…the Tribunal is not in the position to accurately determine what [the Applicant's] fortnightly earnings were in the debt period and therefore if the debt calculations are correct. Part of the calculations involved averaging out income rather than taking account of variable income' [17].

- The Tribunal found that no sole administrative error or special circumstances existed to justify a write off or waiver of the recalculated debt and considered the preferable course of action was to remit the matter to Centrelink to conduct further investigations about the Applicant's actual income using its information-gathering powers [27].

AAT Review Number	DOC ID	Member	Date
2019/S142488	CTH.3043.0033.1737	T Bubutievski	9 December 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside.

Key Findings

- An ARO affirmed the debt on internal review.
- Centrelink also imposed a 10% recovery fee, which was subsequently removed.
- The Tribunal commented:

  In calculating this overpayment, Centrelink has simply averaged [the Applicant's] income over the relevant financial year periods, with no regard to the variations in her income from fortnight to fortnight, or the information it had before it in the form of [the Applicant's] estimates for family tax benefit, which clearly showed that she had advised Centrelink that her income was no longer $924.67 per month [10].

- The Tribunal was satisfied this was a Robodebt [13], and that no debt existed.

AAT Review Number	DOC ID	Member	Date
2019/M142519 & 2019/M142495	CTH.3761.0004.1040	R Perton	10 December 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt based on the Applicant's actual income on a fortnightly basis.

Key Findings

- ATO information was used to calculate the Applicant's debt, however, the Tribunal found it was not in a position to accurately determine what the Applicant's fortnightly earnings were in the debt periods and accordingly whether the debt calculations were correct [20].
- The Tribunal found that there was no sole administrative error or special circumstances warranting the recalculated debt to be written off or waived.

AAT Review Number	DOC ID	Member	Date
2019/B142304	CTH.3761.0002.8302	Senior Member D Benk	11 December 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and the matter was remitted to Centrelink with a direction to obtain payroll records and/or payslips from relevant employers.
- The Tribunal directed that Centrelink reassess the Applicant's entitlements on the receipt of this information

Key findings

- The Tribunal noted that in determining the overpayment (debt)debt Centrelink had, in the absence of payroll records and or payslips, applied an apportionment method to cross- reference reported earnings and entitlement generated as a result of many years after the event, relying in the main on figures provided by the ATO and stated: [4].
- The Tribunal stated: 'Ordinarily the tribunal has no issues with applying the apportionment method where income is steady however this is not the case here' [4].
- Despite the vast number of documents before it, the Tribunal was of the view there was a paucity of evidence to provide a breakdown of earnings from each employer for each relevant Centrelink fortnightly instalment of NSA. The Tribunal noted this situation could have been corrected by the provision of payroll records and/or payslips and stated: [6].
- The Tribunal stated also that '[a]s a last resort bank records may be satisfactory provided there was a reassurance by [the Applicant] that no deductions were made apart from taxation' [6].
- The Tribunal further stated they understood that:

  …since the robodebt controversy, most recently in November 2019, Centrelink has instigated various and more robust processes for the gathering of additional information including obtaining via its powers, employment records, bank records, payroll records etc. This action is mandatory in this case as the evidence discloses [the Applicant] worked variable periods for various employers at variable hours and the averaging of income over two financial years does not produce an accurate statement of the income earned during the various fortnightly reporting periods concerned for the payment of newstart benefits. The ATO information therefore is unreliable when it comes to cross referencing declared income, particularly when [the Applicant] was not in regular receipt of benefits throughout this period of time [7].

- The Tribunal did not consider whether special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M142463	CTH.3761.0005.6612	D Benk	11 December 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the Applicant's entitlements on the basis payroll records and/or payslips Centrelink was directed to obtain from the Applicant's relevant employers.

Key findings

- The Tribunal noted:

  In determining the overpayment (debt) Centrelink, in the absence of payroll records and or payslips, applied an apportionment method to cross reference reported earnings and entitlement generated - many years after the event, relying in the main on figures provided by the Australian Taxation Office. This process has been labelled by the media as a 'robodebt'. Ordinarily the tribunal has no issues with applying the apportionment method where income is steady however this is not the case here [3].

- The Tribunal found it could not 'be satisfied that the debt has been correctly calculated or if one even exists' [6].
- The Tribunal noted the situation could be corrected by the provision of payroll records and/or payslips and '[a]s a last resort, bank records may be satisfactory provided there was a reassurance by [the Applicant] that no deductions were made apart from taxation' [6].

- The Tribunal stated:

  …since the robodebt controversy, most recently in November 2019, Centrelink has instigated various and more robust processes for the gathering of additional information including obtaining via its powers, employment records, bank records, payroll records etc. This action is mandatory in this case, as the evidence discloses [the Applicant] worked variable hours for five separate employers during the debt period stemming over two years and the averaging of income over the financial year does not produce an accurate reflection of the income earned during the various fortnightly reporting periods concerned for the payment of newstart benefits. The ATO information therefore is unreliable when it comes to cross referencing declared income, particularly when [the Applicant] was not in regular receipt of benefits throughout this period of time.

- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M143336	CTH.3761.0006.0688	D Benk	11 December 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the basis of payroll records and/or payslips Centrelink was directed to obtain.

Key findings

- The issue before the Tribunal was whether the Applicant was overpaid NSA and the application of a 10% penalty by Centrelink following a data match with information obtained from the ATO [1].
- The Tribunal noted:

  In determining the overpayment (debt) Centrelink in the absence of payroll records and or payslips applied an apportionment method to cross reference reported earnings and entitlement generated as a result; - many years after the event, relying in the main on figures provided by the Australian Taxation Office. This process has been labelled by the Media as a robodebt. Ordinarily the tribunal has no issues with applying the apportionment method where income is steady however this is not the case here.

- The Tribunal noted that the apportionment method did not work in the Applicant's circumstances [4].
- The Tribunal found, with reference to Centrelink's powers to obtain pay information from employers, that:

  The tribunal understands that since the robodebt controversy, most recently in November 2019, Centrelink has instigated various and more robust processes for the gathering of additional information including obtaining via its powers, employment records, bank records, payroll records etc. This action is mandatory in this case, as the evidence discloses [the Applicant]worked variable periods for various employers at variable hours and the averaging of income over three financial years does not produce an accurate statement of the income earned during the various fortnightly reporting periods concerned for the payment of newstart benefits. The ATO information therefore is unreliable when it comes to cross referencing declared income [7].

- The Tribunal remitted the matter to Centrelink for recalculation [8].
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M142622	CTH.3025.0003.8872	D Benk	11 December 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and the matter is remitted to Centrelink for recalculation on the basis that Centrelink obtain evidence of actual fortnightly income.

Key Fi ndings

- An ARO affirmed the debt on internal review but waived the recovery fee.

- The Tribunal commented:

  In determining the overpayment (debt) Centrelink, in the absence of payroll records and or payslips, applied an apportionment method to cross reference reported earnings and entitlement generated as a result; - many years after the event, relying in the main on figures provided by the Australian Taxation Office.

  This process has been labelled by the media as a 'robodebt.' Ordinarily the tribunal has no issued with applying the apportio nment method where income is steady however this is not the case here [4].

- The Tribunal was not satisfied that Centrelink's calculations were correct and remitted the decision for recalculation on the basis of actual income. Centrelink was to obtain the records from the Applicant's employer.

AAT Review Number	DOC ID	Member	Date
2019/S143984	CTH.3761.0001.5085	D Benk	12 December 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside remitted to Centrelink for recalculation of the debt using payslip information (to be obtained by Centrelink).

Key findings

- The Tribunal commented:

  In November 2019, Centrelink publically (sic) announced that it would no longer raise debts based only on averaging of data from the ATO and have now instigated various and more robust processes for the gathering of additional information including obtaining via its powers, employment records, bank records, payroll records etc. This action is critical in this case, as the evidence discloses [the Applicant] worked variable periods and for variable hours and therefore averaging of income over two financial years does not produce an accurate statement of the income earned during the individual fortnightly reporting periods that applied to [the Applicant's] newstart benefits. The ATO information therefore is unreliable when it comes to calculating [the Applicant's] true entitlement to newstart allowance and whether or not there has been an overpayment [6].

- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M142628	CTH.3761.0005.6066	R Perton	12 December 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink to further investigate the Applicant's actual income and recalculate the debt on that basis.

Key Findings

- Centrelink raised the debt following a data match with the ATO and recalculated the debt using additional evidence of income from various sources. It determined that the debt amount and period were incorrect and increased the debt for a shortened period [3]-[4].
- The Applicant submitted that his income during the relevant period was variable, however, he was unable to provide records of this
- The Tribunal found that, on the balance of probabilities, the Applicant was overpaid because there were likely to be inadvertent mistakes in reporting given the circumstances [18]. It noted, however, that it could not determine what the Applicant's earnings were in the debt period and that a further recalculation of the debt after an attempt to obtain actual pay records was necessary [20].
- The Tribunal found that there was no sole administrative error or special circumstances warranting the debt to be written off or waived but considered that remitting the matter to Centrelink for recalculation of the debt following further investigations was the preferable course of action.

AAT Review Number	DOC ID	Member	Date
2019/H143108	CTH.3761.0005.6826	D Benk	12 December 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the Applicant's entitlement on the basis of payroll records and/or payslips Centrelink was directed to obtain.

Key findings

- The Tribunal noted Centrelink apportioned ATO data to raise a debt against the Applicant [4].
- The Tribunal found:

  …the apportionment method did not work in the Applicant's circumstances. In the assessment of the matter, Centrelink primarily relied on the apportionment method, which is not appropriate given the casual nature of her work [5].

- The Tribunal found it could not be satisfied that the debt raised by Centrelink was correct and noted the situation could be remedied by the provision of payroll records and/or payslips. Bank records may be satisfactory as a last resort 'provided there was a reassurance by [the Applicant] that no deductions were made apart from taxation and some confirmation as to the timing between earning the amounts and the amounts being paid into her bank account' [6].
- The Tribunal stated that Centrelink had announced 'that it would no longer raise debts based only on averaging of data from the ATO' and would use powers to obtain employment and payroll records which the Tribunal stated would be 'critical' in the Applicant's case as she worked 'for variable periods and for variable hours' [7].
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M141987	CTH.3761.0006.1174	F Zuccala	12 December 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the basis of payslip information.
- Any resultant debt was recoverable.

Key Findings

- The tribunal was satisfied that the gross amounts from the ATO data matching exercise provided enough evidence for Centrelink to question whether the Applicant had accurately reported her income during the relevant period [9]. However, the exact amount needed to be calculated using payslips [11].
- The Tribunal found:

  Centrelink will need to u on-gathering powers under section 192 of the Administration Act to contact [the Applicant's] employers from the relevant period to obtain payslips in order to make those calculations [12].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/P142637	CTH.3067.0016.2176	M Martellotta	12 December 2019

How it was decided and key facts

Outcome

- The decision under review was set aside and the Tribunal decided the Applicant did not owe a debt.

Key Findings

- An ARO affirmed the debt on internal review.
- The Tribunal commented:

  In the tribunal's view the approach taken by the Department in its calculation of any possible overpayment in this matter was not an acceptable method. Their approach fails to take into account the reality of [the Applicant's] casual employment and the actual earnings for each fortnight period. As such it fails to provide a precise or acceptable calculation of any alleged overpayment. The Department has powers by which it could have required [the Applicant's] former employer to provide relevant income information which would have provided the Department a proper evidentiary basis upon which to calculate any possible overpayment. Instead it placed the onus on [the Applicant] which as noted after considerable time and effort on her part has resulted in her providing a selection of payslips at hearing [12].

- Despite the Applicant providing some payslips, the quantum of the debt was unclear. The Tribunal could not be satisfied of the existence of the debt, and so concluded that no debt was owed.

AAT Review Number	DOC ID	Member	Date
2019/S144159	CTH.3043.0033.4668	D Benk	19 December 2019
How it was decided and key facts			

Outcome

- The decision under review was set aside and the matter was remitted to Centrelink for recalculation on the basis that Centrelink obtain evidence of actual fortnightly income.

Key Findings

- An ARO affirmed the debt on internal review.
- The Tribunal commented:

  In determining the overpayment (debt) Centrelink, in the absence of payroll records and or payslips, applied an apportionment method to cross reference reported earnings and entitlement generated as a result; - many years after the event, relying in the main on figures provided by the Australian Taxation Office. This process has been labelled by the media as a 'robodebt.' Ordinarily the tribunal has no issued with applying the apportionment method where income is steady however this is not the case here [3].

- The Tribunal was not satisfied that Centrelink's calculations were correct and remitted the decision for recalculation on the basis of actual income. Centrelink was to obtain the records from the Applicant's employer.

AAT Review Number	DOC ID	Member	Date
2019/S142440	CTH.3761.0005.6639	AJ Halstead	8 January 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with directions that:
  - obtain detailed earnings and payroll information for the Applicant from their employer and bank statement records in the event payroll information is unavailable;
  - the debt be recalculated by apportioning the Applicant's income in each instalment period according to law with reference to his actual income; and
  - the recalculated debt, if any, is to be recovered.

Key Findings

- The Tribunal found Centrelink originally used ATO data to assess the Applicant's entitlement to NSA and determine the debt, and then reassessment of the debts later occurred after the Applicant supplied bank statement records relevant to part of one of the periods he was paid NSA [9].
- The Tribunal was satisfied that where available bank statement records were used to obtain a 'grossed-up' amount it was accurate; however, for periods where bank statement records were not available and averaging was applied, the

Tribunal stated:

…the Tribunal cannot be satisfied the use of averaged income accurately reflects the income received by [the Applicant] from employment on a fortnightly basis. It is not accepted that averaging income for the period he received newstart allowance, for which bank statement records are not available, has been correctly apportioned as required by section 1073B of the Act [12].

- The Tribunal found that Centrelink's calculations inaccurate and not calculated in accordance with legislative requirements. It stated:

  …the evidence does not establish that the Applicant's income was the same from one period to the next and so an averaging does not reflect actual income for each social security payment period. In such circumstances the debt for those periods needs to be recalculated with reference to actual periodic income' [13].

- The Tribunal found that should the Department issue the required notice in accordance with s 1229 of the Act and the debt remains unpaid, an interest charge would arise [18].
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/B144665	CTH.3761.0002.5386	D Benk	10 January 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt on the basis of payroll records Centrelink was directed to obtain.

Key Findings

- The Tribunal found that the Applicant's income was determined using an apportionment method despite fluctuating income/hours worked per week. Debts raised through this process have been labelled by the media as "robo-debts". The Tribunal stated that while the apportionment method could provide an accurate calculation where income is steady, this is not the case here.[3].
- The Tribunal could not be satisfied that the debt raised by Centrelink was correct [5].
- The Tribunal stated:

  In November 2019, Centrelink publicly announced that it would no longer raise debts based only on averaging of data from the ATO and has now instigated various and more robust processes for the gathering of additional information including obtaining it via its powers, employment records, bank records, payroll records etc. This action is critical in this case, as the evidence discloses [the Applicant's] worked variable periods at variable hours and therefore averaging of income over the above period does not produce an accurate statement of the income earned during the individual fortnightly reporting periods that applied to [the Applicant's] parenting payment. The existing information therefore is largely unreliable when it comes to calculating [the Applicant's] true entitlement to parenting payment and whether or not there has been an overpayment [6].

- The Tribunal remitted the matter back to Centrelink with a direction to obtain the payroll records and/or payslips from the relevant employer [7].
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/P144721	CTH.3761.0005.8465	D Benk	10 January 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the basis of payroll records/payslip information Centrelink was directed to obtain.

Key Findings

- The Tribunal noted that, in determining the overpayment many years after the event and in the absence of payroll

records and/or payslips, Centrelink applied an apportionment method to cross-reference amounts averaged from annual figures provided by the ATO with the earnings the Applicant originally reported [3].
- The Tribunal stated that Centrelink gathering additional information via its powers, including employment records, bank records, payroll records, etc., was 'critical' in this case as income averaging does not produce an accurate statement of earnings reflecting the Applicant's circumstances [6].
- Waiver and write off were not considered because the Tribunal was not satisfied that a debt existed.

AAT Review Number	DOC ID	Member	Date
2019/M144758	CTH.3761.0005.6829	D Benk	10 January 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink with directions that it obtain payroll records and/or payslips from relevant employers.

Key Findings

- The Tribunal summarised Centrelink's method:

  In determining the overpayment (debt) many years after the event and in the absence of payroll records and/or payslips, Centrelink applied an apportionment method to cross reference amounts averaged from annual figures provided by the Australian Taxation Office with the earnings [the Applicant] had originally reported. Debts raised through this process have been labelled by the media as "robo-debts". While the apportionment method can provide an accurate calculation where income is steady, this is not the case here [3].

- The Tribunal noted that Centrelink's apportionment method was not correct in circumstances where the Applicant worked as a casual employee with varying income [4].
- The Tribunal remitted the matter back to Centrelink on the basis that:

  In November 2019, Centrelink publically [sic] announced that it would no longer raise debts based only on averaging of data from the ATO and has now instigated various and more robust processes for the gathering of additional information including obtaining it via its powers, employment records, bank records, payroll records etc. This action is critical in this case, as the evidence discloses [the Applicant] worked variable periods at variable hours and therefore averaging of income over the above period does not produce an accurate statement of the income earned during the individual fortnightly reporting periods that applied to [the Applicant's] newstart allowance. The existing information therefore is unreliable when it comes to calculating [the Applicant's] true entitlement to newstart allowance and whether or not there has been an overpayment.

- The Tribunal did not consider whether administrative error or special circumstances existed to justify the write off or waiver of the debt [5].

AAT Review Number	DOC ID	Member	Date
2019/S145030	CTH.3043.0034.5197	D Benk	13 January 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and the debt is waived in full.

Key Findings

- An ARO affirmed the debt on internal review, but waived the interest charge.
- The Tribunal commented:

  In determining the overpayment (debt) Centrelink, in the absence of payroll records and or payslips, applied an apportionment method to cross reference reported earnings and entitlement generated as a result; - many years after the event, relying in the main on figures provided by the Australian Taxation Office. This process has been labelled by the media as a 'robodebt'. Ordinarily the tribunal has no issues with applying the apportionment method where income is steady however this is not the case here as employment is at best casual.[3]

The Tribunal stated:

> Centrelink primarily relied on the apportionment method but in this case, there were also some reporting of earnings without verification via payslips. This makes it difficult for the tribunal to assess whether the debt has been correctly calculated. For this reason, the tribunal cannot be satisfied that the debt as raised by Centrelink is correct. In any event, this coupled by the advice of Centrelink that [the Applicant] was no longer required to report along with his mental health issues results in a finding that special circumstances exist sufficient to waive the debt. [5]

AAT Review Number	DOC ID	Member	Date
2019/B143117	CTH.3761.0002.5733	M Amundsen	14 January 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that there was no debt as calculated by Centrelink.

