CONNECTING THE DOTS: A CASE STUDY OF THE ROBODEBT COMMUNITIES

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In the weeks leading up to Christmas 2016, Australians were checking their letterboxes — for Christmas cards, an aunty's annual Christmas newsletter and last-minute online gift purchases. Some Australians checking their letterbox found an unwanted surprise waiting for them — a letter from Centrelink advising they owed hundreds or thousands of dollars in Centrelink overpayments made as far back as 2010.[1]

Recipients of the letters were confused. They did what any confused person in today's world does — they went online looking for answers and to social media to share their experiences.

Other users of social media noticed the chatter. One of them — Lyndsey Jackson — created the *NotMyDebt* website to collect and share the experiences and created Twitter hashtags to connect the different conversations about the letters. In a matter of days, lawyers, journalists and community activists such as Asher Wolf and Justin Warren, social services and recipients of what came to be known as 'Robodebt letters' were talking about the letters and what could be done about them.

United in their opposition to the Department of Human Services' Online Compliance Intervention (OCI), these lawyers, journalists, activists and recipients became online communities, which I will describe as the 'Robodebt communities'.[2] The Robodebt communities are not communities that would be recognised by administrative law. Yet my contention is that the Robodebt communities *affected* and enhanced administrative law by connecting people with administrative law problems to administrative law solutions.

In particular, in this article I will:

- consider how online communities such as the *NotMyDebt* and Robodebt communities fit within Brennan J's analogy of the 'ripples of affection';
- explain who these online communities are, what they did and what the effect has been; and
- challenge members of the administrative law community to consider how we can engage with online communities in the future to enhance the effectiveness of administrative law.

Administrative law and communities

Administrative law regulates the exercise of public power through an individual paradigm.[3] Administrative law processes generally consider a specific, as opposed to general, instance of the exercise of a public power. Standing requirements limit access to administrative law

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processes and remedies by requiring persons seeking to challenge the exercise of public power to have a 'special' interest in a specific exercise of the power. The classic example is that only persons with a direct interest in a decision may challenge that decision through merits or judicial review.

By privileging individual rights and interests, standing requirements distinguish between the individual and 'third parties'. The distinction is a strict one, with standing requirements treating an individual decision as being 'of no immediate consequence to anyone other than the [individual]'.[4] In Brennan J's metaphor of the 'ripples of affection', each exercise of public power is a distinct and separate disturbance in the 'pool of sundry interests',[5] as illustrated in Figure 1.[6]

Figure 1

In the Robodebt context, 200 000 people received Robodebt letters. Administrative law treats each of those 200 000 letters as separate and distinct disturbances in the 'pool of sundry interests'. Administrative law stipulates that each recipient of a Robodebt letter has an interest in their letter and their letter alone. Equally, the only person likely to be recognised by administrative law as having an interest in a specific Robodebt letter is the recipient of that letter.

There is an artificiality in treating each Robodebt letter as separate, distinct and of no interest to anyone but the recipient. Each of these letters stemmed from a single program — the OCI. The remedies and processes available to deal with the letters are common — that is, merits review, judicial review, complaints to the Ombudsman and requests under the *Freedom of Information Act 1982* (Cth). From a lay perspective, a recipient of a Robodebt letter (Halo) would at least be *interested in* the manner in which another recipient (Hades) challenged his Robodebt letter and the outcome, as it would inform Halo about how she should challenge her letter. That interest is not recognised by administrative law — but it does not mean it does not exist.

A consequence of the strict distinction between individuals with interests and third parties without interests is that standing requirements have traditionally struggled with the treatment of exercises of public power that have a communal effect, including exercises that:

- are of 'public concern with which no private person has any immediate connection'[7] (such as decisions affecting the environment[8]); or
- may indirectly affect a third party's interest (such as a decision that a duty applied to imported goods, when advice had been provided that such duty was not payable[9]).

Expressed another way, administrative law understands and recognises individual decisions that affect individual people. It struggles with individual decisions that affect many people and does not recognise at all the collective effect of many decisions with a common source that affect many people.

Traditionally, persons concerned with exercises of power with communal effect have formed communities in an attempt to fit communal interests within an individual paradigm. For example, environmental groups have incorporated and attempted to show, by way of their purposes, functions and activities, that they have interests in the exercise of public power greater than members of the general public.[10]

This attempt to fit communal interests in an individual paradigm has not occurred in the Robodebt context. Recipients of Robodebt letters have not incorporated a protest group against Robodebt. Existing groups that could be seen as having special interests greater than that of the general public (such as Social Security Rights Victoria) have not sought to challenge Robodebt letters in their own right — presumably because of the time, expense and uncertainty involved in establishing that they satisfy the standing requirements.

Instead, the communal interests about Robodebt have remained firmly communal and varied. The interests found within Robodebt, by and large, would be considered too remote and insufficiently distinct to be recognised by administrative law. At best, they are the fading, outer ripples in Brennan J's 'ripples of affection'.

To extend the metaphor, the online communities exist between the disturbances and ripples. They exist in, or are, the 'pool of sundry interests' (see, for example, Figure 2[11]). I contend that the pool (community) is not a passive thing that is affected by the disturbances (Robodebt letter). Rather, the pool is active and moving and can affect the disturbance as much as the disturbance affects the pool. Administrative law is not concerned with the pool (online community) but is nevertheless affected by it. This is particularly the case where multiple decisions (droplets) have a single or common source. To extend the metaphor, the OCI is the rain cloud from which 200 000 raindrops fell (Figure 3[12]).

Figure 2

Figure 3

Who are the Robodebt communities?

The communities that arose around Robodebt are informal and amorphous. They are united by their shared interest in, and opposition to, the OCI. The Robodebt communities are not recognisable as a single entity. They may not even be a single community but, rather, a collection of many communities. They do not have a single identity, let alone a legal identity.

The communities exist online, connected on platforms such as Twitter, Facebook and Slack through hashtags, pages and groups. There are no leaders per se, although the efforts of

people like Asher Wolf, Lyndsey Jackson and journalist Justin Warren have given the communities visibility and profile, thus attracting interested people to the communities.

The 'members' of the Robodebt communities are varied. Some members are recipients of Robodebt letters, but many are not. Members include journalists, community activists, Centrelink payment recipients, lawyers, legal assistance organisations, industry and professional peak bodies, academics and citizens. Many members contribute in their professional capacities, but not all are doing so in a paid, employment or official capacity. I use the term 'member' loosely, because it is probable that the 'members' of Robodebt communities do not identify as 'members' of a Robodebt community.

The interests of the members are equally varied. Some are individuals who simply want their individual debt reversed. Some want the systemic issues underlying the OCI to be addressed. Others want improved government practice when exercising public functions through technology. The Robodebt communities are classic examples of 'single issue' communities. They are united by their desire to see the end of Robodebt (at least in its current incarnation), and the communities are unlikely to exist if and when the Robodebt issue is resolved.

In the language of administrative law standing requirements, the Robodebt communities are the antithesis of an organisation with a special interest in an administrative decision. They (we[13]) are 'busybodies' *par excellence.*

What did the Robodebt communities do?

Since administrative law regulates the exercise of public power through an individual paradigm, reviewing exercises of public power (such as Robodebt letters) requires an individual to do a number of things. The last of these things is to invoke an administrative law process, such as apply for merits review. Douglas and Jones have identified that, before complaining or taking other administrative law action, an individual must:[14]

- be aware that there may be grounds for complaint;
- be aware that there exist channels of complaint and what those channels are;
- know how to mobilise or access those channels; and
- have sufficient confidence in the channels (and, I would add, their own abilities to make an effective complaint) to consider it worthwhile making the complaint.

The Robodebt communities provided individuals with the necessary awareness, knowledge and confidence to pursue administrative law remedies, particularly merits review.

The Robodebt communities crowd-sourced Robodebt stories and experiences through social media and the *NotMyDebt* website. The volume of tweets and posts about Robodebt raised awareness within the broader community that there was potentially a problem in the way in which the OCI was being implemented. This awareness extended to recipients of Robodebt letters, who may otherwise have assumed that the government was entitled to recover the debts claimed in the Robodebt letters.

Members of the community with experience in social security matters, such as lawyers, academics and social services organisations, contributed knowledge to the Robodebt communities. They identified:

- possible grounds and channels for complaint about the Robodebt letters and the debts they claimed;

- how to access those channels; and
- organisations that could assist recipients to take action.

Such organisations included community legal centres, legal aid commissions and social services organisations, which in turn used the Robodebt communities to distribute widely resources and information they developed to assist recipients of Robodebt letters. Recipients of Robodebt letters shared their experiences in challenging Robodebt letters and the debts claimed and whether their actions had been successful or not. The Robodebt communities enabled a crowd-sourced, iterative, en masse approach to addressing en masse administrative action that may have been infected by common administrative errors.

This crowd-sourced, iterative approach was particularly significant given the paucity of information contained in the original Robodebt letters and the challenges in obtaining information directly from Centrelink.[15] Given that the characterisation of the Robodebt letters themselves was, and remains, contested between the Department of Human Services and the Robodebt communities (are they 'debt letters' or 'clarification letters'), the letters did not contain information that would ordinarily be expected in letters about administrative action, such as how to access merits review. The Robodebt communities filled the gaps and connected the dots.

