



Australian Government  
Department of Social Services

MS22-001126

To: Minister for Social Services (for information)  
Minister for Government Services (for information)

Subject: Assessing employment income and social security debt calculations - General Instructions for Services Australia

Recommendations for Minister Rishworth: That you

1. Note the department and Services Australia have agreed General Instructions for the calculation of pre 7 December 2020 debts.	Noted / Please Discuss
2. Note ongoing investigations being undertaken to develop further advice on the handling of historical cases.	Noted / Please Discuss
3. Note that the Commonwealth Ombudsman has initiated two investigations into Services Australia's handling of these debts.	Noted / Please Discuss

Minister Rishworth Comments

*Please keep me informed of further advice*

Minister Rishworth's signature: *[Handwritten Signature]*

Date: *8.6* 2023

Recommendations for Minister Shorten: That you

1. Note the department and Services Australia have agreed General Instructions for the calculation of pre 7 December 2020 debts.	Noted / Please Discuss
2. Note ongoing investigations being undertaken to develop further advice on the handling of historical cases.	Noted / Please Discuss
3. Note that the Commonwealth Ombudsman has initiated two investigations into Services Australia's handling of these debts.	Noted / Please Discuss

Minister Shorten Comments

Minister Shorten's signature:.....

Date:...../...../ 2023

## OFFICIAL: Sensitive, Legal Privilege

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### Introduction

1. **s 47C**
2. Former Senator Patrick initially raised the issue of relying on payslips without clear evidence of alignment with fortnightly instalments in questioning during Budget Estimates on 29 October 2020 and then again on 25 March 2021. See **Background** below for further details.
3. Former Senator Patrick subsequently wrote to the former Minister for Families and Social Services on 14 February 2022 about 14 specific cases, asking for them to be reviewed. The former Minister gave an undertaking to have the cases reviewed by Services Australia. On 9 June 2022, Senator Patrick wrote to Minister Rishworth seeking an update on these reviews. Whilst a number of these reviews have been finalised, some are not yet fully complete given the complexity of matters under review.
4. Since 9 July 2021, the department and Services Australia have been working to resolve an appropriate, lawful method of assessing employment income earned before the introduction of the *Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Act 2020* on 7 December 2020. This has involved investigating and settling on the preferred legal methodology, and working to develop General Instructions relating to the assessment of employment income.
5. In consultation with Services Australia, the department has now finalised the General Instructions which guide decision-makers in reviews of social security debts related to this employment income (refer **Attachment B**). Investigations of how historical cases can be remediated, if at all, continue.

### General Instructions

6. I (Secretary) formally agreed to the General Instructions on 12 December 2022 and wrote to the Chief Executive Officer Services Australia, to provide the General Instructions for use by Services Australia. I had earlier directed the preparation of this brief, and this was progressed, in consultation with Services Australia, following my formal agreement to the General Instructions.
7. The General Instructions are based on the principle Services Australia should use the best available probative evidence to establish customers' pay rates and patterns of work to inform debt calculations. The General Instructions enable employment income to be apportioned *within* instalment periods based on when income was *received*, where there is no available evidence of the customer's daily earnings. In this situation, the entire earnings from the pay period is attributed over the number of days in the one instalment period in which that income was received, even if the pay period overlaps multiple instalment periods.

8. The General Instructions have been informed by legal advice from Sparke Helmore Lawyers, and advice from Mr Stephen Lloyd SC<sup>1</sup> (Mr Lloyd) and the Australian Government Solicitor (AGS). See **Background** below for further details about the General Instructions.
9. While the General Instructions were being developed, the department instructed Services Australia to recalculate debts for active cases in the General Division of the Administrative Appeals Tribunal (AAT2), in accordance with principles set out above. Other customer requests for a formal review of related debts, and raising of debts for overpayments based on employment income received prior to 7 December 2020, were paused by Services Australia pending development of the General Instructions. Services Australia, in consultation with the department, continued to progress individual formal reviews and debt reassessments for customers experiencing vulnerability.
10. In November 2022, the AAT2 made decisions in *Innes* and *Wilson* (**Attachments C and D**), and in both cases accepted Services Australia's debt calculations based on the approach of assessing employment income in the instalment periods in which employment income was *received*. In both cases, evidence of daily earned income was not available. While the AAT2 did not expressly address the methodology used, these two decisions are consistent with the General Instructions. However, we will need to continue monitoring cases and the reasoning being applied by the AAT.
11. In consultation with the department, Services Australia is finalising operational guidance and implementation plans to give effect to the General Instructions and address the paused work items. Further advice on implementation progress will be provided once the plan is settled.

**Investigation of options for handling of historical cases**

12. In relation to historical debt decisions, the General Instructions provide that the Secretary does not expect to initiate administrative reviews of these debts (i.e. outside of those currently in scope for calculation/recalculation, as described above). s 47E(d)

s 47E(d)

s 47E(d)

<sup>1</sup> Stephen Lloyd SC is an experienced senior counsel with extensive appellate practice, having appeared in the Full Court of the High Court in over 60 proceedings (not counting special leave applications). He has appeared before the Federal Court in over 500 cases, as well as appearing in the Supreme Courts of several States, and other courts and tribunals. He acts in proceedings in all Australian states and (internal) territories and regularly appears on behalf of the Commonwealth. Prior to coming to the Bar, Mr Lloyd held senior executive positions in the Commonwealth public service.

s 47E(d)

**Ombudsman investigations**

15. The Office of the Commonwealth Ombudsman has a number of active investigations (14 at present but the number fluctuates as some cases are resolved and new cases are received) initiated on behalf of customers who have experienced delays in receiving outcomes for formal reviews of pre 7 December 2020 debt decisions. Services Australia and the department have engaged with the Commonwealth Ombudsman to address concerns raised about progressing these reviews.
16. Services Australia and the department consulted with the Commonwealth Ombudsman on its proposed response on 17 February 2023, and subsequently provided information on the background, including the General Instructions and associated legal advice, to the Ombudsman's office on 24 February 2023.
17. On 14 March 2023, the department and Services Australia received notice (**Attachment E**) that the Commonwealth Ombudsman has initiated two 'own motion' investigations into this matter. We are advised by the Ombudsman that the investigations will focus on:
  - a. examining Services Australia's legal framework for income apportionment, leading up to and following legislative amendments that took effect from 7 December 2020, and
  - b. Service Australia's administration of income apportionment including its engagement with customers, training and guidance to staff, as well as its handling of complaints, internal reviews and AAT or Federal Court appeals.
18. The department and Services Australia will work together in responding to these investigations.

**Sensitivities:**

19. Engagement with customers regarding this issue, particularly as paused work items are actioned, will likely raise concerns that it is similar to 'Robodebt', particularly given the evidence received by the Robodebt Royal Commission. There is a consequent risk of adverse public and media attention in this regard.
20. Despite likely perceptions of similarity, there is a clear distinction between this issue and raising debts based on unlawfully averaging annual income under the Robodebt Scheme. The methodology involved in assessing an individual's employment income to determine whether the person owes a debt requires using sufficiently probative evidence, such as payslips, to enable the decision-maker to determine the daily amount of the customer's employment income or, if that is not available, the date on which the income was received, based on their payslip. The General Instructions guide the decision-maker on the lawful approach to take based on the best available probative evidence. This is not the same as Robodebt where debts were raised by unlawfully averaging an individual's income using data from the Australian Taxation Office.

**S 47E(d)**

22. There are approximately a further 87,000 potential overpayments related to earned income for the period prior to 7 December 2020, where Services Australia is yet to calculate and raise a debt. The assessment of potential overpayments was impacted by a number of debt pauses and the redeployment of staff to support the Australian Government's COVID-19 and Disaster Emergency responses. These overpayments form part of a larger backlog of around 1.3 million potential overpayments.

s 47E(d)

**Risk Management:**

24. The department and Services Australia will continue to work on the implementation of the General Instructions, and monitor AAT decisions and inform the approach being used in the AAT for debt matters. There remains a risk that the approach adopted under the General Instructions will be subject to further challenges or appeals before the AAT or the courts.

s 47E(d)

26. The department has previously received legal advice in 2013 that, s 42  
s 42  
s 42 The department is seeking further advice from Mr Lloyd to confirm this view in the context of the General Instructions.

**Departmental Funding / Financial Implications:** Nil.

**Regulatory Implications:** Nil.

**Consultation:**

- Department of Social Services – International Payments and Compliance Branch.
- Services Australia – Legal Services Division; Compliance Assurance and Debt Operations Division; Debt Programme Appeals and Reviews Division.

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**Attachments:**

**s 47C**

**Attachment B:** Payslips and apportionment of employment income – General Instructions

**Attachment C:** AAT Decision – *Innes and Secretary, Department of Social Services* [2022] AATA 3977

**Attachment D:** AAT Decision – *Wilson and Secretary, Department of Social Services* [2022] AATA 4067

**Attachment E:** Letter from the Commonwealth Ombudsman to the Secretary dated 14 March 2023

Contact Officer: Emma White  
Position: Deputy Chief Counsel  
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Phone/Mobile: **s 22**

Cleared by: Bronwyn Worswick  
Position: Chief Counsel  
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Cleared by: Ray Griggs AO CSC  
Position: Secretary  
Department of Social Services

Signature:

Date: / /

Cleared by: Rebecca Skinner PSM  
Position: Chief Executive Officer  
Services Australia

Signature:

Date: / /

**Background – Former Senator Patrick concerns and development of General Instructions:**

1. In the 2019-20 Budget the Changing the Social Security Income Assessment model was announced. Subsequently, the *Social Security Act 1991* (the Act) was amended with effect from 7 December 2020 to significantly improve the reporting and processes for attribution of employment income. The amendments provided that income is assessed on when it is paid by the employer, rather than when it is earned by the customer. The changes make reporting easier for customers, so they are more likely to receive correct social security payments and are less likely to incur a debt.
2. **s 47C** prior to 7 December 2020, a range of methods were used to calculate payments and raise debts involving employment income. The method under the Act differed according to the payment type, and outcomes varied according to the customer's reporting patterns and the quality of the evidence of employment income available.
3. For social security benefit customers (such as Jobseeker payment, Youth Allowance and Austudy payment), the rate calculators required employment income to be assessed on the basis of the instalment period in which it was 'first earned, derived or received'.
4. For social security pension customers (such as Age Pension and Disability Support Pension), employment income was apportioned across the instalment periods in which the income was 'earned, derived or received'.
5. In cases where an employment period did not align with a fortnightly Centrelink instalment period, section 1073B of the Act was applied to apportion employment income across instalment periods following the customer's rate of payment being worked out with regard to the income test module of the relevant rate calculator in Chapter 3 of the Act.
6. In October 2020 and March 2021, during Community Affairs Senate Committee hearings, the former Senator Patrick raised concerns about how apportioned employment income was being considered when raising debts. In particular, Senator Patrick was concerned with the use of payslips where the customer's employment period did not align with their Centrelink instalment period, and where the payslip does not provide a daily rate of income.
7. The office of the former Senator Patrick had also assisted some customers with applications before the Social Services and Child Support Division of the Administrative Appeals Tribunal (AAT1), some of which were reported in the media in November 2020 and March 2021.
8. Between February and April 2021, the AAT1 made several decisions directing Services Australia to recalculate customers' debts by obtaining further evidence to determine the precise amount of income earned by a customer during each day in a Centrelink instalment period. In the same period, the AAT1 also made a number of decisions that affirmed the approach to raising debts by relying on section 1073B of the Act to apportion income earned across different Centrelink instalment periods.
9. In light of Senator Patrick's concerns, and these differing findings in AAT cases, the department sought legal advice from the Australian Government Solicitor (AGS) **s 42**

**s 42**

10. In September 2021, Services Australia paused internal reviews and raising of undetermined debts in relation to matters where employment income was earned prior to 7 December 2020, including those that may have been apportioned across instalment periods, pending receipt of instruction from the department.

11. Services Australia also sought advice from senior counsel, Mr Lloyd in October 2021 s 42

s 42

12. Advice from Mr Lloyd regarding the two AAT matters s 42

s 42

13. The debts in the two AAT2 matters conducted by Mr Lloyd were recalculated in a manner that is now consistent with the General Instructions. However, ultimately the AAT2 did not definitively endorse a particular approach to assessing employment income in these two cases.

14. The legal advice, together with our understanding of relevant AAT decisions, s 42

s 42

15. The General Instructions now provide practical, user-friendly guidance for decision-makers. In line with the statutory framework, the General Instructions are based on the principle that the best available probative evidence should be used in calculating relevant debts. This includes:

- where daily income information is available, calculating income on the basis of when it is earned
- where daily income information is not available, calculating income on the basis of when it is received
- zeroing the debt where there is insufficient evidence available to substantiate the debt, and
- taking a pragmatic approach when seeking additional information that may affect a customer's rate of social security payment (for example, information specifying daily earned income).

16. The department is seeking additional legal advice from Sparke Helmore Lawyers with a view to developing further instructions in consultation with Services Australia. These will provide greater clarity for cases involving the assessment of employment income where social security pension customers earned income for periods greater than a fortnight, prior to 7 December 2020. This scenario has only arisen in one recent matter before the AAT2. Instructions in that case will be informed by the advice sought.

s 42



## Payslips and apportionment of employment income - general instructions

1. These instructions apply to debts caused by employment income arising from an **employer/employee relationship** and apply to debt raising processes and debts currently subject to internal and external review, where the debt period falls before 7 December 2020. These instructions do not apply where income arises through a contract for services. In the first instance, consideration should be given to determine what the relationship is (i.e. employer/employee or contract for services).
2. It is not expected that administrative reviews of historical debt decisions will be initiated by the Secretary.
3. Former and current recipients are entitled to appeal any debt decision they do not agree with and if they do, these instructions should be applied and the debts recalculated, if necessary.
4. For debts under internal or external review, any debts previously calculated using apportionment between instalment periods, with employment income based on payslips, should be recalculated.
5. In calculating debts, the best available **probative evidence** of employment income should be used. That is, a finding of fact in relation to an amount of employment income earned, derived, or received must be based on evidence which logically shows the existence of that fact. **s 47E(d)**

s 47E(d)

s 47E(d)

Services Australia should adopt the following general approach to debt calculations:

- a. Where available, daily income information should be relied upon in the first instance to calculate overpayments and debts, by calculating the total income earned in each instalment period on a **daily earnings basis** (the daily earnings method of calculation). For example, where timesheets or payslip evidence is available to show the amounts earned from employment income on any given day, then the income should be assessed on each day it was earned and attributed to the respective days in the instalment period in which it was earned. This may mean that one employment income period may span more than one instalment period and each day's earnings should be attributed to its respective day in the instalment period it falls into.
- b. If the available payslip evidence does not support the daily earnings method of calculation, Services Australia should consider whether any of the pay periods to which the payslips relate fall entirely within a single instalment period. If so, the income for that pay period should be attributed solely to that instalment period.

c.

**s 47E(d)**

s 47E(d) Where a pay period overlaps multiple instalment periods, income is not to be apportioned between instalment periods.

6. It is not lawful to raise or calculate employment income debts solely using Australian Taxation Office (ATO) averaged annual income data. Refer to point 5 above for instructions.
7. If the potential debt being raised or recalculated arises from:
  - a. overpayment of an allowance (e.g. Newstart Allowance, Youth Allowance or widow allowance); and
  - b. the relevant employment pay periods are greater than a fortnight; and
  - c. s 47E(d)
  - d. s 47E(d)

s 47E(d)

8. s 47C

9. s 47E(d)

a. s 47E(d)

b. s 47E(d)

c. s 47E(d)

10. s 47E(d)

11.

s 47E(d)

12. If a person has multiple employers, or multiple debt periods, Services Australia should use the best information available for each employer and debt period. It is acceptable to use a mix of methodologies to calculate a debt, but Services Australia should take care not to double count the same income.
13. Services Australia should ensure it meets obligations under the social security law to seek information that may affect an individual's rate of payment or entitlement. s 47E(d)

s 47E(d)

- a. Under section 535 of the *Fair Work Act 2009* and Division 3 of Part 3.6 of the *Fair Work Regulations 2009*, employers are not required to hold information such as pay records for more than seven years, s 47E(d)

s 47E(d)

14. These instructions relate to debt raising decisions and debt calculations under internal and external reviews. There should be a consistent approach to the way in which debts involving serious non-compliance and fraud actions and referrals are calculated using the best evidence available. These instructions do not cover how prosecutions for fraud, etc. are managed by Services Australia.



Administrative  
Appeals Tribunal

DECISION AND  
REASONS FOR DECISION

**Innes and Secretary, Department of Social Services (Social services second review) [2022] AATA 3977 (24 November 2022)**

Division: GENERAL DIVISION

File Number: **2018/6384**

Re: **Peter Innes**

APPLICANT

And **Secretary, Department of Social Services**

RESPONDENT

**DECISION**

Tribunal: **Member D Mitchell**

Date: **24 November 2022**

Place: **Brisbane**

The Tribunal varies the decision under review to the extent that the Applicant's Newstart Allowance debt is written off for a period of 6 months from the date of this decision. The decision under review is otherwise affirmed.

.....[SGD].....

**Member D Mitchell**

## **Catchwords**

*SOCIAL SECURITY – Newstart Allowance – overpayment – where income was not correctly reported – where no sole administrative error – where no special circumstances - where appropriate to write off repayment of the debt – decision under review otherwise affirmed*

## **Legislation**

*Crimes Act 1914 (Cth)*

*Judgement Debt Recovery Act 1984 (Vic)*

*Social Security Act 1991 (Cth)*

*Social Security (Administration) Act 1999 (Cth)*

## **Cases**

*Boscolo v Secretary, Dept of Social Security* [1999] FCA 106; (1999) 90 FCR 531

*Callaghan and Secretary, Department of Social Security* (1996) 45 ALD 435

*Davy and Secretary, Department of Employment and Workplace Relations* (2007) 94 ALD 693; [2007] AATA 1114

*Groth v Secretary, Department of Social Security* (1995) 40 ALD 541; [1995] FCA 1708

*Kazmierczak v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2010] FCA 1084

*L v Department of Social Security* [1981] AATA 57

*Secretary, Department of Social Security v Hales* [1998] FCA 219

*Sekhon v Secretary, Department of Family and Community Services* (2003) 76 ALD 105; [2003] FCAFC 190

*Re Anderson and Secretary, Department of Families and Community Services* (2002) 69 ALD 494

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

*Re Iovic and Director-General of Social Services* (1981) 3 ALN N95; [1981] AATA 57

*Re Lumsden and Secretary Department of Social Security* [1986] AATA 228

*Re Secretary, Department of Family and Community Services and Jonauskas* (2001) 65 ALD 553; [2001] AATA 72

*Re Stubbs and Secretary Department of Families Community Services* [2003] AATA 729

*Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs v Jones* (2012) 89 ATR 267; [2012] FCA 639

*Ward and Secretary, Department of Families and Community Services* [2000] AATA 212

## **REASONS FOR DECISION**

**Member D Mitchell**

**24 November 2022**

## **INTRODUCTION**

1. Mr Peter Innes (the Applicant) has undertaken a long and challenging journey in dispute of the Respondent's decision dated 8 May 2014 to raise and recover a Newstart Allowance (NSA) debt for the period 26 June 2009 to 27 November 2013.<sup>1</sup>
2. The debt was raised on the basis that the Applicant's correct employment income was not taken into account in calculating the NSA payments made to him.
3. The debt period and debt amount have been recalculated and as such, the reviewable decision relates to a NSA debt raised of \$21,158.63 (inclusive of a \$1,923.50 debt recovery charge) in relation to the period 7 August 2009 to 6 June 2013 (the debt period).<sup>2</sup>

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<sup>1</sup> Exhibit 1, T Documents, T11, pages 127-128, Centrelink Notice: Account Payable.

<sup>2</sup> Exhibit 2, Joint Tribunal Book, R6, Respondent's Statement of Facts, Issues and Contentions and Attachment C, Letter from the Respondent to the Applicant dated 16 September 2022.

4. The issues before the Tribunal are:
  1. Whether the Applicant was paid more than his correct amount of NSA for the debt period;
  2. If so, whether any such overpayment constitutes a debt to the Commonwealth; and
  3. If so, whether the debt is recoverable in part or in full?

### **BACKGROUND**

5. The Applicant was in receipt of NSA since 7 April 1999 (with some periods of suspension and cancellation)<sup>3</sup> until he was granted the disability support pension (DSP) in October 2021.<sup>4</sup>
6. During the debt period, the Applicant's employment history and wage details are as follows:

<b>Employer</b>	<b>Period in which the Applicant was employed by this employer</b>	<b>Wage details</b>
EI-Electric	2 July 2009 to 27 October 2010	Total verified earnings of \$5,650.00 <sup>5</sup>
ESM Security Pty Ltd	2 November 2009 to 1 October 2013	Total verified earnings of \$16,333.63 <sup>6</sup>
Glad Retail Cleaning	18 July 2012 to 10 August 2012	Total verified earnings of \$1,980.00 <sup>7</sup>

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<sup>3</sup> Exhibit 1, T Documents, T17, pages 150-151, Centrelink Mainframe Screen Printouts.