Key Findings

- The Tribunal found that debt was raised by relying on the apportionment of income.
- Despite its broad information gathering powers, Centrelink did not try to obtain information from applicant's employers about his earnings [14].
- The Tribunal was not satisfied that debt calculated by Centrelink is accurate.
- The Tribunal stated:

  > As I understand it, the term "robodebt" (which has been used regularly in recent media publications), refers to a Centrelink procedure whereby earnings information provided to Centrelink by the Australian Taxation Office (ATO) is apportioned over the period to which the earnings information is stated to relate. Essentially an assumption is made that the specified earnings were earned at a constant rate over the specified period. That apportioned earnings information is then used to determine whether a person has been overpaid any social security payments. In cases where Centrelink concludes a debt has arisen, customers are invited to provide information to show that Centrelink's conclusion is incorrect [9].

- In my view, the assumption inherent in the "robodebt" process will often not be sustainable [10].

  > From information in the Centrelink papers, it is apparent that Centrelink raised [the Applicant's] debt relying, at least in part, on the apportionment of income amounts as advised by the ATO [11].

- The Tribunal referred to Justice Davies' judgment in the Amato proceeding.
- The Tribunal was not satisfied that the Applicant had the debt as calculated by Centrelink, and accordingly set the decision aside and found there is no foundation for the decision that a penalty amount should be added.
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/S143608	CTH.3041.0012.4080	J Leonard	16 January 2020
How it was decided and key facts			

Outcome

- In relation to both the Newstart and Austudy payment, the decision under review was set aside and the matter was remitted to Centrelink for recalculation.

Key Findings

- An ARO affirmed the debt on internal review.
- Centrelink apportioned the Applicant's income over the period in question. After receiving the Applicant's bank account statements it based its calculations on those actual figures.
- The Tribunal commented:

  > In cases such as this, the onus is on Centrelink to establish that a person has been overpaid, and also the amount of the overpayment. It is not the case that a person owes a debt to Centrelink unless it is proved otherwise (McDonald v

Director-General of Social Security [1984] FCA 59). On the evidence before it the Tribunal cannot find that Centrelink has established that [the Applicant] has a debt of newstart allowance from 1 July 2015 to 16 December 2015 [17].

- The Tribunal commented:

  The Tribunal also noted the consent orders in the case of Amato v Commonwealth (FCA, 27 November 2019) and the notes to those orders, in which it was stated that in that case Centrelink had "no probative evidence" to support an assumption that Ms Amato had earned a set amount of fortnightly income during the period, and that there was material before the decision maker, being the applicant's reported earnings, which indicated that the applicant had not earned a steady amount of income during the relevant fortnights. The same applies here [18].

AAT Review Number	DOC ID	Member	Date
2019/B144262	CTH.3761.0005.8101	D Tucker	17 January 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that the debt be waived due to the special circumstances of the case.

Key Findings

- The Tribunal noted that Centrelink reviewed the Applicant's entitlements for the 2012/13 FY after a data match with the ATO [2].
- The Tribunal found that, to estimate the Applicant's debt, 'Centrelink apportioned the income not accounted for by the Applicant's payslips … over 140 days' [11].
- The Tribunal found apportioning annual income across the relevant period

  …only provides an accurate estimate of a person's income if they have worked regular hours and received regular earnings throughout the relevant period. Where a person's earnings are irregular or sporadic, it can erroneously indicate that a person has been overpaid and consequently owes a debt [13].

- The Applicant advised the Tribunal that when notified of his alleged debt he sought payroll records from his former employer but they had already been discarded. The Tribunal took the view that remitting the matter to Centrelink was unlikely to achieve anything given the difficulty in obtaining records [17].
- The Tribunal found that special circumstances existed to justify waiving the Applicant's debt [24].

AAT Review Number	DOC ID	Member	Date
2019/M143253	CTH.3041.0011.7879	J Nalpantidis	17 January 2020
How it was decided and key facts			

Outcome

- Part of the decision under review was affirmed. The other part of the debt was set aside and remitted to Centrelink for recalculation.

Key Findings

- An ARO varied the debt amount on internal review.
- In relation to one of the debts, the Tribunal commented:

  Centrelink therefore apportioned [the Applicant's] pay period income to the Centrelink period by working at a daily rate from his actual pay periods and apportioning this actual daily rate to the Centrelink fortnightly pay periods [16].

- In relation to another of the debts, there is some evidence that the Applicant did not correctly report their income [41].
- The Tribunal was not satisfied that some of the debt was correctly calculated, and remitted the decision to Centrelink for recalculation based on actual fortnightly income.

AAT Review Number	DOC ID	Member	Date
2019/A143317	CTH.3761.0002.7132	D Benk	20 January 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt after obtaining payslips from the Applicant's relevant employers.

Key Findings

- Centrelink raised five debts following a data match with the ATO [3].
- The Tribunal found:

  In determining the overpayment (debt) many years after the event and in the absence of payroll records and/or payslips, Centrelink applied an apportionment method to cross-reference amounts averaged from annual figures provided by the Australian Taxation Office with the earnings [the Applicant] had originally reported. Debts raised through this process have been labelled by the media as "robodebts". While the apportionment method can provide an accurate calculation where income is steady, this is not the case here [3].

  [The Applicant] testified that she was a casual employee during the above period. There were fortnights where she earned significant amounts and other fortnights where the income was negligible. Hence, the apportionment method does not work in her circumstances. In the assessment of the matter, Centrelink primarily relied on the apportionment method, which is not correct for these circumstances [4].

  In November 2019, Centrelink publically announced that it would no longer raise debts based only on averaging of data from the ATO and have now instigated various and more robust processes for the gathering of additional information including obtaining via its powers, employment records, bank records, payroll records etc. This action is critical in this case, as the evidence discloses [the Applicant] worked variable periods at variable hours and therefore averaging of income over the above period does not produce an accurate statement of the income earned during the individual fortnightly reporting periods that applied to [the Applicant's] newstart allowance. The existing information therefore is unreliable when it comes to calculating [the Applicant's] true entitlement to newstart allowance and whether or not there has been an overpayment [6].

- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt as it could not be satisfied that the debt amount was accurate [5].

AAT Review Number	DOC ID	Member	Date
2019/B142815	CTH.3041.0011.3869	DC McKelvey	21 January 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and the matter remitted to Centrelink for recalculation.

Key Findings

- An ARO varied the debt on internal review.
- The Tribunal commented:

  This calculation methodology has attracted continuing criticism by the Tribunal. The calculation will only be accurate if an employee's actual work and earning pattern reflects this assumed regularity of employment and earnings. It will not be accurate if there is variation in actual hours or days worked, if not the rate of remuneration, in any particular fortnight [13].

- The Tribunal was not satisfied the calculations were correct and remitted the decision back to Centrelink for recalculation.

AAT Review Number	DOC ID	Member	Date
2019/B135307	CTH.3041.0011.9071	S Letch	22 January 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and the matter was remitted to Centrelink for reconsideration in accordance with the direction that Centrelink recalculate the subject debt in light of the payslips supplied to it.

Key Findings

- The Tribunal noted that the Centrelink materials suggested that the Applicant's case was originally a robodebt [3].
- The Tribunal noted that the source of the employer information appeared to have been the Applicant's online disclosure via an app. The Applicant subsequently provided their payslips, but it did not appear that Centrelink had taken any action on the payslips [3].
- The Tribunal noted that there appeared to be discrepancies between the information disclosed via the app, and the payslip information. On this basis, the Tribunal concluded that it could not be satisfied of the debt calculation before it was correct [3].
- The Tribunal directed Centrelink to recalculate the debt based on the Applicant's payslips, and to consider with regard to the inaccuracies in averaging the Applicant's pay information and their disclosures, whether the evidence reliably supports a conclusion that a debt exists [5].
- The Tribunal noted:

  As a general observation, the Tribunal empathises with the difficulties faced by many recipients of casual income in meeting Centrelink's disclosure obligations. The Tribunal also observes that a Centrelink calculation based on fortnightly payslips is still not accurate and relies on averaging over the particular fortnight. The only way for an accurate calculation to be made would be to obtain [the Applicant]'s pay information for every single day she worked; rarely will this information be available from employers. The Tribunal observes that a comparison of the sums disclosed by [the Applicant], and her pay information, reveal what the Tribunal considers genuine attempts by [the Applicant] to properly disclose her earnings [4].

- The Tribunal did not consider issues of sole administrative error or special circumstances.

AAT Review Number	DOC ID	Member	Date
2019/B144109	CTH.3041.0011.3033	D Benk	23 January 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and the matter was remitted to Centrelink for reconsideration in accordance with the direction to obtain the payroll records and/or payslips from the Applicant's employers. On receipt of that documentation, the Tribunal directed that entitlements be reassessed and the Applicant be notified of the outcome [6].

Key Findings

- The Tribunal noted that Centrelink:

  applied an apportionment method to cross-reference amounts averaged from annual figures provided by the Australian Taxation Office with the earnings [the Applicant] had originally reported. Debts raised through this process have been labelled by the media as "robodebts". While the apportionment method can provide an accurate calculation where income is steady, this is not the case here [3].

- The Tribunal noted Centrelink's public announcement in November 2019, that it would no longer raise debts based on averaging, and had implemented 'more robust processes for the gathering of additional information including obtaining via its powers, employment records, bank records, payroll records etc' [5].
- The Tribunal noted that this action was critical in the Applicant's case, who worked variable periods at variable hours, as the use of averaging 'over the debt period does not produce an accurate statement of the income earned during the individual fortnightly reporting periods that applied to [the Applicant's] carer payment' [5].
- The Tribunal concluded that, on this basis, the existing information was unreliable for calculating the Applicant's 'true entitlement to carer payment and whether or not there has been an overpayment' [5].

- The Tribunal noted that it could not consider issues of sole administrative error or special circumstances because it could not be 'satisfied that the debt has been correctly calculated or if one exists' [4].

AAT Review Number	DOC ID	Member	Date
2019/H143014	CTH.3041.0012.3668	A Schiwy	23 January 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and the matter was remitted to Centrelink for reconsideration in accordance with the direction that it obtains payroll information relating to the Applicant's earnings during the period between 10 September 2017 to 20 June 2018.
- Having regarding to this payroll information, the Tribunal also directed Centrelink to recalculate the amount of the Applicant's DSP for the period 10 September 2017 to 20 June 2018, and to ensure there is 'no double counting of overpayments with the second debt raised from 14 May 2018'.
- The Tribunal confirmed that the resultant debt is recoverable from the Applicant, with the exception of the portion of debt incurred after 17 November 2017, which is to be waived.

Key Findings

- On February 26 2019, the Applicant notified Centrelink that they were working. Centrelink reviewed the Applicant's prior payments and on 26 March 2019 'an officer from Centrelink decided to raise and recover a disability support pension debt of $13,246.40 for the period 10 September 2017 to 20 June 2018' [3].
- The Tribunal noted evidence that Centrelink had contacted the Applicant on 17 November 2017, who confirmed that they were employed from around 31 August 2017. A review was not finalised, but Centrelink noted that the Applicant was aware of their requirement to report income within 14 days [11].
- The Tribunal concluded from the evidence that the Applicant was working from sometime in September 2017 and had not reported their earnings [15].
- The Tribunal noted that Centrelink had provided:

  Debt calculations showing that the debt was calculated from 10 September 2017 to 20 June 2018 and the amount overpaid was $654.59 per fortnight – the income included was $1,477.18 per fortnight and appears to be based on the ATO information above [11].

- The Tribunal noted that the 'debt calculation appears to have been assessed on earnings of around $738 per week based on prorating the gross income advised by the ATO' [15].
- The Tribunal noted their concern 'that the debt is calculated to 20 June 2018 but there appears to be another debt commencing from 14 May 2018' [16].
- The Tribunal decided that the debt needed to be recalculated, taking into account the Applicant's actual earnings from the relevant employer, and the debt raised from 14 May 2018 to ensure no double counting occurred [18].
- The Tribunal found that no sole administrative error existed to waive the debt [21]-[24]
- However, the Tribunal found that special circumstances existed, and that the debt accrued from 17 November 2017 to 20 June 2018 be waived [31].

AAT Review Number	DOC ID	Member	Date
2019/B143957	CTH.3041.0011.6791	M Amundsen	28 January 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside, and the Tribunal substituted its own decision that there was no debt as calculated by Centrelink.

Key Findings

- The Tribunal noted that it was apparent that Centrelink had used information from the ATO and the Applicant's bank statements to raise the Applicant's debt [12].

- The Tribunal stated that:

  As I understand it, the term "robo been used with some regularity in recent media publications), refers to a Centrelink procedure whereby earnings information provided to Centrelink by the ATO is apportioned over the period to which the earnings information is stated to relate. Essentially an assumption is made that the specified earnings were earned at a constant rate over the specified period. That apportioned earnings information is then used to determine whether a person has been overpaid any social security payments. In cases where Centrelink concludes a debt has arisen, customers are invited to provide information to show that Centrelink's conclusion is incorrect [13]. In my view, the assumption inherent in the "robodebt" process will often not be sustainable [14].

- The Tribunal reviewed a copy of Centrelink's Casual Earnings Apportionment table, and was not able to reconcile certain information with information in other documents [15].
- The Tribunal identified the relevance of Federal Court proceedings where Justice Davies 'issued Consent Orders declaring that the demand for payment of the alleged debt was not validly made' to the Applicant [17]-[18].
- Regarding an excerpt from Centrelink's Interaction Log Details printout:

  it is recorded on 18 June 2019 that the earnings amount advised by the ATO exceeded the "grossed up" bank deposits by $809.71. After the comment "not sure why we have the discrepancy", it is recorded that Centrelink "apportioned it [that is, $809.71] where it will not impact on her rate". In my view, that approach does not support a conclusion that the relevant decision maker had a proper basis to form the view that [the Applicant] has a debt in the amount determined by Centrelink [19].

- The Tribunal was not satisfied that the Applicant had the debt as calculated by Centrelink, and set aside the decision [21].
- The Tribunal noted that it remains open to Centrelink to use its information gathering powers, undertake further investigations and make decisions using probative evidence and social security law [22].
- The Tribunal did not consider issues of sole administrative error or special circumstances.

AAT Review Number	DOC ID	Member	Date
2019/H144190	CTH.3041.0011.6226	D Benk	28 January 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and the matter was remitted to Centrelink for reconsideration in accordance with the direction to obtain the payroll records and/or payslips from the Applicant's employers. On receipt of that documentation, the Tribunal directed that entitlements be reassessed and the Applicant be notified of the outcome [6].

Key Findings

- Centrelink, in the absence of payroll records and/or payslips, 'applied an apportionment method to cross reference amounts averaged from annual figures provided by the Australian Taxation Office (ATO) with the earnings [the Applicant] had originally reported', labelled as 'robodebts' [3].
- The Tribunal noted that because the Applicant's income was not steady, the apportionment method could not provide an accurate calculation [3].
- The Tribunal noted Centrelink's public announcement in November 2019, that it would no longer raise debts based on averaging, and had implemented 'more robust processes for the gathering of additional information including obtaining via its powers, employment records, bank records, payroll records etc' [5].
- The Tribunal noted that this action was critical in the Applicant's case, who worked variable periods at variable hours, as the use of averaging 'over the debt period does not produce an accurate statement of the income earned during the individual fortnightly reporting periods that applied to [the Applicant's] youth allowance' [5].
- The Tribunal concluded that, on this basis, the existing information was unreliable for calculating the Applicant's 'true entitlement to youth allowance and whether or not there has been an overpayment' [5].
- The Tribunal noted that it could not consider issues of sole administrative error or special circumstances because it could not be 'satisfied that the debt has been correctly calculated or if one exists' [4].

AAT Review Number	DOC ID	Member	Date
2019/M141115	CTH.3761.0002.1060	S Lewis	29 January 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt using payslip information (to be obtained by Centrelink).
- The debt calculations were to be documented in a way that is capable of being checked by a reasonably informed lay person and the Applicant was to be provided with a copy of that documentation.

Key Findings

- The initial debt calculation apportioned income over the debt period using ATO data.
- The Applicant queried Centrelink's calculation of the debt. In order to satisfy the Tribunal that he did not owe a debt, the Applicant endeavoured to source payslips from his various employers and also provided bank statements for the Tribunal's benefit.
- The Tribunal made comments about Centrelink's methods of calculation, and the use of the available income information and found:

  The calculation has then been undertaken through reliance on a combination of verified earnings and unverified earnings using bank statements. Certain bank statements were missing and so could not be made available to the tribunal. The multiple calculations are confusing and the potential for duplication or omission significant. The tribunal also notes that a significant portion of the alleged overpayment relies on unverified employment earnings or earnings only verified through bank statements [14].

  The actual calculations set out there are beyond reproach so far as their accuracy is concerned, provided the additional income amounts have been correctly included for the relevant fortnights. For the reasons identified above, the tribunal was not satisfied that the correct income has been included [15].

  In light of the tribunal's findings, the existing calculations will need to be recalculated and should be undertaken on the basis of earnings information sourced from each employer by Centrelink [16].

- Given the Tribunal was not satisfied that the debt had been raised on the basis of actual fortnightly earnings, the decision under review was remitted back to Centrelink for recalculation.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/B145281	CTH.3761.0001.2698	D Benk	31 January 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and the Tribunal remitted the decision back to Centrelink to recalculate the debt using payslip information (to be obtained by Centrelink).

Key Findings

- The Tribunal directed that Centrelink ought to obtain payslips from the Applicant's employers for the relevant periods.
- The Tribunal was not able to make a decision about waiving the debt, in the absence of proof that a debt actually existed. The Tribunal remitted the decision to Centrelink for recalculation.
- The Tribunal also commented in respect of the Robodebt Scheme:

  In November 2019, Centrelink publically announced that it would no longer raise debts based only on averaging of data from the ATO and have now instigated various and more robust processes for the gathering of additional information including obtaining via its powers, employment records, bank records, payroll records etc. This action is critical in this case, as the evidence discloses [the Applicant] worked variable periods at variable hours and therefore averaging of income over the above period does not produce an accurate statement of the income earned during the individual fortnightly reporting periods that applied to [the Applicant's] newstart allowance. The existing information therefore

is unreliable when it comes to calculating [the Applicant's] true entitlement to newstart allowance and whether or not there has been an overpayment [6].

- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/B145305	CTH.3761.0002.6109	D Benk	31 January 2020
How it was decided and key facts			

Outcome

- The decision was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt on the basis of payroll records/payslips Centrelink was directed to obtain.

Key Findings

- Centrelink determined that the applicant was overpaid NSA totalling $7,782.49. AN ARO affirmed this decision.
- In relation to Centrelink's calculations, the Tribunal found:

  In determining the overpayment (debt) many years after the event and in the absence of payroll records and/or payslips, Centrelink applied an apportionment method to cross reference amounts averaged from annual figures provided by the Australian Taxation Office with the earnings [the Applicant] had originally reported. Debts raised through this process have been labelled by the media as "robodebts". While the apportionment method can provide an accurate calculation where income is steady, this is not the case here [3].

- The Tribunal found that Centrelink applied an apportionment method to cross-reference amounts averaged from annual figures provided by the ATO with earnings originally reported and Tribunal noted that debts such as these have been labelled "robodebts" [3].
- The Tribunal noted that the matter becomes complicated as Applicant said he has never worked at that workplace, despite income being assigned to that source on his ATO record [3].
- The Applicant testified that he was a casual employee during the debt period. His income fluctuated and the apportionment method is not accurate in his circumstances [4].