The Robodebt communities also gave recipients of Robodebt letters the confidence to take action. The experiences of recipients indicate that challenging Robodebt letters was stressful, difficult and time consuming. The awareness that this was a problem shared by thousands and that the effort achieved the desired outcome of a reduced debt arguably gave individual recipients the confidence and motivation to take action and to pursue that action until an outcome was obtained.

What were the effects of the actions of the Robodebt communities?

The Robodebt communities raised awareness of the OCI and the problems associated with it. By focusing considerable attention on the conduct of the Department of Human Services and its agents, the Robodebt communities furthered one of the key objectives of administrative law — the accountability of public sector agencies exercising public power.

As a result of the awareness raised by the Robodebt communities, systemic issues with the Robodebt letters were recognised quickly. Within a month after the Robodebt communities were formed, the Commonwealth Ombudsman commenced an investigation of the OCI. On its second sitting day of 2017, the Senate referred to a Senate committee an inquiry into the OCI. The fact and timing of these investigations were attributed to the intense public pressure,[16] which in turn was facilitated by the Robodebt communities.

The Department of Human Services has made a number of changes to the OCI, such as using Registered Post to deliver Robodebt letters;[17] clearly stating in the Robodebt letters a telephone number through which further information can be obtained;[18] allowing recipients to use bank statements, rather than payslips, to establish the income received during the relevant periods; extending the time for responding to Robodebt letters; and not requiring repayment of the debt while it is disputed.[19] It is unlikely that these changes would have occurred, at all or as quickly, without the Robodebt communities effectively identifying the common problems with the Robodebt letters and generating intense public pressure for changes.

The attention focused by the Robodebt communities on the problems with Robodebt means that it is likely to become a case study for future governments intending to engage with technology assisted or automated decision-making. The Robodebt communities have

therefore assisted in achieving the objectives of administrative law — improving administrative action.

The effect on individual recipients of Robodebt letters is more difficult to assess. The Department of Human Services has not published data about the number of debts varied after a Robodebt letter was issued. Such data would be of limited utility in assessing the effect of the Robodebt communities, since one of the problems with the OCI process is that there is a considerable lack of clarity about the various stages of the process and an absence of the neat administrative law boxes of 'administrative action' and 'administrative review'.

Based on the conversations on Twitter, Facebook and *NotMyDebt*, it appears that recipients of Robodebt letters have taken action, such as seeking merits review by an Authorised Review Officer, after engaging with the Robodebt communities. In January 2017, South Australian community legal centres experienced a threefold increase in attendance as a result of Robodebt. In the same period in Victoria, Social Security Rights Victoria and Victoria Legal Aid experienced a 68 per cent and 150 per cent increase in legal services respectively. Given that, ordinarily, only 16 per cent of people with a legal problem recognise that they have a legal problem and seek help, it can be inferred that the significant increases in demand for legal services were facilitated, at least in part, by the Robodebt communities.

The effect of the Robodebt communities has not been complete or ideal. As online communities the Robodebt communities are messy. Anyone can provide information, and that information may not always be right. It is entirely possible, if not probable, that engagement with the Robodebt communities has increased the confusion of a recipient of a Robodebt letter before the recipient was connected to accurate and helpful information and organisations. The Robodebt communities have clearly not reached all 200 000 recipients, given that the Senate committee found that many individuals remain unaware of their rights when dealing with the department and that more needs to be done by the department to improve the OCI process. The OCI remains in place and is being extended to new groups of Centrelink recipients (namely, recipients of the aged care pension).

These observations are not offered as a condemnation of the Robodebt communities or a finding of failure. Rather, these observations indicate that the Robodebt communities can be improved. It is my contention that those improvements can be achieved, in part, through earlier and increased engagement by the administrative law community with online communities like the Robodebt communities.

The future for communities and administrative law

The Robodebt communities demonstrate that communities that do not have standing to pursue administrative law remedies can nevertheless influence the effectiveness of those remedies. Rather than trying to fit within the individual paradigm of standing, online communities bring individuals together and provide common information and support to individuals to access the individual-based administrative law remedies.

Online communities can increase the likelihood that individuals will challenge individual administrative decisions by:

- making those individuals aware that there may be a problem with the decision;
- providing information about how to challenge a decision;
- connecting the individuals to organisations that can assist in challenging a decision; and
- giving individuals the confidence to take action.

Like all communities, online communities are only as good as their members. One of the benefits of an online community is access to information and expertise. The Robodebt communities were enhanced by contribution from experts in the legal and social services sectors. Experts assist by providing good quality information and clarifying and countering misinformation. Often, the information required is no more than the basics — things that are simple for experts but confusing or daunting for non-experts. Consequently, experts can contribute a lot without significant time or effort.

If administrative law is to exist beyond statute books and their digital equivalents then it is imperative for members of the administrative law community to engage with online communities that form around administrative law issues. The opportunities for engagement are as varied as the number of social media platforms available and include participating in Twitter conversations, writing blogs about administrative law issues (either general or specific), joining a Slack group and/or extending online and physical networks to include community activists and journalists who are regularly part of online communities.

The challenge for the administrative law community

There are features of the administrative law community that may constrain the ability of members of that community to engage with online communities, especially those related to the fact that many, if not most, members of the administrative law community are employed by government. Public servants are required to be apolitical and may be concerned that, if they engage online with people who are engaged in political activities, they will be associated with those political activities and views. In some jurisdictions, the restrictions on public debate by public servants are enshrined in the constitution of that jurisdiction, the breach of which may constitute a criminal offence.[20]

Furthermore, like all employers, governments have (and should have) social media policies which set out the expectations and obligations for employees engaging in social media. These policies generally distinguish between using social media for work and personal purposes. Some will further distinguish unofficial professional use — that is, use of social media as a professional for purposes unrelated to their employment. Some policies require employees to notify their employer before engaging in public comment, even on social media, and to use certain disclaimers that may be difficult to express in the confines of social platforms such as Twitter.[21] Some policies restrict employees from commenting on *any* government policy, whereas others restrict public comment only in respect of the agency for which the employee works.

Members of the administrative law community who are lawyers may also be concerned about risks to their legal professional obligations, such as inadvertently creating a solicitor–client relationship or engaging in conduct that may not be protected by professional indemnity insurance.[22] Others may simply be concerned about the consequences of providing inaccurate information — that is, the consequences for the community member if they act in reliance upon that information and for the lawyer's reputation.

Although members of the administrative law community may have significant knowledge and confidence in administrative law issues, they may feel less confident in the platforms on which online communities gather. Each platform has different features and cultural norms. This diversity is a strength for online communities, with communities using different platforms to best achieve their objectives. However, it is daunting for someone who has limited knowledge and confidence with a particular platform or social media generally.

These challenges need to be explored and discussed by the administrative law community. Engagement with online communities presents a significant opportunity to enhance the

relevance and effectiveness of administrative law. The challenge for the administrative law community is to identify how to reconcile these opportunities with their professional obligations.

Online technology and communities have changed how we perform our roles as citizens, consumers, students, employees and family members. It is inevitable that it will change the way in which people with administrative law problems access administrative law solutions. In the 'pool of sundry interests', every disturbance affects the others. How far will the administrative law community's ripples of affection extend?

Endnotes

1 Senate Community Affairs References Committee, Parliament of Australia, *Design, Scope, Cost-benefit Analysis, Contracts Awarded and Implementation Associated with the Better Management of the Social Welfare System Initiative* (2017) 17 [2.21].
2 Although the phrase 'Robodebt letter' is in common usage, the phrase 'Robodebt community' is not.
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4 Ibid 719 [11.10].
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13 In both my capacity as an administrative lawyer who tweets regularly and as an Executive Director of Victoria Legal Aid, I identify as a member of one or more Robodebt communities.
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LESSONS LEARNT ABOUT DIGITAL TRANSFORMATION AND PUBLIC ADMINISTRATION: CENTRELINK'S ONLINE COMPLIANCE INTERVENTION

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In July 2016 the Department of Human Services (DHS) and Centrelink launched a new online compliance intervention system known as the Online Compliance Intervention (OCI).[1]

The OCI automates much of the investigation and debt-raising process where DHS detects a discrepancy between the amount of PAYG income a person declared in a year and the amount of PAYG income reported to the Australian Taxation Office (ATO).

DHS has investigated ATO data-match income discrepancies since 1991. Prior to the introduction of the OCI, resourcing considerations meant that DHS could manually investigate only around 20 000 income data-match discrepancies *per year*. By contrast, the OCI generated approximately 20 000 letters *per week*, and DHS expects to undertake around 783 000 assessments in the 2016–17 year.

By December 2016 the system, which was dubbed 'Robodebt' by the media, had come under sustained public criticism. The Commonwealth Ombudsman experienced a spike in the number of Centrelink debt related complaints being received and commenced an own-motion investigation in January 2017. A Senate inquiry[2] was also announced, and the committee issued its reports on 21 June 2017.