<sup>4</sup> Exhibit 2, Joint Tribunal Book, R6, Respondent's Statement of Facts, Issues and Contentions, page 134, paragraph 3.2.

<sup>5</sup> Exhibit 1, T Documents, T8, pages 55-61, EI Electric's response to information request with attached transaction listing and Exhibit 2, Joint Tribunal Book, R6, Respondent's Statement of Facts, Issues and Contentions and Attachment A.

<sup>6</sup> Exhibit 1, T Documents, T6, pages 42-48, ESM Security's response to information request with attached payroll and Exhibit 2, Joint Tribunal Book, R6, Respondent's Statement of Facts, Issues and Contentions and Attachment A

<sup>7</sup> Exhibit 1, T Documents, T7, pages 49-54, Glad Retail Cleaning's response to information request with payslips; Exhibit 2, Joint Tribunal Book, R6, Respondent's Statement of Facts, Issues and Contentions and Attachment A.

Acquired Awareness Traffic Management Pty Ltd	19 September 2012 to 26 February 2013	Total verified earnings of \$52,043.64 <sup>8</sup>
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7. On 9 July 2009, the Respondent issued the Applicant with a notice pursuant to section 68(2) of the *Social Security (Administration) Act 1999* (Cth) (Information Notice) advising details of his rate of NSA and outlining his reporting requirements.<sup>9</sup> The Information Notice outlined:<sup>10</sup>

**IMPORTANT INFORMATION**

- *Your Reporting Statement (Application for Payment) is enclosed. If you are using Self Service (online or phone), you do not need to return this form. You must report your earnings and other information on the Due Date.*

...

**What is income**

*Income has a very broad meaning for social security purposes. Some examples of income are earnings from employment (including fringe benefits), business income (including farms), income from rental properties, deemed income from financial investments, income from superannuation pensions and other income streams, income paid from overseas including pensions, most compensation payments.*

...

**You must tell us if any of these things below have happened in the period Friday 10 July 2009 to Thursday 23 July 2009**

**Income**

- *You got any money from or changed your investments....*
- *Your hours of work changed.*
- ...
- *You got any other money from any other source.*

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<sup>8</sup> Exhibit 1, T Documents, T5, pages 22-41, Acquired Awareness Traffic Man's response to information request with payslips; Exhibit 2, Joint Tribunal Book, R6, Respondent's Statement of Facts, Issues and Contentions and Attachment A.

<sup>9</sup> Exhibit 1, T Documents, T20, pages 468-469, Archived Centrelink Notices addressed to the Applicant in the period 03.06.2009 to 24.02.2011.

<sup>10</sup> Exhibit 1, T Documents, T20, page 468, Archived Centrelink Notices addressed to the Applicant in the period 03.06.2009 to 24.02.2011.



8. The Applicant was provided with approximately forty-four Information Notices to the same effect throughout the debt period.<sup>11</sup>
9. The Applicant's employment history and income details outlined at paragraph 6 above were received by the Respondent from the relevant employers as a result of notices issued by the Respondent to the employers.<sup>12</sup>
10. Based on the verified employment income information, the Applicant's income during the debt period was \$75,995.56.<sup>13</sup> During that period, the Applicant reported his income 54 times, however only declared a total income of \$21,681.<sup>14</sup>
11. On 8 May 2014, the Respondent raised a NSA debt of \$25,305.74 (inclusive of a recovery fee of \$2,300.50) for the period 26 June 2009 to 27 November 2013.<sup>15</sup>
12. The Applicant sought review of that decision in a letter provided to the Respondent on 11 July 2014.<sup>16</sup> The Applicant apologised "*for not being more accurate with [his] financial dealings with Centrelink*" and outlined personal circumstances that had affected him during the debt period.
13. On 5 November 2014, an authorised review officer (ARO) affirmed the decision.<sup>17</sup>
14. On 5 December 2016, the Applicant pled guilty to two counts of '*obtains financial advantage from a Commonwealth entity*' in relation to NSA in the amount of \$16,897.34 relating to the period between 18 July 2010 and 1 March 2013.

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<sup>11</sup> Exhibit 1, T Documents, T20, Archived Centrelink Notices addressed to the Applicant in the period 03.06.2009 to 24.02.2011 and T21, Centrelink Notices addressed to the Applicant in the period 31.08.2010 to 18.11.2013.

<sup>12</sup> Exhibit 1, T Documents, T5, Acquired Awareness Traffic Man's response to information request with payslips; T6, ESM Security's response to information request with attached payroll; T7, Glad Retail Cleaning's response to information request with payslips and T8, EI Electric's response to information request with attached transaction listing.

<sup>13</sup> Exhibit 2, Joint Tribunal Book, R6, Respondent's Statement of Facts, Issues and Contentions and Attachment A, Verified Earnings Details.

<sup>14</sup> Exhibit 1, T Documents, T20, pages 152-157, Archived Centrelink Notices addressed to the Applicant in the period 03.06.2009 to 24.02.2011; Exhibit 2, Joint Tribunal Book, R6, Respondent's Statement of Facts, Issues and Contentions and Attachment A, Verified Earnings Details.

<sup>15</sup> Exhibit 1, T Documents, T11, pages 127-128, Centrelink Notice: Account Payable.

<sup>16</sup> Exhibit 1, T Documents, T12, pages 129-133, Written statement prepared by the applicant.

<sup>17</sup> Exhibit 1, T Documents, T14, pages 135-141, Decision and notes of Authorised Review Officer.

15. The Applicant was ordered to:<sup>18</sup>

- undertake 200 hours of community service pursuant to section 20AB of the *Crimes Act 1914* (Cth) (Crimes Act);
- make reparation to the Commonwealth in the amount of \$15,438.86 pursuant to section 21B of the Crimes Act; and
- pay Court costs in the amount of \$89.80.

16. The Prosecution Report dated 8 December 2016 provided the following:<sup>19</sup>

**FACTS:** *During a period of sixty (60) fortnights, whilst in receipt of Newstart Allowance the defendant failed to correctly declare the amount of his income from employment to the Department of Human Services (hereafter "Centrelink").*

*The incorrect information the Defendant repeatedly provided Centrelink about his income from employment during the offence periods amounted to an ongoing course of conduct, in that they were acts of a similar nature committed with the purpose of obtaining payments of Newstart Allowance from the Commonwealth, which the Defendant knew or believed he was not eligible to receive.*

**REMARKS:** *Her Honour noted the facts, as well as the submissions of the Crown and defence. She also took into account the defendant's plea of guilty to the offences and that the defendant had no criminal history. The Magistrate noted the psychological material before the court, and took into account the fact that the defendant had suffered from depression after the death of a family member. Her Honour also had regard to the fact that the defendant had the care of his daughter. Her Honour noted that a period of imprisonment with immediate release might have been in range, but that a CSO was the more appropriate penalty when considering the mitigating circumstances of the defendant and the unsophisticated nature of the offending.*

17. It is noted that the reparation amount was received by the Respondent on 16 April 2020 as part of a compensation garnishee notice and was subsequently refunded to the Applicant as a result of subsequent Tribunal proceedings.<sup>20</sup>

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<sup>18</sup> Exhibit 2, Joint Tribunal Book, R6, Respondent's Statement of Facts, Issues and Contentions and Attachment B, Verdict and Judgment Record.

<sup>19</sup> Exhibit 2, Joint Tribunal Book, R6, Respondent's Statement of Facts, Issues and Contentions and Attachment B, Prosecution Report.

18. On 23 May 2018, the Applicant applied to the Social Services and Child Support Division of the Tribunal (SSCSD) for review of the ARO decision dated 5 November 2014.<sup>21</sup>
19. On 25 September 2018, the SSCSD affirmed the decision of the ARO.<sup>22</sup>
20. Following this, the Applicant sought a second-tier review of this matter by the General Division of this Tribunal, by way of an email dated 29 October 2018.<sup>23</sup>
21. On 25 July 2019, the Applicant and Respondent signed terms of agreement, finalising the matter before the Tribunal on the basis that:<sup>24</sup>
  - (a) the Applicant would make a lump sum repayment of \$10,000 towards the debt amounting to \$25,305.74 on or before 30 September 2019; and
  - (b) subject to the payment being made the Respondent would waive the Commonwealths right to recover \$5,000 of the debt.
22. The Applicant did not make the agreed lump sum repayment and as such, the right to recover \$5,000 of the debt amount was not waived.<sup>25</sup>
23. On 17 February 2022, the Applicant sought reinstatement of the matter before the Tribunal. The Respondent consented to the reinstatement request on 3 March 2022.<sup>26</sup> On 11 March 2022, Deputy President McDermott directed that the application be reinstated.
24. On 16 September 2022, the Respondent issued the Applicant with an amended debt notice varying the SSCSD decision such that the Applicant had a recoverable NSA debt of \$21,158.63 (inclusive of a \$1,923.50 recovery fee) for the debt period.

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<sup>20</sup> Exhibit 2, Joint Tribunal Book, R6, Respondent's Statement of Facts, Issues and Contentions, page 138; Exhibit 1, T Documents, T17, pages 150-151, Centrelink Mainframe Screen Printouts.

<sup>21</sup> Exhibit 1, T Documents, T15, pages 142-143, Request for statement.

<sup>22</sup> Exhibit 1, T Documents, T2, pages 2-7, Decision of the SSCSD.

<sup>23</sup> Exhibit 1, T Documents, T1, pages 1, Application for Review.

<sup>24</sup> Exhibit 2, Joint Tribunal Book, R6, Respondent's Statement of Facts, Issues and Contentions, paragraph 3.20, pages 138-139.

<sup>25</sup> Exhibit 2, Joint Tribunal Book, R6, Respondent's Statement of Facts, Issues and Contentions, paragraph 3.21, page 139.

<sup>26</sup> Exhibit 2, Joint Tribunal Book, R6, Respondent's Statement of Facts, Issues and Contentions, paragraph 3.23, page 139.

25. Pursuant to section 182(2) of the *Social Security (Administration) Act* 1999 (Cth), the Respondent's decision of 16 September 2022 is taken to be a decision by the SSCSD to vary the amount of and recover the Applicant's NSA debt.
26. On 7 October 2022, a Hearing was held for this application. At the Hearing, the Applicant was self-represented and gave evidence under affirmation by telephone.
27. As at 14 October 2022, the Applicant was in receipt of a net fortnightly payment of \$1,168.52 (being DSP inclusive of \$150.36 in rent assistance) plus a fortnightly Pensioner Education Supplement payment of \$62.40. The Applicant had regular fortnightly withholdings of \$20.00 from his DSP.<sup>27</sup>

### **APPLICANTS EVIDENCE AND CONTENTIONS**

28. On 9 May 2022, the Applicant provided a letter to the Tribunal with accompanying medical information outlining that he was asking for a fresh review of his debt on two grounds.<sup>28</sup>
29. Firstly, the Applicant submitted that his debt is a Robodebt, he is a tier 2 class action member of the Robodebt class action, that he only pled guilty to the charges regarding the debt in a court of law and the lawyer who advised him has since been banned from practicing law in Queensland. He stated that he is not guilty of the debt amount.<sup>29</sup>
30. Secondly, the Applicant submitted that he is seeking a review due to special/changed circumstances and sought to have the debt waived. He provided that since his last review, he had been attacked at work, received a TPD payout and common law compensation, been diagnosed with PTSD and placed on the DSP. The Applicant submitted that the Respondent incorrectly garnished his TPD payout and applied a preclusion period which led to him being homeless from May 2021 to mid-November 2021, resulting in a deterioration of his medical and physical condition.<sup>30</sup>

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<sup>27</sup> Respondent's closing submissions, page 2, paragraphs 4.5 and Attachment A.

<sup>28</sup> Exhibit 2, Joint Tribunal Book, A3, Correspondence from the Applicant to the Tribunal dated 9 May 2022 with attachments, pages 3-50.

<sup>29</sup> Exhibit 2, Joint Tribunal Book, A3, Correspondence from the Applicant to the Tribunal dated 9 May 2022 with attachments, pages 7-8.

<sup>30</sup> Exhibit 2, Joint Tribunal Book, A3, Correspondence from the Applicant to the Tribunal dated 9 May 2022 with attachments, pages 7-8.

31. The Applicant submitted:<sup>31</sup>

*I am asking for my debt to be frozen and/or waived due to my changed special circumstances and present mental and financial position.*

*After the trauma I have endured through Robodebt and incorrect administration error the last few years, I am willing to contest this matter further.*

32. On 6 July 2022 and 23 August 2022, the Tribunal received further documents from the Applicant in support of his application.<sup>32</sup>

33. Ahead of the Hearing, on 5 October 2022, the Tribunal received a submission from the Applicant enclosing a Freedom of Information decision and the documents that were released.<sup>33</sup> The Tribunal notes that those documents are substantially reproductions of those contained in the T Documents.

34. At the Hearing, the Applicant gave evidence under affirmation and provided evidence that was consistent with his written submissions. The Applicant told the Tribunal that:

- When he went to court in December 2016, he was urged to plead guilty by his lawyer.
- In his view, the only legal document before the Tribunal is the prosecutor's document and judgement sheet.
- He believed that \$10,000 of the debt was a Robodebt but this proposition was rejected by the appeal in 2018.
- His understanding was that when he reinstated this matter a few months ago, he was appealing this debt on two grounds, special circumstances and administrative error.
- He has never seen a lot of the payslips that have been received from Acquired Awareness Traffic Control.

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<sup>31</sup> Exhibit 2, Joint Tribunal Book, A3, Correspondence from the Applicant to the Tribunal dated 9 May 2022 with attachments, page 9.

<sup>32</sup> Exhibit 2, Joint Tribunal Book, A4, Correspondence from the Applicant to the Tribunal dated 6 July 2022 with attachments; A5, Article from the Guardian in relation to Robodebt and A6, Article from Homeless Law in Practice.

<sup>33</sup> Exhibit 3, FOI decision letter and released documents.

- Acquired Awareness Traffic Control lost a contract in 2013 for not providing payslips.
- The Robodebt situation has affected his relationship with his daughter.
- He agrees with the Judge who in December 2016 said that *“it was an unsophisticated matter, not a contrived matter, not a preconceived matter.”*
- He was of the genuine belief that the ATO and the Respondent worked together to work everything out. He filed his income tax returns for the relevant years and if anything, he overdeclared his income.
- He had declared all of his income in his tax returns before the legal action started.
- He did not intentionally defraud anyone as he declared his income in his tax.
- In relation to special circumstances, he is a tier 2 Robodebt victim and the fact that he survived being homeless due to the Respondent’s actions in garnishing his compensation payment, is special to him.
- The Respondent in September withheld \$150 from his Centrelink payment and that caused him to be unable to pay his rent and to lose his accommodation. He was now homeless.
- This is the second time that the Respondent’s actions have led to him being homeless.
- The medical reports show that Robdebt has affected him psychologically.
- *“I would like to think some leeway is attributed in regard to special circumstances and the two times Services Australia’s actions, and the action of the bikies attacking me at work a few years ago, they’ve made my circumstances special because the prospects of me paying off this debt, what now I’m on a disability support pension, are limited in my opinion and Legal Aid’s opinion virtually nil.”*
- He is trying to get back on his feet and contribute to society and wants to work between 10 and 20 hours a week.
- He is about to start his MR licence so that he can drive a bus as he knows someone who can get him work.
- He is judgment proof.

- When asked if he agreed that he was overpaid NSA during the debt period, that he agreed he was overpaid but he does not agree that he did it deliberately or maliciously.
- When asked if he agreed that the income details provided in the evidence before the Tribunal were correct, that he would not comment on that as he has a retired financial accountant going through the information.
- He agreed that during the debt period, he did not always report his income correctly but that was due to the information he was getting from his employers. For example, he had to estimate what he was paid by Acquired Awareness.
- When asked what being a tier 2 Robodebt victim meant, that it means that Services Australia used an algorithm to average out his income instead of using payslips or banks statements.
- He was receiving DSP and an additional \$60 per fortnight as he had just completed a carer's course, otherwise he had no other income.
- He has no other assets outside of his vehicle.
- He has no official debts owed to banks, however, has personal debts of between two and three thousand dollars owed to friends and family.
- When asked if he was able to meet his expenses from his DSP, that at the moment he could because he is sleeping in his car so he is not paying rent and can actually start to give his daughter \$50 a fortnight.
- The flipside of living in his car is that it gets used more and needs more maintenance and petrol.
- It all balances out and he does not have much left at the end of each fortnight.
- When he was not homeless, he was paying \$325.00 a week for furnished accommodation and at that stage, it was borderline whether he could meet his expenses. This is why when Centrelink took a large chunk out of his DSP, he could not pay his rent and lost his accommodation.
- He has all of his linen, clothes and stuff in his car.
- He is proud of the fact that given everything that has happened over the past 2 years, he stayed in the area so he could be there for his daughter.

35. On cross-examination, the Applicant told the Tribunal:

- When asked if he thought that because he put in his tax returns and declared the amount of income he earned to the ATO, it would resolve the issue in terms of whether he had been under-reporting to Centrelink at various stages, that he is of the opinion now that it should have, considering everything that was going on in his life at the time.
- When asked if he agreed that in addition to any obligations he had to the ATO, he knew that in respect of his obligations to Centrelink, he was required to advise them of his earnings, that he did to the best of his ability.
- Agreed that a number of times the amounts of income he declared were incorrect because they were estimates.
- He pled guilty to the two charges without having all of the information he has now and was given incorrect legal advice.
- When asked if he agreed that he was incorrectly declaring his income in the period between 2009 and 2013, that “*Due to circumstances.*”
- When asked if the incorrect declaration of his income has led to the calculation of debts, that he agreed but the debts also included a Robodebt.
- When asked if he was aware that the debt had now been recalculated and is no longer a Robodebt, that does not mean it is okay.

36. When asked by the Tribunal at the Hearing how long would he seek if the Tribunal was minded to write off his debt for a period of time, the Applicant said that realistically, he would need 6 months or so to get himself working, hopefully 15 hours a week on DSP.

### **CONSIDERATION**

37. The law in relation to the payment of NSA (now referred to as Jobseeker payment) and recovery of social security debts owed to the Commonwealth is found in the *Social Security Act 1991* (Cth) (the Act) and the *Social Security (Administration) Act 1999* (Cth) (Administration Act).

38. The Tribunal must consider whether a NSA debt exists for the debt period and if so, whether the debt should be recovered in part or in full.



Did a debt exist?

*How is the rate of NSA calculated?*<sup>34</sup>

39. Section 643 of the Act provides that a person's rate of NSA is worked out using the Benefit Rate Calculator B found at the end of section 1068 of the Act. Module G of section 1068 of the Act provides a Method Statement for calculating the effect that a person's ordinary income has on the maximum payment rate of NSA.
40. Ordinary income is defined by the Act to mean income that is not maintenance income or an exempt sum.<sup>35</sup> Income in relation to a person is defined to mean an income amount earned, derived or received by the person for the person's own use or benefit.<sup>36</sup>
41. Further, ordinary income includes employment income that is for remunerative work of the person as an employee in an employer/employee relationship.<sup>37</sup>
42. Part 3.10 of the Act provides general provisions relating to the ordinary income test.
43. Division 1AA of Part 3.10 of the Act provides employment income attribution rules. Section 1073A of the Act provides that employment income received in respect of a period greater than a fortnight that is taken to have been earned, derived or received by a person may be taken to have been earned, derived or received over such period, not exceeding 52 weeks as the Respondent (or on review the Tribunal) determines.
44. Section 1073B of the Act provided that:
  - (1) *If:*
    - (a) *a person is receiving a social security pension or a social security benefit; and*
    - (b) *the person's rate of payment of the pension or benefit is worked out with regard to the income test module of a rate calculator in this Chapter; and*

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<sup>34</sup> Note the Tribunal has applied the law as in place at the time the NSA debt was first raised with regards to the calculation of the rate of NSA payable to the Applicant.

<sup>35</sup> Section 8(1) of the Act.

<sup>36</sup> Section 8(1)(a) of the Act.

<sup>37</sup> Section 8(1A) of the Act.

*(d) the person earns, derives or receives, or is taken, either by virtue of the operation of section 1073A or any other provision of this Act, to earn, derive or receive, employment income during the whole or a part of a particular instalment period of the person;*

*the person is taken to earn, derive or receive, on each day in that instalment period, an amount of employment income worked out by dividing the total amount of the employment income referred to in paragraph (d) by the number of days in the period.*

*(2) If a person has reached pension age and is receiving a social security benefit, subsection (1) does not apply to the person, to the extent that it relates to that benefit.*

45. As a result, once it is satisfied that a person had earned, derived or received an amount of employment income during the whole or a part of a particular instalment period, the person is deemed to have earned, derived or received an amount of employment income on each day in that instalment period, worked out by dividing the total amount of employment income by the number of days in the instalment period.
46. An instalment period for the Applicant's purposes is taken to be a social security periodic payment that was to be paid in arrears by instalment relating to such periods (not exceeding 14 days) as the Respondent determined calculated by reference to the daily rate of payment applicable to each day.<sup>38</sup>
47. Division 1AB of Part 3.10 of the Act outlines working credit accrual and depletion rules and their consequences when calculating the rate of NSA payment.
48. These provisions taken together mean that the Applicant's gross employment income is assessed under the ordinary income test in Module G of section 1068 of the Act in order to determine his appropriate rate of NSA.