  In November 2019, Centrelink publically announced that it would no longer raise debts based only on averaging of data from the ATO and have now instigated various and more robust processes for the gathering of additional information including obtaining via its powers, employment records, bank records, payroll records etc. This action is critical in this case, as the evidence discloses [the Applicant] worked variable periods at variable hours and therefore averaging of income over the above period does not produce an accurate statement of the income earned during the individual fortnightly reporting periods that applied to his newstart allowance. The existing information therefore is unreliable when it comes to calculating [the Applicant's] true entitlement to newstart allowance and whether or not there has been an overpayment [6].

- The Tribunal was not satisfied that Centrelink's calculation was correct and the matter was remitted to Centrelink to recalculate the debt.
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/P145505	CTH.3761.0005.7527	D Benk	3 February 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the on the basis of payroll information/payslips Centrelink was directed to obtain.

Key Findings

- The Tribunal found the averaging of income in the Applicant's case had not 'produced an accurate statement' of income earned during the relevant reporting period and the information was therefore 'unreliable' at the time of 'calculating true entitlement' [6].
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/M145561	CTH.3761.0006.0336	D Benk	3 February 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the on the basis of payroll information/payslips Centrelink was directed to obtain.

Key Findings

- The issue before the Tribunal involved determining whether the Applicant was overpaid YA and Austudy, including the validity of the 10% penalty and recovery by garnishee applied to the debts [1].
- The debt was then calculated following data matching information obtained from the ATO and 'an apportionment method used to cross reference reported earnings and entitlement' [3]. The Tribunal stated:

  Debts raised through this process have been labelled by the media as "robodebts". While the apportionment method can provide an accurate calculation where income is steady, this is not the case here.

- The Applicant was a casual employee and there were fortnights where he earned significant amounts and other fortnights were the income was negligible. The Tribunal found that the apportionment method does not work in these circumstances [4].
- The Tribunal directed Centrelink to obtain 'the payroll records and/or payslips from the relevant employers and directs, on receipt of that information, that the entitlement under review be reassessed' [7].
- Regarding the garnishee, the Tribunal stated:

  As an aside, the tribunal wishes to add that it has no power to review the decision concerning the garnishee of [the Applicant's] taxation refund. It also has no power to direct Centrelink to reconsider its decision. However, given the above direction and findings, it would be open and indeed appropriate for Centrelink to review its conduct with respect to that garnishee [9].

- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/B143017	CTH.3041.0014.3320	J Green	3 February 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the direction that the Applicant had not been overpaid NSA during the period from 22 May 2013 to 9 January 2017.

Key Findings

- The Tribunal noted that:

  The debt was calculated during periods from 22 May 2013 to 9 January 2017 when [the Applicant] was employed and receiving payments from Centrelink. Centrelink has been provided with [the Applicant's] pay records and bank statements and has concluded that [the Applicant] made errors in his reporting which resulted in him being paid $1,170.36 more than he was entitled to receive. The decision was affirmed by an authorised review officer on 2 October 2019.

- The Tribunal compared the employer's pay records with the Applicant's declared income and concluded the likelihood that the Applicant had under-declared income in some fortnights, and on other occasions over-declared income [8].
- The Tribunal noted that the employer's pay records showed that the Applicant did not earn any income between 30 December 2015 and 28 January 2016, but that part of the debt had been attributed to this period [9].
- The Tribunal was not satisfied that the Applicant was paid more than their entitlement during the relevant period, and found that the Applicant had not been overpaid [10].
- The Tribunal did not consider issues of sole administrative error or special circumstances.

AAT Review Number	DOC ID	Member	Date
2019/M143353	CTH.3761.0001.3904	D Benk	4 February 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and the Tribunal remitted the decision back to Centrelink to recalculate the debt using payslip information (to be obtained by Centrelink).

Key Findings

- The Applicant's debt was not calculated on the basis of his actual fortnightly income, and so there had been discrepancies in the calculation. The Tribunal was not satisfied that the calculations were correct and remitted the decision back to Centrelink.
- Centrelink were required to obtain actual earnings information from the Applicant's employers.
- In its decision, the Tribunal commented that:

  In determining the overpayment (debt) many years after the event and in the absence of payroll records and/or payslips, Centrelink applied an apportionment method to cross reference amounts averaged from annual figures provided by the Australian Taxation Office with the earnings [the Applicant] had originally reported. Debts raised through this process have been labelled by the media as "robodebts". While the apportionment method can provide an accurate calculation where income is steady, this is not the case here [4].

- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M144025	CTH.3761.0006.0628	P Sperling	5 February 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the on the basis of payroll information/payslips Centrelink was directed to obtain.
- Centrelink was directed to refund amounts already recovered under the garnishee notice and any other amounts.

Key Findings

- The Tribunal stated that 'Centrelink is only entitled to raise a debt under subsection 1223(1) of the Act if there is a proper basis for forming the view that a debt in the amount sought is owed' [20].
- The Tribunal found:

  …there [was] insufficient information about the Applicant's actual income during the relevant period to support the reliability and accuracy of Centrelink's debt calculation. Given this, the tribunal [was] unable to conclude that a debt of the amount calculated by Centrelink has arisen [23]-[24].

- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M143891	CTH.3041.0018.0797	M Martellotta	6 February 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the direction that Centrelink exercises its powers to obtain information from the Applicant's employer.
- The Tribunal also directed that any overpayment be recalculated on this basis and is a debt, that 50% of the recalculated debt be waived due to special circumstances, and that any amount that had been recovered from the Applicant in excess of the recalculated and waived amount be remitted to the Applicant.

Key Findings

- The Tribunal deferred making a decision and requested information from the Applicant's employer [6].
- Following a data match between the ATO and Centrelink, Centrelink determined that some of the Applicant's earned income was not taken into account when their rate of DSP was calculated [14].
- 'The tribunal was satisfied that payments received by [the Applicant] from her employment … did not include excluded amounts' [19].
- The Tribunal noted that it appeared that different methodologies had been used in the debt calculation, and highlighted a reference where a particular period had 'apportioned on the basis of ATO provided figures' [22].
- The Tribunal noted an ADEX schedule report:

  which appears to show that the Department has simply taken the ATO advised amount and apportioned this equally over the debt period to arrive at a debt amount of $3,893.69. Clearly this is not an acceptable method to calculate an alleged debt. This approach taken by the Department fails to take into account the actual earnings for each fortnightly period and as such does not provide a precise or acceptable calculation of any alleged overpayment [22].

- The Tribunal also referred to 'other notes on the file refer to the Department taking net income amounts from the bank statements that [the Applicant] had provided but noting that pay dates had been modified' [23].
- The Tribunal viewed the approach used by the department as one which did 'not provide an acceptable or precise basis upon which to calculate any alleged overpayment' [24].
- The Tribunal determined that the matter be remitted and directed the department to obtain payslips to calculated any overpayment. If the department then determined an overpayment had occurred, the Tribunal 'is satisfied that any recalculated amount as based on verified payslip evidence will be a debt owed to the Commonwealth' [29].
- The Tribunal found that no sole administrative error existed to waive the debt [33]. However, the Tribunal found overall that special circumstances existed for 50% of the recalculated debt to be waived [27].

AAT Review Number	DOC ID	Member	Date
2019/S143806	CTH.3041.0013.0302	J Leonard	6 February 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and the matter was remitted to Centrelink for reconsideration in accordance with the direction that the Applicant's entitlement to YA within the listed period be recalculated, having regard to the Applicant's payslips. If the payslips do not exist, the use of grossed up employment income as indicated by net wages deposited into the Applicant's bank account is to be used as the basis for recalculation.
- If a YA debt exists, it is to be recovered.

Key Findings

- The Applicant provided payslips from their employers, and bank statements showing deposits of YA and wages after being 'notified of a data match with the Australian Taxation Office which suggested she had not declared all of her earned income' [7]. However, not all payslips for the relevant period were supplied [11], [13].
- The Applicant noted they did not realise they were required to declare income earned and not received [8].
- The Tribunal was, despite this, not satisfied that the overpayment calculation was correct [9].
- In relation to overpayments identified in certain periods, the Tribunal stated the information to be relied upon for recalculation of overpayments. The Tribunal noted that in one instance this should occur, rather than apportioning an amount over a particular period identified [14].
- The Tribunal compared the apportioned income used in the debt calculation against the Applicant's weekly payslips and bank statements for an employer, and detected three calculation errors [15].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt.

AAT Review Number	DOC ID	Member	Date
2019/S143866	CTH.3041.0012.8263	J Forgan	6 February 2020

How it was decided and key facts

Outcome

- The decision under review was varied in accordance with the listed debt amounts for the periods in question.

Key Findings

- The Applicant was contacted after a data match between the ATO and Centrelink showed discrepancies between reported, and received earnings during the relevant periods. Debts for two periods were raised in this basis [3].
- Following a review, further calculations were undertaken with the use of the Applicant's bank statements. The first debt was varied and the second debt was affirmed. Both debt amounts were then affirmed by an ARO [5].
- In relation to the first debt, the Applicant confirmed that they had provided their bank statements for part of the relevant period. The Applicant did not agree with Centrelink averaging their income from ATO information, for the portion of the period in which they had not supplied bank statements [13].
- The Tribunal noted that in the absence of payslips, Centrelink used an average of ATO reported income for a portion of the relevant period [14].
- The Tribunal noted that:

  Although there is a slight shortfall in what was declared by [the Applicant] and what [the Employer] reported as his income to the ATO, I am not satisfied that averaging the income from the ATO is an accurate way to determine the debt amount as he did not work the same shifts and hours each fortnight. For these reasons I am not satisfied that [the Applicant] was overpaid in the Centrelink entitlement periods covering 9 July 2011 to 9 December 2011 [14].

- The Tribunal noted that the use of bank statements was 'a generous interpretation of the social security law', and decided to 'apply the legislation beneficially in this matter', by allowing the net income from the Applicant's bank statements to be used as documentation for earned income, for the remainder of the relevant period. The Tribunal 'carefully checked the debt calculations' for this period, and found an overpayment had occurred in the amount listed [15].
- In relation to the second debt, Centrelink relied fully on the Applicant's bank statements [16].
- The Tribunal made the same comments as to the use of bank statements by Centrelink, but allowed their use as the source documentation for earned income [21].
- The Tribunal 'carefully checked the debt calculations', and found an overpayment had occurred in the amount listed [22].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt.

AAT Review Number	DOC ID	Member	Date
2016/B100308	CTH.3761.0002.5981	D Benk	7 February 2020

How it was decided and key facts

Outcome

- The decision was set aside and remitted to Centrelink for recalculation of the debt with directions that the Applicant correctly reported her income from the first employer and Centrelink was to obtain payroll records from the other relevant employers.

Key Findings

- Centrelink raised a debt following a data match with the ATO. Centrelink submitted that the Applicant earned her income at a constant daily rate. The Tribunal found Centrelink's submissions to be unsubstantiated and preferred the Applicant's sworn evidence that she accurately declared her income [3]-[5].
- The Tribunal directed Centrelink to obtain payroll information from two past employers and recalculate the debt. It stated:

  It is clear that [the Applicant] received an overpayment. Centrelink will need to take reasonable steps to obtain the evidence necessary to accurately recalculate the overpayment [11].

The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/S144461	CTH.3041.0013.6047	D Benk	7 February 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the direction to obtain the payroll records and/or payslips from the Applicant's employer. On receipt of that documentation, the Tribunal directed that entitlements be reassessed and the Applicant be notified of the outcome [7].
- The Tribunal also deemed bank records provided by the Applicant to be unreliable for the purposes of assessing income [7].

Key Findings

- The Applicant sought review on the basis that it was a 'robodebt', and that she could not be satisfied that the debt had been correctly calculated [1].
- The Tribunal noted that:

  In determining the overpayment (debt) many years after the event and in the absence of payroll records and/or payslips, Centrelink applied an apportionment method to cross reference amounts averaged from annual figures provided by the Australian Taxation Office with the earnings [the Applicant] had originally reported. Debts raised through this process have been labelled by the media as 'robodebts'. While the apportionment method can provide an accurate calculation where income is steady, this is not the case here. The debt was subsequently recalculated using net income supplied by [the Applicant] from bank accounts and not payslips [3].

- The Tribunal stated that the apportionment method did not work in the Applicant's circumstances, and Centrelink's reliance on this method was incorrect for these circumstances [4].
- The Tribunal noted Centrelink's public announcement in November 2019, that it would no longer raise debts based on averaging, and had implemented 'more robust processes for the gathering of additional information including obtaining via its powers, employment records, bank records, payroll records etc' [6].
- The Tribunal noted that this action was critical in the Applicant's case, who worked variable periods at variable hours, as the use of averaging 'over the debt period does not produce an accurate statement of the income earned during the individual fortnightly reporting periods that applied to [the Applicant's] newstart allowance and austudy' [6].
- The Tribunal concluded that, on this basis, the existing information was unreliable for calculating the Applicant's 'true entitlement to newstart allowance/austudy and whether or not there has been an overpayment' [6].
- The Tribunal noted that the Applicant expressed concern about the robodebt system generally [9].
- The Tribunal noted that it had no power to place the debt collection on hold, but did:

  not consider this to be an unreasonable request. The tribunal certainly considers that it would be appropriate for any garnishee action to be placed on hold pending reassessment yet acknowledges it has no power to make such a direction [9].

- The Tribunal noted that it could not consider issues of sole administrative error or special circumstances because it could not be 'satisfied that the debt has been correctly calculated or if one exists' [5].

AAT Review Number	DOC ID	Member	Date
2019/S142162	CTH.3041.0012.8377	Mr J Nalpantidis	7 February 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the directions that the debt be recalculated based on the Applicant's income as determined by the Tribunal, and that the recalculated debt was recoverable.

Key Findings

- The material from Centrelink included information from the ATO regarding the Applicant's employment and income, which revealed a discrepancy between earnings to Centrelink and ATO information of the Applicant's gross earnings. Subsequently, Centrelink received payslips from two of the Applicant's four employers [15].

- In relation to these two employers, the Tribunal accepted that the Applicant's income was as listed in their payslips, which did not accord with their declared earnings throughout the relevant period [20].
- In relation to the third employer, the Tribunal found that the Applicant had over-declared their income [21].
- In relation to the fourth employer, the Tribunal found that Centrelink averaged the Applicant's income for the 2014/15 financial year, as advised by the ATO, at a certain rate 'across the financial year and applied this fortnightly figure to its debt calculations' [22].
- The Tribunal noted that:

  Incorrectly assigning income to a different fortnight can result in a skewing of the rate payable and as a consequence, any debt. The tribunal has previously noted that it is not always possible to obtain evidence of a person's weekly or fortnightly income and in such instances the approach has been to average the income amounts across all fortnights in the period covered by the amount. In Halls and Secretary, Department of Education, Employment and Workplace Relations [2012] AATA 802 the tribunal considered that it was appropriate for Centrelink to use an averaging method to calculate fortnightly income because in the circumstances it was the best available information that could be provided by the employer and the applicant. In Provan and Secretary, Department of Families, Community Services and Indigenous Affairs [2006] AATA 831 the issue of averaging fortnightly income was considered appropriate; however this was in circumstances where the employer had shut down and Mr Provan did not have any pay advice or other information that would assist in working out his periodic income [23].

- The Tribunal considered that the:

  "averaging" method applied by Centrelink is potentially unreliable as the "average" fortnightly income of $29.46 applied by Centrelink evenly across each fortnight in the relevant period may not have reflected [the Applicant's] actual earnings [24].

- The Tribunal accepted that the Applicant's income for this employer was the amount listed in the reasons, and noted that 'Centrelink incorrectly applied an average of his annual income in its debt calculations' [25].
- The Tribunal noted that it did not accept that Centrelink's averaging method was appropriate for the Applicant's income from one of their employers, and that:

  applying an average has the potential to incorrectly assign income to a different fortnight and can result in a skewing of the rate payable and as a consequence the tribunal cannot be satisfied that any calculated debt using this method is accurate or reliable [26].

- The Tribunal determined that the debt will need to be recalculated on the basis that the Applicant's income for the employer in question was as listed in the reasons. The Tribunal accepted that Centrelink had applied the Applicant's income correctly for the remainder of their employers in its debt calculations [28].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt.

AAT Review Number	DOC ID	Member	Date
2020/P145844	CTH.3041.0013.6087	D Benk	7 February 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the direction to obtain the payroll records and/or payslips from the Applicant's employer for the specific period listed. On receipt of that documentation, the Tribunal directed that entitlements be reassessed and the Applicant be notified of the outcome [7].

Key Findings

- The Tribunal stated that:

  in determining the overpayment (debt) many years after the event and in the absence of payroll records and/or payslips, Centrelink applied an apportionment method to cross reference amounts averaged from annual figures provided by the Australian Taxation Office with the earnings [the Applicant] had originally reported for the period 20 September 2010 to 26 December 2010 (folio 12 of the papers refers). Debts raised through this process have been labelled by the media as "robodebts". While the apportionment method can provide an accurate calculation where income is steady, this is not the case here [3].

- The Tribunal stated that the apportionment method did not work in the Applicant's circumstances, and Centrelink's reliance on this method was incorrect for these circumstances [4].
- The Tribunal noted Centrelink's public announcement in November 2019, that it would no longer raise debts based on averaging [6].
- The Tribunal noted that this action was critical in the Applicant's case, who worked variable periods at variable hours, as the use of averaging 'over the debt period does not produce an accurate statement of the income earned during the individual fortnightly reporting periods that applied to [the Applicant's] newstart allowance' [6].
- The Tribunal concluded that, on this basis, the existing information was unreliable for calculating the Applicant's 'true entitlement to newstart allowance and whether or not there has been an overpayment' [6].
- The Tribunal noted that it could not consider issues of sole administrative error or special circumstances because it could not be 'satisfied that the debt has been correctly calculated or if one exists' [5].

AAT Review Number	DOC ID	Member	Date
2019/B143072	CTH.3041.0014.0864	E Kidston	10 February 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the direction that it takes all reasonable steps to obtain income details from the Applicant's employer for the relevant periods [37].
- Once this information is obtained, the Tribunal directs Centrelink to consider the actual earnings for each period against each notification of earnings provided by the Applicant, to recalculated the running balance of working credits for the relevant periods, and if these actions produce an overpayment, consider if it is recoverable at law [37].

Key Findings

- A data match between Centrelink and the ATO revealed a discrepancy between the Applicant's earnings reported to Centrelink and their gross earnings, and a debt was raised on the basis of a NSA overpayment [4]-[5].
- After the debt was raised, the Applicant provided 'financial information including bank account statements' to Centrelink [19].
- The Tribunal noted that:

  [The Applicant's] earnings, in part, have been verified by bank account statements and Centrelink has updated the corresponding information. For the balance of the period Centrelink has relied on the ATO's records and apportioned the income [24].