The Commonwealth Ombudsman published its investigation report[3] in April 2017. The report found there were issues with the transparency, usability and fairness of the system. It found that many of these problems could have been avoided by better project planning and stakeholder engagement. It made a number of recommendations to improve the system, which DHS accepted and has begun implementing.

Automated decision-making is not new. Australian Government agencies, including DHS, have increasingly used automated and semi-automated administrative decision-making platforms. DHS was part of the working group which delivered the *Automated Assistance in Administrative Decision Making Better Practice Guide* in February 2007 (Better Practice Guide)[4]. The guide built on the 27 best-practice principles identified in the November 2004 ARC report to the Attorney-General on *Automated Assistance in Administrative Decision Making* (ARC Best Practice Principles*)*.[5]

This article considers the lessons to be learnt from the rollout of OCI and the continuing importance of the ARC Best Practice Principles and the Better Practice Guide in the context of a rapidly evolving technological and policy environment.

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Automating the calculation of debts

In the investigation, the Commonwealth Ombudsman's Office examined the accuracy of debts raised under the OCI and was satisfied that the method of calculating debts had not changed and debts raised by the OCI are accurate decisions, based on the information which is available to DHS at the time the decision is made (that is, ATO data).

So what was different about the OCI as an automated decision-making process?

First, there was a shift in DHS's approach to fact-finding and the quality of information on which it is prepared to make a decision. While the method of calculation had not changed, the information being fed into the calculation tool was qualitatively different.

In the past, investigations were done manually by a compliance officer. This meant there was human intervention in every investigation. Where it appeared an overpayment may exist, the customer was asked to provide payslips or other supporting documentation to verify their income.[6]

If the information requested was not forthcoming or did not adequately address the request, generally the compliance officer wrote to the customer's employer using information-gathering powers[7] to obtain payroll records showing fortnightly income information.[8] This would then be manually entered by the DHS officer into a debt calculation tool.[9]

If fortnightly earnings information still could not be obtained, DHS guidelines permitted compliance officers to apportion ATO annual earnings over the debt period but only 'if every possible means of obtaining the actual income information has been attempted'.[10] The same DHS guidelines acknowledged that apportioning annual earnings could result in debts being over- or under-calculated if the person's actual fortnightly income was different from the averaged amount (for example, if their employment was fluctuating or intermittent). This is because, under the *Social Security Act 1991* (Cth), entitlements are calculated using fortnightly, not annual, income.

The OCI involved two departures from this previous manual process:

- first, the task of collecting and entering historical pay data shifted almost entirely to the customer;[11]
- secondly, if income information was not provided by the customer within the requisite time frames, the OCI used averaged ATO income information to calculate any debt.

Administrative decisions are made on the best available information at the time of the decision. If further information becomes available, a new decision can be made. To enable it to automate debt raising in situations where earnings information was not forthcoming from the customer, DHS decided to accept the best *already available* evidence[12] to calculate an approximate debt figure by averaging ATO data, rather than using its information-gathering powers to obtain verified fortnightly data to calculate an exact debt figure.[13] This decision was fundamental to the efficiency and scale of the system, because it meant that compliance officers did not manually have to intervene to obtain fortnightly payroll data.

In other words, the system would calculate an accurate debt, but only if the customer was ready, willing and able to collect and enter the requisite information accurately. Debt-raising decisions by the OCI, which are by their nature adverse decisions, may therefore be affected by a user's ability to engage effectively with the system. It follows that success of the

system, and the integrity of any decisions it made, would rely on its usability, transparency, accessibility and fairness and the adequacy of support for users of the system. Our investigation therefore concentrated on these aspects of the system, including quality of service delivery and procedural fairness.

Secondly, the OCI was different to existing automated systems.

To understand what was different about the OCI, it is also useful to look at other Commonwealth government systems which rely on self-assessment and data entry by individuals. DHS's self-service system for reporting income and the ATO's E-tax system are useful for the purposes of comparison.

DHS's self-reporting tool has enabled Centrelink customers to enter their fortnightly income information online or via an automated telephone service for many years. The system uses this information automatically to calculate the person's fortnightly entitlement resulting in an automated decision about the person's rate of payment for that fortnight.

The ATO's E-tax tool enables a person to enter their annual income information online by answering a series of questions. The answers given to those questions opens and closes alternative question pathways according to what is relevant to the person. At the end of the process the person is presented with an assessment of their income tax or refund for that financial year.[14]

No doubt there are a number of differences between these two examples and the OCI, but, for the purposes of this article, it is worth observing the following features of the DHS self-reporting and ATO E-tax tools:

1. Both systems rely on the user inputting information which relates to a relatively recent period — normally the preceding fortnights or annual year respectively.
2. Users of both systems will generally have been warned in advance, or ought reasonably to be aware,[15] they may need to have kept relevant income documentation for these purposes.
3. Users of both systems are generally current or relatively recent customers of the relevant agency.

By contrast, the OCI system relies on users inputting data which relates to a historical period, up to six financial years past. Our investigation found that DHS customers had not been forewarned they may need to retain their detailed fortnightly earnings information (such as payslips) indefinitely. For some, employers could no longer be contacted or may refuse to provide the relevant income information. Many users were not current DHS customers and had no reason to keep the agency updated about their current contact information. This meant they did not receive the originating OCI notices inviting them to go online.

What can be learnt from the OCI experience?

Communication with users

One aim of digital transformation is to help citizens provide the information needed to assess their eligibility for benefits or services. As her Honour Justice Perry points out in her paper 'iDecide: The Legal Implications of Automated Decision Making', this self-service function holds great promise for government agencies, as it may help them process a high volume of transactions quicker, more reliably and less expensively than using human decision-makers.[16]

One of the key lessons from the OCI experience is that an agency's strategy for communicating with citizens about a new digital process is at the heart of successful digital transformation. A digital process that relies on electronic coding to process data is only as good as the information the citizen provides, so the citizen needs sufficient guidance to successfully navigate the new process.

How much guidance is necessary depends on the circumstances, including the complexity of the new process. However, generally consideration should be given to providing sufficient guidance to ensure:

- the citizen understands from the outset what the process will require from them, including what information they will need successfully to navigate it;
- where they have options or choices about how to use the process, guidance about which option is appropriate for them and/or the consequences of their choice; and
- where to go for help if they have questions or difficulties with the process.

There are likely to be a number of points where this information needs to be provided — in the online space itself, on a website and through a helpline. Providing guidance to manage user input to reduce the risk of error or misinterpretation is recommended in the Better Practice Guide.[17]

However, one of the key lessons from the rollout of the OCI was the importance of the quality of initial communication with users of a new digital service. The OCI's initial messaging to customers, both through its letters and in the system itself, was unclear and did not include crucial information.[18] What we learned from the OCI was that the first communication with users can influence their response to the process and how successfully a new digital service meets its objectives.

The initial communication should clearly explain:

- the process and key steps to be taken;
- the consequences of engaging with the process (either fully, partially or not at all);
- the options available, including if there is more than one way of engaging with the process; and
- what support is available and how to access it — for example, via a website, instructional videos or dedicated helpline.

The OCI experience also demonstrated the need to take extra care to ensure that initial communication is received if the user is not a current customer of the agency. When agencies are implementing new systems, and non-engagement may adversely impact an individual, careful attention needs to be paid to the agency's ability to contact former customers or determine whether contact has successfully been made.

Design of digital platforms

Digital transformation often involves the creation of an online platform for citizens to use to engage with a new process. The development of online access promises increased convenience for citizens and reduces expense for agencies. As identified in the ARC Best Practice Principles and the Better Practice Guide, when developing an online system, agencies should take into account access and equity considerations in the delivery of their services.

A key lesson from the OCI experience is that the design of the online platform may have a significant bearing on the successful launch of the new process.

Seemingly micro-level issues of design may have significant consequences. For example, if there is a helpline, how visible should the phone number be? What icon should be used? Should the phone number appear prominently on each webpage? This may determine whether people access help at critical points or instead give up in frustration, failing to complete the process correctly or at all. It may influence whether people seek to use other access points to an agency, attending a shopfront, instead of using the dedicated helpline into which resources have been put.

There are also more fundamental design questions to be considered. Where information is required from the citizen before a decision may be made, one standard design approach is to mandate in the business rules that certain critical questions be answered before the digital process may be completed by the citizen. We are all familiar with this kind of design — we get to the bottom of a webpage after answering a series of questions and click on the 'next' button, but we are told we have not answered all of the required questions (now marked with an asterisk).

However, an agency may consider for various reasons that it is appropriate to allow a citizen choice in how they access or interact with a digital process. This in turn presents a different set of issues. It may require greater attention to the communication issues already mentioned — ensuring that citizens are clearly informed of their options and the consequences of those options.

The OCI was an optional process. A person was invited to update their income details, but engagement with DHS was not legally required. However, there was a consequence for non-engagement, as DHS would apply their ATO income data to their record. Within the OCI itself, a person could make choices about whether to enter data (for example, they could choose to provide some but not all of the fortnightly income data for a relevant period).