*Did a debt arise?*

49. Section 1223(1) of the Act provides that if a person receives a payment that they were not entitled to for any reason, the amount of the payment is a debt due to the Commonwealth

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<sup>38</sup> Sections 23 of the Act and 43 of the Administration Act.

by the person and the debt is taken to arise when the person obtains the benefit of the payment.

50. The obligation is on the payment recipient to report any changes in their circumstances, which includes their earnings.<sup>39</sup> This is set out in most letters sent by Centrelink to the Applicant pursuant to section 68 of the Administration Act. Section 74 of the Administration Act provides that it is an offence to fail to comply with a notice given under section 68.
51. Section 100 of the Administration Act deals with circumstances where a person, who is receiving a social security payment, is given a notice under section 68(2) of the Administration Act requiring them to report a change in circumstances within a specified time. If the change occurs but the person does not inform Centrelink and the person's rate of social security payment changes, the social security payment becomes payable to the person at the reduced rate on the day on which the change of circumstances occurred.
52. While the Tribunal understands that during the debt period, the Applicant may have been in receipt of payslips and that he was going through an extremely difficult period of his life, how an overpayment of a social security benefit occurs is irrelevant in determining whether a debt to the Commonwealth exists pursuant to section 1223(1) of the Act. The Act clearly sets out how the rate of NSA is to be calculated and provides that the person's income must be taken into consideration.
53. The Applicant acknowledges that his income was not correctly reported and that he was overpaid. The issue in contention is the quantum of any arising NSA debt.
54. The Respondent provided the following submissions:<sup>40</sup>

*4.30 For the purposes of these proceedings, calculations have been performed of the effect the Applicant's ordinary income had on his rate of payment during the debt period in accordance with Module G of section 1068 of the Act (see MultiCal at Attachment A).*

*4.31 The Applicant received employment income from ESM Security Pty Ltd, Glad Retail Cleaning, and Acquired Awareness Traffic Management Pty Ltd during the*

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<sup>39</sup> Section 66A of the Administration Act.

<sup>40</sup> Exhibit 2, Joint Tribunal Book, R6, Respondent's Statement of Facts, Issues and Contentions, pages 144-145, paragraphs 4.30-4.37.

*debt period, which was not correctly taken into account when calculating his rate of newstart allowance. The applicant's employment income has been verified by ESM Security Pty Ltd, Glad Retail Cleaning, and Acquired Awareness Traffic Management Pty Ltd (T5-T9), and the debt has been recalculated on the basis of this information (Attachment A).*

*4.32 The Secretary contends that the recalculated debt as outlined in Attachment A has been correctly calculated on the basis of the best available evidence of the Applicant's employment income. In relation to the Applicant's employment income from ESM Security Pty Ltd, Glad Retail Cleaning, and Acquired Awareness Traffic Management Pty Ltd, the information available does not permit the Secretary to identify the particular date on which the employment income was earned or derived. The Secretary has therefore taken the approach of recognising the income at the point at which it was first received by the Applicant (by reference to the relevant pay date). This approach to debt calculation was accepted by the Tribunal in Judd and Secretary, Department of Social Services [2022] AATA 727 as being open.*

*4.33 On 26 June 2009 (start of the debt period), to receive the maximum rate of newstart allowance, the Applicant's income needed to be no more than \$62 per fortnight. Any income between \$62 and \$250 would have reduced the rate by 50 cents in the dollar, and 60 cents for each dollar above \$250 per fortnight. The income test reductions changed through the debt period and are detailed in the Guide to the Australian Government Payments.*

*4.34 Paragraph 123(3)(b) of the Administration Act states that a determination regarding the rate of a social security payment continues in effect until the payment becomes payable at a lower rate under section 98, 99 or 100.*

*4.35 The Secretary submits that the Applicant failed to correctly declare his employment income for the purposes of his newstart allowance as required by section 66A and subsection 68(2) of the Administration Act.*

*4.36 The Applicant was entitled to \$21,137.45 in newstart allowance during the debt period however he received \$40,372.58. This amounts to an overpayment of \$19,235.13.*

*4.37 The Secretary contends that the debt has been correctly calculated in the amount of \$19,235.13 and is a debt due to the Commonwealth.*

55. At the Hearing, the Respondent further submitted that the NSA debt, as it stood at that time, was a debt calculated in accordance with the relevant provisions of the Act and had been done on the basis of comparison of the actual payslips. It is not a matter where there has been data obtained from the ATO in terms of annual returns or declared income and averaging. The debt has been calculated on an instalment period to instalment period basis, having regard to all of the payslips that have been provided. The Respondent told the Tribunal that the debt amount had been varied by the decision made on 16 September 2022 as a fresh set of eyes had gone back over all of the available information and done a recalculation.

56. The Tribunal notes that while the Applicant does not agree with the NSA debt calculation for the debt period, he did not provide any evidence or make any submissions in relation to the accuracy of the verified earnings provided by his employers or the application of the legislative formula used.
57. Having reviewed the evidence before it, the Tribunal finds that the Applicant received more than his entitlement to NSA during the debt period. Further, having considered the debt calculation and the supporting evidence provided by the Respondent, the calculation method as set out above and having cross referenced a sample of the calculations, in the absence of evidence to the contrary, the Tribunal accepts the debt calculation submitted by the Respondent.
58. As such, the Tribunal finds that the Applicant has a NSA debt in relation to the debt period of \$19,235.13.
59. The Tribunal notes that neither party made any submissions in relation to the recovery fee of \$1,923.50 that was applied to the Applicant's NSA debt. For completeness, section 1228B of the Act provides for a 10% penalty to be added to a debt if, among other things, the debt arose because the person failed to provide information about their earnings from personal exertion. On the evidence before the Tribunal, it is satisfied that the NSA debt arose due to the Applicant's failure to provide information about his earnings and as such, the Tribunal finds that the recovery fee has been correctly applied.
60. Consequently, the Tribunal finds that the Applicant has a NSA debt in relation to the debt period of \$21,158.63 (inclusive of a debt recovery charge of \$1,923.50), which constitutes a debt being debt is owed to the Commonwealth.

Is the NSA debt recoverable?

61. As the Tribunal has found that a NSA debt in relation to the debt period exists, it must determine whether the debt must be repaid.
62. It is generally expected that debts to the Commonwealth resulting from overpayments are recovered. This proposition was expressed by French J in relation to debt recovery in *Secretary, Department of Social Security v Hales* [1998] FCA 219 as:

*The taxpayer is entitled to expect that in the ordinary course money paid to people that they are not entitled to receive will be recovered, albeit in a way appropriate to the circumstances which led to the overpayment and the circumstances of the persons concerned.*

63. However, there are circumstances where the recovery of debts is either put on hold for a period of time (written off) or is no longer pursued (waived). Relevant to the Applicant's NSA debt, the Respondent may write off, or waive, his NSA debt if the requirements set out in sections 1236, 1237A or 1237AAD of the Act are met.

*Should the Applicant's NSA debt be written off pursuant to section 1236 of the Act?*

64. Section 1236 of the Act applies in relation to whether the Applicant's NSA debt for the debt period should be written off.
65. Section 1236(1) of the Act provides that subject to section 1236(1A), the Respondent may, on behalf of the Commonwealth, decide to write off a debt for a stated period or otherwise.
66. Section 1236(1A) of the Act allows the Respondent to decide to write off a debt if and only if:
- (a) *the debt is irrecoverable at law; or*
  - (b) *the debtor has no capacity to repay the debt; or*
  - (c) *the debtor's whereabouts are unknown after all reasonable efforts have been made to locate the debtor; or*
  - (d) *it is not cost effective for the Commonwealth to take action to recover the debt.*
67. Section 1236(1B) of the Act provides that for the purposes of section 1236(1A)(a), a debt is taken to be irrecoverable at law if, and only if:
- (b) *there is no proof of the debt capable of sustaining legal proceedings for its recovery; or*
  - (c) *the debtor is discharged from bankruptcy and the debt was incurred before the debtor became bankrupt and was not incurred by fraud; or*
  - (d) *the debtor has died leaving no estate or insufficient funds in the debtor's estate to repay the debt.*

68. Section 1236(1C) of the Act provides that for the purposes of section 1236(1A)(b), if a debt is recoverable by means of:

- (a) *deductions from the debtor's social security payment; or*
  - (b) *deductions under section 84 of the A New Tax System (Family Assistance) (Administration) Act 1999; or*
  - (c) *setting off under section 84A of that Act;*
- the debtor is taken to have a capacity to repay the debt unless recovery by those means would result in the debtor being in severe financial hardship.*

69. The term severe financial hardship is not defined in the Act, however, has been considered by the Tribunal in a number of cases.

70. In *Re Lumsden and Secretary Department of Social Security* [1986] AATA 228, the Tribunal considered that for financial hardship to be established, a person's entire financial position would need to be materially less than the current rate of pension.

71. In *Re Stubbs and Secretary Department of Families Community Services* [2003] AATA 729, the Tribunal remarked at [20] that:

*...Severe financial hardship, while not implying destitution, goes beyond straitened financial circumstances and imports a need for the particular case of a person to include financial suffering of a severe or extreme nature ....*

72. In *L v Department of Social Security* [1981] AATA 57, the Tribunal stated at [66]:

*In summary, I consider that matters relating to the personal financial hardship of the individual are always relevant in any decision as to write off under subsection 1236(1). Retrospective considerations may occasionally be relevant. The essential inquiry will always be whether recovery is a feasible proposition, bearing in mind the financial means and obligations of the individual concerned. Will recovery cause such personal hardship as to run contrary to the beneficial nature of the legislation ....*

73. The evidence before the Tribunal is that the Applicant is in receipt of fortnightly payments of DSP, pension education supplement and possibly rent assistance and that previously, he has had regular fortnightly withholdings of \$20.00 from his DSP. The Applicant has at all times kept in contact with the Respondent. Further, the Tribunal has found that the Applicant's NSA debt for the debt period exists.

74. The Applicant gave evidence at the Hearing that he was presently homeless and was living in his vehicle, having lost his rental accommodation in September 2022. The

Applicant outlined that he was meeting his expenses, his only asset was his vehicle and that he had debts of approximately \$2,000 to \$3,000 owed to family and friends.

75. The Applicant told the Tribunal that he was about to start a MR course and was hoping to get a job to drive a bus for at least 10 hours a week once it was finished. When asked how long he thought he would need to be in a position to start repaying his NSA debt should it be found that one exists, the Applicant told the Tribunal that he realistically needed six months to get himself working and sorted out.
76. The Tribunal requested that the Respondent provide closing submissions following the Hearing in relation to its views as to whether, given the Applicant's evidence at Hearing, it considered it was appropriate for the Applicant's NSA debt, should one be found, to be written off and if so, for what period. In the Respondent's Closing Submissions dated 14 October 2022, it contended that it is open to the Tribunal on account of the Applicant's oral evidence at the hearing to write off the debt for a period of six months on the basis that continuing deductions for the Applicant's social security payment will result in the Applicant being in severe financial hardship.<sup>41</sup>
77. The Tribunal notes that the Applicant contended that any NSA debt was not recoverable as he was judgment proof. The Applicant provided a printout from the website of Homeless Law in Practice that deals with the payment of judgment debts under the *Judgement Debt Recovery Act 1984* (Vic).<sup>42</sup> The information provided deals with instances where a person has had a court judgment made against them requiring them to make a payment and advises as to when collection of the arising debt can be enforced. This is of no assistance to the Applicant in this present matter.
78. In the absence of evidence to the contrary, the Tribunal is satisfied that the Applicant's NSA debt for the debt period is not irrecoverable at law, that the Applicant's whereabouts are known and it is cost effective for the Commonwealth to take action to recover the debt.
79. The Tribunal has no reason to doubt the evidence given by the Applicant at the Hearing and confirmed in the submissions he made after the Hearing, that he was presently

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<sup>41</sup> Respondent's Closing Submissions, page 3, paragraph 4.10.

<sup>42</sup> Exhibit 2, Joint Tribunal Book, A6, Article from Homeless Law in Practice.



homeless. The evidence outlined by the Applicant at the Hearing indicated that while he was meeting his everyday expenses and may have had a small amount of money left over, also outlined that the resources he may need to resecure accommodation and to continue to survive whilst homeless. The Tribunal considers that the evidence before it showed a level of financial suffering of a severe or extreme nature and as a result, the Applicant is experiencing severe financial hardship.

80. Consequently, based on the evidence before it and the contentions of the Applicant and Respondent, the Tribunal finds that for the purposes of section 1236(1A)(b) and 1236(1C), while the Applicant's NSA debt for the debt period is recoverable by means of deductions from his social security payments, doing so would result in him being in severe financial hardship.
81. As such, the Tribunal is satisfied that the Applicant's NSA debt for the debt period should be written off pursuant to section 1236(1) of the Act for a period of 6 months from the date of this decision.

*Should the Applicant's NSA debt be waived due to sole administrative error pursuant to section 1237A of the Act?*

82. Section 1237A of the Act applies in relation to whether the Applicant's NSA debt for the debt period should be waived due to a sole administrative error having been made by the Respondent.
83. Section 1237A of the Act provides that the Respondent must waive the right to recover the proportion of a debt that is attributable solely to an administrative error made by the Commonwealth if the debtor received in good faith the payment or payments that gave rise to that proportion of the debt.
84. Selway J, in *Sekhon v Secretary, Department of Family and Community Services* [2003] FCAFC 190 at paragraph [35] stated:

*The ordinary or usual interpretation of the phrase 'attributable solely to' is that it refers to the single or sole cause of the relevant act or event. The word 'attributable' means 'capable of being attributed'. It involves an objective assessment of causation. The words 'a debt attributable solely to an administrative error' can be paraphrased as meaning that the only cause that objectively can be ascribed to the relevant debt is an administrative error.*

85. Relevantly, in *Ward and Secretary, Department of Families and Community Services* [2000] AATA 212, Deputy President Forgie held at [47]:

*This means that the Secretary's duty to waive does not extend to those debts which are attributable to errors or other factors which are independent of the Commonwealth's administrative error. It makes no difference that those other errors or factors are minor.*

86. The Respondent comprehensively contended that the Applicant's NSA debt is not attributable solely to an administrative error made by the Respondent in circumstances where the debt arose due to the Applicant's failure to correctly report his employment income during the debt period. The Respondent contended that the Applicant's NSA debt in relation to the debt period is not in any part due to administrative error on behalf of the Respondent.<sup>43</sup>
87. While the Applicant points to a number of administrative errors, he considers that the Respondent made in relation to withholdings made from his payments or the amounts garnished from his compensation payment, he also acknowledges that he did not accurately report his income throughout the debt period. The Applicant contended that his reporting issues arose due to his personal circumstances and having not been furnished with payslips from his employers. The Applicant further contended that he thought by declaring all of his income in his income tax returns and submitting them to the ATO, it would remedy any failure to report his income to the Respondent.
88. Based on such evidence, the Tribunal does not accept that the Applicant's NSA debt has arisen due to sole administrative error. The notices sent to the Applicant pursuant to section 68(2) of the Administration Act clearly set out that Applicant must report his income and any changes to his circumstances to the Respondent via Centrelink. The Applicant's expectation that the lodging of his income tax returns would also in some way mitigate the NSA debts that had arisen appears to have developed after the debts were incurred.

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<sup>43</sup> Exhibit 2, Joint Tribunal Book, R6, Respondent's Statement of Facts, Issues and Contentions, pages 148-151, paragraphs 4.55-4.72.

89. As such, based on the evidence before it, the Tribunal finds that the Applicant's NSA debt arising during the debt period resulted from his failure to accurately report his income and as such, did not result from an administrative error, let alone a sole administrative error.
90. Consequently, the Tribunal finds that the Applicant's NSA debt cannot be waived pursuant to section 1237A of the Act.

*Should the Respondent's NSA debt be waived due to special circumstances pursuant to sections 1237AAD of the Act?*

91. Section 1237AAD of the Act applies in relation to whether the Applicant's NSA debt for the debt period should be waived due to the presence of special circumstances.
92. Section 1237AAD of the Act provides that the Respondent may waive the right to recover all or part of a debt if they are satisfied that:
- (a) *the debt did not result wholly or partly from the debtor or another person knowingly*
    - (i) *making a false statement or a false representation; or*
    - (ii) *failing or omitting to comply with a provision of this Act, the Administration Act or the 1947 Act; and*
  - (b) *there are special circumstances (other than financial hardship alone) that make it desirable to waive; and*
  - (c) *it is more appropriate to waive than to write off the debt or part of the debt.*

93. The Act does not provide a definition of "knowingly", however it has been discussed in numerous Tribunal decisions. In *Re Callaghan and Secretary, Department of Social Security* (1996) 45 ALD 435, it was stated at [48]:

*There is nothing in section 1237AAD which suggests that the word "knowingly" should be given any meaning other than that a person has actual knowledge, rather than constructive knowledge, that he or she is making a false statement or representation or that he or she is failing or omitting to comply with a provision of the Act. That actual knowledge is to be ascertained by reference to the statements of the person as to his or her actual state of knowledge at the time and to events surrounding the false statement or the act or omission.*

94. In *Re Anderson and Secretary, Department of Families and Community Services* (2002) 69 ALD 494, the Tribunal stated at [27]:

*... It is open for the Tribunal to infer that the applicant has actual knowledge of his obligations under the Act where there are opportunities for that knowledge to be gained and where there are no obstacles to him acquiring that knowledge. In this case, the applicant has had the opportunity to gain an understanding of his obligations under the Act through the provision of advice letters to him from the respondent. The Tribunal is not aware of any obstacles that would prevent Mr Anderson from understanding those letters and gaining that knowledge.*

95. In *Davy and Secretary, Department of Employment and Workplace Relations* [2007] AATA 1114, Deputy President Forgie referred to her decision in *Re Secretary, Department of Family and Community Services and Jonauskas* [2001] AATA 72 at [74]:

*... I concluded that 'knowingly' means actually knowing as opposed to the other two of the three degrees of knowledge. The first of the other two sorts is the sort of knowledge that comes from deliberately refraining to make enquiries because the enquiries will lead to answers that are not desired by the enquirer. The second is constructive knowledge in the sense that the person ought to have known the specific information or had the means of knowledge.*

96. The Respondent contended that the Applicant knowingly made a false statement and failed to comply with his obligations during the debt period by incorrectly declaring his employment income when he was reporting.<sup>44</sup> The Respondent provided that:<sup>45</sup>

*4.78 As contended at paragraph 4.68 above, the Applicant plead guilty to two counts of 'obtains financial advantage from a Commonwealth entity' during the debt period by virtue of his failure to correctly declare his employment income to the Agency. The Secretary contends that the Applicant's guilty plea demonstrates the Applicant had actual knowledge that he made false statements and failed to comply with the legislative requirements set out in the various notices issued to him. The Secretary further contends that the Applicant was on notice of his reporting obligations and the incorrect information about his employment income being relied upon by the Agency which he failed to correct, as well as a previous newstart allowance debts which arose for the same reasons thereby indicating the Applicant was well aware of the requirements.*

*4.79 In Evans and Secretary, Department of Social Services* [2013] AATA 944 at [16], the Tribunal found that the Applicant had actual knowledge that the representations made to the Agency throughout the debt period were false by virtue of the fact that the Applicant had been found guilty of defrauding the Commonwealth and causing a loss to the Commonwealth entity. It noted in respect of those offences that the jury were satisfied to the criminal standard that the Applicant had acted dishonestly. The Secretary contends that the Tribunal should reach the same finding in the present matter, by virtue of the fact that the

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<sup>44</sup> Exhibit 2, Joint Tribunal Book, R6, Respondent's Statement of Facts, Issues and Contentions, page 152, paragraph 4.74.

<sup>45</sup> Exhibit 2, Joint Tribunal Book, R6, Respondent's Statement of Facts, Issues and Contentions, pages 152-153, paragraphs 4.78-4.81.