- The Tribunal considered that the issue of the Applicant's actual earnings and over which period was significant, as there was evidence that their income was variable through the debt periods. The Tribunal noted that:

  it is possible that the apportioning of the income based on the ATO's information does not accurately reflect [The Applicant's] actual earnings in the relevant periods [27].

- The Tribunal considered that the most appropriate action was to remit the matter to Centrelink with the direction to obtain financial information directly from the Applicant's employer, and to recalculate any overpayment of NSA [29].
- The Tribunal did not consider issues of sole administrative error or special circumstances.

AAT Review Number	DOC ID	Member	Date
2019/M140850 2019/ H142442	CTH.3761.0006.1380	J Longo	13 February 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that there were debts but that the debts were waived.

Key Findings

- The decision under review for the Tribunal involved determining whether the Applicant was overpaid Carer Payment at [1].

- The Applicant submitted his employment was 'sporadic' and that when the Applicant did work, he was not always given a payslip [10].
- The Tribunal found that according to the debt calculations provided by Centrelink, the Applicant's income had been apportioned over each fortnightly period of receiving carer payment. The Tribunal was not satisfied that the debt, if any, had been correctly calculated [11].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M144146	CTH.3041.0013.7112	H Moreland	13 February 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink in accordance with the direction to obtain payslip information from the Applicant's formers employers, to recalculate the debt using this payslip information, and that any subsequent debt is recoverable.

Key Findings

- Centrelink calculated the Applicant's entitlement to austudy during the relevant period based on bank statements provided by the Applicant, as well as ATO data match information [9].
- The Tribunal noted that:

  The tribunal is not satisfied that [the Applicant's] entitlement to austudy during the relevant period has been calculated with sufficient specificity to determine any resulting debt. The only way the tribunal can be satisfied that a debt is calculated correctly is based on payroll data because the averaging of income does not provide sufficient accuracy because it cannot show the fortnights where someone worked much more than others. The tribunal also finds that payment information derived from bank statements cannot provide sufficient accuracy as it is not always clear what non-assessable items are included, nor can the tribunal be otherwise satisfied that the calculation from net to gross is correct [10].

- The Tribunal noted that Centrelink would need to contact the Applicant's employers and obtain payslips to determine the exact amount of any debts owing, and to communicate the results to the Applicant once the resulting debts are calculated [11]-[12].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt.

AAT Review Number	DOC ID	Member	Date
2019/P143514	CTH.3041.0014.3443	M Martellotta	14 February 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with the direction to recalculate any overpayment for the specified period using actual employment income from the Applicant's payslips, and that verified payslips were to be used to the entire period under review. Any recalculated amount will be a recoverable debt to the Commonwealth.

Key Findings

- The Tribunal identified that payslips from the Applicant's former employer were used to apportion actual earnings received by the Applicant for part of the debt period. The remainder of the debt period appeared to have been calculated by averaging out the income amounts, which was confirmed in the department's response to the Tribunal [14].
- The Tribunal cross-referenced the information that the Applicant provided to the Department, and identified discrepancies against the payslips available for that period [15].
- The Tribunal was unclear as to why the department had not used payslips for the entire debt period, and had instead averaged income for the later part of the debt [18].

- The Tribunal:

  was not satisfied that in this matter the debt amount for the debt period has been properly or accurately calculated. In the tribunal's view averaging income rather than utilising the verified income amounts does not provide an acceptable or accurate calculation of a debt [18].

- The Tribunal determined the most appropriate action was to remit the matter to Centrelink, and direct it to recalculate the overpayment using payslips for the entire debt period. The Tribunal was satisfied that any overpayment recalculated on this basis was a debt owed to the Commonwealth [19]-[20].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt.

AAT Review Number	DOC ID	Member	Date
2019/S143548	CTH.3047.0001.4888	S Brakespeare	14 February 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that the Applicant did not have debts for the specified periods.

Key Findings

- The debts were raised after information from the ATO indicated that not all of the Applicant's income from employment had been taken into account in determining their payment rates [2].
- The Tribunal noted that the Applicant declared earnings from all of their employers, but that income had not been verified by pay advices from the Applicant's employers. While there were a small number of pay advices supplied for one employer, Centrelink obtained information from the ATO and the Applicant's bank accounts, and used that information to calculate the overpayment [11].
- The Tribunal noted their view that:

  neither the information from the ATO nor the information from bank deposits is sufficient to determine what [the Applicant's] gross income from employment was from each relevant instalment fortnight. The authorised review officer's notes indicate that the amount of income per fortnight has been calculated using some of the ATO information and some of the bank deposit information, grossed up [13].

- The Tribunal was not satisfied that Centrelink had accurately established the Applicant's gross income for the relevant periods, and had failed to establish an overpayment of NSA or austudy for the periods under review [13]. On this basis, the Tribunal did not find any debts arising [14].
- The Tribunal did not consider issues of sole administrative error or special circumstances.

AAT Review Number	DOC ID	Member	Date
2019/P143514	CTH.3053.0142.1075	M Martellotta	14 February 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink with the direction that actual employment income in the Applicant's payslip is used for recalculation of the debt.

Key Findings

- The Tribunal noted that part of the debt was calculated by averaging income as there were no payslips [14].
- The Tribunal found that there had likely been an overpayment as the Applicant underreported or did not report at all [16] – [17].
- The Tribunal cited with approval Re SDFHCSIA and George [2011] AATA 91 which considered the requisite standard of proof to determine whether a debt is owing [17]. Applying this case, the Tribunal concluded it was 'left in a state of doubt as to the correct calculation of the debt' [17].

- The Tribunal criticised Centrelink's use of income averaging:

  In the tribunal's view averaging income rather than utilising the verified income amounts does not provide an acceptable or accurate calculation of a debt. In this regard the tribunal also noted the following comment made by the ARO7 "…The SME doc is messy with regards the debt calculation but, after piecing it together appears correct." [18].

The Tribunal found that no administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/P145762	CTH.3041.0245.1598	D Benk	14 February 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt based on the Applicant's payroll records to be obtained by Centrelink from the Applicant's employers.

Key Findings

- The Tribunal stated:

  In determining the overpayment (debt) many years after the event and in the absence of payroll records and/or payslips, Centrelink applied an apportionment method to cross reference amounts averaged from annual figures provided by the Australian Taxation Office (ATO) with the earnings [the Applicant] had originally reported. Debts raised through this process have been labelled by the media as "robodebts". While the apportionment method can provide an accurate calculation where income is steady, this is not the case here [3].

  Centrelink were successful in obtaining some employment information from a few of [the Applicant's] employers but not all of them. Applying that information resulted in a significant reduction in the debt. However, Centrelink did not obtain employment income from the employers' direction (approximately five in total) and relied on averaging using the ATO taxable income for each financial year [4].

  [The Applicant' said that he was a fruit picker. He would travel around Australia picking fruit. When the work was on he did not claim benefits. When there was no work, he did so. He said that it was wrong therefore to apply the apportionment method to overall entitlements received as large portions of income were earned when he was not receiving benefits. Hence, the apportionment method does not work in his circumstances. In the assessment of the matter, Centrelink primarily relied on the apportionment method, which is not correct for these circumstances globally [5].

- The Tribunal found there was a paucity of evidence to provide a breakdown of earnings from each employer for each relevant period. The Tribunal was not satisfied on the evidence before it that a debt existed and found that the situation could only be remedied by Centrelink obtaining the relevant payroll records for the Applicant [6].
- The Tribunal further stated:

  In November 2019, Centrelink publically announced that it would no longer raise debts based only on averaging of data from the ATO and have now instigated various and more robust processes for the gathering of additional information including obtaining via its powers, employment records, bank records, payroll records, etc. This action is critical in this case, as the evidence discloses [the Applicant] worked variable periods at variable hours and therefore averaging of income over the above period does not produce an accurate statement of the income earned during the individual fortnightly reporting periods that applied to [the Applicant's] benefits. The existing information therefore is unreliable when it comes to calculating [the Applicant's] true entitlement to newstart/sickness allowance and whether or not there has been an overpayment [7].

- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/H144304	CTH.3041.0014.5293	H Moreland	17 February 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt based on payslip information Centrelink which was directed to obtain. The recalculated debt was recoverable.
- The decision under the review that the Applicant was to pay interest was substituted with the decision that no interest was payable.

Key Findings

- Centrelink raised the debt following a data match with the ATO and initially calculated the debt on the basis of that information. Centrelink subsequently recalculated the debt on the basis of verbal information provided by the Applicant in relation to his earnings [7]. The Applicant subsequently denied giving the relevant figures to Centrelink [9].
- Centrelink garnisheed $656.55 of the Applicant's tax return towards repayment of the debt [8].
- The Tribunal found:

  The tribunal is not satisfied that [the Applicant's] entitlement to newstart during the relevant period has been calculated with sufficient specificity to determine any resulting debt. The only way the tribunal can be satisfied that a debt is calculated correctly is based on payroll data because the averaging of income does not provide sufficient accuracy because it cannot show the fortnights where someone worked much more than others. The tribunal also finds that payment information derived from bank statements cannot provide sufficient accuracy as it is not always clear what non-assessable items are included, nor can the tribunal be otherwise satisfied that the calculation from net to gross is correct [10].

  To eliminate any doubt and to determine the exact amount of any debts owing, Centrelink will need to use its information gathering powers under section 192 of the Administration Act to contact [the Applicant's] employer…from the relevant period to obtain payslips in order to make those calculations [11].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M144038	CTH.3041.0014.4391	A Carson	17 February 2020

How it was decided and key facts

Outcome

- The decision under review that the Applicant owed a recoverable parenting payment debt was affirmed.
- The decision under review in relation to the NSA debt was set aside and remitted to the Chief Executive Centrelink with the direction that the debt for the period between 3 October 2015 to 3 February 2017 be reviewed and recalculated, if necessary. Any recalculated debt would be recoverable.

Key Findings

- Based on the payslips produced for the relevant period, the Tribunal found that there was a parenting payment debt [11].
- The Tribunal was not satisfied with the accuracy of the NSA debt calculations, noting the only source of data for the Applicant's actual fortnightly income was that which was obtained via an ATO data match [12]. The Tribunal accordingly directed Centrelink to check its calculations and recalculate the debt for the relevant period if necessary.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/S143511	CTH.3761.0001.5898	AJ Halstead	19 February 2020

How it was decided and key facts

Outcome

- The decision under review relating to youth allowance from one period in question was affirmed.
- The decision under review relating to the remaining period was set aside and remitted to Centrelink for recalculation of the debt using payslip information (to be obtained by Centrelink).
- Centrelink was directed to use the correct apportionment method.

Key Findings

- The Tribunal set aside part of the decision, on the basis that income averaging was used to raise the debt. Centrelink had not taken into account the Applicant's actual fortnightly earnings.
- The Tribunal commented that:

  [the Applicant] said her income from employment varied significantly from one week to the next during the second period because she worked on a casual basis. Averaging income does not accurately reflect her periodic income in the circumstances. It is not correct to apply averaged fortnightly income in the calculation of youth allowance payments for the period [the Applicant] was employed. The effect of using averaging is that income was incorrectly attributed throughout the relevant period. As a result, the income was not apportioned as required by section 1073B of the Act [15].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M144535	CTH.3761.0002.8694 Family of documents: CTH.3761.0002.8589	M Baulch	19 February 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and the matter was remitted to Centrelink for recalculation of the debt on the basis that Centrelink was to obtain payroll information.

Key Findings

- The Tribunal found there were no payslips or payroll information to corroborate the amounts used by Centrelink to verify the Applicant's earnings from the relevant employer for the relevant periods.
- The Tribunal stated that: 'This suggests that Centrelink has used "income averaging" to assess the overpayment for this period – an approach that is no longer considered appropriate' [13].
- The Tribunal directed that Centrelink was to exercise its information gathering powers and request payslips, or payroll information, from the Applicant's employer which disclosed not only the Applicant's gross earnings, but also the allowances that were paid [14].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M144418	CTH.3041.0018.0467	P Sperling	19 February 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt using the Applicant's payslips and correctly apportioning his income to the relevant fortnights.

Key Findings

- The Tribunal noted that Centrelink originally raised and calculated the debt following a data match with the ATO. Centrelink subsequently recalculated the debt for the period between 21 June 2010 to 17 June 2012 based on payslips provided by the Applicant [22].
- The Applicant's payslips, however, indicated that he received four payments during the relevant period identified as 'back payments' [24]. In relation to Centrelink's calculations of these payments, the Tribunal noted that Centrelink incorrectly treated these payments as lump sums and apportioned them over 52 weeks [25]-[26]. The Tribunal found that this should instead have been treated as income earned, derived or received and accordingly be attributed to their relevant fortnights [28].
- The Tribunal accordingly disagreed with Centrelink's calculations and directed Centrelink to recalculate the Applicant's debt by treating the back payments as income and attributing them to the fortnights in which they were received [30].
- The Tribunal did not find that the debt, as currently calculated, existed and therefore any amounts already recovered would need to be refunded. However, it was possible that a recalculation as directed could still produce a debt [31].
- The Tribunal advised the Applicant that he could pursue compensation from Centrelink via the Compensation for Detriment caused by Defective Administration scheme after he raised concerns about the advice he received from Centrelink regarding his reporting requirements and their dealings after the debt was raised [36]-[38].

AAT Review Number	DOC ID	Member	Date
2019/M144041	CTH.3041.0015.6515	H Moreland	20 February 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted the Chief Executive Centrelink for recalculation of the debts using payslip information.
- Only 50% of the debt was recoverable due to special circumstances.

Key Findings

- The Tribunal noted that:
  - The income information in relation to the first employer was based on payslips and Centrelink's calculations were correct [7]
  - In relation to the income from the second employer, the Tribunal stated:

    The income in relation to [Employer 2] (also referred to as 39+ on payslips) is based on payslip advice,2 with the exception of the payslips for the pay periods 9 October 2017 to 15 October 2017 and 16 October 2017 and 18 October 2017. According to the Centrelink papers, these were determined by Centrelink using its 'Check and Update Past Information' (CUPI) online system and averaging. The tribunal finds that Centrelink will need to use its powers under section 192 of the Administration Act to contact [Employer 2] (39+) to obtain payslips for those two pay periods [7].

  - The income in relation to the third employer was based on payslip information [7].
  - In relation to income from the fourth employer, the Tribunal stated:

    The income in relation to [Employer 4] is based on information matched with the Australian Taxation Office (ATO). The tribunal finds that Centrelink will need to use its powers under section 192 of the Administration Act to contact [Employer 4] to obtain payslips for the relevant pay periods [7].

- The Tribunal ultimately concluded:

While the tribunal finds that it is likely that [the Applicant] has incurred a debt due to overpayment of newstart allowance during the relevant periods, the tribunal is not satisfied that [the Applicant's] entitlement to newstart allowance during the relevant periods has been calculated with sufficient specificity to determine any resulting debt. The only way the tribunal can be satisfied that a debt is calculated correctly is based on payroll data provided in documentary form from the relevant employer because the averaging of income does not provide sufficient accuracy because it cannot show the fortnights where someone worked much more than others; and requiring payment recipients to provide verbal payslip information poses a risk of data entry error with no documents for calculations to be properly checked. The tribunal also finds that payment information derived from bank statements cannot provide sufficient accuracy as it is not always clear what non-assessable items are included, nor can the tribunal be otherwise satisfied that the calculation from net to gross is correct [8].

- The Tribunal found that special circumstances existed to justify a waiver of 50% of the debts.

AAT Review Number	DOC ID	Member	Date
2019/M144584	CTH.3041.0016.3224	H Moreland	24 February 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt using payslip information.
- The recalculated debt was recoverable.

Key Findings

- The Tribunal stated:

  This debt originated as a "robodebt", that is a data match with the Australian Taxation Office (ATO) showed that [the Applicant] earned more in the 2013/14, 2014/15 and 2015/16 financial years than Centrelink had recorded as her earned income.1 [the Applicant] provided her payslips which were then used to calculate her entitlement during the relevant period, along with her self-reported earnings from [Employer]. It is apparent to the tribunal that [the Applicant's] earned income was underreported to Centrelink during the relevant period [9].

  …

  The only way the tribunal can be satisfied that a debt is calculated correctly is based on payroll data provided in documentary form from the relevant employer because the averaging of income does not provide sufficient accuracy because it cannot show the fortnights where someone worked much more than others; and requiring payment recipients to provide verbal payslip information poses a risk of data entry error with no documents for calculations to be properly checked. The tribunal also finds that payment information derived from bank statements cannot provide sufficient accuracy as it is not always clear what non-assessable items are included, nor can the tribunal be otherwise satisfied that the calculation from net to gross is correct [11].

- The Tribunal accordingly directed Centrelink to use its information gathering powers to obtain the relevant payroll information [12].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/B144588; 2020/B145603	CTH.3041.0015.0256	J Green	24 February 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt based on the Applicant's payroll records Centrelink which was directed to obtain or her bank statements.

Key Findings

- Centrelink raised the debt following a data match with the ATO [6].
- The Tribunal found:

  In this case Centrelink has apportioned income over periods which do not relate to the instalment periods during which income was earned and has likely attributed income during instalment periods when no income was earned, derived or received [10].

  [The Applicant] worked variable periods at variable hours therefore averaging of income over a long period does not produce an accurate statement of the income earned during the individual fortnightly reporting periods that applied to her youth allowance [11].

- The Tribunal was accordingly not satisfied that there was a legally recoverable debt based on Centrelink's calculations and directed Centrelink to obtain all payroll records from the Applicant's employers or, failing that, the Applicant's bank statements to recalculate the debt [12].
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M144543	CTH.3761.0006.0035	A Carson	24 February 2020
How it was decided and key facts			

Outcome

- The decision under review in relation to the parenting payment debt and interest charge were affirmed.
- The decision in relation to sickness allowance/NSA were set aside and remitted to Centrelink for recalculation of the debt on the basis of the Applicant's actual periodic earnings Centrelink was directed to obtain.
- Centrelink was directed not to apply a 10% penalty to any recalculated sickness allowance/NSA debt.

Key Findings

- The decision under review for the Tribunal involved determining whether the Applicant was overpaid Sickness Allowance/NSA and a parenting payment including the validity of the 10% penalty at [1].
- Centrelink undertook calculations following an ATO data match [15]-[16].
- The Tribunal was unable to determine the correct amounts of overpayment and noted that it appeared that the Applicant's earnings varied each week [17].
- The Tribunal directed Centrelink to obtain payroll information from the Applicant's employer.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/P145860	CTH.3761.0005.6212	D Benk	25 February 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt on the basis of the payroll information/payslips Centrelink was to obtain from the relevant employers.

Key Findings

- The Tribunal found that, in the absence of payslips, Centrelink apportioned the Applicant's annual gross income as provided by the ATO. The Tribunal stated: 'Debts raised through this process have been labelled by the media as "robodebts". While the apportionment method can provide an accurate calculation where income is steady, this is not the case here' [3].
- The Tribunal found the apportionment method was incorrect as the Applicant's income varied [4].
- The Tribunal accordingly remitted the matter to Centrelink with directions to obtain payslips/payroll information for the Applicant from her employers and to recalculate the debt on the basis of that information [7].