What we learnt from the OCI is that, if a compulsory process is not used, this increases the need for clear communication and messaging both outside and within the online platform, particularly in regard to the consequences of opting not to engage with the system or of providing only partial information. It demonstrated that agencies designing optional systems should give close attention to:

- layout — for example, the helpline should be clearly displayed on every page;
- warnings — for example, warning of the consequences of skipping a step and prompts to review information; and
- messages about options and consequences.

Transparency

An important lesson from the OCI is that, when designing a digital system where human interaction may not eventuate, the messaging of the system is key to ensuring transparency.

Transparency is not just a fundamental administrative law value. It is also essential to the process of continuous improvement that is so important in digital transformation processes. It became apparent during our OCI investigation that poor communication was at the heart of the complaints we received about transparency, and it followed that improving the quality of communication was the key to improving transparency and usability of the system.

It was also clear that much of the misinformation about the system in the public domain derived from the lack of visibility of the system for commentators. Privacy is a key consideration in digital systems designed to be accessible only to the citizen and the staff of the owning agency. DHS ensured that its staff could access the system directly to talk people through the process and even enter data on behalf of the customer while they were on the telephone, where appropriate.

However the lack of visibility of the system for third parties was an issue in the public domain, where critics and commentators formed and voiced opinions without having seen the screens that customers were presented with when they went online. The Commonwealth Ombudsman's Office's understanding of the system was greatly improved by the 'walk-through' and 'screen shots' of the system that we received, which we annexed to our report, placing them in the public domain for the first time. Once we were able to 'see' the system, we were able to provide feedback to DHS that led to revisions and improvements to the system.

The value of a clear communication strategy cannot be overstated, and a key consideration for agencies is whether the inability of third parties to access a digital system may cause confusion in the public domain or impede third-party organisations, such as legal services and community organisations, from supporting users. There is value in providing 'walk-throughs', 'screen shots' and instructional video-on-demand resources to oversight bodies, peak bodies and other organisations that support users prior to and at the time of rollout as part of a comprehensive communication strategy. This approach is consistent with the Better Practice Guide, which recommends agencies consider providing access to customers, call centre operators (for providing general advice and information), outsourced service delivery agents and/or providers, and community organisations assisting their clients properly to achieve the benefits of the transition to digital service delivery.

Support for users

Understanding user needs is paramount when designing digital systems and is the first standard of the Digital Transformation Agency's Digital Service Standards.[19]

The design and implementation of a new digital process should include consideration of user needs and support for them. The nature and degree of support required will depend on a number of circumstances, including the novelty of the new process, its complexity, the demands made of users and the characteristics of the user group.

At one end of the spectrum are systems which require only clear information for users. For example, where the new process is relatively simple and users are relatively sophisticated, the process is similar in nature to other processes users will already be familiar with.

However, as the complexity and demands of a new process increase, so does the need carefully to consider the support required for users. In fact, the successful implementation and operation of the new process may depend on it.

There are a number of key issues for agencies to consider. These include:

- **the complexity of the process relative to the sophistication of the user**. For example, a portal for tax accountants may be able to assume a degree of knowledge and sophistication among its users that a portal for taxpayers could not
- **the extent to which alternatives to a new digital process should remain available**. What are the consequences if non-digital alternatives are not retained? If they are to remain available, questions of inclusion and exclusion may arise. For example, if access

to alternatives is restricted to 'vulnerable persons', how are they to be identified and defined? Will it be available short, medium or long term?

- **the novelty of the process for users**. If the process is new some people may continue — at least at first — to seek to undertake the transaction in the way they are familiar with. What training should be given to front-of-house staff who may be the first point of contact for people seeking help?
- **the form support should take**. This may range from information (for example, website, video-on-demand, a help button in the online platform) to specialist trained staff to assist people. It may be helpful to user test some forms of support in the planning stages to test its effectiveness. There needs to be a clear communication strategy directing users to sources of support
- **how to ensure support is accessible**. Considerations include timing (when it is needed, for example, at rollout) cost (including time, financial and emotional) user capacity (particularly where users may be vulnerable — for example, due to literacy, language, disability) and communication (in particular, pathways directing users to support). Steps should be taken to identify vulnerable customers prior to rollout, where possible, and a strategy should be developed for identifying and servicing customers whose vulnerability only presents after rollout.[20]

The OCI was an example of a complex system relative to the user. It followed that there would be a higher need for user support.

DHS had maintained non-digital channels and had set up a dedicated helpline with specialist trained staff. However, the existence of these supports was poorly communicated, as the helpline number was initially excluded from letters and was not obvious in the system. This meant customers called general customer service lines, resulting in long wait times, instead of the helpline.

The OCI provided other accessibility lessons for agencies rolling out complex digital systems on a large scale. It showed that instructional resources, such as user guides, factsheets, video-on-demand and other 'how to' resources should be developed and be available at the time a new system is launched. An incremental rollout approach should be taken if there is a risk that demand for support may reduce accessibility (for example, long telephone wait times).

Finally, the OCI demonstrated that, when designing systems where citizens enter data which will inform an automated decision, consideration must also be given to how readily available that information will be to the user. Wherever possible, agencies designing self-service systems should forewarn people to retain records they may need for future interaction with the system.[21] Where this is not possible, and where appropriate, agencies need to give consideration to whether they have adequate assistance and support for people to obtain the documentation or information they need effectively to engage with self-service systems. During our investigation, for example, DHS redesigned its system to enable people to enter bank statement data where payslips or payroll data were unavailable.

External perspectives

A key lesson for agencies and policy makers when proposing to roll out large-scale measures that require people to engage in a new way with new digital channels is that agencies must user test thoroughly and engage early with external stakeholders. Many of the problems outlined in this article and in our report could have been mitigated through better project planning, engagement, change management and communication at the outset.

An important consideration for agencies is at what point external stakeholders should be consulted in the design and implementation of a new digital service. This may be particularly difficult if there is a high risk that the new system could be jeopardised by criticism of early prototypes. However, this must be weighed against the risk that a lack of external perspective may affect the design and delivery of the project.

DHS did not ensure that all relevant external stakeholders were consulted during key planning stages and after the full rollout of the OCI. This was evidenced by the extent of confusion and inaccuracy in public statements made by key non-government stakeholders, journalists and individuals. Better consultation processes would have provided important feedback both for improving the system design and for identifying gaps in the communication strategy.

Our investigation found the OCI required more rigorous user testing and would have been improved by greater use of the co-design approach the department has adopted elsewhere. After DHS worked with the now Digital Transformation Agency (DTA) in February 2017 to review and redesign the OCI and undertook comprehensive user testing, this resulted in a more user-friendly system. In future, systems like the OCI should be developed in collaboration with the DTA and other oversight agencies. Consultation and use of multidisciplinary teams during design and testing is consistent with the ARC Best Practice Principles.

The OCI demonstrated the need for external perspectives in the design, testing and implementation of new digital systems. Wherever possible, systems should be tested with citizens, service delivery staff, oversight agencies and other organisations that support users at the earliest possible stages.

Guidance and oversight

As her Honour Justice Perry commented in her paper, the ARC's *Automated Assistance in Administrative Decision-Making* report was groundbreaking and appears to have been the first report systematically to review the administrative law implications of automated decision-making systems. The Better Practice Guide, which assists agencies in their design and implementation of automated systems, was also the first of its kind.[22]

Somewhat prophetically, most of the problems with the OCI were foreshadowed by the Better Practice Guide. For example, the Better Practice Guide identified the risk that user interface design problems may 'artificially limit the effectiveness of the information gathering process that is essential to good administrative decision-making'. It also articulated the importance of access to support, including telephone and face-to-face support, and considering the impact that the new system may have on existing service delivery channels.

However, it is now 10 years since the Better Practice Guide was published, and questions arose about its currency in a rapidly changing environment. Our experience with the OCI suggests that, in particular, more guidance is needed on managing user input and the importance of effective communication strategies to ensure that public confidence in government administration is preserved during digital transformation.

The OCI experience also raises questions about whether greater project management oversight is required, particularly in pre-implementation phases.

In its 2004 report, the ARC recommended the establishment of an independent interdisciplinary advisory panel to oversee automated systems. It envisaged that the panel would focus on the extent to which administrative law values are reflected in the use of such

systems and proposed the panel would include the Auditor General and Commonwealth Ombudsman, as well as community organisations that represent users of these systems.

When DHS redesigned its system in February 2017, it incorporated feedback from the Commonwealth Ombudsman and the DTA. This was six months after implementation, when the insights and expertise of oversight agencies and other external stakeholders could have been captured in the early design and planning stages. One solution to this problem may be for agencies rolling out automated decision-making systems to consider establishing advisory panels or delivery units to oversee major digitalisation projects, which include external stakeholders — in particular, the DTA, the Commonwealth Ombudsman, the Office of the Australian Information Commissioner and the Australian National Audit Office — in the earliest stages of design and planning.