*Applicant pled guilty to the offences of 'obtains financial advantage from a Commonwealth entity', demonstrating the requisite degree of knowledge.*

*4.80 The Tribunal has previously found that an Applicant's mental health condition do not deter it from making a finding that that an Applicant knowingly made false representations to the Agency. In Re Bota and Secretary, Department of Family and Community Services [2003] AATA 246 at [65], the Tribunal considered that the Applicant was employed throughout the relevant period and noted:*

*although he stated that his work required little thought or initiative, the same could be said of completion of fortnightly continuation forms, and in particular, the question on the form that asks for a 'yes' or 'no' answer to the question of whether the applicant did any work in a particular period. There is no evidence to suggest that the Applicant's thought processes were impaired to the extent of being unable to discern whether he had or had not worked or to recognise a question that required a 'yes' or 'no' answer.*

*4.81 The Secretary contends that there is no evidence that the applicant was so impaired by his mental health conditions so as to not have 'actual knowledge' that he was making a false statement on his fortnightly forms. Consequently, the Secretary that the Tribunal is precluded from waiving the right to recover all or part of the debt under section 1237AAD in circumstances where the Applicant knowingly made a false statement and failed to comply with the legislative requirements under the Act.*

97. The Applicant's evidence indicates that he knowingly made a false statement or false representation and failed to provide income information as he stated that he did not report the information accurately as he was not provided with payslips and during the time in question, was dealing with extremely difficult personal circumstances. In situations where such circumstances lead to small discrepancies between the amounts of income reported compared to income earned and received, a person may be considered not to have knowingly made a false statement or false representation. However, in the present instance, the difference between the income earned during the debt period and that reported is some \$54,314.56. Further, the Applicant was provided with a large number of notices from the Respondent during the debt period outlining his reporting requirements.
98. While the Applicant has told the Tribunal that he is seeking to undertake further litigation in relation to the 2016 court proceedings, it does not change the fact that he did plead guilty to the offences with which he was charged and demonstrated that at that time, he acknowledged that he had knowingly received Commonwealth benefits he was not entitled to.

99. While the Tribunal acknowledges the Applicant's personal difficulties and the medical evidence before it, it agrees with the Respondent that there is no evidence before it that indicates the Applicant was so impaired by his mental health conditions so as to not have actual knowledge that he was making false statements when undertaking his fortnightly reporting.
100. Consequently, the Tribunal is satisfied that the Applicant's NSA debt in relation to the debt period resulted at least partly from the Applicant knowingly making a false statement and failing to comply with the legislative requirements under the Act. As such, in accordance with section 1237AAD(a) of the Act, the Tribunal is unable to waive the right to recover all or part of the Applicant's NSA debt in relation to the debt period.
101. For completeness, the Tribunal has also considered whether special circumstances exist (other than financial hardship alone) that make it desirable to waive the Applicant's NSA debt. The Act does not provide a definition of special circumstances, however the general proposition established by relevant Federal Court decisions make it clear that special means something different from the usual or ordinary.<sup>46</sup>
102. In *Re Beadle and Director-General of Social Security* (1984) 6 ALD 1, the Tribunal held at paragraph 3:

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

103. In *Re Ivovic and Director-General of Social Services* [1981] AATA 57, the Tribunal stated:

*Whilst it would be unwise, if not impossible, to attempt to lay down any precise delineation of what may amount to "special circumstances" ...., the use of the word "special" is, we think, intended to allow the decision-maker the fullest opportunity to*

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<sup>46</sup> *Groth v Secretary, Department of Social Security* [1995] FCA 1708; (1995) 40 ALD 541, at 545 per Kiefel J; *Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs v Jones* (2012) 89 ATR 267; [2012] FCA 639, at [51]; *Boscolo v Secretary, Dept of Social Security* [1999] FCA 106; (1999) 90 FCR 531, at [18]; Barker J in *Kazmierczak v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2010] FCA 1084, at [37].

*consider the particular circumstances of each case ... In the exercise of the discretion ....., the decision-maker must have regard to whether, by exercising the discretion in a particular case, he will be achieving or frustrating ends or objects which are conformable with the scope and purpose of the .... Act.*

104. The Applicant has sought that his NSA debt for the debt period be waived due to special circumstances on the grounds of his personal circumstances, inability to repay the debt and health conditions. In particular, the added distress that homelessness and being part of the Robodebt class action have caused him amount to special circumstances.
105. The Respondent contended that special circumstances are not present. The Respondent submitted that the Applicant has not provided evidence which indicates that his mental health condition is more severe than that of other social security recipients who have incurred debts and noted that in any event, it is not altogether uncommon for social security recipients (particularly those on DSP) to have mental health conditions. Further, the Respondent contended that in the circumstances where the Applicant has had the benefit of the payments but not the entitlement, there is no injustice in requiring him to repay the debt.<sup>47</sup>
106. The Tribunal notes that while the Applicant raised concerns in relation to his ability to pay the NSA debt, he does receive the DSP together with other relevant social security benefits. There is nothing before the Tribunal to indicate that there is an apparent or immediate reason that such social security benefits will not continue to be paid. Further, based on the Applicant's evidence, there is no evidence before the Tribunal that indicates in the medium to long term, he will not be able to repay the NSA debt through withholdings from his DSP or that doing so would cause some out of the ordinary financial hardship. As such, it is not more appropriate to waive the Applicant's NSA debt than to write it off for a period of time.
107. While the Tribunal acknowledges the Applicant's dissatisfaction with the Respondent and how they have managed his NSA debt, that of itself does not constitute a special circumstance. Dissatisfaction with the Respondent and how it administers the social security system is not an uncommon or unusual situation among social security recipients.

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<sup>47</sup> Exhibit 2, Joint Tribunal Book, R6, Respondent's Statement of Facts, Issues and Contentions, pages 20-22, paragraphs 4.82-4.100.

108. The Tribunal does not doubt that the personal circumstances of the Applicant during the debt period were extremely difficult or that the Applicant's health has deteriorated given the events that have occurred since that period. While the Tribunal sympathises with the Applicant and in no way intends to trivialise his past and present personal and health circumstances, there is no evidence before it that indicates his circumstances, whilst special to him, are unusual, uncommon or exceptional when compared to other social security recipients who have incurred debts or that there is any injustice in requiring him to repay the debt.
109. As such, based on the evidence before it, the Tribunal is not satisfied that, for the purposes of section 1237AD(b) and (c) of the Act, special circumstances exist that make it desirable to waive the Applicant's NSA debt in relation to the debt period or that make it more appropriate to waive the debt rather than write it off.
110. Consequently, the Tribunal finds that the Applicant's NSA debt in relation to the debt period cannot be waived pursuant to section 1237AAD of the Act.

## **DECISION**

111. For the reasons set out above, the Tribunal finds that:
- (a) the Applicant was paid more than his correct amount of Newstart Allowance for the period 7 August 2009 to 6 June 2013; and
  - (b) the overpayment results in a debt of \$21,158.63 (inclusive of a debt recovery fee of \$1,923.50) being owed to the Commonwealth; and
  - (c) the Applicant's NSA debt is to be written off pursuant to section 1236 of the Act for a period of 6 months from the date of this decision; and
  - (d) there is no basis upon which the Applicant's NSA debt should be waived pursuant to sections 1237A or 1237AAD of the Act;
  - (e) the Applicant's NSA debt is recoverable in full.



112. Consequently, the Tribunal varies the decision under review<sup>48</sup> to the extent that the Applicant's Newstart Allowance debt is written off for a period of 6 months from the date of this decision. The decision under review is otherwise affirmed.

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<sup>48</sup> Being the decision of the SSCSD as varied by the Respondent pursuant to section 182 of the Administration Act on 16 September 2022 to raise and recover a NSA debt of \$21,158.23 (inclusive of \$1,923.50 recovery fee) for the period of 7 August 2009 to 6 June 2013.

*I certify that the preceding 112 (one hundred and twelve) paragraphs are a true copy of the reasons for the decision herein of Member D Mitchell*

.....[SGD].....

Associate

Dated: 24 November 2022

Date of hearing: **7 October 2022**

Applicant: **By phone**

Solicitors for the Respondent: **Mr Ben Dube  
Sparke Helmore Lawyers**



Administrative  
Appeals Tribunal

**DECISION AND  
REASONS FOR DECISION**

**Wilson and Secretary, Department of Social Services (Social services  
second review) [2022] AATA 4067 (30 November 2022)**

Division: GENERAL DIVISION

File Number(s): **2020/0886**

Re: **Lauren Wilson**

APPLICANT

And **Secretary, Department of Social Services**

RESPONDENT

**DECISION**

Tribunal: **Member P Ranson**

Date: **30 November 2022**

Place: **Brisbane**

The decision under review is varied, such that Ms Wilson has a recoverable debt due to the Commonwealth of \$27,108.02 for the period 5 September 2013 to 19 June 2019, and the Secretary is requested to consider the health circumstances of Miss Wilson in negotiating repayment by instalments.

.....[SGD].....

Member P Ranson

### *Catchwords*

*SOCIAL SECURITY — Parenting Payment Single — where applicant misreported her income — where applicant may be a member of Robodebt class action — where applicant applies for waiver of debt due to illnesses*

### *Legislation*

*Income Tax Assessment Act 1997 (Cth)*

*Social Security Act 1991 (Cth)*

*Social Security (Administration) Act 1999 (Cth)*

### *Cases*

*Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593; [2003] FCAFC 184

*Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634; [1979] AATA 179

### *Secondary Materials*

*Guides to Social Policy Law, Child Support Guide, Version 4.57, released 1 July 2021*

## REASONS FOR DECISION

### Member P Ranson

#### INTRODUCTION

1. Miss Lauren Wilson has one child, a son, from a previous relationship. She was in receipt of Parenting Payment Single (**PPS**) from the 2013 to 2019. That brought with it the obligation for her to report the gross amount of her ordinary income on a regular basis.
2. Miss Wilson rightly pointed out on numerous occasions she did report her earnings whenever changes occurred and believes she did so accurately other than on a limited number of occasions. That she reported to Centrelink is not in dispute. Unfortunately for Miss Wilson, she consistently under reported her fortnightly earnings. She thought Centrelink would detect any errors in her reporting once she lodged her annual income tax return each year. For PPS purposes, there is no annual reconciliation of adjusted taxable income as occurs with some other benefits and so her under reporting was not detected for many years.
3. Given her answers at the hearing, it is possible Miss Wilson reported net earnings (after tax) rather than gross earnings (before tax). No one is suggesting the amounts she reported were deliberately incorrect and Centrelink concedes she accepted the payments in good faith. However, Centrelink's records show she regularly underreported her earnings for PPS purposes. Why it took Centrelink seven years to discover this underreporting is both regrettable and unexplained although this case does not turn on that delay.
4. In any event, Miss Wilson has a debt due to the Commonwealth of \$27,163.40, which she is currently repaying at the rate of \$15 per fortnight by way of deduction from her Family Tax Benefit (**FTB**). Miss Wilson was adamant she was a party to the so-called Robodebt class action, which she was, however her circumstances precluded her from participating in the settlement. As Miss Wilson concedes she may have made some reporting errors, errors by Centrelink (if any) are not solely by them. She says even if she did make errors, the debt could be no more than \$5,000, although she had no explanation of how she arrived at that amount, nor why she says the amount calculated by Centrelink is incorrect.

5. When a Centrelink recipient is overpaid a benefit, the amount of the overpayment is automatically a debt due to the Commonwealth. Miss Wilson claims negligence by Centrelink caused the debt because they took seven years to discover the underreporting of her earnings and have several times changed the amount of the debt. She also said many times she is a single mother who suffers from Posttraumatic Stress Disorder (PTSD) and anxiety, and for all those reasons the debt should be waived. All PPS recipients are single parents and there are circumstances where such a debt can be waived or written off however the circumstances of Miss Wilson do not warrant that.
6. The issues in this case are:
- (a) Did Miss Wilson report the correct amount of fortnightly gross income?
  - (b) Was she overpaid PPS during the 2014 to 2019 financial years?
  - (c) Is the Robodebt class action relevant to this case?
  - (d) Are there any grounds for the debt to be waived or written off?
7. For the following reasons, the decision under review is varied, such that Ms Wilson has a recoverable debt due to the Commonwealth of \$27,108.02 for the period 5 September 2013 to 19 June 2019, and the Secretary is requested to consider the health circumstances of Miss Wilson in negotiating repayment by instalments.

## BACKGROUND

8. The parties in this case are:

Applicant	Miss Lauren Wilson ( <b>Miss Wilson</b> )
Respondent	Secretary, Department of Social Services (the <b>Secretary</b> )

9. On 24 January 2020, the Social Services and Child Support Division (**SSCSD**) of the Administrative Appeals Tribunal (**AAT**) affirmed a decision of the then Department of Human Services, now known as Services Australia, to raise and recover a PPS debt of \$31,296.10 against Miss Wilson for the period 18 October 2012 to 8 May 2019 (**AAT1**). Resulting from AAT1, the debt was recalculated to \$28,095.88 for the period 5 September 2013 to 19 June 2019 and later still reduced to \$27,163.40 for the period 19 September 2013 to 19 June 2019.<sup>1</sup>
10. The post-hearing submission from the Secretary (Exhibit 6) identified a minor adjustment of \$55.38 in Miss Wilson’s favour being underpayment arrears for the fortnight of 5 September 2013 to 18 September 2013. This decision then deals with a debt of \$27,108.02 (\$27,163.40 less \$55.38), for the debt period of 5 September 2013 to 19 June 2019 (the **Debt Period**), which incorporates the underpayment of \$55.38 identified by the Secretary.
11. The hearing was held on 14 October 2022 and conducted by MS Teams video (the **Hearing**). Miss Wilson attended and gave affirmed evidence. Mr Karwan Eskerie (**Mr Eskerie**), Solicitor attended the Hearing by video representing the Secretary.

**WHAT EVIDENCE WAS BEFORE THE TRIBUNAL?**

12. Prior to the Hearing, all parties were provided with an Exhibit List showing Exhibits 1 to 4 and Exhibit 5 was added at the Hearing. A post-hearing submission received from the Respondent has been included as Exhibit 6 and was provided to Miss Wilson. The following documents were admitted into evidence:

<b>Number</b>	<b>Description</b>
Exhibit 1	T Documents (T1 to T28) in four volumes.
Exhibit 2	Supplementary T Documents (ST1 to ST24, pages 1 to 627)
Exhibit 3	Secretary’s Statement of Facts, Issues and Contentions dated 3 June 2022

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<sup>1</sup> Exhibit 2, ST19, *Debt Multical* - \$27,163.40 for period 19/09/2013 — 19/06/2019.

<b>Number</b>	<b>Description</b>
Exhibit 4	Applicant's correspondence with local MP
Exhibit 5	Bundle of e-mails received by the Tribunal from the Applicant in the days before the Hearing.
Exhibit 6	Post-hearing submission from the Respondent concerning the status of the Applicant in the Robodebt scheme class action, and the debt calculation recalibrated into financial years.

13. In the days prior to the Hearing, Miss Wilson forwarded several e-mails to the Tribunal and copied the Respondent. These e-mails are included as Exhibit 5 and were duplicates of documents already contained in Exhibits 1 and 2.
14. The Tribunal notes Miss Wilson provided no evidence or submissions in support of her case other than a series of e-mails, such as Exhibit 5, and she provided no post-hearing submissions or a reply to Exhibit 6.
15. The Tribunal contacted Miss Wilson a week before the hearing to enquire if she had copies of the documents provided by the Secretary. She replied they would be in her e-mails. She was asked to reread the Secretary's statement of facts issues and contentions and she replied she was not a lawyer or an accountant. The Tribunal is satisfied all possible steps have been taken to ensure Miss Wilson had possession of all the exhibits and time to review and refute them or otherwise if she wished to do so and was afforded all necessary procedural fairness in this case.
16. The Tribunal has considered all the material supplied to it and the oral evidence of Miss Wilson at the Hearing. Not all the evidence is referred to at length, or at all, in this decision record. That does not mean it has not been considered in determining the outcome. It is sometimes unnecessary to canvass all aspects, arguments, and history of a case in a decision record.<sup>2</sup>

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<sup>2</sup> *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593; [2003] FCAFC 184, [46]



## THE LAW

17. Exhibit 3 sets out in detail the law which is relevant to this case with which the Tribunal concurs. As a copy of all exhibits and their attachments were provided to Miss Wilson prior to the Hearing that law will not be reproduced in detail in this decision other than to confirm the relevant legislation is contained in the *Social Security Act 1991* (Cth) (the **Act**) and the *Social Security (Administration) Act 1999* (Cth) (the **Administration Act**).
18. Exhibit 3 also refers to the *Social Security Guide* (the **Guide**).<sup>3</sup> The Tribunal notes where a general policy exists to guide the decision maker in exercising its powers, the Tribunal:
- “will ordinarily apply that policy in reviewing the decision, unless the policy is unlawful or unless its application tends to produce an unjust decision ... cogent reasons will have to be shown against its application”.*<sup>4</sup>
19. The Tribunal considers there are no pressing reasons to depart from the policy outlined in the Guide. To the extent the Tribunal has considered policy in this case, it has not applied it inflexibly and has only considered it to the extent the Guide is consistent with the requirements as set out in the legislation as it would be an error of law for the Tribunal to state it *must* (emphasis added) follow what policy says concerning the scope or meaning of a provision in the Act or Regulations.
20. In Exhibit 3, the Secretary points out some of the relevant provisions of the Act and Administration Act have been amended since 2019 and as such, the versions of both Acts, as they were at the relevant time, apply in this case, rather than the current versions of those Acts.<sup>5</sup>

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<sup>3</sup> See *Guides to Social Policy Law, Child Support Guide, Version 4.57*, released 1 July 2021

<sup>4</sup> *Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634; [1979] AATA 179, 645 (Brennan J).

<sup>5</sup> Exhibit 3, *Secretary’s Statement of Facts & Contentions* dated June 2022, [34].

## THE FACTS

### Did Miss Wilson report the correct amount of her fortnightly gross income?

21. Other than Exhibit 5, Miss Wilson provided no written evidence in support of her case. As discussed above, in making this decision the Tribunal relies on exhibits 1 to 6 and the oral evidence of Miss Wilson.
22. PPS is calculated daily based on ordinary income, which includes gross income from employment, such as salary and wages.<sup>6</sup> Gross income is the amount before PAYG tax is deducted. It excludes maintenance income and exempt lump sums all of which are defined in the legislation. Ordinary income for PPS is neither taxable income nor adjusted taxable income as used in the calculation of other benefits and there is no annual reconciliation of earnings as occurs with other benefits.<sup>7</sup> The onus is on the recipient to correctly report their gross income.
23. The Act defines an instalment period as the period determined by the Secretary. Generally, social security periodic payments are paid in arrears and by instalments not exceeding 14 days.<sup>8</sup>
24. A person's pay period with their employer may not and often don't directly align with an instalment period for social security purposes. Where pay periods and instalment periods do not align the Act has to identify when the income is earned, derived, or received in each instalment period.
25. Once it is satisfied a person had earned, derived, or received an amount of employment income during the whole or a part of a particular instalment period, s 1073B of the Act provides the person is deemed to have earned, derived, or received an amount of employment income on each day in that instalment period, worked out by dividing the total amount of employment income by the number of days in the instalment period.

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<sup>6</sup> *Income Tax Assessment Act 1997* (Cth) s 6-5 ('ITAA 1997').

<sup>7</sup> See, e.g. Family Tax Benefit.

<sup>8</sup> Administration Act s 43.

26. Exhibit 3 identifies where Miss Wilson was employed during that period as follows:

<b>Employer</b>	<b>From</b>	<b>To</b>
MyStyle Homes	4 September 2013	12 May 2016
Mr Rentals Cairns	16 May 2016	20 May 2016
Cairns & Cape Electrical	1 June 2016	12 July 2018
LDI Constructions Civil Pty Ltd	24 July 2018	21 December 2018
HC Building and Construction	7 January 2019	4 August 2019

27. Where a payslip does not indicate the hours worked on a given day during the pay period, and instead shows the total hours worked for the whole of the pay period, the Act deems that income to be earned, derived, or received, whichever occurs first, on each day in that instalment period by dividing the total amount by the number of days in the instalment period.<sup>9</sup>

28. Where a payslip identifies the days and hours worked, the income for those days is earned or derived in the instalment period in which those days fall. Absent identification of the days worked the income is deemed received in the instalment period in which the pay date occurs. Based on the payslips provided by the Secretary who obtained them from the employers concerned, the income has been assessed as follows:

<b>Employer</b>	<b>Basis applied</b>
MyStyle Homes	Daily earnings
Mr Rental Cairns	Daily earnings
Cairns Cape Electrical (Vyner Pty Ltd)	Income received
Brooks Build	Income received
LDI Constructions	Daily earnings
HC Building and Construction	Daily earnings

29. Miss Wilson received PPS from 5 November 2011 to 18 July 2019 with some periods of suspension when her ordinary income exceeded the relevant threshold. The Secretary issued letters and statements to her throughout that period reminding her to report the name of her employer and her gross employment income. She was also reminded to advise of any changes in employment.

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<sup>9</sup> Act s 1073B.

30. There is no dispute Miss Wilson regularly reported her earnings to Centrelink during the 2014 to 2019 financial years. The Secretary acknowledges this, for example, in Exhibit 3 at paragraph 86. Her employer payslips show the pay periods do not directly align with the instalment period for social security purposes.<sup>10</sup> The issue though is whether the amounts reported were the income required to be reported.