AAT Review Number	DOC ID	Member	Date
2019/P143887	CTH.3761.0006.0593	J Nalpantidis	25 February 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the basis of payroll information Centrelink was directed to obtain.
- Centrelink was directed to waive any recalculated debt.
- Centrelink was directed that the 10% penalty was not to be applied.

Key Findings

- The Tribunal found that Centrelink initially applied a fortnightly average of the Applicant's income, using figures provided by the ATO [24].
- The Applicant then provided payslips for part of the debt period and Centrelink applied 'actual fortnightly income' as per the payslips for part of the period. Where payslips were not provided, Centrelink applied an average of the Applicant's ATO advised income for part of the period, resulting in a further amended debt calculation [24].
- The Tribunal accepted that '[the Applicant's] income varied considerably from fortnight to fortnight and an "average" of her financial year income does not accurately reflect her fortnightly income' [28].
- The Tribunal found the 10% penalty fee did not apply and should be removed from the debt [49].
- The Tribunal found that no sole administrative error existed to justify the write off or waiver of the debt, but found that special circumstances existed to warrant waiving recovery of the debt [90].

AAT Review Number	DOC ID	Member	Date
2020/H146452	CTH.3761.0005.6770	D Benk	27 February 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the on the basis of payroll information/payslips Centrelink was directed to obtain.

Key Findings

- The Tribunal found 'Centrelink applied an apportionment method to cross-reference amounts averaged from annual figures provided by the Australian Taxation Office with the earnings [the Applicant] had originally reported' [3].
- The Tribunal also found 'the apportionment method does not work in her circumstances. In the assessment of the matter, Centrelink primarily relied on the apportionment method, which is not correct for these circumstances' [4].
- The Tribunal found it could not be satisfied a debt was correctly calculated or even if a debt existed [5].
- The Tribunal stated:

  …[the] situation could be remedied by the provision of payroll records and/or payslips. As a last resort bank records may be satisfactory provided there was a reassurance by [the Applicant] that no deductions were made apart from taxation and some confirmation as to the timing between earning the amounts and the amounts being paid into her bank account [5].

- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/H144641	CTH.3029.0001.1961	L Rieper	10 March 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt based on the Applicant's payroll records which Centrelink was directed to obtain.

Key Findings

- Centrelink raised the debt following a data match of ATO [9].
- The Tribunal found:

  Centrelink did not have the majority of [the Applicant's] payslips or any other means of determining [the Applicant] earned the income within those tax years. As a result Centrelink apportioned the income evenly across each of the relevant tax years [10].

  …

  In November 2019, Centrelink publically announced that it would no longer raise debts based only on averaging of data from the ATO and have now instigated various and more robust processes for the gathering of additional information including obtaining via its powers employment records, bank records, payroll records, etc. This action is critical in this case, as the evidence discloses [the Applicant] worked variable periods at variable hours and therefore averaging of income over the above period does not produce an accurate statement of the income earned during the individual fortnightly reporting periods that applied to [the Applicant's] newstart allowance. The existing information therefore is unreliable when it comes to calculating [the Applicant's] true entitlement to newstart allowance and whether or not there has been an overpayment [12].

- Given this, the Tribunal remits the matter back to Centrelink with a direction to obtain the payroll records and/or payslips from the relevant employers. On receipt of that documentation, the Tribunal directs that entitlements be reassessed and for the Applicant be notified of the outcome [13].
- The Tribunal did not consider whether circumstances existed to justify a write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/B141543	CTH.3041.0018.6210	J Green	11 March 2020

How it was decided and key facts

Outcome

- The decision to raise and recover the parenting payment debt was affirmed (Decision 1).
- The decision to raise and recover the NSA debt was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt based on the Applicant's payslips (Decision 2).

Key Findings

- In relation to Centrelink's calculations, the Tribunal stated:

  As a result of a data match with records of the Australian Taxation Office (ATO) Centrelink concluded that [the Applicant] had not declared the full amount of her income during the debt periods. Initially, Centrelink averaged the income reported by the ATO over each financial year and raised a debt based on those figures. The debt of parenting payment was varied to the amount now claimed after Centrelink obtained payslips. As no payslips were provided for the latter period that debt has been calculated based on averaging income over the period [6].

  …

  In [the Applicant's] case Centrelink has used [the Applicant's] pay records to calculate her entitlement during each fortnight during the 2010/2011 period and the tribunal is satisfied that the calculations for that period are correct. However, the tribunal cannot be satisfied that is the case for the second debt period as no payslips were available and income may have been apportioned over periods which do not relate to the instalment periods during which income was earned and may have been attributed to instalment periods when no income was earned, derived or received [10].

- As the Applicant had since provided her payslips, the Tribunal directed Centrelink to recalculate the debt on the basis of those payslips [11].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/B146366	CTH.3041.0018.8316	D Benk	13 March 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt based on the Applicant's payroll records which Centrelink was directed to obtain.

Key Findings

- The Tribunal found:

  In determining the overpayment (debt) many years after the event and in the absence of payroll records and/or payslips, Centrelink applied an apportionment method to cross reference amounts averaged from annual figures provided by the Australian Taxation Office with the earnings [the Applicant] had originally reported. Debts raised through this process have been labelled by the media as "robodebts". While the apportionment method can provide an accurate calculation where income is steady, this is not the case here [3].

  [The Applicant] testified that he was a casual employee during the above period. There were fortnights where he earned significant amounts and other fortnights where the income was negligible. Hence, the apportionment method does not work in his circumstances. In the assessment of the matter, Centrelink primarily relied on the apportionment method, which is not correct for these circumstances [4].

  … Despite the vast number of documents before it, the tribunal was of the view there is a paucity of evidence to provide a breakw entrelink publicly announced that it would no longer raise debts based only on averaging of data from the ATO and have now instigated various and more robust processes for the gathering of additional information, including obtaining via its powers employment records, bank records, payroll records, etc. This action is critical in this case, as the evidence discloses [the Applicant] worked variable periods at variable hours and therefore averaging of income over the above period does not produce an accurate statement of the income earned during the individual fortnightly reporting periods that applied to [the Applicant's] youth allowance. The existing information therefore is unreliable when it comes to calculating [the Applicant's] true entitlement to youth allowance and whether or not there has been an overpayment [6].

- The Tribunal did not consider whether circumstances existed to justify a write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M143642	CTH.3761.0006.0691	H Moreland	23 March 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink with directions that:
  - Centrelink recalculate the debt based on 'apportionment of [the Applicant's] income according to when it was earned'; and
  - the recalculation, particularly any variations from the apportionment calculated by the Tribunal, will need to be explained to the Applicant in a plain English format; and
  - the resulting debt was recoverable.

Key Findings

- The Tribunal noted that Centrelink used payslip information provided by the Applicant to calculate the current debt amount for the relevant period [12].
- The Tribunal found 'that the only way it can be satisfied that a debt is calculated correctly is based on payroll data because averaging of income does not provide sufficient accuracy because it, by definition, cannot show the fortnights where someone worked much more than others' [13].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2019/M143141	CTH.3761.0006.1014	D Lambden	23 March 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that no overpayments had been proved.

Key Findings

- The Tribunal noted that Centrelink received a data match from the ATO in relation to the Applicant's income for the 2011/12, 2012/13, 2013/14, and 2014/15 financial years. The Applicant subsequently provided to Centrelink copies of her bank statements and some payslips [3]-[4].
- Centrelink recalculated the debt and advised the Applicant that the debts were based on the payslips she provided and the ATO data matches being apportioned over the financial years [5].
- The Tribunal found 'the Act does not authorise the calculation of parenting payment or NSA by reference to averaging of income' [14].
- The Tribunal also found 'Centrelink had not obtained details of actual earnings from employers during the periods in question to verify her actual earnings during these periods' and concluded that the debts were not proved [16]-[18].
- The Tribunal did not consider whether circumstances existed to justify a write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/S145539	CTH.3761.0001.5147	AJ Halstead	25 March 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink to recalculate the debt using payslip information (to be obtained by Centrelink).

Key Findings

- The Applicant's fortnightly income varied significantly in the period in which she received benefits. There were some fortnights where payslip data was not available, and her income amounts are subsequently unknown.
- In lieu of this information, Centrelink apportioned the Applicant's income over fortnightly periods. The Tribunal was not satisfied that the debt had been calculated correctly.
- Centrelink was directed to obtain the missing payslip data from the Applicant's employers so that the debt could be appropriately recalculated.
- The Tribunal found:

  Averaging income does not accurately reflect [the Applicant's] periodic income in circumstances where her wages regularly varied. It is not correct to apply averaged fortnightly income in the calculation of youth allowance payments for the period [the Applicant] was employed and specific information about her earnings is not currently known. The effect of using averaging is that income was incorrectly attributed throughout the relevant period. As a result, the income was not apportioned as required by section 1073B of the Act [10].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/M145188	CTH.3761.0005.7530	S De Bono	16 April 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that there were YA debts, but the debts were to be recalculated in accordance with the directions as set out at paragraphs [19] and [24] of the decision, with any recalculated debts to be recoverable.

Key Findings

- The Tribunal noted that Centrelink documents initially identified that the Applicant had income higher than the amount she reported to Centrelink based on a data match with the ATO [9].
- Due to these differences, Centrelink wrote to the Applicant requesting further information about her employment income from these employers and the Applicant provided some payslips for some employers throughout the relevant period [10]-[11].
- The Tribunal noted it explained to the Applicant that:

  …income averaging was different to income apportionment and that income averaging is permitted in accordance with subsection 1073B(2) of the Act. Income apportionment is when income is evenly apportioned over a period of time in the absence of other supporting information other than the matched income data from the ATO; this is known as a 'robo debt'.

- In relation to the debt arising from the period of 20 July 2013 to 19 June 2015, the Tribunal stated it checked the debt calculations and was satisfied that the debt calculation is based on the evidence contained in the documents before it and 'no portion of the debt was apportioned' [19].
- The Tribunal was not satisfied that the second debt amount was correct and directed 'that the debt be recalculated based on the payslip information before the tribunal' [24].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/M146117	CTH.3039.0029.6090	D Lambden	20 April 2020

How it was decided and key facts

Outcome

- The Tribunal set aside the decision under review and, in substitution, decided that no overpayment of youth allowance of $7,515.38 to the Applicant for the period 5 July 2014 to 20 November 2015 had been proved.

Key Findings

- On 25 September 2018 Centrelink made a decision that the Applicant had been overpaid youth allowance of $7,515.38 during the period 16 August 2014 to 20 November 2015. The ATO provided information to Centrelink about the Applicant's income [3]. The Applicant provided payslips to Centrelink as well as bank statements and paid invoices [4]-[6].
- The Applicant stated that during the relevant period she was working as a model and had to give a 20% commission to her agent. This was included as income. The Applicant also stated that her pay fortnights did not match the Centrelink fortnights.
- The Tribunal was not satisfied that Centrelink's debt calculations were made based on the actual fortnightly amount of youth allowance that she received during the debt period and her actual fortnightly income during the period under review and that there were inconsistencies in the debt calculations [21]
- The Applicant's income was determined using an apportionment method averaged despite fluctuating income/hours worked per week. The Tribunal stated:

  The ADEX Debt Schedule Report included in the tribunal papers states [the Applicant] had apportioned actual income each fortnight during the debt period and the total amount of apportioned actual income for the debt period is recorded as $67,166.53. [21]

- The Tribunal found:

  In short, the Act does not authorise the calculation of youth allowance by reference to averaging of income in this case. Clearly, with regard to fluctuating income, the averaging of income can produce distortions in the calculation of social security entitlements so as to give rise to phantom debt balances, when no overpayment has actually been made [23].

- The Tribunal concluded that the debt was not proved [24].

AAT Review Number	DOC ID	Member	Date
2020/A145411	CTH.3761.0005.7958	S Lewis	21 April 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt based on the Applicant's verified earnings Centrelink was directed to obtain.
- Centrelink was directed to document the debt calculations in a way that a lay person could understand.
- The recalculated debts were recoverable in full.

Key findings

- The Tribunal noted the Applicant's 'rate of parenting payment was impacted in the relevant periods by employment income of both her and her partner' [10].
- The Tribunal stated it:

  …was not satisfied that the income had been correctly apportioned. A significant amount of the employment income across the three calculations is unverified other than by reference to ATO data apportioned evenly across many fortnights. Further, the debt calculations include two calculations for periods which overlap (debts B and C). The tribunal agrees with [the Applicant] that there is a lack of transparency. It is confusing and fraught with potential error to endeavor to "stitch" two scenarios together for the same debt period [15].

- The Tribunal found 'Centrelink [had] not exercised its powers to attain information from third parties in a rigorous and holistic manner' [15].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/B146624	CTH.3041.0027.8765	S Letch	21 April 2020

How it was decided and key facts

Outcome

- The decision under review is varied so that, pursuant to section 1237AAD of the Social Security Act 1991, with effect from the day after the debt was raised, recovery of the sum of $439.16 (50% of the calculated debt) is waived.

Key Findings

- The Applicant's debt was originally a "robodebt" for a much higher sum, but was reduced to $970.83 in January 2019. The debt arose due to the applicant failing to disclose his income from casual employment.
- The Applicant not convinced that the debt is correct as Centrelink have changed the debt amount multiple times. The Applicant had language barriers and requested that Centrelink arrange an interpreter, which they had not done.
- Centrelink averaged earnings over each fortnight. The Tribunal stated:

  Unlike the fundamentally flawed "robodebt" scheme which applied averages over an entire tax year, averaging over a fortnight is deemed an acceptable methodology given employers often cannot produce daily payroll information [6]

  The Tribunal found the applicant did his best in difficult circumstances to disclose his variable casual income. There was no knowing or deliberate failure on his part.

- The Tribunal has examined Centrelink's calculations and applied the fortnightly earnings information for the debt period as it does in the ordinary course. The tribunal found there had been an overpayment but decided to waive 50% of the debt.

AAT Review Number	DOC ID	Member	Date
2020/A146597	CTH.3029.0001.5314	J Forgan	23 April 2020

How it was decided and key facts

Outcome

- The decision under review that there was an overpayment of NSA in the 2017/2018 financial year was affirmed.
- The matter was remitted to the Secretary and the debt was to be recalculated using the Applicant's payslips.

Key Findings

- The Applicant had a debt of $7,004.26, in the period 12 July 2017 to 26 June 2018. The debt arose as a result of a data match with the ATO [2].
- Centrelink determined the debt by averaging income throughout the remainder of the financial year based on the ATO information [3].
- The Applicant requested an ARO review but did not submit bank statements. Due to no further documentation the ARO affirmed the debt [4].
- The Tribunal stated:

  I am not satisfied that averaging the income from the ATO is the most accurate way to calculate the debt amount as [the Applicant] said her earnings changed constantly throughout the year. She said she usually worked a split shift of three days a week for five hours a day. She was uncertain but thought her hourly rate was the minimum wage of $23.00 per hour. On that basis, I calculated she would earn at least $345 per week. [The Applicant] estimated that she earned about $250.00 per week. She noted that her hours probably increased over Christmas time. She said her pay periods did not align with the Centrelink reporting fortnights. She acknowledged that there may have been some weeks where she had not reported her wages correctly because she had to estimate the amounts. It also was a difficult time personally for her due to family violence and she described herself in 'survival mode' at that time. She did not think that Centrelink's apportioned amount of $859.64 per fortnight truly reflected her fortnightly gross earnings [13].

  For these reasons, while I agree that [the Applicant] was overpaid in the relevant period due to not declaring the full amount of her earnings, I am not satisfied that the debt amount of $7,004.26 is the correct debt amount. [The Applicant] said she has her payslips for the relevant period. I requested that [the Applicant] submit her payslips for the 2017/2018 year to the Tribunal for reconsideration of the debt calculations. She provided these after the hearing [14].

- The Tribunal was not satisfied of the debt amount and the matter was remitted to Centrelink for recalculation using newly provided payslips to the Tribunal [15].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/B147357	CTH.3761.0005.7660	M Amundsen	28 April 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the basis of the Applicant's actual income during the relevant period which Centrelink was directed to obtain.

Key Findings

- The Tribunal noted it was apparent that the Applicant's debt had been undertaken by apportioning for each financial year based on the earnings information provided by the ATO [18].
- The Tribunal referred to the consent orders issued by Justice Davies in 'recent Federal Court proceedings' which declared that:

  …the demand for payment of the alleged debt was not validly made because the information before Centrelink was not capable of satisfying the decision-maker that a debt was owed pursuant to section 1223 of the Act in the amount of the alleged debt [19].

- The Tribunal stated it found for 'essentially the same reasons' as Justice Davies that the information was not capable of proving the debt [20].

- The Tribunal stated:

  …debt calculations based on information provided by [the Applicant's] employer would provide an accurate income' and found that 'Centrelink will need to recalculate the Applicant's debt after having obtained specific information about [the Applicant's] earnings during the debt period [21].

- The Tribunal stated it was not required to reach a decision with respect to waiver or write off by way of sole administrative error or special circumstances. The Tribunal however noted that '[t]here is no question that, in rejecting [the Applicant's] claim for CA and instead granting her CP, the payments subsequently made were initially solely due to Centrelink error' [23].

AAT Review Number	DOC ID	Member	Date
2020/S148588	CTH.3041.0028.6151	D Benk	28 April 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and the matter was sent back to the Chief Executive Centrelink for reconsideration in accordance with paragraph 7 of its reasons.

Key Findings

- Centrelink determined that the Applicant was overpaid $10,289.69 in austudy between 14 July 2012 and 23 August 2013.
- The Tribunal noted:

  In determining the overpayment (debt) many years after the event and in the absence of payroll records and/or payslips, Centrelink applied an apportionment method to cross reference amounts averaged from annual figures provided by the Australian Taxation Office with the earnings [the Applicant] had originally reported. Debts raised through this process have been labelled by the media as "robodebts". While the apportionment method can provide an accurate calculation where income is steady, this is not the case here [3].

  [The Applicant] testified that he was a casual employee during the above period. There were fortnights where he earned significant amounts and other fortnights where the income was negligible. Further he was unemployed for the large part of the financial year and it was only towards the end of the financial year that he started employment and worked his variable hours. Hence, the apportionment method does not work in his circumstances. In the assessment of the matter, Centrelink primarily relied on the apportionment method, which is not correct for these circumstances [4].

- The Tribunal found that it could not be satisfied that the debt had been correctly calculate, or if one exists. The Tribunal stated:

  Despite the vast number of documents before it, the tribunal was of the view there is a paucity of evidence to provide a breakdown of earnings from each employer for each relevant Centrelink fortnightly instalment of austudy. For this reason, the tribunal cannot be satisfied that the debt as raised by Centrelink is correct. This situation could be remedied by the provision of payroll records and/or payslips [5].

  In November 2019, Centrelink publicly announced that it would no longer raise debts based only on averaging of data from the ATO and it has now instigated various and more robust processes for the gathering of additional information including obtaining via its powers, employment records, bank records, payroll records etc. This action is critical in this case, as the evidence discloses [the Applicant] worked variable periods during the financial year at variable hours and therefore averaging of income over the above period does not produce an accurate statement of the income earned during the individual fortnightly reporting periods that applied to [the Applicant's] austudy. The existing information therefore is unreliable when it comes to calculating [the Applicant's] true entitlement to austudy and whether or not there has been an overpayment [6].