In October 2016 the Australian Government expanded the role of the DTA, which now has central oversight of the government's ICT agenda. In February 2017, the DTA announced the establishment of a new Digital Investment Management Office within the agency to improve transparency of ICT design and delivery across government and provide independent assurance. The DTA's *Digital Service Standard* has a strong focus on understanding user needs. DHS indicated that it will apply these standards and collaborate with the DTA in future. All government agencies embarking on the digital transformation journey would do well to ensure decision-making carried out by or with the assistance of an automated system is consistent with ARC Best Practice Principles, the Better Practice Guide and the *Digital Service Standard.*

Endnotes

1 The OCI was introduced as part of a 2015–2016 Budget measure, 'Strengthening the Integrity of Welfare Payments', and a December 2015 Mid-Year Economic Fiscal Outlook announcement.
2 Senate Standing Committee on Community Affairs, *Design, Scope, Cost-benefit Analysis, Contracts Awarded and Implementation Associated with the Better Management of the Social Welfare System Initiative* (2017) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/SocialWelfareSystem>.
3 Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System*, Report No 02/2017 (2017) <http://www.ombudsman.gov.au/__data/assets/pdf_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf>.
4 Commonwealth Ombudsman, *Automated Assistance in Administrative Decision Making Better Practice Guide* (February 2007) <http://www.ombudsman.gov.au/__data/assets/pdf_file/0032/29399/Automated-Assistance-in-Administrative-Decision-Making.pdf>.
5 Administrative Review Council, *Automated Assistance in Administrative Decision Making*, Report No 46, November 2004.
6 This would be done by sending a legal notice under the *Social Security (Administration) Act 1999* (Cth) (the Administration Act) that required the customer to produce the information. For current social security recipients, the notice was sent out under s 63 or s 80 of the Administration Act, and the consequence for non-compliance was suspension or cancellation of payment. For former social security recipients, the notice was sent out under the department's broader information-gathering powers under pt 5, div 1, ss 192–197 of the Administration Act, the penalty being up to 12 months' imprisonment (unless the customer was unable to comply or had a reasonable excuse).
7 Administration Act, pt 5, div 1, ss 192–197.
8 If employer information was unavailable, DHS would seek information from other third parties as appropriate.
9 If a debt existed, the compliance officer could apply a 10 per cent recovery fee if satisfied the customer had refused or failed to provide information about their income, or had recklessly or knowingly failed to declare their income, without reasonable excuse: *Social Security Act 1991* (Cth) s 1228B.
10 Department of Human Services, *Operational Blueprint 107-02040020 — Acceptable documents for verifying income when investigating debts*.
11 Note that social security recipients have a legal obligation to keep DHS informed of changes to their income. This obligation may be created by the issuing of a notice under the social security law. There is also a freestanding obligation to do so (irrespective of whether a notice has been given) in s 66A of the Administration Act. However, in the past, DHS compliance officers performed the task of collecting and entering historical pay data during compliance investigations.
12 That is, ATO income data.

13 A 10 per cent recovery fee was also added to a debt if the debtor refused or failed to provide information about their income without reasonable excuse. In the OCI as it was originally designed, a person was provided with an opportunity to provide a reasonable excuse by ticking a box about 'personal factors' which may have affected their ability to declare their income.

14 The Hon Justice Melissa Perry, 'iDecide: the Legal Implications of Automated Decision Making' (Paper presented at *Process and Substance in Public Law*, Cambridge Centre for Public Law Conference 2014, University of Cambridge, 15–17 September 2014) p 2 <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-perry/perry-j-20140915>.

15 The ATO publishes information explaining how long people need to keep their tax records — for example, on its website <https://www.ato.gov.au/Individuals/Income-and-deductions/In-detail/Keeping-your-tax-records/>.

16 Perry, above n 14, p 2.

17 Commonwealth Ombudsman, above n 4, p 26.

18 In particular, there was no clear explanation that income would be averaged across the employment period if they did not enter their income against each fortnight and that this may affect the amount of the debt. Complaints to the Commonwealth Ombudsman's Office showed that even users with high levels of education and digital readiness experienced difficulty understanding what information was required of them and how to enter the information once online.

19 Digital Transformation Agency, *Digital Service Standard* (10 May 2017) <https://www.dta.gov.au/standard/>.

20 DHS identified vulnerable customers using existing records prior to rollout and developed an alternative servicing strategy for those customers.

21 The Commonwealth Ombudsman's Office was also concerned about the fairness of a system which relied on users being able to provide historical employment income information, when those people had not been informed in advance they may need to keep that information. Many complainants to our office had problems collecting evidence about their employment income, particularly for periods from several years ago. Although it was subsequently amended, at the time the OCI was rolled out the DHS website advised people to keep their income information for six months.

22 Perry, above n 14, p 3.

SOCIAL SECURITY OVERPAYMENTS AND DEBT RECOVERY: KEY DEVELOPMENTS

Peter Sutherland*

It is important to understand the history of the social security legislation, and other contexts such as the language of 'error', 'overpayment', 'debt' and 'fraud', to fully understand the social and legislative basis of social security debt recovery today.

Legislative history

Social Security Act 1947

In the *Social Security Act 1947* (Cth) (the 1947 Act), overpayments and debt recovery were dealt with in two sections in pt XXI, 'Miscellaneous':

- s 246, 'Recovery of overpayments'; and
- s 251, 'Write off, Waiver, &c'.

Section 246(1) stated:

(1) Where, in consequence of a false statement or representation, or in consequence of a failure or omission to comply with any provision of this Act, an amount has been paid by way of pension, allowance or benefit under this Act which would not have been paid but for the false statement or representation, failure or omission, the amount so paid is a debt due to the Commonwealth.

Section 246(2) provided for recovery by deduction from a current social security payment where 'an amount has been paid by way of pension benefit or allowance under this Act that should not have been paid'. Subsection (2) and (2A) extended this recoverability to certain other payments, including under the *Veterans' Entitlements Act 1986* (Cth), prescribed educational scheme and assurances of support.

Section 251 provided a broad discretion for the Secretary to waive a debt 'that is payable by the person under or as a result of this Act' and also provided for write-off of classes of debt specified by the Minister by notice in the Gazette, determinations by the Minister which give directions relating to the Secretary's waiver power, and a six-year limitation period on commencement of recovery action by legal proceedings.[1]

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These two relatively economical sections gave rise to a considerable body of case law developed by the Federal Court and the Administrative Appeals Tribunal (AAT). Prominent cases explored the various elements of the sections, including:

- 'in consequence of' — the failure or omission need not be the dominant or effective cause of the overpayment;[2]
- 'false statement or representation' or 'failure or omission to comply' — this is not confined to a knowing or intentional failure to comply;[3]
- principles of administration in s 246;[4]
- principles as to the discretion to waive: in *Director-General of Social Services v Hales*[5] (*Hales*) the Full Federal Court gave guidance as to the exercise of the discretion which were widely adopted and comprised:

  (a) the fact that the applicant has received money to which he was not entitled;
  (b) the way in which the overpayment arose whether as a result of innocent mistake or fraud;
  (c) the financial circumstances of the prospective defendant;
  (d) the prospect of recovery;
  (e) whether a compromise is offered;
  (f) whether recovery should be delayed if there is a prospect that the circumstances of the person who received the overpayments may improve; and
  (g) compassionate considerations and the fact that the Act is social welfare legislation and any financial hardship which may result from an action for recovery.

There were a great many AAT decisions on the application of the *Hales* principles which were helpful at the time but now are not usually cited, as more recent cases consider the specific provisions of the successor to the 1947 Act, the *Social Security Act 1991* (Cth) (the 1991 Act).

Social Security Act 1991

The 1991 Act repealed the 1947 Act on 1 July 1991. It was intended to be a 'plain English' rewrite of the 1947 Act with very little change in underlying legislative policy. The intent of the rewrite was discussed in the Department of Social Security *1990–91 Annual Report*:

> The Act is a clear English rewrite of the 1947 Act. The language used should make the meaning of any particular provision apparent to the reader. The reader aids are designed to assist with any readability problems in areas of the Act which deal with complex policy matters.
>
> The rewrite of the 1947 Act did not involve any major policy initiatives and its financial impact is negligible. The new legislation reflects existing policy.
>
> The Act contains a Reader's Guide to explain how the Act is arranged and how the other reader aids can help in reading the Act and finding one's way through the legislation.
>
> Other innovations include:
>
> - an index of defined words and phrases and groups of definitions according to subject matter in the definitional part of Chapter 1 to facilitate accessibility;
> - the use of modules, points and method statements where a step-by-step approach is required, such as in rate calculators;
> - the location of the modules for each of the 20 types of Social Security payments in one Chapter (Chapter 2). Each module is now almost totally self-contained to enable a reader to find out everything he or she needs to know about a particular pension, benefit or allowance;
> - the simplification and reorganisation of individual provisions so that they appear in a logical order, with all provisions which relate to a particular topic now being located together;

- the insertion of notes throughout the text which act as signposts to assist the reader in locating relevant provisions quickly and set the context for the provision and explain references to other Acts;
- the use of tables to replace complex formulae and textual provisions; and
- where cross-reference to other provisions occurs, brief descriptions of those provisions together with their section numbers.[6]

The new Act was less successful than its policy makers and drafters envisaged, for a number of reasons:

- The introduction of 'plain English' was generally welcomed; however, the drafters were less experienced in this form of drafting than is the case today. Drafters have learnt many useful lessons about 'plain English' and the structure of legislative provisions in the 25 years since the commencement of the 1991 Act.
- The policy makers and drafters attempted to create an Act which allowed an individual beneficiary to go to the legislation on their particular payment and, supposedly, find a self-contained statement of their rights and obligations. This approach failed completely, as it led to a large amount of legislation repeated for each payment type in ch 2 — the original 1991 Act comprised 1364 sections and its first printing by CCH exceeded 1000 pages of closely spaced text.
- Since its commencement the 1991 Act has been constantly and extensively amended for a number of reasons, including targeting and re-targeting of benefits, Budget initiatives and labour market initiatives. For many years, it was very difficult to obtain an accurate, up-to-date consolidation of the Act; however, this has now been achieved through vast improvements in IT and the construction of the *ComLaw* website.