31. Exhibit 6 sets out the information on which the Debt has been calculated as follows:<sup>11</sup>

<b>Financial year</b>	<b>Actual earnings</b>	<b>Reported earnings</b>	<b>Under reported earnings</b>
2013/2014	34,846	26,440	8,406
2014/2015	47,500	30,000	17,500
2015/2016	45,413	28,291	17,122
2016/2017	48,041	36,370	11,671
2017/2018	46,852	36,328	10,524
2018/2019	55,009	45,862	9,147

32. By employer, the difference in the amounts earned, derived, and received by Miss Wilson compared with the amounts declared by her over the relevant period as shown on Exhibit 6 are as follows:

<b>Employer</b>	<b>Declared</b>	<b>Actual</b>	<b>Difference</b>
MyStyle Homes	83,814	126,195	42,381
Mr Rental Cairns	0	811	811
Brookes Build	65,324	77,222	11,898
Cairns Cape and Electrical	17,723	27,419	9,696
LDI Constructions	20,417	22,211	1,795
HC Building & Constructions	16,863	23,808	6,945
<b>Totals</b>	<b>\$204,141</b>	<b>\$277,666</b>	<b>\$73,526</b>

33. The important point to take from the above schedule is the consistent underreporting of gross employment income in all years in question with amounts

<sup>10</sup> Exhibit 1, T9 and T10.

<sup>11</sup> Exhibit 6, *Respondent's Further Submissions* dated 4 November 2022, [3.2] and [3.8].

over \$10,000 in all but two years. A certain outcome of this underreporting of gross income by Miss Wilson is overpayment of her PPS benefits, which results in a debt due to the Commonwealth as has occurred in this case.

34. At the hearing, and following receipt of Exhibit 6 from the Secretary, Miss Wilson was invited to make submissions in support of her case. She made no such submissions. At the hearing she conceded she may have misreported a few times and as such the debt would be no greater than \$5,000 yet she could provide no basis for that estimate. She was also asked to identify errors in the Secretary's calculation. She declined saying she was not a lawyer or an accountant.
35. The Tribunal finds Ms Wilson underreported her gross income for PPS purposes during the Debt Period because of the substantial differences between the amounts reported by her and the gross employment income recorded on employer payslips.

#### **Was she overpaid PPS during the Debt Period?**

36. At the request of the Tribunal, the Secretary recalibrated the detailed calculations of Miss Wilson's entitlement to PPS on a financial year basis for 2014 to 2019.<sup>12</sup> The schedule for each financial year shows the individual employers, and the declared income and updated income for each. Updated income has been calculated from payslips provided by each employer. The Tribunal notes the declared income in FY2014, which for the purpose of this case was solely from MyStyle Homes, is \$27,288 as opposed to \$26,440 as shown in Exhibit 6 at paragraph 3.8. This difference is in favour of Miss Wilson and this decision does not turn on that difference.
37. The Tribunal conducted random testing of the amounts shown as 'Updated Income' on Attachment C to Exhibit 6. This is the amount of gross employment income derived from the various employers during the Debt Period. The purpose of the testing was to satisfy the Tribunal the calculation was correctly based on the

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<sup>12</sup> Exhibit 6, *Respondent's Further Submissions* dated 4 November 2022, annexure C.

gross income shown on the payslips to the Debt Schedule. No discrepancies were discovered in this testing.

38. Miss Wilson rightly queried the changing amount of the Debt over time and how the amount could be credible when it had changed so many times. The history of the debt amount is set out below:

<b>Date</b>	<b>Amount</b>	<b>Period</b>	<b>Basis</b>
24-07-2019	\$24,897.98	05-11-2012 to 21-06-2017	Original calculation of the Debt using employment income information provided by the ATO (T8, p76).
12-08-2019	\$30,432.52	05-11-2012 to 08-06-2019	Revised calculation of the Debt following receipt of some payslips from Miss Wilson (T13, p266).
04-10-2019	\$31,296.10	18-10-2012 to 08-05-2019	Revised calculation incorporating bank statements provided by Miss Wilson. Later upheld by an ARO (T20, p575). This amount was the subject of the AAT1 decision on 24 January 2020.
16-04-2020	\$33,368.73	18-10-2012 to 19-06-2019	Revised calculation incorporating payroll information provided by LDI Construction, HC Building and Construction and Mr Rentals Cairns (ST5, p99)
28-01-2021	\$28,095.88	05-09-2013 to 19-09-2019	Revised calculation following the first review in the AAT. This calculation only relies on employment income provided by Miss Wilson's employers and excludes earnings shown on her bank statements (ST20, p560).
09-03-2022	\$27,163.40	19-09-2013 to 19-06-2019	Revised calculation based on payslip information from all six employers (ST19 & ST20) (Exhibit 3, para 62).
04-11-2022	\$27,108.02	05-09-2013 to 19-06-2019	Revised calculation following recalibration of the debt schedules on a financial year basis (see Exhibit 6). Incorporates \$55.38 underpayment arrears.

39. At the hearing, Mr Eskerie explained the calculation of Miss Wilson's PPS entitlements changed over time as further and better information became available. It began incorrectly based only on gross annual income provided by the ATO, which may have been the reason Miss Wilson was originally thought to be part of the Robodebt class action. Various calculations of the debt included income shown on Miss Wilson's bank statements, which were later disregarded. The Secretary says the final calculation made in March 2022 is based on the best information available to it being the payslips from the six businesses which employed Miss Wilson during the Debt Period showing her gross employment income and the calculation methodology contained in the Act and the Administration Act.
40. Included in Exhibit 5 is a copy of a letter dated 30 March 2021 from Townsville Community Law to Miss Wilson. In that letter under the heading of 'Debt recalculation' the author Ms Fiona Spencer says:
- 'With respect to recalculating the debt, we advise we do not have the resources to do a manual recalculation of the debt on your behalf. Should you consider there is an error in calculations, you may wish to engage an accountant to recalculate the debt, or alternatively request the AAT recalculate the debt (in the event you choose to proceed). You would need to provide some evidence to the AAT that indicates the debt has not been calculated correctly.'
41. Miss Wilson was asked at the hearing if she could identify any errors in the final calculation of the debt consistent with the advice she received from Ms Spencer in her letter of 30 March 2021 as shown in the last sentence in the above quote. She repeated she was not a lawyer or an accountant and so didn't have the skill to check the calculation herself nor could she afford to pay for it to be independently checked.
42. The debt has been calculated on an instalment period to instalment period basis, having regard to all of the payslips provided by Miss Wilson's employers during the Debt Period. Absent any submissions by Miss Wilson identifying an error in the calculations made by the Secretary, there is no evidence before the Tribunal to indicate the final calculation of the debt, viz, \$27,108.02 is incorrect.

43. How an overpayment of a social security benefit occurs is irrelevant in determining whether a debt to the Commonwealth exists pursuant to s 1223(1) of the Act. When a recipient of a social security benefit receives payments more than they are entitled to, the excess is a debt due to the Commonwealth.<sup>13</sup>
44. The Tribunal finds Ms Wilson received overpaid PPS of \$27,108.02 for the period 5 September 2013 to 19 June 2019 and this amount is a debt due to the Commonwealth because she consistently underreported her gross employment income and there is no evidence before the Tribunal to indicate the amount has not been correctly calculated.<sup>14</sup>

**Is the Robodebt class action relevant to this decision?**

45. Miss Wilson said Centrelink wrote to her to advise she was part of the Robodebt class action, and so she was adamant she was. In her evidence she said:

*MS WILSON: Yes, I was part of the class action. I forwarded you the documentation from that.*

*MEMBER: So, did you get a settlement?*

*MS WILSON: No, I haven't had any correspondence from Centrelink in regards to it.<sup>15</sup>*

46. The Tribunal does not doubt she received such a letter because in Exhibit 6 the Secretary provided a copy of a letter dated 4 November 2021 sent to Miss Wilson advising the outcome of her participation in that class action, which means she had received correspondence from Centrelink despite her saying she didn't. The letter is listed as annexure A and confirms she was a member of that class action, and she was not eligible for a settlement payment.

47. The reason given for her ineligibility for a settlement payment is stated as:

'This debt used averaged Australian Taxation Office (ATO) income information. The amount repaid was less than what was owed after the debt was recalculated using verified income information.'

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<sup>13</sup> Act s 1223(1).

<sup>14</sup> Administration Act s 72(1).

<sup>15</sup> Transcript, p 18, lines 4–10.



48. In her e-mail dated 5 March 2022 to federal MP the Hon Warren Entsch, Miss Wilson acknowledges she was not part of the Robodebt class action because she says: ‘Upon settlement of the Class Action my case was noted as not being a class action case.’<sup>16</sup> Again this is evidence Miss Wilson did receive correspondence from Centrelink advising her she was not part of the Robodebt settlement, despite her saying she didn’t.
49. Miss Wilson’s involvement in the Robodebt class action is not relevant to and does not affect the matters to be decided in this case.

**Are there any grounds for the debt to be written off or waived?**

***Write off***

50. The Secretary can write off a debt, meaning delay its recovery, for a stated period in certain circumstances.<sup>17</sup> Those circumstances include:
- (a) The debt is not recoverable at law
  - (b) The debtor has no capacity to repay the debt
  - (c) The debtor’s whereabouts are unknown, or
  - (d) It is not cost effective for the Commonwealth to recover the debt.
51. There is no suggestion the debt cannot be recovered from future entitlements of Ms Wilson to other social security benefits, as occurs now with deductions from her Family Tax Benefit (FTB),<sup>18</sup> or future income tax refunds. Ms Wilson’s whereabouts are known, and it can be cost effective for the Commonwealth to recover the debt by instalments.

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<sup>16</sup> E-mail exchanges between Miss Wilson and the offices of federal MPs the Hon Warren Entsch and the Hon Bob Katter forwarded to the Tribunal on 13 April 2022.

<sup>17</sup> Act s 1236(1A).

<sup>18</sup> Exhibit 3, *Secretary’s Statement of Facts & Contentions* dated June 2022, [32].

52. The Secretary asserts Miss Wilson had estimated taxable income of \$90,000 for FY2022 and adjusted taxable income of \$60,734 for FY2021.<sup>19</sup> Miss Wilson has not challenged this. Severe financial hardship can be considered in deciding whether to recover a debt. However, Miss Wilson is employed, and the Secretary is currently accepting repayment by modest instalments from her entitlement to FTB, which indicates repayment will not cause her severe financial hardship.
53. Given the findings above, the Tribunal is satisfied there are no grounds to write off the debt for any period because it is recoverable, and Miss Wilson can negotiate repayment by instalments.

### ***Waiver***

54. Ms Wilson asserts she should not have to repay the debt because she is a single mother and suffers from PTSD. This would require the debt waiver provisions of the Act apply. For the purposes of this decision, there are two circumstances where waiver might apply.
55. Firstly, the Secretary must waive the right to recover the proportion of a debt that is attributable solely to an administrative error made by the Commonwealth if the debtor received in good faith the payment or payments that gave rise to that proportion of the debt. This Subsection does not allow waiver of a part of a debt that was caused partly by administrative error and partly by one or more other factors (such as error by the debtor).<sup>20</sup> Solely means the error must have been caused only by the Commonwealth and by no other party.
56. Secondly, the Secretary may also waive the right to recover all or part of a debt if the Secretary is satisfied the debt did not result wholly or partly from the debtor or another person knowingly making a false statement or a false representation or failing or omitting to comply with a provision of the Act, the Administration Act or the 1947 Act. There must be special circumstances (other than financial hardship

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<sup>19</sup> Exhibit 3 *Secretary's Statement of Facts & Contentions* dated June 2022, [73].

<sup>20</sup> Act s 1237(A).

alone) that make it desirable to waive the debt, and it is more appropriate to waive than to write off the debt or part of the debt.<sup>21</sup>

57. As already discussed, the main issue in this case is the error by Miss Wilson in the amounts of gross income she reported over a seven-year period. She may have been reporting net income rather than gross income as the following exchange at the hearing demonstrates:

*MEMBER: Okay. Let me ask another one [question] that will seem very silly to you but let me ask it anyway. What is the difference between gross and net pay?*

*MS WILSON: So, over the years, the more administration work I have done, I have gone into learning about bookkeeping and contract administration, et cetera, et cetera. So gross earnings is – my understanding – what you take home.*

*MEMBER: Well, if that is so, what is net pay?*

*MS WILSON: Net pay is the total amount what you receive. Before tax.*

*MEMBER: Okay. All right. Let me suggest to you that it's actually the other way around. Gross pay is before tax. Net pay is after tax.*

*MS WILSON: Well, there you go.*

*MEMBER: So, given that confusion – and easily done – is it conceivable in your mind that when you were reporting some of your earnings, you may have incorrectly reported your net pay being after tax rather than your gross pay being before tax?*

*MS WILSON: Well yes, it could have been that.<sup>22</sup>*

58. Exhibit 3 shows Centrelink wrote to Miss Wilson on many occasions specifying she was to report her gross income. Nonetheless, the Secretary accepts Miss Wilson accepted the PPS payments she received in good faith.<sup>23</sup>

59. To make a finding of sole administrative error by Centrelink in this case is precluded because the overpayments arose from the underreporting of her income by Miss Wilson, which she partially acknowledges, and not by any error by Centrelink. The following quote from the hearing demonstrates this:

*MS WILSON: I already stated before there is the possibility on the times when I have had, like, holidays and you have to report early and things like that, that that could be where I have made discrepancies in what I've reported. But I certainly don't believe I owe \$27,000.<sup>24</sup>*

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<sup>21</sup> Act s 1237AAD.

<sup>22</sup> Transcript, p 40, lines 9–31.

<sup>23</sup> Exhibit 3, *Secretary's Statement of Facts & Contentions* dated June 2022, [78].

<sup>24</sup> Transcript, p 41, lines 5–8.

60. Miss Wilson says the seven-year delay in discovering the overpayments coupled with the many different calculations of the debt means the error was all by Centrelink. The Tribunal has already explained above why the calculation of the debt changed many times as further and better information was provided. Whilst a seven-year delay in discovering the errors in reporting by Miss Wilson may suggest poor administration by Centrelink and is regrettable, it is not an error by Centrelink. The only error was by Miss Wilson in consistently underreporting her gross income from employment.
61. Given the findings above, the Tribunal is satisfied there has been no administrative error by the Commonwealth and the errors which gave rise to the debt are solely those of Miss Wilson because at the Hearing she admitted she misreported her income on some occasions and every year in question her reported gross income was significantly less than her actual gross income so as to preclude inadvertence on her part.
62. The Secretary accepts Miss Wilson did not knowingly fail or omit to comply with her notification obligations because she was regularly reporting her earnings, albeit incorrectly.<sup>25</sup> That leaves special circumstances as a possible ground for the debt to be waived. To be special, the circumstances of Miss Wilson must be unusual, uncommon, or exceptional. She says her diagnosed PTSD and anxiety plus being a single mother amount to special circumstances.
63. Miss Wilson provided a medical certificate dated 12 January 2020 from Dr Susan Fernandes which states:<sup>26</sup>
- ‘Miss Lauren Wilson has PTSD [Post-traumatic stress disorder] and Anxiety. This certificate has been issued at the consent of the patient.’
64. The Tribunal and the Secretary accept Miss Wilson has been diagnosed with PTSD and anxiety, which is very unfortunate, and no doubt would be considered by the Secretary in negotiating repayment of the debt by instalments.

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<sup>25</sup> Exhibit 3, *Secretary’s Statement of Facts & Contentions* dated June 2022, [86].

<sup>26</sup> Exhibit 2, ST23, *Medical certificate* dated 12 January 2020, 567.

65. The state of her health was commented on further by Dr Rohit Goel on 9 October 2022 who provided a medical certificate which states:

Miss Lauren Wilson has been a patient of mine since 2018 and states that she has been under considerable stress due to her ongoing issues with Centrelink and issues around repayment. She was referred to a psychologist by myself and a colleague in 2018.<sup>27</sup>

66. Whilst this certificate is current at the time of this decision, it mentions a referral to a psychologist in 2018. As the debt arose during the period 5 September 2013 to 19 June 2019, most of the debt arose in period before the diagnosis of PTSD. Further, the letter from Dr Goel advises self-reporting by Miss Wilson of her stress rather than a diagnosis of her condition by a suitably qualified medical practitioner, such as a psychiatrist or clinical psychologist. In her evidence at the hearing, Miss Wilson confirms the diagnosis of her PTSD was in 2018:

*MEMBER: Well, let's pick up on those points. You've said there's no consideration of your mental health issues. When were you first diagnosed with PTSD?*

*MS WILSON: In 2018.*<sup>28</sup>

67. Many people suffer from PTSD and anxiety and continue to function in society as does Miss Wilson, who has regular employment, lives independently and cares for her son as a sole parent. These medical conditions do not in and of themselves amount to special circumstances for the purpose of debt waiver.
68. Given the findings above, the Tribunal is satisfied there are no special circumstances in this case which would warrant waiver of the debt.

## **CONCLUSION**

69. Regrettably, Miss Wilson failed to engage in any serious way in these proceedings rather continuously protesting the apparent injustice of the debt.

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<sup>27</sup> Exhibit 5.

<sup>28</sup> Transcript, p 38, lines 43–47.

70. The Tribunal contacted her ahead of the hearing to ensure she had the relevant documents and at least had read Exhibit 3. She agreed she had the documents and wouldn't read them because she was not a lawyer or accountant.
71. She asserted more than once in the hearing she was part of the Robodebt class action, which the Secretary confirmed in Exhibit 6 she had been and was advised a year ago she was not entitled to a settlement. Miss Wilson knew at the hearing she would not be receiving a settlement payment from the Robodebt class action. In any event, her involvement in the Robodebt class action is not relevant to this case.
72. Townsville Community Law advised her in March 2021 she would need to provide some evidence to the Tribunal to indicate the debt has not been calculated correctly. She didn't do so reverting instead to her stated position of not being a lawyer or accountant as though that somehow precluded her from making any such submission.
73. Her only rationale for the debt being waived is she is a single mother who suffers from PTSD and anxiety. Those medical conditions, which the Secretary and the Tribunal accept are real, have not stopped her from obtaining well paid employment including most recently, living independently, and caring for her son as a single parent.
74. As this decision has clearly shown, Miss Wilson did not accurately report her employment income and she was overpaid PPS as a result.

## **DECISION**

75. The decision under review is varied, such that Ms Wilson has a recoverable debt due to the Commonwealth of \$27,108.02 for the period 5 September 2013 to 19 June 2019, and the Secretary is requested to consider the health circumstances of Miss Wilson in negotiating repayment by instalments.

*I certify that the preceding 75  
(seventy-five) paragraphs are  
a true copy of the reasons for  
the decision herein of  
Member P Ranson*

.....[SGD].....

Associate

Dated: 30 November 2022

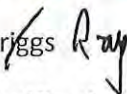
Date(s) of hearing:	<b>14 October 2022</b>
Date final submissions received:	<b>4 November 2022</b>
Applicant:	<b>In person</b>
Advocate for the Respondent:	<b>Mr K Eskerie, Solicitor</b>
Solicitors for the Respondent:	<b>Sparke Helmore</b>

A2316389

14 March 2023

Mr Ray Griggs AO CSC  
Secretary  
Department of Social Services

By email to: [Ray.GRIGGS@dss.gov.au](mailto:Ray.GRIGGS@dss.gov.au)

Dear Mr Griggs 

**Notification of Ombudsman own motion investigations — Income Apportionment**

I am writing to inform you that I have decided to initiate 2 investigations into Services Australia under section 5(1)(b) of the *Ombudsman Act 1976* (Ombudsman Act).

I have written to the Chief Executive Officer of Services Australia, Ms Rebecca Skinner PSM to notify her of these investigations.

**Issues**

On 3 January 2023, Services Australia requested my Office provide dates for the Deputy Ombudsman to receive a briefing on an 'income apportionment' issue and my Office responded. After several attempts by my Office to follow up and obtain more information about the issue, Services Australia scheduled a meeting on 17 February 2023.

At that meeting, senior officials from Services Australia and the Department of Social Services provided the Deputy Ombudsman with a verbal briefing on issues arising from processes used to verify employment income in retrospective entitlement reviews prior to 7 December 2020. During the meeting, the Deputy Ombudsman requested Services Australia provide additional information about the 'income apportionment' approach including copies of legal advice, Administrative Appeals Tribunal (AAT) outcomes and details of proposed engagement with affected customers, along with any other information relevant to the issue.

On 24 February 2023, Services Australia provided my Office several documents including copies of legal advice provided to your department, AAT outcomes and a General Instruction. I am concerned about the scale and significance of this issue and the potential impact on a considerable number of individuals such that I consider own motion investigations into both the legality and administration of these matters are warranted.

Without limiting matters that may be considered, the investigations will focus on:

1. examining Services Australia's legal framework for income apportionment, leading up to and following legislative amendments that took effect from 7 December 2020, and
2. Service Australia's administration of income apportionment including its engagement with customers, training and guidance to staff, as well as its handling of complaints, internal reviews and AAT or Federal Court appeals.



As the Department of Social Services will likely hold information relevant to our investigations, we anticipate requesting information from you and your departmental officers throughout the course of the investigations.

**Next steps**

I expect to provide Services Australia, and your department, with an initial set of questions and requests for information and documents within the next 2 weeks.

These investigations may result in my Office preparing one or more reports under the Ombudsman Act. I may decide to publish these reports, after giving Services Australia, and your department, appropriate opportunity to comment in accordance with the requirements of the Ombudsman Act.