  As an aside the Applicant entered into a payment arrangement due to some undue pressure by debt collectors. Given that the debt was to be reviewed with recalculation based on payslips it would not be unreasonable for Centrelink to pause recovery pending reassessment. The Tribunal however acknowledged that it has no powers to make such a direction [9].

AAT Review Number	DOC ID	Member	Date
2020/M147387	CTH.3761.0004.5419	H Grossman	29 April 2020

How it was decided and key facts

Outcome

- The decision under review was affirmed.

Key Findings

- Centrelink commenced a review of the Applicant's entitlement following a data match with the ATO and determined that the Applicant had not provided full details of his income [9].
- This was an historical debt and the Applicant stated he was unable to provide bank statements or payslips for a period dating back 10 years [11].
- The Tribunal found that the Applicant had failed to satisfy notification requirements by not informing Centrelink of his change of address in a timely manner. It found that had he done so, he would have been aware, via the correspondence sent to him (at the wrong address), that Centrelink undertakes data matching with and that '[i]It was clearly in [the Applicant's] interests to retain or seek payslips from his previous employers and to retain his bank statements, given that Centrelink alerted him to its practice of reviewing entitlements' [11].
- The Tribunal stated:

  The Tribunal finds that Centrelink was entitled to rely on the information provided to it by the ATO given [the Applicant's] inability to provide bank statements and payslips for the entire debt period. The Tribunal does not accept [the Applicant's] submission that as he worked for labour hire companies during part of the debt period, he was not given payslips [12].

  The information obtained by Centrelink from its ATO data match in 2016, showing the gross amounts earned by [the Applicant] from each of his employers in the debt period, is clearly set out at page 108 of the Centrelink documents. The Tribunal has perused debt calculations contained in the Centrelink documents and has no reason to doubt their accuracy [13].

- The Tribunal found that the interest charge was correctly applied as the Applicant had '…failed to engage with Centrelink in a timely manner… or enter into and maintain payments under an acceptable payment arrangement…' [16].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt and noted that Centrelink had already taken some action by garnishing the Applicant's a tax refund [37].

AAT Review Number	DOC ID	Member	Date
2020/P147546	CTH.3761.0005.8505	W Budiselik	4 May 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt on the on the basis of payroll information/payslips Centrelink was directed to obtain.

Key Findings

- The Tribunal found that, while a portion of the overpayment was calculated based on the Applicant's fortnightly earnings, part of the debt was also calculated by averaging the ATO data [11].
- The Tribunal found the overpayment debt had not been accurately calculated and it was appropriate for Centrelink to use its powers to obtain payroll data from the Applicant's former employers to accurately assess the Applicant's entitlements [14].
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/S148483	CTH.3761.0001.0011	D Benk	D Benk

How it was decided and key facts

Outcome

- The decision under review was set aside and the matter remitted to Centrelink for reconsideration.

Key Findings

- The Tribunal stated:

  In November 2019, Centrelink publicly announced that it would no longer raise debts based only on averaging of data from the ATO and it has now instigated various and more robust processes for the gathering of additional information including obtaining via its powers, employment records, bank records, payroll records etc. This action is critical in this case, as the evidence discloses [the Applicant] worked variable periods during the financial year at variable hours and therefore averaging of income over the above period does not produce an accurate statement of the income earned during the individual fortnightly reporting periods that applied to [the Applicant's] parenting payment. The existing information, therefore, is unreliable when it comes to calculating [the Applicant's] true entitlement to parenting payment and whether or not there has been an overpayment [6].

  Given this, the tribunal remits the matter back to Centrelink with a direction to obtain the payroll records and/or payslips from the relevant employer [7].

  …

  As an aside, [the Applicant] appears to have repaid most if not all of the debt. When asked why she had taken so long to come to the tribunal she indicated she was struggling with her mother's passing, Family Court proceedings, trying to maintain employment, relocation and her own health issues. It was only after media attention confirmed her original misgivings about this debt that she has decided to have the matter independently reviewed [9].

- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/B147244	CTH.3041.0031.2068	DC McKelvey	5 May 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and the matter sent back to the Secretary for reconsideration.

Key Findings

- Centrelink raised an NSA debt of $11,798.80 for the period 10 July 2013 to 31 July 2018 following a data match conducted with the ATO [12]. The original debt was based on averaging of income [13].
- The Tribunal noted that the Secretary confirmed that no further review of the alleged overpayment is being conducted and relies on the calculations undertaken on 16 September 2019 [16].
- The Applicant gave evidence that she worked casually for a number of employers and that her work periods and hours varied [17].
- The Tribunal stated:

  Having regard to the data match and the information subsequently used by the Secretary on further review of the debt, I am not satisfied the overpayment and consequential debt as calculated are correct. The calculations continue to rely significantly on data match information and various bank statements provided by [the Applicant] to the Secretary. Missing is the best evidence in the form of complete payroll information and/or payslips or complete bank statements [18].

  Centrelink has attracted widespread criticism, including from this Tribunal, for raising debts simply on the basis of data matches and averaging gross income from each employer over the employment period declared by the employer to the ATO. Such debt calculations, called "robodebts" will only be accurate if an employee's actual work and earning

pattern reflects this assumed regularity of employment and earnings. It will not be accurate if there is variation in actual hours or days worked, if not the rate of remuneration, in any particular fortnight. The Secretary has recently announced (November 2019) that it would no longer raise debts based only on averaging of data from the ATO and has now instigated more robust processes for the gathering of additional information, including obtaining via its powers, employment records, bank records, payroll records etc. The Secretary further intends to reconsider debts previously raised only on the basis of broad averaging of income, or "robodebts," on this basis [19].

The further review of [the Applicant's] debt by the Secretary involved use of some payroll information from one employer and some bank statements provided by [the Applicant]. The information obtained was, however, incomplete and cannot support the calculation of an overpayment and debt across the whole debt period [20].

- The Tribunal set the debt aside and directed the Secretary to reconsider the matter by seeking to obtain payroll information from employers and bank statements, if there are gaps in the payroll information [21].

AAT Review Number	DOC ID	Member	Date
2020/S147522	CTH.3041.0029.5357	S De Bono	5 May 2020
How it was decided and key facts			

Outcome

- The Tribunal set aside the decision under review and decided that the Applicant did not have an NSA debt of $11,044.20.

Key Findings

Centrelink raised an NSA debt of $11,044.20 for the period 6 November 2011 to 30 September 2012. An ARO reviewed and affirmed this decision on 14 June 2016.

Centrelink raised the debt on the basis of income averaging over the relevant period. Income averaging was used to raise a debt based on gross income reported to the ATO for particular financial years and comparing this income with annual income reported to Centrelink throughout the relevant period; this method of raising a debt has become known as the 'robodebt' scheme [8].

The debt was raised solely on the basis of matched income data from the ATO for the periods stated (see paragraph 6). Raising a debt in this manner means that income earnt in a particular period is not verified and therefore the tribunal cannot be satisfied in which Centrelink benefit fortnight the income was earnt and if indeed income was earnt in any particular fortnightly instalment period [9].

- The Tribunal was not satisfied that a debt exists and decided that the Applicant did not have an NSA debt [22].

AAT Review Number	DOC ID	Member	Date
2020/S147216	CTH.3041.0031.5042	J Bakas	11 May 2020
How it was decided and key facts			

Outcome

- The decision under review in relation to the NSA debt for the period between 26 August 2011 to 15 June 2012 (**Decision 1**) was set aside and substituted with the decision that there was no debt.
- The decision under review in relation to the NSA debt for the period between 28 June 2014 to 3 August 2015 (**Decision 2**) was affirmed.

Key Findings

- The Tribunal found that '[t]he information relied upon by Centrelink in this regard has predominantly been provided by way of a data match with the Australian Taxation Office (ATO), providing information about annual earnings from various employers as well as bank statements and a few payslips' [2].
- The Tribunal found a number of issues with the issues with the data relied on by Centrelink and noted '…apart from the ATO data match there is also no evidence of earnings being verified by Centrelink with either the employer or through payslips or bank statements; if this evidence was obtained it is not evident in the papers' [17].

- In relation to Decision 2, the Tribunal found that the debt for this period was calculated using grossed up income amounts from bank statements provided by the Applicant [22].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/A149376	CTH.3041.0032.1878	D Benk	15 May 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt based on the Applicant's payroll records which Centrelink was directed to obtain.

Key Findings

- The Tribunal stated:

  In determining the overpayment (debt) many years after the event and in the absence of payroll records and/or payslips, Centrelink applied an apportionment method to cross reference amounts averaged from annual figures provided by the Australian Taxation Office with the earnings [the Applicant] had originally reported. Debts raised through this process have been labelled by the media as "robodebts". While the apportionment method can provide an accurate calculation where income is steady, this is not the case here [3].

  …The records show she was employed casually and there were fortnights where she earned significant amounts and other fortnights where the income was negligible. Hence, the apportionment method does not work in her circumstances. In the assessment of the matter, Centrelink primarily relied on the apportionment method, which is not correct for these circumstances [4].

  …Despite the vast number of documents before it, the tribunal was of the view there is a paucity of evidence to provide a breakdown of earnings from each employer for each relevant Centrelink fortnightly instalment of newstart allowance. For this reason, the tribunal cannot be satisfied that the debt as raised by Centrelink is correct. This situation could be remedied by the provision of payroll records and/or payslips. Bank records are of little value as they do not accurately represent the employer pay periods. To waive or write off a debt, the tribunal must first be satisfied that a debt exists. Such a finding cannot be made in this case for the reasons discussed above [5].

  In November 2019, Centrelink publicly announced that it would no longer raise debts based only on averaging of data from the ATO and has now instigated various and more robust processes for the gathering of additional information (including obtaining via its legislative powers, employment records, bank records, payroll records etc). This action is critical in this case, as the evidence discloses [the Applicant] worked variable periods at variable hours and therefore averaging of income over the above period does not produce an accurate statement of the income earned during the individual fortnightly reporting periods that applied to [the Applicant's] newstart allowance. The existing information therefore is unreliable when it comes to calculating [the Applicant's] true entitlement to newstart allowance and whether or not there has been an overpayment [6].

  Accordingly, the Tribunal directed Centrelink to obtain payroll records from the Applicant's employers and recalculate the debt on that basis.

- The Tribunal did not consider whether there were circumstances to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/S147256	CTH.3041.0032.2408	M Horsburgh	18 May 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that the Applicant had no debt.

Key Findings

- The Tribunal stated:

  …Centrelink discovered a discrepancy of $12,155.64 between the gross income and the information from the ATO. Centrelink made no attempt to discover why this discrepancy existed. Instead, they apportioned the amount of $12,155.64 over the remaining period of the financial year from 15 April 2014 to 26 June 2014 and raised the debt under review [7].

  During the period of the debt, [the Applicant] was not working. She had no earnings in that period. It follows from this that the debt under review is both arbitrary and unlawful. It is arbitrary because it was imposed without any investigation of the discrepancy. It is unlawful because it is contrary to the provisions of section 1073B of the Act, which does not allow such apportionments [8].

- The Tribunal accordingly found that the Applicant did not owe a debt.

AAT Review Number	DOC ID	Member	Date
2020/M148062	CTH.3025.0001.1375	H Moreland	18 May 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt using payslip information.
- The recalculated debt was recoverable.

Key Findings

- The Tribunal stated that the debt originated as a "robodebt" [8].
- The Tribunal found:

  While the tribunal finds that it is likely that [the Applicant] has incurred a debt due to overpayment of newstart allowance during the relevant period because she habitually and erroneously reported her net income rather than her gross income, the tribunal is not satisfied that [the Applicant's] entitlement to newstart allowance during the relevant period has been calculated with sufficient specificity to determine any resulting debt [10].

  The only way the tribunal can be satisfied that a debt is calculated correctly is based on payroll data provided in documentary form from the relevant employer because the averaging of income does not provide sufficient accuracy because it cannot show the fortnights where someone worked more hours than others; and requiring payment recipients to provide verbal payslip information poses a risk of data entry error with no documents for calculations to be properly checked. The tribunal also finds that payment information derived from bank statements cannot provide sufficient accuracy as it is not always clear what non-assessable items are included, nor can the tribunal be otherwise satisfied that the calculation from net to gross is correct [11].

- Accordingly, the Tribunal directed Centrelink to use its information gathering powers to obtain payroll information for the Applicant from her employer [12].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/M147949	CTH.3025.0083.5604	H Moreland	18 May 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt using payslip information.
- The recalculated debt was recoverable.

Key Findings

- The Tribunal noted that the Applicant's NSA entitlement was calculated using payslip information for one employer, however, bank statement information was used to calculate his income from the other two employers [7].
- The Tribunal stated:

  The tribunal is not satisfied that [the Applicant's] entitlement to newstart during the relevant period has been calculated with sufficient specificity to determine any resulting debt. The only way the tribunal can be satisfied that a debt is calculated correctly is based on payroll data because the averaging of income does not provide sufficient accuracy because it cannot show the fortnights where someone worked more hours than others. The tribunal also finds that payment information derived from bank statements cannot provide sufficient accuracy as it is not always clear what non-assessable items are included, nor can the tribunal be otherwise satisfied that the calculation from net to gross is correct [8].

  To eliminate any doubt and to determine the exact amount of any debts owing, Centrelink will need to use its information gathering powers under section 192 of the Administration Act to contact [the Applicant's] employers from the relevant period to obtain payslips in order to make those calculations [9].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/B147768	CTH.3047.0003.3745	A Byers	19 May 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt.
- The recalculated debt was recoverable.

Key Findings

- The Tribunal found that the original overpayment arose as Centrelink did not take the Applicant's earnings from Employer 1 into account. Centrelink conceded its error in relation to this [7].
- The Tribunal found:

  Regarding the period prior to 6 July 2018, Centrelink indicated it used [the Applicant's] pay advice for the fortnight ending 18 June 2017. The pay advice contains the entry: "Total Adjustments From Previous Pay Periods (Gross) - (See Over) $537.57". As there are no further details, Centrelink has used this as an annual figure for a period of 12 months from 28 June 2017. The statutory basis for this approach is section 1073A of the Act (although this provision only applies to lump sum earnings covering a period greater than a fortnight) [11].

  Regarding the period from 6 July 2018 Centrelink has confirmed that it has incorrectly used a fortnightly figure of $933.15 instead of $993.15. Centrelink has also advised that no attempt was made to ascertain [the Applicant's] actual earnings for this period, or, it appears, for any part of the overpayment period. Accordingly, as the debt has to be recalculated, it is appropriate for Centrelink to obtain actual earnings details from QH from 23 June 2017 to 8 November 2018. Full details relating to the pay fortnight ending 18 June 2017 should also be obtained [12].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/M148170	CTH.3761.0002.1519	H Grossman	25 May 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and the matter remitted to Centrelink for reconsideration.

Key Findings

- The Tribunal indicated that income averaging was used to raise the debt, as not all of the Applicant's income data had been readily available at the time the debt was calculated.

- The Applicant was not able to provide all of the relevant documents to the Tribunal in time for the review.
- The Tribunal found:

  However, the apportionment method used by Centrelink to calculate that portion of the debt attributable to [the Applicant's] employment with [Employer] involves in part, an approximation of his earnings each fortnight. The Tribunal notes that the apportionment method used by Centrelink to calculate this segment of the debt involves an approximation of his earnings each fortnight, as well as some reliance on bank statements and bank deposits not included in the Centrelink documents [19].

  The Tribunal must be satisfied that the amount of the debt is accurate and reflects the income earned during the debt period. In circumstances such as [the Applicant's], where he had an irregular work pattern at [Employer], and in the absence of more specific pay information, the Tribunal cannot be satisfied that the debt amount calculated by Centrelink on the basis of regular apportionment of income across a debt period is correct. In this case there is enough doubt in the Tribunal's mind that, on balance, the debt amount cannot be confirmed [20].

  In summary, in this case the Tribunal does not accept the apportionment of the total income earned over the debt period based on data matching from the ATO and is satisfied, on the basis of [the Applicant's] evidence during the hearing and the information that he provided to Centrelink during the relevant period, that it does not accurately reflect the income that he earned at the time. In the absence of more detailed fortnightly income information in respect of the debt period, the Tribunal is not satisfied that the overpayment amount calculated by Centrelink is correct [22].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/S147881	CTH.3761.0001.5142	H Schuster	1 June 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside because due to insufficient evidence.
- The Tribunal was not satisfied that the Applicant incurred a debt.

Key Findings

The Tribunal indicated that Centrelink had used income averaging to raise the debt, and apportion the Applicant's income over fortnightly periods.

- The Tribunal found:

  As the NSA income test is based on income from employment undertaken in a particular fortnightly instalment period, the ATO information of itself is simply insufficient to determine the debt owed by the person each fortnight. The Department has more recently publically (sic) acknowledged that the averaging of income based on ATO data alone is not sufficient to constitute evidence of a debt having been incurred. This is particularly so when, as in this case, a person was in receipt of NSA payments during part of each financial year [25].

  The evidence provided by Centrelink is not sufficient to allow any decision maker to reach a comfortable level of satisfaction that [the Applicant] was overpaid, much less that the debt amount was correctly determined [26].
- In lieu of sufficient evidence of the debt, the decision was remitted back to Centrelink for recalculation.
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/S148232	CTH.3025.0049.9964	S Cullimore	2 June 2020
How it was decided and key facts			

Outcome

- The decision under review and remitted the Centrelink for recalculation of the debt.

Key Findings

- The Tribunal stated:

  The Centrelink files indicate that the information which Centrelink used to calculate the debt in this matter was the ATO data match and such of [the Applicant's] pay records as he was able to supply. He could not locate all of the relevant payslips [22].

  That scenario immediately raises the strong probability that the debt may not be strictly correct [23].

- The Tribunal conducted its own calculations based on the ATO data and directed Centrelink to recalculate the debt using the same methodology [33]-[36].
- The Tribunal found that the debts arose as the Applicant under-declared his income [42].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remainder of the debt.

AAT Review Number	DOC ID	Member	Date
2020/A146895; 2020/A146896	CTH.3041.0036.2726	P Jensen	2 June 2020

How it was decided and key facts

Outcome

- The decision under review to raise an NSA debt of $23,429.34 for the period between 11 August 2010 to 23 was affirmed.
- The decision under review to raise an NSA debt of $6,489.75 for the period between 17 July 2013 to 10 February 2016 was set aside and substituted with the decision not to raise a further debt against the Applicant.

Key Findings

- In relation to the first debt, the Tribunal found that Centrelink obtained relevant payroll records from each of the Applicant's employers to recalculate the final debt amount. The Tribunal accepted these calculations [4].
- In relation to the second debt, the Tribunal stated:

  …The authorised review officer noted: "On 29 September 2017, as no further breakdown of your earnings from [your other employers] had been received, the department apportioned the verified income from the Australian Taxation Office over the relevant periods." In other words, the Second Debt was a robodebt. Centrelink could have taken further action to obtain [the Applicant's] payroll records, but it elected to not do so. On balance, I am not persuaded that Centrelink has established that [the Applicant] was overpaid in respect of any particular fortnightly instalment period during the longer period from 17 July 2013 to 10 February 2016 (apart from the overpayments that formed part of the overlapping First Debt). For those reasons, the decision to raise the Second Debt will be set aside' [5].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the first debt [7]-[8].