The Full Federal Court commented adversely on the drafting of the 1991 Act in *Blunn v Cleaver*.[7] This criticism was echoed by Spender J in *Jackson v SDSS*,[8] where Spender J said:

> The Act is admittedly complex. In *Blunn v Cleaver* (supra), the Full Court made it plain, particularly at 127–129, that the drafting of the Act produced a disconformity with the genuine objects of legislation in this area and the legitimate expectations of persons affected by such legislation.
>
> The Court, however, has to do the best it can in the discharge of its statutory obligation. The situation in the present case is complicated by the fact that it is likely that the factual circumstances thrown up by the present proceeding was not in contemplation of the legislature at the time when the provisions which are meant to govern its determination were enacted.[9]

The consolidation of the administration provisions by the *Social Security (Administration) Act 1999* (Cth) on 20 March 2000 reduced the overall bulk of the Social Security Law, but the problems arising from complexity of drafting remained. See, for example, the comments of Weinberg J in *SDFaCS v Geeves*.[10]

Social Security Law and Family Assistance Law

On 20 March 2000, the 1991 Act was restructured into five separate Acts:

Social Security Law

- 1991 Act: Chapters 1, 2, 3 and 5 continued in force but with a lot of duplicate provisions in ch 2 moved into a single Administration Act.
- *Social Security (Administration) Act 1999* (Cth): Essentially administrative provisions set out in chs 6, 7 and 8, and duplicated provisions in ch 2, were moved to this Act and consolidated in a logical format.

- *Social Security (International Agreements) Act 1999* (Cth): Part 4.1 and the Scheduled International Agreements were moved into this Act.

Family Assistance Law

- *A New Tax System (Family Assistance) Act 1999* (Cth): Family payments were moved to this new Act and provisions concerning child care were added.

- *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth): This Act deals with family assistance and child care administration issues.

The restructure did not affect the overpayment and debt recovery provisions in ch 5 of the 1991 Act; however, offences were moved to pt 6 of the *Social Security (Administration) Act 1999* (Cth). The *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) included parts dealing with overpayments, debt recovery and offences in similar (but not the same) terms as those in the social security law.

Developments in chapter 5 of the 1991 Act: 1991–2017

Chapter 5 of the 1991 Act has seen a number of significant amendments since its commencement on 1 July 1991, including the following.

The *Social Security (Budget and Other Measures) Legislation Amendment Act 1993* (Cth) (No 121/1993) repealed the original s 1237 and inserted new ss 1236A, 1237 and 1237A with effect from 24 December 1993. The new sections attempted to restrict waiver to certain prescribed circumstances but were poorly drafted. In *Lee v SDSS*,[11] the Full Federal Court held that cases already determined by the department and subject to review should be considered under the repealed waiver provisions.

The *Social Security Legislation Amendment (Carer Pension and Other Measures) Act 1995* (Cth) repealed the existing waiver provisions (ss 1236A, 1237 and 1237A), replacing them with eight new sections (ss 1236A–1237AAD) intended 'to provide more consistency and flexibility' in the waiver arrangements. In particular, new s 1237AAD restored waiver in 'special circumstances', provided the debt did not arise 'knowingly' from a false representation, and new s 1237AAC extended waiver in relation to notional entitlement to certain other benefits.

The *Social Security Legislation Amendment (Budget and Other Measures) Act 1996* (Cth) made significant amendments to the debt recovery provisions, including repealing and substituting a new s 1223, 'Debts arising from lack of qualification, overpayment etc.'. After this date, a debt was due to the Commonwealth if an overpayment was made on or after 1 October 1997 because the recipient was not qualified for the payment *or* because the amount was not payable. Clause 105(1) in sch 1A included a savings provision which provided that the amendments did not affect the operation of pts 5.2 or 5.3 before 1 October 1997; extinguish the amount of any debt arising before 1 October 1997; or prevent recovery of any outstanding debt.

The *Family and Community Services and Veterans' Affairs Legislation Amendment (Debt Recovery) Act 2001* (Cth) (No 47/2001), with effect from 1 July 2001, introduced measures to strengthen the debt recovery processes of the Department of Family and Community Services and the Department of Veterans' Affairs. The amendments made all overpayments (for any reason) recoverable and revised the arrangements for penalty interest,

administrative charges and recovery of amounts paid in error directly from financial institutions.

The *Commonwealth Reciprocal Recovery Legislation Amendment Act 1994* (Cth) (No 68/1994), commencing on 1 July 1994, amended ch 5 as part of a scheme to facilitate the reciprocal recovery of overpayments arising from the social security, student assistance and veterans' entitlements income support schemes.

The *Budget Savings (Omnibus) Act 2016* (Cth) included a significant number of Budget savings measures and three measures affecting debts which commenced on 1 January 2017:

(i) application of a new interest charge to outstanding debts owed by former recipients of social welfare payments who have failed to enter into, or have not complied with, an acceptable repayment arrangement (sch 12);
(ii) introduction of departure prohibition orders in new pt 5.5 of the Act (sch 13, pt 1); and
(iii) removal of the six-year limit on debt recovery (sch 13, pt 2).

The importance of language

In considering social security overpayments and debt, it is important to be very clear about the language used, as there is a political and public confusion about this language, often conflating 'debt' and 'compliance' or similar terms with 'social security fraud'. In this article, I suggest a careful use of language in the following terms.

overpayment	An overpayment occurs where a customer receives an amount of payment higher than that authorised by the legislation. This may occur though official error, customer error, timing issues, omission or deception.
debt	A social security or family assistance debt arises where the legislation provides that a customer owes a debt to the Commonwealth because of receipt of an overpayment, imposition of penalty interest, recovery of an advance or other reason. Not all overpayments result in a debt, particularly under the former 1947 Act and the adjustment provisions of the family assistance law, and not all debts are recoverable.
error	Overpayments may occur because of error by Centrelink ('administrative error'), by a customer or due to a combination of causes.
'compliance' activities	This is a general term used by the Department of Human Services (DHS) to describe its processes for prevention and identification of overpayments.
non-compliance	This refers to failure to comply with a statutory obligation, usually (but not necessarily) with some connotation of knowing or reckless conduct.
serious non-compliance	'Serious non-compliance' is used by DHS as a general description of fraudulent or associated behaviour (see, for example, *Annual Report 2015–16*, p 119).
fraud	This is an activity which is an offence under the Social Security Law, the Family Assistance Law or criminal legislation such as the *Criminal Code* and the *Crimes Act 1914* (Cth). An offence may be committed under pt 6 of the *Social Security (Administration) Act 1999* (Cth) if the relevant conduct is false, misleading or reckless.

In a *Canberra Times* article 'Welfare crackdown a $270m flop: report',[12] the reporter, DHS and the Minister for Human Services used varying language in relation to compliance measures:

- The reporter was reporting on an Audit Office report which found that 'Government efforts to crack down on welfare have fallen hundreds of millions short of target' because 'compliance' efforts had fallen $270 million short of a target of $790 million.
- DHS disagreed with the Audit Office findings, claiming that it had delivered savings of $998 million from seven new compliance measures, putting it ahead by $210 million.
- The Minister noted that the Audit Office and DHS had used different accounting measures. The Minister said that 'the overall anti-welfare fraud effort was going very well' (reporter's language). The Minister was then quoted: 'Across all fraud and compliance activities, the Commonwealth realised $3.9 billion in savings since 2012, with the 10 measures delivering savings of $1.4 billion against a target of $1.07 billion, exceeding the target by 35 per cent.'

In this example, the language used is 'crack down', 'compliance' efforts, 'new compliance measures', 'anti-welfare fraud effort', 'all fraud and compliance measures' and 'measures delivering savings'. Each of them has a different shade of meaning and could quite properly be applied to different resource expenditures and different savings targets.

Associate Professor Lisa Marriott illustrated the relevance of language about welfare payments in a recent seminar at the ANU Crawford School. She described variations in language used in the context of social welfare and taxation in New Zealand, where 'benefits fraud' totalled NZ$24.17 million in 2014–15, whereas tax fraud, described euphemistically as 'tax position differences', totalled NZ$1200 million. The disparity between New Zealand taxpayers and social welfare recipients was further emphasised by the fact that, in 2011–12, Inland Revenue wrote off NZ$435 million of tax debt (54.1 per cent of penalties and 11.6 per cent of all debt), whereas the Ministry of Social Development wrote off NZ$6 million of social welfare debt.[13] I suggest that the Australian experience around tax evasion and write-off is reasonably similar to the New Zealand position; however, the amount of social security debt waived in Australia probably is relatively much higher because of our legislative provisions, particularly pt 5.4 of the 1991 Act.