If you wish to discuss these investigations, you may contact me directly on s 22 [redacted] If your staff have any questions, they may contact Emma Cotterill on s 22 [redacted]

Yours sincerely



Iain Anderson  
Commonwealth Ombudsman

*Influencing systemic improvement in public administration*



Australian Government  
Department of Social Services

General Brief

MS23-000578

**To:** Minister for Social Services (for noting)  
**Cc:** Minister for the National Disability Insurance Scheme and Minister for Government Services  
**Subject:** Proposal to brief the Solicitor-General on income apportionment

**Recommendations for Minister Rishworth:** That you

Note the information provided in this brief.	Noted / Please Discuss
<b>Minister Rishworth Comments</b>	
<p>Please keep no informal when advice is received from the Solicitor-General</p> <p><i>[Handwritten Signature]</i></p> <p><b>Minister Rishworth's signature:</b>..... <b>Date:</b> 8/6/2023</p>	
<b>Cc: Minister Comments</b>	
<p><b>Minister Shorten's signature:</b>..... <b>Date:</b>...../...../ 2023</p>	

*This document contains legal advice and may be subject to legal professional privilege. Unless it is waived or lost, legal professional privilege is a rule of law that, in part, provides that the client need not disclose confidential communications between a legal practitioner and client. To keep this privilege, the purpose and content of this advice must only be disclosed to persons who have a need to know and on the basis that those persons also keep it confidential.*

**Key Issues:**

1. This brief provides an update to MS22-001126 (**Attachment A**) which related to the General Instructions, issued on 12 December 2022, which guide decision makers in reviews of social security debts related to employment income prior to 7 December 2020. The General Instructions, developed in consultation with Services Australia and Sparke Helmore Lawyers (Sparke Helmore), were informed by legal advice from Sparke Helmore, and advice from Mr Stephen Lloyd SC and the Australian Government Solicitor (AGS).
2. In MS22-001126, the department advised that, on 14 March 2023, the Commonwealth Ombudsman (the Ombudsman) had initiated 2 'own motion' investigations into this matter which focus on:
  - a) examining Services Australia's legal framework for income apportionment, leading up to and following legislative amendments that took effect from 7 December 2020; and
  - b) Services Australia's administration of income apportionment including its engagement with customers, training and guidance to staff, as well as its handling of complaints, internal reviews and AAT or Federal Court appeals.

3. On 18 May 2023, the Ombudsman notified you of the investigations as he is required to under section 8(7A)(b) of the *Ombudsman Act 1976* (**Attachment B**). The Ombudsman is required to conduct investigations in private (section 8(2) of the *Ombudsman Act*) and this review has not been publicised by the Ombudsman.
4. The Ombudsman has issued a number of notices to the both department and to Services Australia seeking documents and other information to assist the investigations. This has included providing the legal advice of both Mr Lloyd and the AGS.

5. As noted in MS22-001126, s 42

s 42

6. On 19 May 2023, the Ombudsman's Office expressed concern that the department and Services Australia have "two different legal answers to a question that impacts a large number of people" and suggested that the Solicitor-General be asked to settle the difference in the legal advices by advising which of the 2 interpretations should be preferred.
7. While Mr Lloyd is a preeminent Senior Counsel, and was briefed to advise on the issues arising in consultation with the Office of Legal Services Coordination (OLSC) in the Attorney-General's Department, the department is mindful of the significance of the Ombudsman's suggestion that advice from the Solicitor-General would assist in settling a preferred approach.
8. The department, in consultation with Services Australia, has engaged Sparke Helmore to brief the Solicitor-General and has notified OLSC. In order to seek the Solicitor-General's opinion, he will need to agree to accept the brief, and the Attorney-General will also need to consent.
9. The Deputy Chief Executive Officer, Payments and Integrity Group, Services Australia, has advised that Services Australia has paused the proposed implementation of the General Instructions pending further advice from the Solicitor-General. The department is also working with Services Australia to consider whether to pause using the approach set out in the General Instructions for current AAT1 and AAT2 appeal proceedings.
10. We had previously advised that Mr Lloyd was preparing advice on the handling of historical cases. The department has received advice on the treatment of historical cases, but further action will be put on hold pending receipt of the Solicitor-General's opinion.
11. We expect that it will take some weeks for the Solicitor-General to be briefed and for advice to be provided. We will provide you with a further briefing once the advice is received.

12. In the meantime, Services Australia has advised that:

- a) Services Australia will continue to collect information relating to formal reviews for vulnerable customers, but will not finalise these reviews until the Solicitor General's advice is obtained.
- b) Services Australia has engaged with the Commonwealth Director of Public Prosecutions (CDPP) in relation to the Ombudsman's views, and agreed that it is appropriate to pause any further referrals to the CDPP that contain earned income-related debts from pre-7 December 2020, until the required methodology for calculating earned income is confirmed. There are a number of matters currently proceeding through the courts that Services Australia will need to jointly work through with CDPP. It is likely that the CDPP will seek to adjourn matters currently before a court, but adjournments would be at the discretion of the magistrate.
- c) Services Australia is seeking to identify debts already under recovery that may have been impacted by apportionment, including matters before the AAT. Subject to the systems having the capacity to identify these records, Services Australia will seek further instructions from the department about whether these recovery arrangements should be paused pending the Solicitor-General's advice.
- d) JobKeeper compliance intervention is being paused while the impact of apportionment on these interventions is investigated, and how that might interact with earned income.

**Sensitivities:**

s 47E (d)

14. While it is conceivable that these matters could attract media attention, we consider that clarifying the underpinning legal position will provide assurance for the raising, recovery, and prosecution of future debts, and ensure that historical debts are appropriately handled.
15. If the Minister is asked about the Ombudsman's investigations, she could acknowledge she has been advised and is aware of these investigations but cannot comment further as they are current investigations.
16. While there is a genuine issue of legal interpretation here, as noted in MS22-001126, there is a risk that this matter will be perceived as another 'Robodebt'.

**Risk Management:**

17. There is a risk that the Solicitor-General will decline to accept the brief. Should this occur, it is likely that we will continue s 47C

s 47C

**Departmental Funding / Financial Implications:** Nil.

**Regulatory Implications:** Nil.

**Consultation:** Services Australia, Social Security Stream (Pensions, Housing and Homelessness Group)

**Attachments:**

**Attachment A:** MS22-001126

**Attachment B:** Ombudsman letter to Minister Rishworth dated 18 May 2023

Contact Officer: Catherine Seaberg  
Position: Deputy Chief Counsel  
Branch: Public Law Branch  
Phone/Mobile: s 22

Cleared by: Emma White  
Position: A/g Chief Counsel  
Group: Legal Services Group  
Phone/Mobile: s 22

Cleared by: Pat Hetherington  
Position: Chief Operating Officer  
Phone/Mobile: s 22

Signature:

s 22

Date: 25 / 5 /2023



Australian Government  
Department of Social Services

**General Brief**

**MS22-001126**

**To: Minister for Social Services (for information)  
Minister for Government Services (for information)**

**Subject: Assessing employment income and social security debt calculations - General Instructions for Services Australia**

**Recommendations for Minister Rishworth: That you**

1. Note the department and Services Australia have agreed General Instructions for the calculation of pre 7 December 2020 debts.	Noted / Please Discuss
2. Note ongoing investigations being undertaken to develop further advice on the handling of historical cases.	Noted / Please Discuss
3. Note that the Commonwealth Ombudsman has initiated two investigations into Services Australia’s handling of these debts.	Noted / Please Discuss

**Minister Rishworth Comments**

**Minister Rishworth's signature:.....**

**Date:..../..../ 2023**

**Recommendations for Minister Shorten: That you**

1. Note the department and Services Australia have agreed General Instructions for the calculation of pre 7 December 2020 debts.	Noted / Please Discuss
2. Note ongoing investigations being undertaken to develop further advice on the handling of historical cases.	Noted / Please Discuss
3. Note that the Commonwealth Ombudsman has initiated two investigations into Services Australia’s handling of these debts.	Noted / Please Discuss

**Minister Shorten Comments**

**Minister Shorten's signature:.....**

**Date:..../..../ 2023**

## OFFICIAL: Sensitive, Legal Privilege

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### Introduction

1. On 29 June 2022, the Department of Social Services (the department) briefed you about Services Australia's use of fortnightly income to determine a social security debt in circumstances where the fortnightly earnings did not coincide with the Centrelink instalment period (MS22-000520) (**Attachment A**).
2. Former Senator Patrick initially raised the issue of relying on payslips without clear evidence of alignment with fortnightly instalments in questioning during Budget Estimates on 29 October 2020 and then again on 25 March 2021. See **Background** below for further details.
3. Former Senator Patrick subsequently wrote to the former Minister for Families and Social Services on 14 February 2022 about 14 specific cases, asking for them to be reviewed. The former Minister gave an undertaking to have the cases reviewed by Services Australia. On 9 June 2022, Senator Patrick wrote to Minister Rishworth seeking an update on these reviews. Whilst a number of these reviews have been finalised, some are not yet fully complete given the complexity of matters under review.
4. Since 9 July 2021, the department and Services Australia have been working to resolve an appropriate, lawful method of assessing employment income earned before the introduction of the *Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Act 2020* on 7 December 2020. This has involved investigating and settling on the preferred legal methodology, and working to develop General Instructions relating to the assessment of employment income.
5. In consultation with Services Australia, the department has now finalised the General Instructions which guide decision-makers in reviews of social security debts related to this employment income (refer **Attachment B**). Investigations of how historical cases can be remediated, if at all, continue.

### General Instructions

6. I (Secretary) formally agreed to the General Instructions on 12 December 2022 and wrote to the Chief Executive Officer Services Australia, to provide the General Instructions for use by Services Australia. I had earlier directed the preparation of this brief, and this was progressed, in consultation with Services Australia, following my formal agreement to the General Instructions.
7. The General Instructions are based on the principle Services Australia should use the best available probative evidence to establish customers' pay rates and patterns of work to inform debt calculations. The General Instructions enable employment income to be apportioned *within* instalment periods based on when income was *received*, where there is no available evidence of the customer's daily earnings. In this situation, the entire earnings from the pay period is attributed over the number of days in the one instalment period in which that income was received, even if the pay period overlaps multiple instalment periods.

8. The General Instructions have been informed by legal advice from Sparke Helmore Lawyers, and advice from Mr Stephen Lloyd SC<sup>1</sup> (Mr Lloyd) and the Australian Government Solicitor (AGS). See **Background** below for further details about the General Instructions.
9. While the General Instructions were being developed, the department instructed Services Australia to recalculate debts for active cases in the General Division of the Administrative Appeals Tribunal (AAT2), in accordance with principles set out above. Other customer requests for a formal review of related debts, and raising of debts for overpayments based on employment income received prior to 7 December 2020, were paused by Services Australia pending development of the General Instructions. Services Australia, in consultation with the department, continued to progress individual formal reviews and debt reassessments for customers experiencing vulnerability.
10. In November 2022, the AAT2 made decisions in *Immes* and *Wilson* (**Attachments C and D**), and in both cases accepted Services Australia's debt calculations based on the approach of assessing employment income in the instalment periods in which employment income was *received*. In both cases, evidence of daily earned income was not available. While the AAT2 did not expressly address the methodology used, these two decisions are consistent with the General Instructions. However, we will need to continue monitoring cases and the reasoning being applied by the AAT.
11. In consultation with the department, Services Australia is finalising operational guidance and implementation plans to give effect to the General Instructions and address the paused work items. Further advice on implementation progress will be provided once the plan is settled.

**Investigation of options for handling of historical cases**

12. In relation to historical debt decisions, the General Instructions provide that the Secretary does not expect to initiate administrative reviews of these debts (i.e. outside of those currently in scope for calculation/recalculation, as described above).s 47E(d)

s 47E(d)

s 47E(d)

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<sup>1</sup> Stephen Lloyd SC is an experienced senior counsel with extensive appellate practice, having appeared in the Full Court of the High Court in over 60 proceedings (not counting special leave applications). He has appeared before the Federal Court in over 500 cases, as well as appearing in the Supreme Courts of several States, and other courts and tribunals. He acts in proceedings in all Australian states and (internal) territories and regularly appears on behalf of the Commonwealth. Prior to coming to the Bar, Mr Lloyd held senior executive positions in the Commonwealth public service.

s 47E(d)



**Ombudsman investigations**

15. The Office of the Commonwealth Ombudsman has a number of active investigations (14 at present but the number fluctuates as some cases are resolved and new cases are received) initiated on behalf of customers who have experienced delays in receiving outcomes for formal reviews of pre 7 December 2020 debt decisions. Services Australia and the department have engaged with the Commonwealth Ombudsman to address concerns raised about progressing these reviews.
16. Services Australia and the department consulted with the Commonwealth Ombudsman on its proposed response on 17 February 2023, and subsequently provided information on the background, including the General Instructions and associated legal advice, to the Ombudsman's office on 24 February 2023.
17. On 14 March 2023, the department and Services Australia received notice (**Attachment E**) that the Commonwealth Ombudsman has initiated two 'own motion' investigations into this matter. We are advised by the Ombudsman that the investigations will focus on:
  - a. examining Services Australia's legal framework for income apportionment, leading up to and following legislative amendments that took effect from 7 December 2020, and
  - b. Service Australia's administration of income apportionment including its engagement with customers, training and guidance to staff, as well as its handling of complaints, internal reviews and AAT or Federal Court appeals.
18. The department and Services Australia will work together in responding to these investigations.

**Sensitivities:**

19. Engagement with customers regarding this issue, particularly as paused work items are actioned, will likely raise concerns that it is similar to 'Robodebt', particularly given the evidence received by the Robodebt Royal Commission. There is a consequent risk of adverse public and media attention in this regard.
20. Despite likely perceptions of similarity, there is a clear distinction between this issue and raising debts based on unlawfully averaging annual income under the Robodebt Scheme. The methodology involved in assessing an individual's employment income to determine whether the person owes a debt requires using sufficiently probative evidence, such as payslips, to enable the decision-maker to determine the daily amount of the customer's employment income or, if that is not available, the date on which the income was received, based on their payslip. The General Instructions guide the decision-maker on the lawful approach to take based on the best available probative evidence. This is not the same as Robodebt where debts were raised by unlawfully averaging an individual's income using data from the Australian Taxation Office.

**S 47E (d)**

22. There are approximately a further 87,000 potential overpayments related to earned income for the period prior to 7 December 2020, where Services Australia is yet to calculate and raise a debt. The assessment of potential overpayments was impacted by a number of debt pauses and the redeployment of staff to support the Australian Government's COVID-19 and Disaster Emergency responses. These overpayments form part of a larger backlog of around 1.3 million potential overpayments.

S 47E (d)

**Risk Management:**

24. The department and Services Australia will continue to work on the implementation of the General Instructions, and monitor AAT decisions and inform the approach being used in the AAT for debt matters. There remains a risk that the approach adopted under the General Instructions will be subject to further challenges or appeals before the AAT or the courts.

S 47E (d)

26. The department has previously received legal advice in 2013 that s 42  
s 42 s 42 The department is seeking further advice from Mr Lloyd to confirm this view in the context of the General Instructions.

**Departmental Funding / Financial Implications:** Nil.

**Regulatory Implications:** Nil.

**Consultation:**

- Department of Social Services – International Payments and Compliance Branch.
- Services Australia – Legal Services Division; Compliance Assurance and Debt Operations Division; Debt Programme Appeals and Reviews Division.

**Attachments:**

**Attachment A:** MS22-000520

**Attachment B:** Payslips and apportionment of employment income – General Instructions

**Attachment C:** AAT Decision – *Innes and Secretary, Department of Social Services* [2022] AATA 3977

**Attachment D:** AAT Decision – *Wilson and Secretary, Department of Social Services* [2022] AATA 4067

**Attachment E:** Letter from the Commonwealth Ombudsman to the Secretary dated 14 March 2023

Contact Officer: Emma White  
Position: Deputy Chief Counsel  
Branch: Public Law  
Phone/Mobile: S 22

Cleared by: Bronwyn Worswick  
Position: Chief Counsel  
Group: Legal Services  
Phone/Mobile: S 22

Cleared by: Ray Griggs AO CSC  
Position: Secretary  
Department of Social Services

Signature:

Date: / /

Cleared by: Rebecca Skinner PSM  
Position: Chief Executive Officer  
Services Australia

Signature:

Date: / /

**Background – Former Senator Patrick concerns and development of General Instructions:**

1. In the 2019-20 Budget the Changing the Social Security Income Assessment model was announced. Subsequently, the *Social Security Act 1991* (the Act) was amended with effect from 7 December 2020 to significantly improve the reporting and processes for attribution of employment income. The amendments provided that income is assessed on when it is paid by the employer, rather than when it is earned by the customer. The changes make reporting easier for customers, so they are more likely to receive correct social security payments and are less likely to incur a debt.
2. As advised in MS22-000520 (**Attachment A**), prior to 7 December 2020, a range of methods were used to calculate payments and raise debts involving employment income. The method under the Act differed according to the payment type, and outcomes varied according to the customer's reporting patterns and the quality of the evidence of employment income available.
3. For social security benefit customers (such as Jobseeker payment, Youth Allowance and Austudy payment), the rate calculators required employment income to be assessed on the basis of the instalment period in which it was 'first earned, derived or received'.
4. For social security pension customers (such as Age Pension and Disability Support Pension), employment income was apportioned across the instalment periods in which the income was 'earned, derived or received'.
5. In cases where an employment period did not align with a fortnightly Centrelink instalment period, section 1073B of the Act was applied to apportion employment income across instalment periods following the customer's rate of payment being worked out with regard to the income test module of the relevant rate calculator in Chapter 3 of the Act.
6. In October 2020 and March 2021, during Community Affairs Senate Committee hearings, the former Senator Patrick raised concerns about how apportioned employment income was being considered when raising debts. In particular, Senator Patrick was concerned with the use of payslips where the customer's employment period did not align with their Centrelink instalment period, and where the payslip does not provide a daily rate of income.
7. The office of the former Senator Patrick had also assisted some customers with applications before the Social Services and Child Support Division of the Administrative Appeals Tribunal (AAT1), some of which were reported in the media in November 2020 and March 2021.
8. Between February and April 2021, the AAT1 made several decisions directing Services Australia to recalculate customers' debts by obtaining further evidence to determine the precise amount of income earned by a customer during each day in a Centrelink instalment period. In the same period, the AAT1 also made a number of decisions that affirmed the approach to raising debts by relying on section 1073B of the Act to apportion income earned across different Centrelink instalment periods.
9. In light of Senator Patrick's concerns, and these differing findings in AAT cases, the department sought legal advice from the Australian Government Solicitor (AGS) s 42

**s 42**

10. In September 2021, Services Australia paused internal reviews and raising of undetermined debts in relation to matters where employment income was earned prior to 7 December 2020, including those that may have been apportioned across instalment periods, pending receipt of instruction from the department.

11. Services Australia also sought advice from senior counsel, Mr Lloyd in October 2021 s 42

s 42

12. Advice from Mr Lloyd regarding the two AAT matters s 42

s 42

13. The debts in the two AAT2 matters conducted by Mr Lloyd were recalculated in a manner that is now consistent with the General Instructions. However, ultimately the AAT2 did not definitively endorse a particular approach to assessing employment income in these two cases.

14. The legal advice, together with our understanding of relevant AAT decisions, s 42

s 42

15. The General Instructions now provide practical, user-friendly guidance for decision-makers. In line with the statutory framework, the General Instructions are based on the principle that the best available probative evidence should be used in calculating relevant debts. This includes:

- where daily income information is available, calculating income on the basis of when it is earned
- where daily income information is not available, calculating income on the basis of when it is received
- zeroing the debt where there is insufficient evidence available to substantiate the debt, and
- taking a pragmatic approach when seeking additional information that may affect a customer's rate of social security payment (for example, information specifying daily earned income).

16. The department is seeking additional legal advice from Sparke Helmore Lawyers with a view to developing further instructions in consultation with Services Australia. These will provide greater clarity for cases involving the assessment of employment income where social security pension customers earned income for periods greater than a fortnight, prior to 7 December 2020. This scenario has only arisen in one recent matter before the AAT2. Instructions in that case will be informed by the advice sought.

s 42

A2340753

17 May 2023

The Hon Amanda Rishworth MP  
Minister for Social Services

By email to: [minister.rishworth@dss.gov.au](mailto:minister.rishworth@dss.gov.au)

Dear Minister,

**Ombudsman own motion investigations — Income Apportionment**

In accordance with section 8(7A)(b) of the *Ombudsman Act 1976* (Ombudsman Act), I write to inform you that I am conducting 2 investigations into Services Australia and the Department of Social Services (DSS) under section 5(1)(b) of the Ombudsman Act. Both investigations concern Services Australia's approach to apportioning customers' income when assessing their income support payments prior to 7 December 2020.

Services Australia briefed my Office about these issues at a meeting on 17 February 2023 and provided written documents on 24 February 2023.

Being concerned about the scale and significance of this issue and the potential impact on a considerable number of individuals, I have decided to investigate both the lawfulness and the administration of the income apportionment approach.