AAT Review Number	DOC ID	Member	Date
2020/H148508	CTH.3041.0037.0700	J Nalpantidis	5 June 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to the Chief Executive Centrelink for recalculation of the debt as directed.
- The recalculated debt was recoverable.
- The decision under review to apply an interest charge was set aside and substituted with the decision that no interest charge was to be applied.

Key Findings

- The Tribunal noted that Centrelink initially calculated the debt using averaged ATO information and applied a 10% penalty [21]. The Tribunal stated:

The "averaging" method initially applied by Centrelink in [the Applicant's] case was clearly unreliable as the "average" figure initially applied by Centrelink evenly across each fortnight in the relevant period did not reflect her actual earnings [23].

The tribunal accepts that [the Applicant's] income varied considerably from fortnight to fortnight and an "average" of her financial year income, as initially applied by Centrelink does not accurately reflect her fortnightly income [24].

- Centrelink recalculated the debt using the Applicant's bank statements, however, the Tribunal found that the gross income from the Applicant's employers did not match the income applied by Centrelink [28]-[30].
- The Tribunal also could not be satisfied that Centrelink correctly calculated the Applicant's business deductions as there was no consideration of allowable deductions [31].
- The Tribunal found:

  In this case the tribunal accepts that [the Applicant] did not work on a stable and consistent basis and her earnings varied from fortnight to fortnight; this is reflected in her net earnings as listed in her bank statements. In the absence of payslip information, the tribunal does not accept Centrelink's averaging method, which was applied in the initial debt calculations, is appropriate to assess whether or not [the Applicant] incurred a debt and the amount of the debt. Using [the Applicant's] financial year income and "averaging" this income to a fortnightly amount has the potential to incorrectly assign income to a different fortnight and can result in a skewing of the rate payable and as a consequence the tribunal cannot be satisfied that any calculated debt using this method is accurate or reliable [32].

  …

  In this case, there is no direct evidence from [the Applicant's] employer, such as payslips, in the relevant period listing her fortnightly income. [the Applicant] provided bank statements which listed net income from [Employer], which Centrelink "grossed-up" to obtain a gross income figure, taking into account the tax that was paid on that net income [34].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the first debt.

AAT Review Number	DOC ID	Member	Date
2020/H149875	CTH.3761.0005.6650	D Benk	9 June 2020

How it was decided and key facts

Outcome

- The decision under review was set aside as the Tribunal could not be satisfied that a debt existed.

Key Findings

- The Tribunal found:

  In determining the overpayment (debt), Centrelink in the absence of payroll records and or payslips, applied an apportionment method to cross reference reported earnings and entitlements generated as a result, many years after the event, relying in the main on figures provided by the Australian Taxation Office. This process has been labelled by the media as a robodebt. Ordinarily the tribunal has no issues with applying the apportionment method where income is steady however this is not the case here [4].

- The Tribunal noted its understanding that since the 'robodebt controversy', Centrelink had instigated 'various and more robust processes for the gathering of additional information including obtaining via its powers, employment records, bank records, payroll records etc' and found '[t]his had not been done' in the present case [6]-[7].
- The Tribunal also noted:

  As the alleged overpayment has been calculated with reference to ATO data and applying the averaging method, the tribunal cannot be satisfied that there is a debt in the circumstances of this case, on the evidence before it and so sets aside the decision to raise and recover the debt [7].

- The Tribunal also directed in its reasons that '[i]f monies have been recovered to satisfy this debt, they should now be refunded to [the Applicant] until a debt is proven' [7].
- The Tribunal did not consider waiver or write off by way of sole administrative error or special circumstances.

AAT Review Number	DOC ID	Member	Date
2020/S147197	CTH.3041.0036.7034	M Horsburgh	9 June 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that the Applicant had no debts.

Key Findings

- The Tribunal found:

  According to the Centrelink documents, the debts under review were calculated by using information provided by the Australian Taxation Office. This information was apportioned evenly across the relevant date periods. This method of calculation is contrary to the provisions of section 1073B of the Act. That section requires income from employment to be apportioned to the fortnight in which they were earned. That is to say, the method of calculating these debts was unlawful. It follows from this, that [the Applicant] does not have these debts. If [the Applicant] does not have the debts, no penalties can be imposed upon her. I set aside the decision under review. Any monies recovered from [the Applicant], must be repaid to her [8].

AAT Review Number	DOC ID	Member	Date
2020/M150174	CTH.3041.0039.7779	D Benk	22 June 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation.

Key Findings

- An ARO affirmed the debt on internal review.
- The Tribunal commented at [3]:

  In determining the overpayment (debt) many years after the event and in the absence of payroll records and or payslips Centrelink applied an apportionment method to cross reference amounts averaged from annual figures provided by the Australian Taxation Office (ATO) with the earnings [the Applicant] had originally reported. Debts raised through this process have been labelled by the media as “robodebts”. While the apportionment method can provide an accurate calculation where income is steady, this is not the case here.

- The Tribunal directed that Centrelink recalculate the debts based on actual fortnightly earnings and should obtain the relevant payslip or bank account information.

AAT Review Number	DOC ID	Member	Date
2020/S149096	CTH.3761.0001.5081	AJ Halstead	24 June 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and the Tribunal remitted the decision back to Centrelink to recalculate the debt using payslip information (to be obtained by Centrelink).

Key Findings

- Centrelink had used income averaging in lieu of other income information. The Tribunal was not satisfied that the calculation is correct and remitted the decision.
- The Tribunal found:

  The amount of the debts determined for [the Applicant] for the periods where averaged income has been applied has not been correctly calculated in accordance with section 1068 of the Act. This is because the evidence does not

establish that [the Applicant's] income was the same from one period to the next and so an averaging does not reflect actual income for each social security payment period. In such circumstances the debt for those periods needs to be recalculated with reference to actual periodic income [9].

the Department is to obtain detailed payroll records from each of [the Applicant's] employers for which averaged income has been applied... In the event that information is not available, grossed-up amounts assessed from bank statement records obtained from the relevant financial institution for [the Applicant's] bank account may be used. The amount of income received for each period specified in section 1073B of the Act is to be applied according to that provision. [the Applicant's] actual entitlement to newstart allowance is to be calculated thereafter according to section 1068 of the Act [10].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/B148156	CTH.3761.0005.8784	K Juhasz	25 June 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that the debt be recalculated on the basis of employer payroll information, with any resultant debt to be recoverable.

Key Findings

- The decision under review for the Tribunal involved determining whether the Applicant was overpaid Parenting Payment for the periods 2 July 2010 to 16 December 2010 and 13 July 2012 to 26 December 2013 [1]. The Applicant was a party to the Robodebt Class Action [3].
- The Tribunal stated:

  The Tribunal discussed the contents of the authorised review officer's decision within the context of the robodebt being raised. It is apparent from page 11 of that decision that the debts were raised on the basis of a data match with the ATO and there doesn't appear to have been any further investigation done by way of obtaining payslips or PAYG data in order to properly distribute [the Applicant's] income into the appropriate fortnights required to determine her Centrelink rate. [The Applicant] was rightly concerned that a debt could have been originally raised for employment that she received from [Employer] when she had actually moved to the Gold Coast in May 2010 and Centrelink had kept her weekly income from [Employer] applicable to her parenting payment between July and December 2010 [11].

- The Tribunal was critical of the ARO's determination which was not based on the most accurate debt possible [15]-[16].
- The Tribunal noted there was no evidence of Centrelink making any enquiries with the Applicant's employers to obtain payslip records, PAYG records or employment information that could provide a more accurate description of when she received the relevant amounts of income within the overall debt period. It not take significant points of enquiry for the ARO to discover that was a debt incorrectly raised [17].
- The Tribunal sent the matter back to Centrelink in order to seek particular employment data and if this information did not exist, then 'Centrelink may be in a position whereby they distribute the difference between the income declared and the records held by the ATO but until further enquiries have been made, the robodebt process is not something which should have been undertaken' [18].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/B150211	CTH.3761.0002.5389	R Bradley	3 July 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation of the debt.

Key Findings

- Centrelink issued a notice to recover $11,713.90 from the Applicant due to overpayment of parenting payment. The Applicant's debt was originally raised due to income data-matching from the ATO.
- In the circumstances of this case the Tribunal decided it would be appropriate to send the matter back to Centrelink to consider if the Applicant has a debt due to overpayment of parenting payment [54].
- The Tribunal discussed robodebts at length and considered the Amato proceedings.
- The Tribunal stated:

  The Tribunal has not been provided with details from Centrelink about how the "robo-debts" will be treated and if [the Applicant's] debt is an "eligible debt" for which recovery will not be sought by the Commonwealth [53].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/B149726	CTH.3025.0003.0293	R Perton	7 July 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted back to Centrelink for further investigations as to the Applicant's actual income.

Key Findings

- The Applicant received a debt arising from overpayment of newstart allowance.
- An ARO affirmed the debt on internal review.
- The Tribunal commented at [19]:

  However, the Tribunal is not in the position to accurately determine what [the Applicant]'s fortnightly earnings actually were in the debt periods and therefore if the debt calculations are correct. The calculations appear to have been averaged out over the period of the debt notwithstanding that [the Applicant]'s earnings varied.

- The Tribunal also commented at [27]:

  At this stage, while the level of debt is unclear, the Tribunal does not believe it is appropriate to waive any or all of the debt on the basis of special circumstances.

AAT Review Number	DOC ID	Member	Date
2020/B150377	CTH.3041.0044.8046	A Byers	9 July 2020
How it was decided and key facts			

Income averaging was not a key issue in this matter.

Outcome

- The decision under review was affirmed.

Key Findings

- An ARO varied the debt on internal review.
- The Applicant conceded she had made unintentional errors when declaring her earnings to Centrelink.
- Given the Applicant received multiple different calculations of her debt she 'understandably has little confidence in Centrelink's debt calculations' [8].
- In regards to using apportioned income, the Tribunal commented at [11] and [14]:

  As [the Applicant]'s pay periods do not coincide with her newstart allowance payment fortnights, in the absence of more fine-tuned earnings details, Centrelink has, in accordance well established principles, apportioned the earnings across the payment fortnights.

The authorised review officer's overpayment calculations use Centrelink's ADEX program, which is the program used to calculate the ongoing entitlements of Centrelink recipients. Again, as [the Applicant]'s pay periods do not coincide with her carer payment fortnights, Centrelink has apportioned the earnings across the payment fortnights.

- The Tribunal considered income averaging was appropriate in the circumstances.
- The Tribunal was satisfied that the calculations were correct on this basis.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt. Part of the debt was already written off due to the financial impact of COVID-19.

AAT Review Number	DOC ID	Member	Date
2020/B150415	CTH.3761.0005.7893	R Bradley	10 July 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that there was no lawfully recoverable debt due to overpayment of DSP in the relevant period.

Key Findings

- The Tribunal noted there was no evidence that the Applicant provided Centrelink with her payslips or bank statements for Centrelink to calculate the overpayment and found that Centrelink had:

  … apportioned what it considers are the non-declared amounts over the fortnights [the Applicant] was working.

  In the absence of [the Applicant's] pay records the Tribunal could not be satisfied that the overpayment and debt have been correctly calculated [26].

  In this matter the Tribunal is reviewing an overpayment and debt that was raised due to income data-matching from the ATO [27].

- The Tribunal referenced the orders made by Justice Davies in Deanna Amato v The Commonwealth of Australia No VID611/2019 (Amato) and stated:

  The Tribunal notes that the Australian Government conceded in the Amato matter that there was no lawful basis for raising debts on averaging matched data. Nor was there a lawful basis for adding a 10% penalty fee to such debts. Nor was there a lawful basis to recover such debts by garnishee of an income tax refund [31].

- The Tribunal was satisfied that the debt was raised partially using income averaging of ATO data [33].
- The Tribunal was also satisfied that the 'calculation of the overpayment to [the Applicant] was not validly made because the information before the original decision-maker was not capable of satisfying the decision-maker' that the debt was owed within the scope of ss 1222A(a) and 1223(1) of the Social Security Act 1991 (Cth) [34].
- The Tribunal did not consider whether circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/B149130	CTH.3041.0060.5694	K Juhasz	15 July 2020

How it was decided and key facts

Outcome

- The decision under review was set aside, and the Tribunal directs the matter be sent back to Centrelink for recalculation, that the 10% recovery fee be set aside, and that the debt recovery by garnishee notice was correct.

Key Findings

- An ARO varied the debt on internal review.
- The Tribunal commented at [7]-[8]:

  [The Applicant] gave evidence that she had received notice that her debt was as a result of the Robo Debt process initiated by Centrelink and now subject to a class action. She was a party to that class action by the nature of how her debt had been raised against her initially through the annual averaging of income rather than payslips.

She acknowledged that this was no longer the case because she had been forced by Centrelink to find payslips to support her employment payments during the time in which she worked and her debt had been recalculated; however she did not believe that the full extent of payslips from her employers had been obtained. She had been unable to retrieve them in their entirety and she was uncertain whether she had in fact worked throughout all the time periods in which the debt had been raised and distributed. [The Applicant] indicated that within her own material her end dates of employment were in contrast to when Centrelink had her concluding employment upon their records.

- The Tribunal was of the view that the final debt amount did not appear to be calculated as per the averaging of income [10].
- Given the number of times the debt has been recalculated, the Tribunal remitted the decision back to Centrelink, so that they can formally seek payslips for the relevant periods to ensure the final debt calculation is correct [10].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/S150606	CTH.3047.0004.3642	F Zuccala	15 July 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and the decision was remitted to Centrelink for recalculation on the basis of payslip information.

Key Findings

- An ARO affirmed the debt on internal review.
- The decision concerned a parenting payment.
- The Applicant submitted further payslip information to the Tribunal which provided new information about income amounts and pay periods.
- The Tribunal directed that the debt be recalculated based on actual income information as provided by the Applicant.
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/A148841	CTH.3025.0002.6289	N Foster	15 July 2020

How it was decided and key facts

Outcome

- Part of the decision under review was varied and the debt written off. The other part of the debt was remitted to Centrelink for recalculation.

Key Findings

- An ARO affirmed the debt on internal review.
- The Applicant did not correctly declare all of her income, and the Tribunal was satisfied the first three of the five debts had been correctly calculated as Centrelink had received information about her actual income from her various employers.
- In regards to the other two debts, the Applicant had not declared any income. In lieu of pay slip information Centrelink used averaged fortnightly income amounts to determine the debt [8].
- The Tribunal commented at [9]-[10]:

  In his written submissions to the tribunal, [the Applicant] contended that the recent Federal Court decision in the matter of Deanna Amato v The Commonwealth of Australia (VID611/2019) established that the use of income averaging was not a lawful basis for raising a debt against an individual....

  It is a matter of public record that Centrelink announced in November 2019 that it would no longer raise debts on the basis of averaged income and that it intended to revisit previous debts where this had occurred. This change in Centrelink procedure followed the court decision cited by [the Applicant] and months of adverse media publicity

concerning what have become widely known as "robodebts"... Given the matters raised by [the Applicant], the tribunal agrees that the averaged income figures used by Centrelink in calculating the debts of $25,427.92 and $6,444.98 are unlikely to correspond with [the Applicant]'s actual income for the fortnights in question. In the absence of any reliable evidence about [the Applicant]'s actual income in particular fortnights, the tribunal is not satisfied that debts can currently be quantified ...

- The Tribunal was not satisfied these remaining debts had been correctly calculated, and remitted the decision back to Centrelink for recalculation. Centrelink was to obtain actual pay slip information in order to accurately calculate the debt.
- One of the debts was waived. The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the remaining debts.

AAT Review Number	DOC ID	Member	Date
2020/M151222	CTH.3041.0053.5533	D Benk	27 July 2020

How it was decided and key facts

Outcome

- The decision under review was set aside as the Tribunal could not be satisfied that the debts as calculated existed.

Key Findings

- The Tribunal commented at [4]:

  In determining the overpayment (debt), Centrelink in the absence of payroll records and/or payslips, applied an apportionment method to cross reference reported earnings and entitlements generated as a result, many years after the event, relying in the main on figures provided by the Australian Taxation Office (ATO). This process has been labelled by the media as a robodebt. Ordinarily the tribunal has no issues with applying the apportionment method where income is steady however this is not the case here.

- The Tribunal commented at [6] and [7]:

  The tribunal understands that since the robodebt controversy, most recently in November 2019 and again in May 2020, Centrelink has instigated various and more robust processes for the gathering of additional information including obtaining via its powers, employment records and payroll records etc.

- This has not been done here. As the alleged overpayment has been calculated with reference to ATO data and applying the averaging method, the tribunal cannot be satisfied that there is a debt in the circumstances of this case on the evidence before it and so sets aside the decision to raise and recover the debt.
- The Tribunal was not satisfied the debt calculations were correct, and remitted the decision back to Centrelink for recalculation based on actual income information.

AAT Review Number	DOC ID	Member	Date
2020/M151641	CTH.3025.0004.5913	S De Bono	1 September 2020

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that there was no debt with any repayment to be refunded.

Key Findings

- A YA debt was raised on the basis of a data-match with the ATO for the 2015/2016 and 2016/2017 years [7].
- The Tribunal noted the ATO data indicated the Applicant earnt a higher income than the income she declared to Centrelink [8]. An ARO affirmed the decision [2].
- The Tribunal stated in regards to the basis of the debt calculation:

  Additionally, the ADEX debt schedule before the tribunal with the debt amount relevant to this review shows that the income has been apportioned (averaged) without reference to the bank statements provided by [the Applicant] to the tribunal [14].

- The Tribunal stated:

  In conclusion the tribunal finds that this debt in the current form is a robodebt and the alleged overpayment has been calculated with reference to ATO matched data by applying the averaging method. The tribunal cannot be satisfied that there is a debt in the circumstances of this case and sets aside the decision to raise and recover the debt [19].

AAT Review Number	DOC ID	Member	Date
2020/M153050	CTH.3025.0005.8439	H Moreland	28 September 2020
How it was decided and key facts			

Outcome

- The decision was set aside and remitted to Centrelink for recalculation on the basis of obtaining employer payslips, with the recalculated debt to be recoverable.

Key Findings

- Centrelink raised a NSA debt following an ATO data match. Centrelink reassessed and reduced the debt. An ARO affirmed the decision, further revising and reducing the debt amount [2].
- The Tribunal stated:

  According to the Centrelink papers, [the Applicant's] entitlement to newstart allowance during the relevant period has been calculated using a combination of bank statement and payslip information from [Employer 1] and [Employer 2]. The tribunal also notes that this debt originated using ATO data match and therefore began as what is commonly referred to as a 'Robodebt' [7].