DHS compliance activities

The DHS *Annual Report 2015–16* reported on Social Security and Welfare Programme Compliance.[14] This covered social security and family assistance payments.

DHS reported on early intervention compliance activities, including the Online Compliance Intervention (OCI), in the following terms.

Table 45: Social welfare payments compliance activity

	2013–14	**2014–15**	**2015–16**	**% change**
Interventions	869 082	923 462	987 895	+7.0
Reductions in payments	77 272	52 100	69 921	+34.2
Fortnightly savings in future	$19.2 million	$18.2 million	$21.7 million	+19.2
Prevented outlays	$51.8 million	$61.4 million	$63.7 million	+3.7
Debts raised	101 351	126 134	210 009*	+66.5
Total debt value	$283.6 million	$362.1 million	$694.6 million*	+91.8

* The introduction of the Strengthening the Integrity of Welfare Payments — Employment Income Matching budget measure saw an increased focus on addressing historical overpayments. This compliance activity has resulted in a high incidence of debt and has subsequently contributed to a significant increase in debt savings from the 2014–15 financial year.

DHS also reported on the total number of social welfare debts raised.

Table 49: Debts raised from customers receiving social welfare payments

	2013–14	2014–15	2015–16
Number of debts raised	2 230 894	2 350 131	2 439 431
Amount raised	$2.2 billion	$2.5 billion	$2.8 billion

DHS reported on the amount of customer debt recovered, including data on the modest proportion of debts that are recovered using commercial agents; usually this involves debtors who are no longer customers of DHS Centrelink.

Table 50: Social welfare customer debt recovered

	2013–14	2014–15	2015–16
Total debts recovered	$1.27 billion	$1.43 billion	$1.54 billion
- amount recovered by contracted agents	$124.8 million	$131.3 million	$144.7 million
- percentage of total recovered by agents	9.9%	9.2%	9.4%

Fraud

In 2015–16 DHS referred 980 social welfare cases to the Commonwealth Director of Public Prosecutions (CDPP) compared with 1366 referrals in 2014–15. The DHS *Annual Report 2015–16* includes little other statistical data on social security fraud.[15]

The CDPP *Annual Report 2015–16* stated that the CDPP dealt with 1246 summary defendants and 29 indictable defendants referred to them by DHS Centrelink in that financial year.[16]

In a 2012 article, (now) Professor Grainne McKeever studied social security fraud in the UK and Australia. Her findings are an interesting reflection on social security 'fraud':

> In the UK levels of error — both claimant and official error — outstrip levels of fraud. The National Audit Office notes that in 2010–11, £1.2 billion was estimated by the Department for Work and Pensions to be lost to fraud, £1.2 billion to customer error and £800 million to official error, out of a total of £153.6 billion spent on benefits. (NAO 2011)
>
> In Australia levels of 'non-compliance' — the combined figure for error and fraud — is $536 million (out of an $87 billion benefits bill), of which $113.4 million is customer debts identified through fraud investigations (ANAO 2010: para 7).[17]

Chapter 5 — Overpayments and debt recovery

Chapter 5 of the 1991 Act (ss 1222–1237) replaced ss 246 and 251 of the 1947 Act and was originally structured in four parts:

- pt 5.1, 'Effect of Chapter';
- pt 5.2, 'Amounts Recoverable under this Act'
- pt 5.3, 'Methods of Recovery'; and
- pt 5.4, 'Non-Recovery of Debts'.

Part 5.5, 'Departure Prohibition Orders', was inserted by the *Budget Savings (Omnibus) Act 2016* (Cth) (No 55/2016), commencing on 1 January 2017.

Chapter 5 comprises a code

In *Walker v SDSS*,[18] the Full Federal Court held that ch 5 of the 1991 Act is a code providing for the recovery of social security payments. Justice Drummond pointed to the contribution of s 1222 to this conclusion:

> The table contained in sub-section (2) lists the sections of the Act under which recoverable debts arise; against each section there is listed the means of recovery, generally but not invariably by 'deductions', 'legal proceedings' and 'garnishee notice'. A column in the table identifies the particular sections of the Act that prescribe each such recovery method. The opening words of sub-section (1) are a strong indication that Chapter 5 contains an exclusive statement of how the Commonwealth can recover social security payments of the kind listed in that sub-section.
>
> …
>
> Chapter 5, however, does in my opinion reveal an intention to state, in an exclusive way, how the Commonwealth can recover certain kinds of overpaid benefits. Chapter 5 commences with the statement in s 1222 of its intended operation, which included the identification of those social security and other payments which are recoverable by the Commonwealth, and lists the procedures to be followed by the Commonwealth in recovering each class of payment. The Chapter then defines these recovery procedures and makes provision for recovery in two other ways (viz., by instalments and by consent deductions). It concludes with provisions empowering the Secretary to forego the Commonwealth's entitlement to recovery of such payments. In my opinion, the opening words of s 1222(1) and the structure of Chapter 5 show that it is a code which prescribes the exclusive methods whereby recovery can be lawfully effected of those social security and other benefits listed in s 1222(1).[19]

In *Coffey v SDSS*,[20] the Full Federal Court dealt with a converse situation. In that case, the applicant brought an action in the Federal Court alleging that a social security debt had been wrongly raised against him and seeking recovery of the amount plus interest. The Full Federal Court held that the Court did have jurisdiction to entertain the claim under s 39B(1A) of the *Judiciary Act 1903* (Cth) because that Act confers jurisdiction on the Court in matters 'arising under a law made by the Parliament'. However, the Court held that to allow the action would be an abuse of process because the Social Security Act provides a comprehensive and multi-level process for review of decisions under the Act and the applicant had availed himself fully of that review process.

This decision that the Act comprises a code has contemporary relevance. One example arose in the course of the OCI (colloquially known as 'Robodebt'), where some community agencies became concerned that DHS had sold the debts to external collection agencies and that they were harassing social security clients in an attempt to maximise their return from the purchase. In the event, DHS gave assurances that the two external agencies, Probe and Dun & Bradstreet, were simply acting as agents for DHS, which is probably within the parameters of pt 5.3, either as an element of 'legal proceedings' or in the general course of administration of the Act. It is unlikely that a social security debt purchased by a third party would have any basis for recovery under ch 5.

Part 5.1 — Effect of chapter

Section 1222 in pt 5.1 sets out the methods of recovery for the various types of debts recoverable under the Act. The Recovery Methods Table sets out 25 items specifying the debt, the means of recovery and the relevant recovery sections. In almost all cases, the means of recovery is deductions (ss 1231 and 1234A); legal proceedings (s 1232); garnishee notice (s 1233); and repayment by instalments (s 1234). An example is item 1.

1	1135 (pension loan debt)	deductions legal proceedings garnishee notice repayment by instalments	1231, 1234A 1232 1233 1234

The exceptions to use of these means of recovery are items 12, 14, 18 and 19.

12	1226 (compensation payer and insurance debt)	legal proceedings	1232
14	1226 (compensation payer and insurance debt)	enforcement of security deductions legal proceedings garnishee notice repayment by instalments	1230C 1232, 1234A 1232 1233 1234
18	1230 (garnishee notice debt)	legal proceedings garnishee notice	1232 1233
19	1230 (garnishee notice debt under 1947 Act)	legal proceedings garnishee notice	1232 1233

Section 1222(3) provides that overpayments and debts under certain other Acts may be recovered by means of deduction from the person's social security payment.

Part 5.2 — Amounts recoverable under this Act

Part 5.2 (ss 1222A–1230C) specifies the various debts which are raised under the Social Security Act and other legislation and which can be recovered under the Act.

Section 1222A, 'Debts due to the Commonwealth', provides:

> If an amount has been paid by way of social security payment, or by way of fares allowance under the *Social Security (Fares Allowance) Rules 1998*, the amount is a debt due to the Commonwealth if, and only if:
>
> (a) a provision of this Act, the 1947 Act, the *Social Security (Fares Allowance) Rules 1998* or the *Data-matching Program (Assistance and Tax) Act 1990* expressly provided that it was or expressly provides that it is, as the case may be; or
>
> (b) the amount:
>
> (i) should not have been paid; and
>
> (ii) was paid before 1 January 1991; and

(iii) was not an amount to which subsection 245B(2) of the 1947 Act applied.