On 14 March 2023, I wrote to the Chief Executive Officer of Services Australia, Ms Rebecca Skinner PSM, and the Secretary of DSS, Mr Ray Griggs AO CSC, to notify them of these investigations.

On 24 March 2023 and 18 May 2023, I provided Services Australia and DSS with written notices to furnish information and produce documents under section 9 of the Ombudsman Act relevant to the first investigation, focusing on the lawfulness of Services Australia's approach to apportioning customers' income. I anticipate that in the coming months I will provide both agencies with further requests under section 9 of the Ombudsman Act to support these investigations.

These investigations may result in my Office preparing one or more reports under the Ombudsman Act. I may decide to publish these reports, after giving Services Australia and DSS the opportunity to make submissions to me in accordance with the requirements of the Ombudsman Act.

If you wish to discuss these investigations, you may contact me directly on **S 22** If your staff have any questions, they may contact Emma Cotterill, Senior Assistant Ombudsman – Investigations on **S 22**

Yours sincerely



Iain Anderson  
Commonwealth Ombudsman

*Influencing systemic improvement in public administration*



Australian Government  
Department of Social Services



# Deep Dive: Change of Assessment Model (CAM) and income reporting/income assessment

08 June 2023

# Assessment of employment income post-7 December 2020

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Following the 2019-20 Budget, the then Government introduced the *Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Act 2020* to amend the *Social Security Act 1991*.

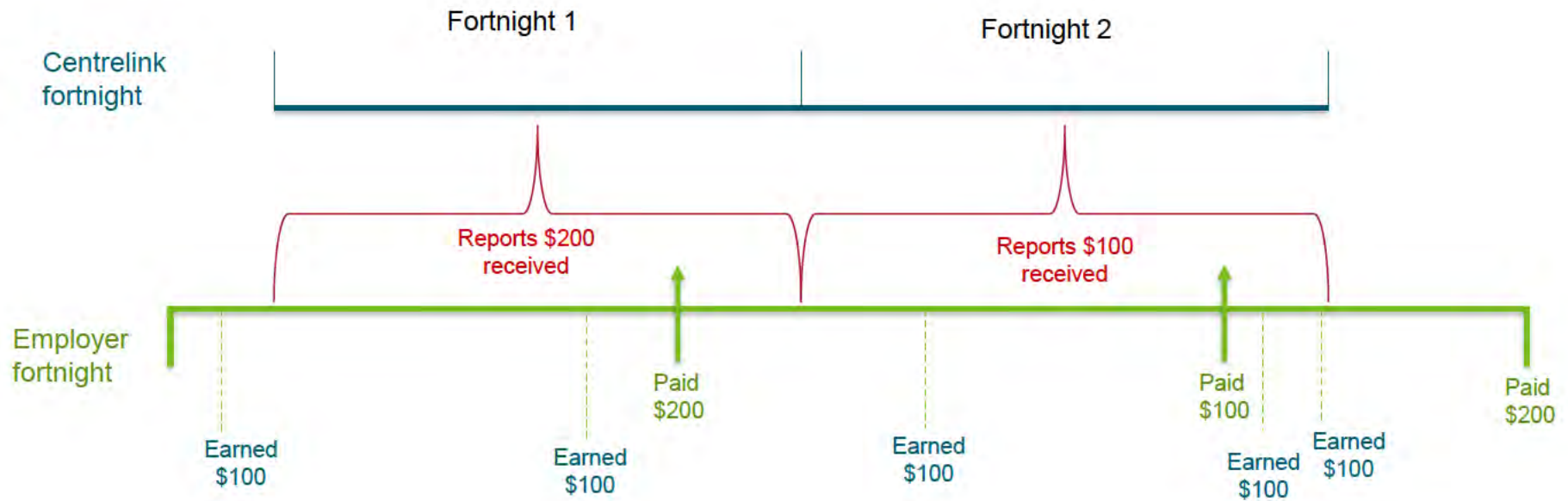
- Employment income is now assessed when it is **paid** avoiding the difficulty in determining when income was actually earned, as was required before this change (see example 1).
- This change also allows for data collected by the Australian Tax Office, particularly employment income reported through the Single Touch Payroll (STP) system, to be shared with Services Australia for the purposes of administering social security, family assistance and student payments.

While this change simplified the calculation of entitlements post 7 December 2020, assessing income received before this date for the purpose of a debt calculation remains difficult and a number of legal issues have been raised.



# Example 1: 7 December 2020 to current

Recipients report any income that was received in the fortnight.



*Rudy worked two days in the fortnight and was paid \$200. Even though the Centrelink pay cycle is different to Rudy's employer pay cycle and they worked two days, it doesn't matter what days they were. Rudy only needs to report they received \$200 and on what date.*

# First Earned, Derived or Received

Prior to 7 December 2020, recipient's employment income was taken into account in the fortnight it was **first earned, derived or received**.

Reporting was what ever event occurred **first**:

**Earned:** When a recipient worked.

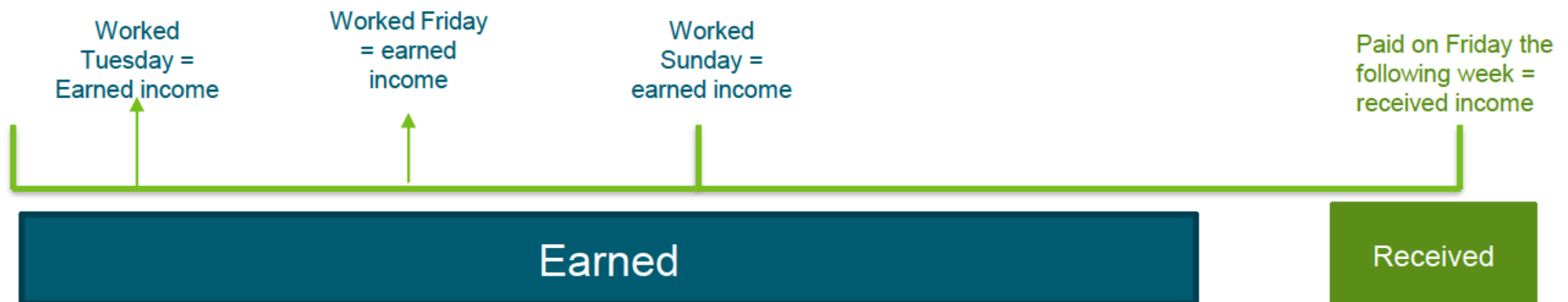
- The income attributed to recipient earnings was reported regardless of when it was received. This rate sometimes had to be estimated as customer's were not always sure about how much they would actually be paid.

**Derived:** When someone became legally eligible for income.

- This applied to compensation payments and in other limited circumstances.

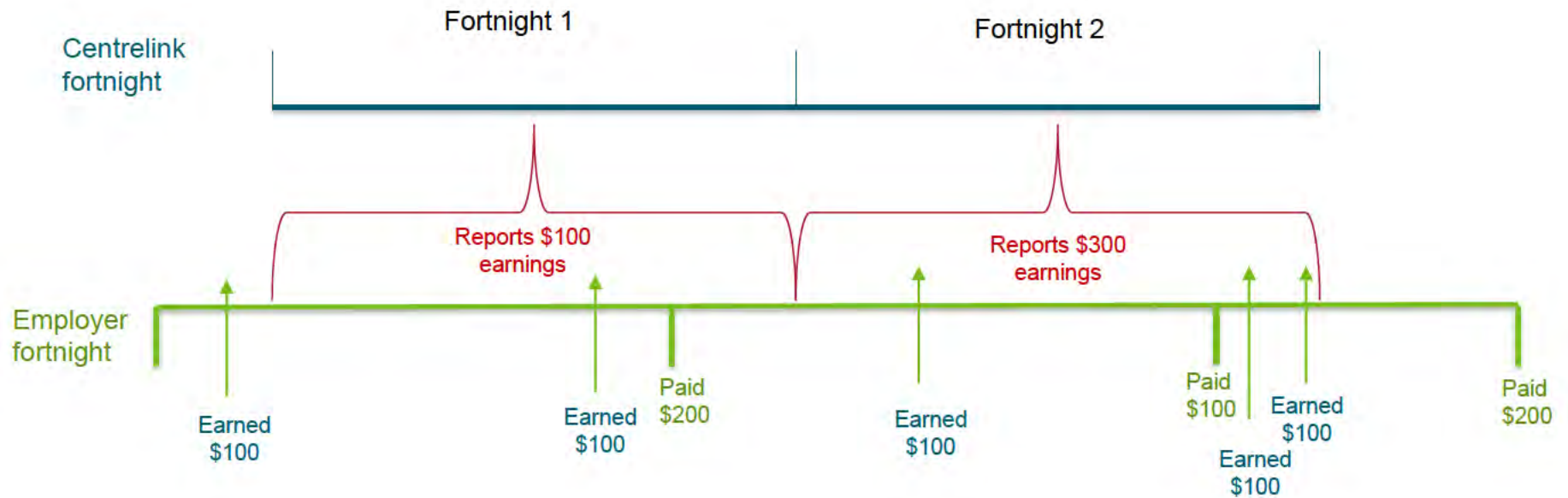
**Received:** When an employer paid the income and it was received by the recipient.

- This usually occurred after the recipient had worked so the recipient had already reported based on when the income was earned. In the unlikely scenario that a recipient was paid before they worked, then they would report received income before it is earned.



# Example 2: Pre-December 2020

Income reporting – first earned, derived or received.



*Lee needs to report earnings for the fortnight to receive Jobseeker Allowance. Lee worked 2 days in the fortnight and earned \$100 per shift and was paid a total of \$200. As reporting is for income earned, Lee reports \$100 to Centrelink for the one day worked in the reporting period. In the second fortnight, Lee earns \$300 in the Centrelink fortnight and must report this amount even though they are only paid \$100 in the relevant fortnight. The date Lee is paid is not important for this model*

# Using payslips to work out earned, derived or received income

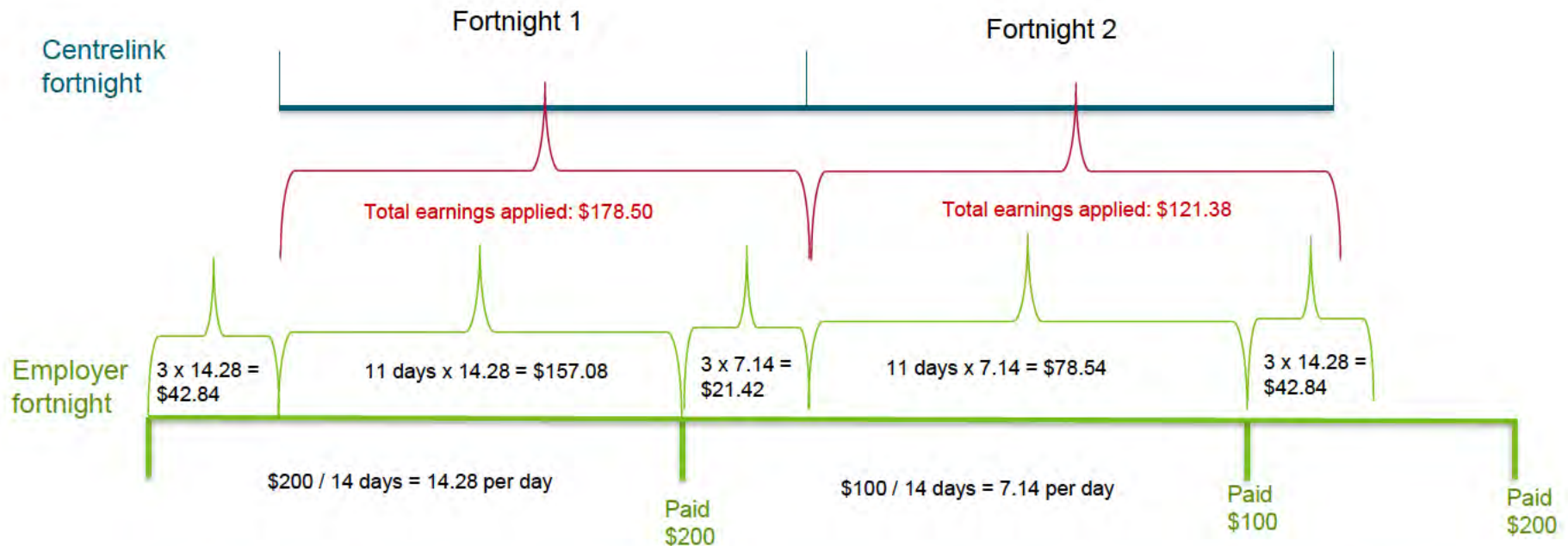
- Payslips often include the total pay, but do not often detail the exact days the income was being earned. For casual workers, this can vary significantly each week.
- Payslips are useful for showing when income is received but not when earned. Often timesheets or other reporting is required to work out the days income was being earned. Some employers do not keep these kinds of records.
- As such, when calculating debts where daily earnings were unknown, Services Australia used a methodology that would calculate a daily average and **apportion** this amount over the number of days in the instalment period where the two periods did not align (see example 3).

DSS sought legal advice on two particular debt cases. The legal advice

s 42

# Example 3: Pre-December 2020

Income reporting – debt calculation when daily earnings are unknown



*Anu did not report any earnings to Centrelink. Centrelink was later provided with income details from their employer. The payslips show that Anu was paid \$200 but no daily details were available. As Centrelink knows there is a debt but do not have daily earnings details, they divide \$200 by 14 days and apply it proportionally to the Centrelink fortnight to determine any overpayment, as income support is calculated on a daily rate.*

# Payslips and calculation of employment income – the ‘Payslips General Instructions’

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- In order to proceed with debt calculations involving income that was received prior to December 2020 the Department provided formal instruction to Services Australia on 12 December 2022 about how to calculate debt involving employment income. The instructions:
  - were guided by advice provided by External Counsel, the Australian Government Solicitor and considerable consultation with Services Australia.
  - aimed to provide a clear, practical way forward for decision-makers and the conduct of AAT reviews and appeals that is compliant with the law.
  - are based on the principle that the best available probative evidence should be used.



# The 'Payslips General Instructions' summary

- The Payslip General Instructions provide guidance on calculating earnings related income debts where the debt period falls before 7 December 2020, and are based on the principle that the best available probative evidence should be used, including:

➤ Where daily income information is available, calculating on the basis of when the income is earned.

➤ **S 47E(d)**

- The instructions expressly state that where an employment period overlaps multiple instalment periods, income is not to be apportioned across instalment periods.

# AAT2 Assessment of employment income pre-7 December 2020

Numerous cases have been approved by the AAT related to the earned, derived or received (s1073B) methodology for debts that involved income received prior to 7 December 2020, with debts that have been recalculated using the general instructions.

## Innes

- In a late 2022 AAT2 decision, Mr Innes's case involved a recalculated debt based on the received methodology, as daily earnings data was not available. This matter related to a Newstart allowance debt, caused by misreported employment income.
- The Secretary's submissions to the AAT2 made it clear that the debt was recalculated by recognising the income when received, and that the available evidence did not permit the Secretary to determine when the income was earned or derived.
- In this matter, the AAT2 explicitly considered and accepted the debt calculations with the supporting evidence provided.

## Wilson

- The AAT2 accepted Services Australia's recalculations which included use of the received methodology where daily earning information was unavailable. However, the AAT2 did not otherwise make any express comments about the calculation methodology.

## Wittenberg

- A 2022 AAT2 decision in Mr Wittenberg's case involved a recalculated debt based on the received methodology.
- Mr Wittenberg did not dispute the debt calculations and the AAT2 accepted the debt amount.



# Other reviews of debt management



- On 14 March 2023, the Ombudsman advised of two own motion investigations into Services Australia's use of income apportionment.
- As part of this investigation legal views, the Ombudsman's office recommended DSS/SA seek **Solicitor-General** advice about the approach for assessing income based on when it was '**first earned, derived or received**'.
- Services Australia has now paused all work on any debt matters affected by this
- The department is further seeking advice on the positive obligations of the Secretary (or delegate) to **review historical debt decisions**, which are not under review involving the apportionment of income.

- The ANAO tabled the *Report on Debt Management and Recovery in Services Australia* on 31 May 2023.

## **Conclusions from the report:**

- The report found Services Australia debt administration is 'partially fit for purpose', however improvements are needed including:
  - a coordinated approach for the debt management 'life-cycle'
  - appropriate supports including policies, procedures, training and quality checking to enable staff to effectively undertake debt activities, and
  - Establishing effective risk based strategies to detect and deter debt.



Royal Commission  
into the Robodebt Scheme

The Royal Commission into the Robodebt Scheme is due to report on 7 July 2023.

# Positive obligation to review historical debt decisions

- Many historical social security debts have been raised based on apportioning employment income between instalment periods s 47E(d)
  - This is a process Centrelink has used for decades.

s 42

s 47E (d)

# This is not Robodebt

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## Robodebt

- Robodebt used annual ATO data and applied this to individual fortnights.
- Automated the application of annual data evenly across the year.
- Onus of proof was on the recipient.
- Raised large debts that were often invalid.
- Legal advice was not followed or clarified.
- Matter was not raised with Office of Legal Services Coordination

## Income Apportionment

- Uses known pay information from an employer received in a fortnight.
- Involves a staff member calculating an averaged rate of daily earnings where exact daily earnings information was unavailable.
- Calculations apply between fortnights, but was not applied over longer periods of time.
- Likely to result in minor differences in debt calculations.

**s 42**

- Matter is being raised with Office of Legal Services Coordination.

# Next Steps

The Department continues to work with Services Australia on next steps.

Requesting Solicitor-General advice

- Advice on approach to assessing income on a 'first earned derived or received' approach.  
Positive obligation to consider historical debts.

Ombudsman's own motion reviews; ANAO recommendations; Royal Commission recommendations.

- Coordinated approach to consider recommendations that come from these reviews.

Developing policy and legislative options

**s 47E(d)**

- Operationalising issues

- Practical implementation of any advice, noting that debt raising is a complex and intensive process.

Thank you

# Supplementary Background Information:

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- 1) External legal advice on S 42 [REDACTED]
- 2) External legal advice on S 42 [REDACTED]

# External legal advice on s 42

23 Mar 2021

The Department and SA sought advice from the Australian Government Solicitor (AGS) on s 42

3 May 2021

AGS provided draft advice s 42

10 Aug 2021

Before AGS advice finalised, Sparke Helmore and Counsel, were requested to advise on s 42  
s 42  
s 42

Nov-Dec 2021

s 42

30 Mar 2022

AGS supplied final advice following submission of Counsel's earlier advices for review and s 42  
s 42

Jun-Dec 2022

Ongoing engagement with Sparke Helmore on s 42

Dec 2022 - Present

Further advice sought from Sparke Helmore advice on s 42  
s 42

# External legal advice on s 42

Early 2023

Services Australia requested advice on s 42

15 Mar 2023

The Department sought advice on this issue from Counsel.

5 Apr 2023

Counsel advise s 42  
s 42

20 Apr 2023

The Department requested s 42  
s 42

24 May 2023

Counsel's view is s 42  
s 42





Australian Government  
Department of Social Services

MB23-000571

To: Minister for Social Services (for noting)

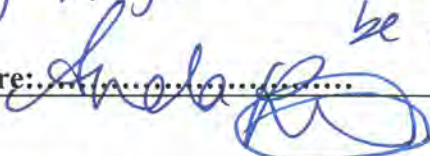
Subject: Income Apportionment – Finalisation of Ombudsman’s First Own Motion Investigation

Recommendations for Minister Rishworth: That you

1. Note the Ombudsman’s draft Public Statement on the own motion investigation into the lawfulness of income apportionment ( <b>Attachment D</b> ).	Noted / Please Discuss
2. Note the further work being undertaken by the Department and Services Australia to address the Ombudsman’s recommendations and concerns around the General Instructions.	Noted / Please Discuss
3. Note the talking points at <b>Attachment H</b> to assist you in ministerial briefings.	Noted / Please Discuss

Minister Rishworth Comments

Please settle legal advice by the end of August. This issue needs to be resolved as quickly as possible

Minister Rishworth's signature:  Date: 2...8...2023

Key Issues:

1. This brief updates MS22-001126 (**Attachment A**) and MS23-000578 (**Attachment B**).
2. On 21 July 2023, the Ombudsman advised that he had finalised the first investigation – *Services Australia’s and the Department of Social Services response to the question of the lawfulness of income apportionment* (draft report, **Attachment C**).
3. The Ombudsman also advised that he would not publish the investigation report due to the risk of waiving the Commonwealth’s legal professional privilege but would provide the Department with a final version and release a public statement and media release in the week of 31 July 2023.
4. On 21 July 2023, the Ombudsman provided the draft public statement – *Lessons in Lawfulness: Own Motion Investigation into Services Australia’s and the Department of Social Services’ response to questions of the lawfulness of income apportionment before 7 December 2020* (draft statement, **Attachment D**) and requested the Department and Services Australia advise of any errors of fact or omissions by 28 July 2023. Subject to receiving our comments on the draft statement, the Ombudsman has indicated he proposes to provide the finalised statement (under embargo) ahead of publication.