- The Tribunal found in relation to the averaging of income:

  The only way the tribunal can be satisfied that a debt is calculated correctly is based on payroll data provided in documentary form from the relevant employers because the averaging of income does not provide sufficient accuracy as it cannot show the fortnights where someone worked more hours than others; and requiring payment recipients to provide verbal payslip information poses a risk of data entry error with no documents for calculations to be properly checked. The tribunal also finds that payment information derived from bank statements cannot provide sufficient accuracy as it is not always clear what non-assessable items are included, nor can the tribunal be otherwise satisfied that the calculation from net to gross is correct [9].

- The Tribunal stated that Centrelink would need to use its information gathering powers to contact the relevant employers and determine the exact amount of the debt owing [10].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/M153030	CTH.3025.0059.2134	P Sperling	29 September 2020
How it was decided and key facts			

Outcome

- The decision was set aside and remitted to Centrelink for recalculation on the basis of payslips, and If a debt was found, the information was to be documented so that it was understandable and capable of being checked by a layperson.

Key Findings

- Following a data-match with the ATO, Centrelink raised a YA debt for the 2017/2018 FY which was reassessed and increased on the basis of payslips provided by the Applicant [2]-[3]. An ARO affirmed the decision and increased the debt amount [4].
- The Tribunal found it was not satisfied the ARO's findings could be relied on [16]. In regards to Centrelink's calculations of the debt:

  the verified earnings and apportioned earnings as set out in the Centrelink documents do not correspond with the information in the pay slips provided in the Centrelink documents; and no pay slips have been provided showing [the Applicant's] income during the debt period [14].

- The Tribunal stated:

  While [the Applicant] may have been overpaid during the debt period, the quantum of any overpayment is not able to be verified on the basis of the documentation and calculations provided. Alternatively, [the Applicant] may have been overpaid during the period actually covered by the available pay slips (i.e. prior to the current debt period), but no calculations have been provided to demonstrate this. The concerns and discrepancies outlined in paragraph 14 of these Reasons explain why the tribunal is not satisfied that the ARO's findings can be relied on [16].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/P154095	CTH.3025.0007.3766	M Manetta	22 October 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that no debt has been proved, and any debt arising from overpayment must be waived.

Key Findings

- Centrelink raised a YA debt on the basis of being overpaid YA [1]. An ARO varied the decision increasing the debt amount [2].
- The Tribunal noted Centrelink calculated the initial debt by averaging income. A reassessment was undertaken on the basis of payslips provided by the Applicant [6].
- The Tribunal stated:

  The fact that four attempts have been conducted raises some doubt in that regard. Moreover, the calculation schedule (Tribunal Papers, page 51) shows, for the period in question total earnings (in the pay cycle) of $2,507 and total declared earnings for the reporting cycle of $2,460 – a discrepancy of $47. Aside from the waste of human and financial resources brought to bear in this relatively trivial exercise, what that means is that the Tribunal cannot be satisfied that the debt has been proved on the balance of probabilities. The Tribunal therefore finds that the debt has not been validly raised [7].

- The Tribunal found sole administrative error existed to justify the waiver of the debt. The Tribunal stated:

  After the Agency had received [the Applicant's] payslips, it had all the information necessary for it to accurately calculate her entitlement. Given that [the Applicant] has received her entitlements in good faith, having honestly and diligently attempted to report accurately, that means that, after 15 August 2018, any overpayment became solely attributable to the administrative failure of the Agency to raise the debt, so the first two conditions were satisfied. The Agency thus had six weeks from 15 August 2018, to raise a valid debt. It did not do so until April 2019. The third condition was thus satisfied. So, if there is a valid debt, it must be waived in any event [9]-[10].

AAT Review Number	DOC ID	Member	Date
2020/M154126	CTH.3041.0092.5019	M Manetta	5 November 2020
How it was decided and key facts			

Outcome

- The decision under review was varied and remitted to Centrelink for recalculation of the Applicant's proper entitlement to NSA and Austudy, with any resultant debt to be reduced and waived without 10% penalty.

Key Findings

- Centrelink raised two debts in respect of the 2015/2016 and 2016/2017 FY for overpayment of NSA and Austudy [1]. Internal review on the basis of payslips provided by the Applicant raised a third debt for the 2017/2018 FY [2]. The debts were varied on internal review again and reduced [3].
- The Applicant accepted that he did not accurately report his income [7].
- The Tribunal made a number of statements in regards to Centrelink's calculation of the debts. The Tribunal noted:

Ultimately when presented with the original debt in the order of $11,000, itself grossly inflated because of the so-called 'Robodebt' techniques of averaging, [the Applicant] found himself so overwhelmed by the fear of incurring further debt that he voluntarily withdrew from social security benefits [8].

- The Tribunal found administrative error existed to justify the waiver of the debts, stating the following:

  On the other hand, if he has done so out of despair or misapprehension provoked by an alarmingly large and unlawful demand made by the Agency, it would be unfair to allow the Agency to recoup any properly owed debt without bringing to account the amount of benefits which [the Applicant] might otherwise have claimed, but has felt obliged to forgo. That would produce a windfall to the Agency at [the Applicant's] expense. It would also allow the Agency to profit from its own wrong. It would also have the counter-productive effect of punishing [the Applicant] for his determination to be self-reliant. In the Tribunal's opinion, these effects would cause the Act to operate unfairly and contrary to the legislative intent, so that the discretion should be exercised favourably to reduce the amount of the debt by the amounts which [the Applicant] would have been entitled to, but did not claim, in the 2018/19 and 2019/20 financial years, had he not withdrawn from his newstart allowance/austudy entitlements when he did [10]-[11].

AAT Review Number	DOC ID	Member	Date
2020/M154768	CTH.3041.0098.4679	K Juhasz	19 November 2020
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted that there was no debt for PP, the FTB debt calculation was correct and the debts be waived.

Key Findings

- Centrelink raised three debts in relation to PP and FTB [1]. The Tribunal stated:

  A debt arose for overpayment of PP from income estimates from the Australian Taxation Office (ATO) compared to her wage disclosures to Centrelink via the "robodebt" scheme in an amount of $2,270.23. This then directly affected her FTB payments [10].

- An ARO varied the PP debt and affirmed the FTB debts [2].
- The Tribunal stated the Applicant gave evidence of the following:

  [The Applicant] gave evidence that she had been made a party to the class action against Centrelink for the improper use of the robodebt system in the calculation of her PP debt. She said that since the decision of the authorised review officer, Centrelink had zeroed the debt to nil. This letter was not in the Centrelink hearing papers. Following the hearing [the Applicant] provide the relevant correspondence dated 31 July 2020. It stated the following: Dear [Applicant] Your income compliance debt has been changed to $0.00. Centrelink has changed how we use employment income information from the Australian Taxation Officer in income compliance reviews. You previously had debts raised using averaging of ATO information. We no longer do this. The debts below have been changed to $0.00: P5349955 parenting payment - $0.00 [9].

- The Tribunal found circumstances existed to justify the waiver of the debts. The Tribunal found the following:

  [The Applicant] was the aggrieved party to a scheme whereby her debt was calculated via the robodebt mechanism which has now been overhauled by the Commonwealth government. She had had a number of years suffering significant stress as a result and her PP debt waived following the class action against Centrelink [24].

  In these circumstances the Tribunal finds there are special circumstances pursuant to section 101 of the A New Tax System (Family Assistance) (Administration) Act 1999 facilitating the FTB overpayments to be waived. Accordingly these amounts do not need to be repaid [25].

AAT Review Number	DOC ID	Member	Date
2020/S154216	CTH.3025.0009.5921	M Horsburgh AM	26 November 2020

How it was decided and key facts

Outcome

- The decisions under review were set aside and remitted to Centrelink for recalculation with the directions that:
  - The income declared by the Applicant as received from one of her employers are accepted as the earnings;
  - There was no debt arising from one employer; and
  - Any resultant debt was recoverable.

Key Findings

- Centrelink raised two PP debts and four family assistance debts which were affirmed by an ARO [1].
- The Tribunal stated in regards to the calculation of the debts:

  When Centrelink obtained information from the Australian Taxation Office (ATO), [the Applicant] supplied her pay slips from the [Employer 1]. To the extent that any part of the parenting payment debts arises from [the Applicant's] employment with the [Employer 1], it was calculated lawfully [13].

  At the hearing, [the Applicant] told me that she was unable to provide payslips from the [Employer 2] before Centrelink finalised the parenting payment debts. As far as I can tell, so much of the parenting payment debts as arises from that employment was calculated by relying solely on annual information from the ATO. I conclude, therefore, that the resulting part of the parenting payment debts constitutes an unlawful robodebt. I set aside that part of the parenting payment debts. I assume that [the Applicant's] parenting payment was calculated using her declaration of income from the [Employer 2]. That is the lawful calculation [14].

- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the resultant debt.

AAT Review Number	DOC ID	Member	Date
2020/B155734	CTH.3041.0134.8729	S Brakespeare	3 February 2021

How it was decided and key facts

Outcome

- The decision under review to raise and recover a NSA debt was affirmed.
- The decision under review to raise and recover a YA debt was set aside and remitted to Centrelink for reconsideration in accordance with the direction to obtain income details from the Applicant's employer and apply same to the rate calculator.
- The decision under review to raise and recover an austudy debt was varied to the extent that the overpaid amount was recalculated to rectify the error and recalculate the overpaid amount.

Key Findings

- The Tribunal noted the Applicant raised concerns that Centrelink had averaged the Applicant's income in calculating the debts, rather than applying the income to the relevant instalment fortnight in which it had been earned [8].
- The Tribunal stated that, in making the final debt calculations, Centrelink had for the most part relied upon pay advices provided by the Applicant. The Tribunal was satisfied the Applicant had been overpaid as it was evident that not all of the income the Applicant earned from employment was taken into account when income support payments were calculated and paid to him [9].
- The Tribunal found the NSA payment had been correctly calculated [10].
- The Tribunal found the YA overpayment had not been correctly calculated – the Tribunal noted that the Applicant was unable to supply pay advices for three fortnights and Centrelink had subsequently used year-to-date figures from other pay advices to work out the gross amounts earned by the Applicant in that 6-week period and averaged the amount over the period [10].
- The Tribunal stated re the YA overpayment:

  that calculation method used is not correct as gross fortnightly income is to be applied to the instalment period relevant to when it was earned. Centrelink's work in establishing the overpayment is not yet complete as it needs to gather the

information necessary to correctly calculate the overpaid amount. As [the Applicant] does not have the information Centrelink will need to gather it from his employer [10].

- In relation to the Austudy overpayment, the Tribunal found the Applicant's gross income had been incorrectly recorded in the casual earnings apportionment sheet as having been apportioned across 76 days, instead of being apportioned across 14 days [10].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/S154956	CTH.3041.0144.6139	S De Bono	4 February 2021
How it was decided and key facts			

Outcome

- The decision under review was set aside and substituted with the decision that the Applicant does not have a DSP debt arising from the relevant period and the debt is to be recalculated on the basis of the Tribunal's findings as outlined in para 14 of these reasons, with any recalculated debt to be recovered from the Applicant.

Key Findings

- The Tribunal was satisfied that not all of the Applicant's income was included when calculating his rate of DSP paid to him throughout the period, but noted there were no payslips before the Tribunal for a particular employer after 3 November 2013 and income had been included in the debt calculations to 13 December 2014 [12].
- The Tribunal stated it was unable to determine if the remainder of income calculations from 4 November 2014 had been determined 'in the absence of payslip or payment summary information before the tribunal from this employer' and there was also 'some evidence in the EANS screen that some portions of the income from IAG have been annualised' [12].
- The Tribunal directed that the debt be recalculated using payslip or payment summary information contained in the hearing papers and no portion of the debt is to be averaged [13].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2020/M156132	CTH.3041.0136.4463	J Nalpantidis	12 February 2021
How it was decided and key facts			

Outcome

- The decision under review was set aside and remitted to Centrelink for reconsideration in accordance with directions that Centrelink verify the Applicant's actual income from the Applicant's employer for the relevant period and apply her actual income to the relevant Centrelink fortnights, with the recalculated debt to be recoverable.

Key Findings

- The Tribunal noted that the Centrelink material included information from the ATO which indicated a discrepancy between the Applicant's 2014/15 FY taxable income from her employer and her Centrelink reported income [16]. The Centrelink material also included payslips provided by the Applicant as part of the 'online review of her income' [17].
- The Tribunal examined Centrelink's debt calculations and identified discrepancies between the information contained in the earnings screen, the ARO summary, and the apportioned earnings table upon which the debt calculations were based. The Tribunal noted as an example that earnings from payslips had been incorrectly apportioned for the duration of the debt period and was not satisfied on the balance of probabilities that the debt had been correctly calculated by Centrelink [27].
- The Tribunal noted there was no direct evidence from the Applicant's employers, such as actual payslips or other records verifying her pay and when she earned that pay, such as for example timesheets [29].
- The Tribunal concluded it was likely that the Applicant was overpaid NSA in the relevant period, but could not be satisfied that Centrelink had correctly calculated the debt [30].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

AAT Review Number	DOC ID	Member	Date
2021/M158782	CTH.3025.0021.1494	D Tucker	28 April 2021

How it was decided and key facts

Outcome

- The decision under review was set aside and substituted with the decision that the debt is to be waived.

Key Findings

- Centrelink raised the debt following a data match with ATO. The Tribunal noted that the debt was initially a robodebt [23].
- The Tribunal found that Centrelink's calculations were not accurate due to incorrect apportioning of his earnings to instalment periods [18].
- The Tribunal found that the Applicant had underreported his income [19].
- The Tribunal found that special circumstances existed to justify the waiver of the debt. The Tribunal noted that the special circumstances of the case included that the debt was initially a robodebt, which caused the Applicant stress and indignation. The Tribunal stated:

  By alleging a debt in this way, Centrelink unfairly put an onus on [the Applicant] to disprove it. Furthermore, because this debt was raised more than four years after the alleged overpayments, the records [the Applicant] needed to prove his case were not readily available [23].

AAT Review Number	DOC ID	Member	Date
2021/B160988	CTH.3041.0169.8220	D Benk	20 July 2021

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted to Centrelink for recalculation on the basis of obtaining payslips from the Applicant's employer.

Key Findings

- Centrelink raised a DSP debt and NSA debt for the periods from 8 January 2015 and 15 March 2016, and 7 March 2016 to 23 June 2017 [1].
- The Tribunal stated:

  Centrelink applied an apportionment method to cross reference amounts averaged from annual figures provided by the Australian Taxation Office with the earnings [the Applicant] had originally reported for several different employers [3].

- The Tribunal noted:

  Debts raised through this process have been labelled by the media as "robodebts". While the apportionment method can provide an accurate calculation where income is steady, this is not the case here. [The Applicant] then provided some bank statements to Centrelink but the sequence of statements was incomplete, that is, a few months were missing. Centrelink then reconciled the earnings by applying the net to gross method from the data obtained in the bank statements which resulted in a small reduction of the debt [4].

- The Applicant was a casual employee during the debt periods [5].
- The Tribunal stated:

  In short, the reliance on the incomplete series of bank statements and the inability to identify when the income was earned, results in the tribunal having concerns that the debt as claimed has been incorrectly calculated. As indicated above, preliminary review of the debt calculations reveal both overpayments and underpayments, but the true extent remains unknown as the bank deposits do not show the periods in which the monies were earned.

- The Tribunal found it could not consider write-off or waiver of the debts as it could not be satisfied that the debt had been correctly calculated or if a debt even existed [6]-[7].

AAT Review Number	DOC ID	Member	Date
2021/S161775	CTH.3025.0024.5036	M Horsburgh	21 July 2021

How it was decided and key facts

Outcome

- The decision under review was set aside and in substitution $512 of the debt was waived.

Key Findings

- Centrelink raised a YA debt and 10% penalty following information received from the ATO which suggested the Applicant had not declared all earnings [8]-[9].
- The Tribunal stated:

  Centrelink then raised the debt by apportioning the amounts in the ATO information equally over the youth allowance pay periods. This action was unlawful, and the original debt raised by Centrelink came into the category of a robodebt [8].

- Centrelink recalculated the debt based on bank statements provided by the Applicant [9]. The interest charge was removed [9].
- The Applicant gave evidence that the money she earned included commissions on sales. The Tribunal noted that the income test treats commissions differently from wages which means it cannot be satisfied that the debt has been calculated properly [11].
- The Tribunal noted the Applicant did not dispute a debt but disputed the amount noting she was not confident the grossed-up amounts were properly assigned to the YA payment cycle [12]. The Tribunal found it was not satisfied of the debt amount [12] but that 50% of the debt should be waived [17].

AAT Review Number	DOC ID	Member	Date
2021/M166392	CTH.3041.0209.3611	D Benk	01 March 2022

How it was decided and key facts

Outcome

- The decision under review was set aside and remitted for recalculation on the basis of obtaining employer pay records, including the interim direction to halt debt recovery action.

Key Findings

- Centrelink raised a DSP debt on the basis of pay information from the ATO [1]-[2].
- The Tribunal noted as part of the documentation on appeal:

  In the letter from Centrelink, [the Applicant] was classified as falling into a Class 3b claimant defined as 'this debt used average ATO income information. The amount repaid was less than what was owed after the debt was recalculated using verified income.' (the issue here is that not all of the income from the three employers has been verified) [7].

- The Tribunal found it was not satisfied of Centrelink's debt calculation overall in the absence of all payroll data from each employer and the inability to identify payment periods of grossed up income from bank statements [9].
- The Tribunal found that no sole administrative error or special circumstances existed to justify the write off or waiver of the debt.

Royal Commisson Staff List

Staff	Position
Rebecca Abbott	Witness Support
Samuel Burgess	Assistant Director Media
Andrew Carolan	Videographer and Content Creator
Elizabeth Clark	Policy Officer
Nicholas Davison	Director Submissions
Laura Dawson	Counsel
Kristy Do	Policy Officer
Karan Gaylard	Director Media, Communications and Publications
Simran Goklaney	Policy Officer
Shannon Gray	Policy Officer
Michelle Gunawan	Senior Policy Officer
Hala Hamed	Submissions Officer
Matthew Heal	Assistant Director ICT
Joanne Healy	Executive Assistant
Evelyn Kennedy	Finance Officer
Sarah Kenny	Copyeditor
Zoe Kent	Director Policy
Jane Lye	Official Secretary
Robyn McBryde	Executive Assistant
Bradley McNamara	Director Policy
Timothy Moores	Logistics Officer
Annelise Nofz	Policy Officer
David O'Brien	Assistant Official Secretary; Director Finance
Alison Page	Assistant Director Human Resources
Kristine Pajda	Director Logistics
Kathryn Payne	Director Human Impacts
Leisa Pendle	Assistant Official Secretary
Ulani Powell	Policy Officer
Bianca Rapisarda	Counsel Assisting Support Officer
Cecelia Redfern	Director Policy
Miranda Robson	Submissions Officer
Jessica Rosengren	Policy Officer
Vesna Veness	Policy Officer
Michael Vesotsky	Media and Communications Officer
Sally Waters	Policy Officer
Isobel Whittle	Senior Policy Officer
Trina Williams	Director Submissions
Heidi Willis	Policy Officer