5. In providing the draft statement to the Department, the Ombudsman did not express any limitation on sharing this advance version with you as the relevant Minister. We are also not aware of any statutory limit that prevents us from advising you about these matters noting your responsibilities for social security matters. However, the Ombudsman advised the Department that it is his expectation that, unless and until he decides to publish them, agencies are to treat his draft report as confidential and share it only within the Department with staff who have a need to know. Accordingly, we are being very cautious about distribution of both the draft investigation report and the draft statement and we recommend you adopt this same approach.
6. The Ombudsman recognises that the Department may also wish to issue a statement, separately or jointly with Services Australia, and if so, would welcome receiving an advance copy.
7. The draft statement indicates that the Ombudsman will make the following findings (which are consistent with the proposed findings in the draft report):
  - *Since at least 2003, Services Australia was unlawfully apportioning customers' income across two or more Centrelink instalment periods. This in turn likely affected social security payment rates and may have led to unfair debts against customers*
  - *Since becoming aware of the issue in October 2020, the agencies took steps to seek legal advice, but should have acted quicker to finalise advice.*
  - *There is an unresolved and significant (in the Ombudsman's view) difference of opinion between some of the legal advices.*
  - *The general instructions that DSS developed to guide how decision-makers should recalculate the approximately 100,000 potential debts needs further development.*
  - *The agencies should have acted quicker to inform us of this issue, particularly since they knew our (the Ombudsman's) Office had investigated some of the affected complaints*
  - *The agencies are still determining how much of the known and potential debts are affected – that is, how much payment rates went up or down because of unlawful or inaccurate income apportionment calculations. It is unknown how many other customers may have been impacted by unlawful or inaccurate debts or underpayments.*
8. The Ombudsman's four recommendations and one suggestion focus on *establishing clear and lawful positions on income apportionment and fostering cooperation with other Commonwealth agencies to resolve other outstanding issues*. Appendix E of the draft statement details the recommendations alongside a summarised version of the joint response of the Department and Services Australia. The information in Appendix E has been drawn from the Department's and Services Australia's joint response (**Attachment E**) to the draft report (**Attachment F**).

**Areas of concern in draft report**

**S 47C**

s 47C

*Solicitor-General advice*

13. The Ombudsman's Recommendation 1(option a) recommends that *DSS, in consultation with Services Australia, seeks Solicitor-General opinion, through an Attorney-General referral under the Law Officers Act 1964 on two issues.*
14. After receiving the draft report, the Department immediately acted on this recommendation and approached the Solicitor-General. However, on 27 June 2023, the Solicitor-General declined the brief stating "*the Solicitor-General recognises that there is **some** difference of opinion between Stephen Lloyd SC/Matthew Sherman and AGS, although it is not presently clear to him how extensive those differences are [emphasis added].*

s 47C

16. The Department has since sought Senior Counsel, Mr Stephen Lloyd's SC, opinion on the differences between his advice and AGS's advices. Mr Lloyd has confirmed that the advices largely align, with only one potential area of divergence, which we are currently exploring with AGS.
17. We will brief you further on the specifics once Counsels and AGS have reached a settled position. Due to Counsels' availability, this will not occur until early August.

*Federal Court test case*

18. Recommendation 1(option b) recommends that *DSS and Services Australia seek Federal Court opinion through a referral by the Administrative Appeals Tribunal (AAT).*

s 47C

# s 47C

## *Resolving the legal position*

22. The Ombudsman is critical about the time taken to resolve the legal issues and the number of advices that were sought on the issue. The way this is described and depicted (page 3 diagram) in the draft statement could be interpreted as the Department and Services Australia have been ‘advice shopping’ for past three years.
23. While we agree that it has taken longer than we would have preferred to get clarity and develop the General Instructions, it has taken time to properly identify, scope and analyse the issues, particularly in terms of identifying relevant AAT cases and working with Services Australia to investigate the factual circumstances in cases. In that respect, the work the Department and Services Australia have undertaken to respond to this issue has been entirely consistent with recommendations from the Robodebt Royal Commission (Recommendations 20.1 to 20.5) in how the Commissioner would expect Agencies to conduct themselves.
24. The Ombudsman has chosen not to clarify that while the various legal advices were related, they were generally obtained for different purposes (e.g. particular litigation matters before the AAT) or focused on particular aspects of income apportionment. This could reinforce the perception of ‘advice shopping’.

## *General Instructions*

25. Recommendation 2 states that the Department should *develop a policy position on Secretary initiated reviews*. This recommendation requires the Department in consultation with Services Australia to amend the General Instructions to ensure delegates do not draw a view that they are inhibited from exercising discretion in considering whether to review historical debts.
26. Recommendation 2 also recommends that the Department reach a policy position on the Secretary’s obligation to review historical debts. As outlined in MS23-000578, s 47E(d)

# s 47E(d)

27.

# s 47C

28.

## *Broader public administration*

29. The Ombudsman refers to his findings and recommendations as going to five themes of good public administration:

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- Ensuring government policy positions are lawful and defensible by seeking timely resolution of ambiguities or differences in legal advice.
  - Developing clear agency policy positions, based on legal advice, to support reasonable, appropriate and lawful decision-making.
  - Ensuring policies do not conflict with legislation or prevent decision-makers exercising discretion – including by expressing an expectation of how a decision-maker will take relevant considerations into account.
  - Encouraging cooperation with relevant stakeholder through developing written strategies and plans to achieve goals.
  - Being transparent and forthcoming with information with other agencies, to enable open communication and collaboration to meet shared goals.
30. These themes largely mirror observations in the Report of the Royal Commission into Robodebt. As outlined in the Secretary's statement to the Royal Commission, the Department is already addressing many of these issues, including by improving the way in which legal advice is obtained and finalised, the management of AAT litigation, and interaction with scrutiny bodies.

### Next steps:

31. As noted above the Department is preparing its response to the Ombudsman on the draft statement, along with considering what response may be required once it is released. Work continues to resolve the issue of treatment of historical debts.

### *Second Own Motion Investigation*

32. At the same time, the Department is responding to the Ombudsman's second own motion investigation. As this investigation centres primarily on Services Australia, there will not be a joint Department and Services Australia response to the Ombudsman. The Department is currently responding to a notice to provide information and documents.
33. The second investigation focuses on Service Australia's administration of income apportionment including its engagement with customers, training and guidance to staff, as well as its handling of complaints, internal reviews and AAT or Federal Court appeals.
34. Given the second investigation is less likely to raise legal professional privilege issues, we anticipate that the Ombudsman will publish the report of this investigation in its entirety. At this point we are not aware of the likely timing of publication of this report.

### Sensitivities:

35. While the draft statement does distinguish income averaging and Robodebt, these are complex issues with some similarity in that both concern debts and have an element that could be characterised as 'averaging' so the two are likely to be conflated and heavily criticised. Coming so close to the release of the Royal Commission's report in Robodebt, the interest from the media is likely to be heightened.
36. Early this coming week (commencing 24 July 2023) we will provide you with media talking points in consultation with Services Australia and work with your office and that of Minister Shorten to ensure that they are consistent. We are conscious the Ombudsman's statement will be released in the first sitting week post the release of the Robodebt Royal Commission report and will draft Question Time Briefs accordingly.
37. Given the legal significance and sensitive nature the Department has also reported the matter to the Office of Legal Services Coordination (OLSC) in the Attorney-General's Department. The

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Ombudsman suggested that the Department and Services Australia reach agreement on who will provide this reporting. Responsibility for OLSC reporting has now been clarified.

**Risk Management:**

38. There has been extensive legal advice obtained and the Department continues to work with our Senior Counsel and legal services providers to resolve this matter. The Department and Services Australia have been working cooperatively on these issues for a number of years and will continue to work together to consider and implement the Ombudsman's recommendations.

39. **s 47C**

**s 47C**      **s 47C**  
**s 47C**

**s 47C** This would also provide the Government with an opportunity to be seen to be taking decisive and positive action to address the issues.

40. On 14 July 2023, Secretary Griggs wrote to the Chief Executive Officer Services Australia, Ms Rebecca Skinner PSM, requesting Services Australia take a statistically valid sample of pre-December 2020 debts to help understand the magnitude of income apportionment. This work is being done by Services Australia **s 47E(d)**

**s 47E(d)**

**s 47E(d)**

42. You have expressed a desire to brief this issue more broadly across Government to enhance broader awareness. Given there is now a clear timeline from the Ombudsman around release of the statement this obviously now takes on some greater urgency. An initial set of talking points to support this is at **Attachment H**.

**Departmental Funding / Financial Implications:**

43. Financial implications are dependent on finalising legal advice. The sampling exercise will also help inform financial implications.

44. The Australian National Audit Office (ANAO) is considering its own position on this matter with respect to its audit of the Department's financial statements. **s 47C**

**s 47C**

**Regulatory Implications:** Nil.

**Consultation:**

MB23-000571

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- Department of Social Services – Deputy Secretary Social Security and Chief Finance Officer.

**Attachments:**

**Attachment A:** MS22-001126

**Attachment B:** MS23-000578

**Attachment C:** Letter to Secretary Griggs – 21 July 2023

**Attachment D:** Draft Public Statement

**Attachment E:** Joint response to Draft First Own Motion Investigation Report

**Attachment F:** Draft First Own Motion Investigation Report

**Attachment G:** Initial assessment of Public Statement

**Attachment H:** Initial Talking points for broader Cabinet discussions

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
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Our reference: 2353908

24 July 2023

Mr Ray Griggs AO CSC  
Secretary  
Department of Social Services

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Dear Mr Griggs 

**Draft public statement – report into income apportionment – Department of Social Services**

Thank you for the Department of Social Services' (DSS) response, provided jointly with Services Australia on 14 July 2023, to my draft report regarding my Office's investigation into *Services Australia's and the Department of Social Services' response to the question of the lawfulness of income apportionment*.

As outlined in my letter of 23 June 2023, I have decided not to publish the investigation report because it discusses the content and substance of legal advice and sharing it publicly may risk waiving Commonwealth legal professional privilege. Nonetheless, I consider it is important to share the outcomes of my Office's investigation and intend to release a public statement.

The draft statement, **attached**, summarises the report's findings and recommendations and the agencies' combined response but does not provide specifics of the legal advice requested or given.

I invite DSS, jointly with Services Australia, to consider the draft statement and advise my Office of any errors of fact or omission by **Friday 28 July 2023**.

I intend to publish the public statement, along with a media release, during the week of 31 July 2023. I will confirm the date and provide the finalised statement (under embargo) ahead of time. I will also provide a copy of the finalised investigation report at the same time.

I do not intend to publish agency responses, except to the extent they are summarised in the draft statement. I acknowledge DSS may also wish to issue a statement, separately or jointly with Services Australia, and if so, would welcome receiving an advance copy.



If your staff would like to discuss the draft statement, they are welcome to contact Ms Emma Cotterill, Senior Assistant Ombudsman – Investigations on s 22 or at [emma.cotterill@ombudsman.gov.au](mailto:emma.cotterill@ombudsman.gov.au). If you would like to speak with me directly, I am available on s 22

Yours sincerely



Iain Anderson  
Commonwealth Ombudsman  
*Influencing systemic improvement in public administration*



Australian Government  
Department of Social Services



Services  
Australia

## Joint Response to Ombudsman Draft Report into Income Apportionment 14 July 2023

### Recommendation 1 (Option A)

*We recommend DSS, in consultation with Services Australia, seeks Solicitor-General opinion, through an Attorney-General referral under the Law Officers Act 1964, on:*

- The preferred interpretation of when income is 'first earned, derived or received' under the Social Security Act 1991 calculators for benefits.*
- Whether the methodology for assessing evidence of employment income in the General Instructions is legally sound and defensible for both social security pensions and benefits.*

### Joint response: **ACCEPTED (BUT ALREADY ACTIONED)**

While the Department of Social Services (the Department) and Services Australia accept *Recommendation 1, Option A*, it should be noted that this recommendation has already been actioned.

On 9 June 2023, a request was made to the Solicitor-General to accept a brief to advise on questions of law relating to the methodology for assessing employment income under the social security law and, specifically, how the term *earns, derives or receives* should be applied. On 19 June 2023, the Ombudsman's office was advised of the request to the Solicitor-General.

On 27 June 2023, the Department was advised that the Solicitor-General had declined to provide an opinion. By email dated 27 June 2023, Counsel Assisting the Solicitor-General stated:

*While the answers to the proposed questions clearly have significant practical implications for the Department, the Solicitor-General is not persuaded that those implications provide a sufficiently good reason for him to accept a brief to advise on detailed statutory interpretation and evidence questions involving various permutations relating to a complex statutory scheme (being questions of a kind which he considers are not generally appropriate for Solicitor-General advice, absent some special factor). That is all the more so in circumstances where the questions relate to legislation in the form it has not taken for a number of years.*

*The Solicitor-General recognises that there is **some difference** of opinion between Stephen Lloyd SC/Matthew Sherman and AGS, although it is not presently clear to him **how extensive those differences are [emphasis added]**. In circumstances where Stephen Lloyd and Matthew Sherman have not seen the AGS advices, it is not clear whether or not any differences can be*

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*bridged by discussion. The Solicitor-General considers that an attempt should be made to see if an agreed position can be reached between Stephen Lloyd and AGS. If it can, then the Solicitor-General can see no reason why the Department should not act upon their advice.*

*If that attempt is made, and fails, then it might be appropriate at that point for the Department to seek the Solicitor-General's advice on questions limited specifically to the points of difference between counsel and AGS that the Department considers to have implications of significance (ie, more specific questions reflecting the outstanding areas of disagreement).*

*If no such differences exist, the Solicitor-General can see no reason why he should advise across the full range of issues that have been raised and that are already the subject of the existing advices from very skilled lawyers who already have significant familiarity with the Act.*

On 28 June 2023, the Department instructed Sparke Helmore to brief Mr Lloyd SC and Mr Sherman with the AGS advices of 23 March 2021, 3 May 2021 and the consolidated advice of 30 March 2022. A discussion between Mr Lloyd SC, Mr Sherman and AGS will be facilitated and we will update the Ombudsman on developments.

The Ombudsman proposes to make a finding that there remains **significant legal ambiguity about how to apportion income for social security benefits**. The Department and Services Australia do not agree. Ultimately, the differing legal advices at the very least agree there is a reasonable argument that s 42

s 42

s 42

In addition, the Solicitor General considers the differences could be bridged by discussion.

### **Recommendation 1 (Option B)**

*We recommend DSS and Services Australia seek Federal Court opinion, through referral by the Administrative Appeals Tribunal, under the Administrative Appeals Tribunal Act 1975, on the whether the methodology for assessing evidence of employment income in the General Instruction is legally sound for both social security pensions and benefits.*

### **Joint response: PARTIALLY ACCEPTED**

The strong preference of the Department and Services Australia is to resolve the issue in accordance with the steps outlined in option A. Notwithstanding this, the Department, supported by Services Australia, will continue to monitor the AAT caseload for an appropriate vehicle to use as a test case.

The Department, supported by Services Australia, will also make the relevant inquiries with the Federal Court and the Administrative Appeals Tribunal as suggested by the Ombudsman and will update the Ombudsman on developments.

Our current understanding is that proceeding to the Federal Court will require:

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- identifying two appropriate cases for review that are currently before the AAT (one involving pensions provisions and the other involving benefits provisions under the social security law)
- seeking referral under section 45 of the *Administrative Appeals Tribunal Act 1975*
- having the applicants agree to referral to the Federal Court
- obtaining the President's approval for the referral
- ensuring there is a question of law appropriately framed for the Federal Court's consideration. This would need to be framed with regard to the appropriate cases and could not be phrased as currently suggested by the Ombudsman "*whether the methodology for assessing evidence of employment income in the General Instruction is legally sound for both social security pensions and benefits*"
- obtaining orders to join the two appropriate cases together for hearing by the Federal Court, and
- obtaining an expedited hearing by the Federal Court in circumstances where we note that the likelihood of securing a Federal Court decision in less than 18-24 months is low.

## **Recommendation 2**

*We recommend DSS, in consultation with Services Australia:*

- *amend paragraph 2 of the General Instructions to ensure delegates are not inhibited from exercising discretion to consider whether to review historical debts, and*
- *develops a new policy position on the Secretary's obligation to initiate a review under section 126 of the SS (Admin) Act of decisions affected by errors in applying section 1073B, including:*
  - *factors to consider when determining when the sufficient reason threshold is met, and*
  - *how to identify, seek and weigh up relevant factors.*

*The policy position should be consistent with legal advice and include consideration of debts accrued in periods prior to 7 December 2020, as well as potential historic underpayments.*

## **Joint response: PARTIALLY ACCEPTED**

The Department and Services Australia do not accept that the General Instructions inhibit a decision-maker's discretion. This was not the intention of paragraph 2 and we do not consider it to have this narrow interpretation. The Department and Services Australia, will however review paragraph 2 of the General Instructions to remove any ambiguity and clarify that a delegate's discretion is not fettered in determining whether there is sufficient reason to review historical debt decisions.

The Department notes that these General Instructions are a policy document intended to guide delegates of the Secretary when exercising powers and making decisions on overpayments and debts. They are not intended to be directions to delegates to decide

matters in a particular way nor to apply the instructions without taking the individual circumstances of the case into account. In particular, paragraph 2 of the General Instructions is intended to convey that there is no expectation that blanket reviews of all historical debt decisions be undertaken.

The Department is reviewing the General Instructions guidance on historical reviews of debt decisions to correctly reflect Counsel's advice, and we will progress this recommendation in consultation with Services Australia. We will update the Ombudsman on these developments.

Regarding developing a policy to consider potential historic underpayments, the current policy guidance and legal advice provide guidance on the methodology for assessing employment income in calculating debts, and do not consider the issue of underpayments in the context of assessing employment income. The Department notes that the arrears limitation provisions in the *Social Security Act 1991* would limit the date of effect of a favourable rate determination where review has not been requested.

### **Recommendation 3**

*We recommend Services Australia, in consultation with DSS and the CDPP, develops a strategy for how agencies will approach historic, current and future criminal prosecutions associated with administrative debts involving income apportionment under section 1073B of the Social Security Act 1991. The strategy should include an agreed policy position on evidence required to prove administrative debt amounts and the impact this will have on prosecutions and convictions.*

### **Joint response: ACCEPTED**

Services Australia and the Department accept Recommendation 3, noting Services Australia will consult with the CDPP and the Department to develop a strategy for how to approach historic, current and future criminal prosecutions associated with debts involving apportioned employment income.

New referrals to the CDPP to consider prosecution for matters involving non-disclosure of employment income earned pre-7 December 2020, have been paused. Adjournments have been requested for matters currently before the courts. This course will be pursued until the methodology for calculating debts based on employment income has been settled.

Administrative debt decisions are determined at the civil standard, not the criminal standard. The CDPP is unlikely to engage in setting policy for the evidence required to administratively determine a debt amount to the civil standard. Nevertheless, the Department and Services Australia will engage with the CDPP on criminal prosecutions associated with debts involving apportioned employment income

### **Recommendation 4**

*We recommend Services Australia and DSS provide the CDPP with copies of:*

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- *Any Solicitor-General's opinion they obtain in response to Recommendation 1.*
- *Draft and finalised advices from the Australian Government Solicitor on section 1073B Social Security Act 1991 for social security benefits.*
- *Our finalised investigation report, including any formal responses from DSS and Services Australia.*

**Joint response: ACCEPTED**

Services Australia and the Department accept Recommendation 4, noting Services Australia has provided to the CDPP copies of the General Instructions, Sparke Helmore's advice on the General Instructions, the advices of Mr Lloyd SC and Mr Sherman in the *Redman* and *Judd* matters, and the AGS advices

The CDPP was also notified of the request made to the Solicitor-General, and has been advised that the Solicitor-General has declined the brief.

The Department and Services Australia will provide to the CDPP any further advices provided by or agreed between Mr Lloyd SC, Mr Sherman and AGS on this issue.

Services Australia has provided the CDPP with the draft Ombudsman report and will provide the finalised Ombudsman investigation report to the CDPP, along with this response.

**Suggestion**

*We suggest Services Australia and DSS collaborate to decide whether to report further to the OLSC about broader section 1073B issues. The decision should also include which agency will be responsible for future reporting on this matter.*

**Joint response: ACCEPTED**

The Department and Services Australia have a protocol on reporting to OLSC. Services Australia reports on significant litigation being managed by Services Australia on behalf of the Secretary, and the Department reports on significant issues arising in legal interpretation impacting policy or statutory drafting.

Where there is a significant issue in the broader interpretation of social security law or policy, such as broader section 1073B issues, the Department, as the legislation and policy owner, has primary responsibility for reporting to OLSC. Again, where relevant, input from Services Australia will be sought in settling that report.

The Department and Services Australia will consider, in consultation with OLSC, what further reporting needs to occur on section 1073B, noting that engagement with OLSC has already occurred on the broader issues as part of seeking Solicitor-General advice. We will update the Ombudsman on developments.