Section 1222A had no direct equivalent in the 1947 Act and operates to exclude the possibility that a debt may arise on a basis other than the operation of the Social Security Law (or the Fares Allowance Rules or *Data-matching Program (Assistance and Tax) Act 1990* (Cth)). One such possibility, whereby a debt could be raised independently of the specific provisions of the Social Security Act, was the principle in *Auckland Harbour Board v R*,[21] as stated by Viscount Haldane:

> no money can be taken out of the consolidated fund into which the revenues of the State have been paid, excepting under a distinct authorisation from parliament itself. The days are long gone by in which the Crown, or its servants, apart from parliament, could give such an authorisation or ratify an improper payment. Any payment out of the consolidated fund made without parliamentary authority is simply illegal and *ultra vires* and may be recovered, by the government if it can ... be traced.[22]

Section 1223, 'Debts arising from lack of qualification, overpayment etc.', is the key section raising social security debts. Section 1223(1) now provides:

> (1) Subject to this section, if:
>
> (a) a social security payment is made; and
>
> (b) a person who obtains the benefit of the payment was not entitled for any reason to obtain that benefit;
>
> the amount of the payment is a debt due to the Commonwealth by the person and the debt is taken to arise when the person obtains the benefit of the payment.

The effect of this provision, essentially, is that any overpayment of a 'social security payment' is a recoverable debt.

Other sections in pt 5.2 deal with other specific types of debts, including:

- s 1223AA, 'Debts arising from prepayments and certain other payments';
- s 1223AB, 'Debts arising from AAT stay orders';
- s 1223ABA, 'Debts arising in respect of one-off payment to carers';
- s 1224C, 'Data-matching Program (Assistance and Tax) Acts debts';
- s 1227, 'Assurance of support debts'; and
- s 1228, 'Overpayments arising under other Acts and schemes': This provision provides for debts under the *Veterans' Entitlements Act 1986* (Cth), the *A New Tax System (Family Assistance) Act 1999* (Cth), payments under various educational schemes and compensation paid under the *Military Rehabilitation and Compensation Act 2004* (Cth), to be recoverable by deduction under the 1991 Act.

The sections quoted are only an illustration of the many debts specifically provided for in the various sections in pt 5.2.

Data-matching

Since 1990, data-matching between Commonwealth Government agencies and the ATO has been conducted under the *Data-matching Program (Assistance and Tax) Act 1990* (Cth). Section 1224C was inserted into pt 5.2 by the *Social Security Legislation Amendment (No 3) Act 1992* (Cth) (No 230/1992) as part of measures intended to make debts identified through data-matching recoverable under the Social Security Act. Relevant cases on social

security data-matching include *Re Sawyer and SDSS*,[23] *Re Sawyer and SDSS*[24] and *Re Frugtniet and SDSS*.[25]

The *Data-matching Program (Assistance and Tax) Act 1990* (Cth) specifies many procedures protective of customer interests, including that a program cycle must be completed within two months of its commencement and that a new cycle cannot begin until the previous one has finished. No more than nine cycles may be conducted each year. During 2015–16, two complete cycles were conducted for DHS and four complete cycles were conducted for the Department of Veterans' Affairs.

The DHS *Annual Report 2015–16* foreshadowed the cessation of data-matching under the *Data-matching Program (Assistance and Tax) Act 1990*:

> In 2016–17 the department will undertake an enhanced approach to address compliance risks covered by the Data-matching Program. The new approach will replace the activity governed by the *Data–matching Program (Assistance and Tax) Act 1990* and bring the activity in line with the department's other data matching activity and the OAIC's Guidelines on Data Matching in Australian Government Administration (voluntary data matching guidelines). Programme cycles conducted under the Data-matching Program will be gradually phased out and cease during 2016–17.[26]

Part 5.3 — Methods of recovery

Part 5.3 provides for various methods of recovery of debts specified as recoverable under pt 5.2. Part 5.3 should be read in conjunction with s 1222 in pt 5.1, which specifies which methods of recovery apply to each kind of debt (discussed above). The primary means of recovery are:

- s 1231, 'Deductions from debtor's pension, benefit or allowance';
- s 1232 'Legal proceedings';
- s 1233 'Garnishee notice'; and
- s 1234 'Arrangement for payment of debt' (repayments by instalments).

The Secretary can also recover funds from a bank where a payment has been made to the wrong person or after a recipient's death (s 1234) and, with consent, by deductions from the social security payment of a person who is not the debtor (s 1234A).

The 1991 Act has no counterpart to a highly unusual provision in the *Social Security Act 1964* (NZ) whereby the partner of a person engaging in welfare fraud can be made jointly liable for a debt where they 'knew, or ought to have known' of the fraud.[27] This appears to be an open invitation to increased levels of 'sexually transmitted debt', as it does not take into account the way that domestic violence and financial duress affects the choices many women realistically have in relation to their partner's financial affairs. Under Australian law, in some cases, a partner may be an accessory to the fraud or may be prosecuted as a joint offender and be subject to a reparation order.

Section 1231 — Deduction from debtor's pension, benefit or allowance

Section 1231 authorises the Secretary to recover debts by deductions from the debtor's social security entitlement.

Section 1232 — Legal proceedings

Section 1232 provides:

> If a debt is recoverable by the Commonwealth by means of legal proceedings under:
>
> (a) Part 5.2 of this Act; or
>
> (b) the 1947 Act; or
>
> (c) the *Social Security (Fares Allowance) Rules 1998*;
>
> the debt is recoverable by the Commonwealth in a court of competent jurisdiction.

Section 251 of the 1947 Act set a limitation period of six years on the initiation of 'proceedings' — a term of some ambiguity. The 1991 Act avoided this problem by specific reference to 'legal proceedings', where this is the intention, and 'action under this section', where some other action is contemplated (see, for example, s 1231A(2)(a)).

Section 1233 — Garnishee

If a social security debt is recoverable by the Commonwealth, s 1233(1) provides that 'the Secretary may by written notice given to another person … require the person to whom the notice is given to pay the Commonwealth' where that person holds or may subsequently hold money for or on account of the debtor.

A person who fails to comply with a notice under s 1233(1) commits an offence with a penalty of imprisonment for 12 months (provided the person is capable of complying with the notice). Section 1233(7) states that this section applies to money in spite of any law of a state or territory (however expressed) under which the amount is inalienable.

The department is entitled to use s 1233 to apply a payment of arrears of benefit to a pre-existing overpayment.[28] In garnisheeing the payment of arrears to Mr Walker, the department drew a manual cheque, which was then deposited personally into Mr Walker's bank account by a departmental employee. The garnishee notice was already in force and served on the bank before deposit, ensuring the effectiveness of the process.

In a later appeal to the Full Federal Court in *Walker v SDSS*,[29] the Court ultimately held that the garnishee should stand. In its decision, the Full Court discussed whether the department's actions had denied natural justice to the applicant by failing to give him an opportunity to be heard on the issue of garnishee or notice of the intention to garnishee. The Court (Drummond and Mansfield JJ), drawing a parallel to the collection of tax by attachment of debts, held that there were good reasons why s 1233 should not be construed as requiring the Secretary to comply with the rules of natural justice in deciding whether to serve a garnishee notice.

In *Re King and SDSS*,[30] substantial amounts of money had been credited to a loan account in the name of the applicant, without his knowledge, by a discretionary family trust; the credits appeared to be part of a tax minimisation scheme established by his father. Evidence before the Tribunal showed that the son was beneficially entitled to the sum of $97 321 standing to his credit in the trust and that the trust held more than $600 000 in cash on deposit. The Tribunal noted that this would appear to be an appropriate case for use of the garnishee power to recover a social security debt of $17 713.63.

Effect of bankruptcy on recovery of a debt

Decisions under the 1947 Act suggested that a social security debt could be recovered by deductions from payments.[31] However, in *SDSS v Southcott*[32] (*Southcott*), the Federal Court

held that the Department had no power to recover a social security debt from a debtor by way of garnishee because the debt raised under former s 1224(1) was replaced by a right to prove in bankruptcy, and former s 1224(2) could not operate because that subsection was premised upon the existence of 'a debt due to the Commonwealth under subsection (1)'. Justice North distinguished *Taylor v SDSS*[33]on the basis of the different wording of the relevant section in the 1947 Act. While *Southcott* specifically related to garnishee, the reasoning can be extended to other forms of recovery such as proceedings and deduction from payments.

Debts owed prior to bankruptcy are debts provable in bankruptcy, and it is not open to Centrelink to make determinations for waiver in respect of those debts. In *Re Klewer and SDFHCSIA*,[34] Centrelink recovered from the applicant part of a debt that was incurred prior to bankruptcy. The Tribunal held that it could not waive the pre-bankruptcy debt, but it could waive that part of the debt that arose after the bankruptcy was declared.

In *Re Caudell and SDEEWR*,[35] one of the applicants went into bankruptcy after the Social Security Appeals Tribunal decision but before the AAT proceedings. On the basis of s 58(1) of the *Bankruptcy Act 1966* (Cth), the Tribunal held that it had no power to continue with the appeal from that applicant. See also *Re Cook and SDEWR*[36] (*Re Cook*) and *Re Barber and SDFHCSIA*[37] to similar effect, relying on s 60 of the Bankruptcy Act. In *Re Cook*, the Tribunal noted that the applicant may have a right of review if the Secretary commenced recovery action for the debt, after his discharge from bankruptcy, on the basis that the debt was 'incurred by means of fraud'.[38]

The current approach to bankruptcy is illustrated by *Re SDFaCS and Grindlay*,[39] where the respondent was overpaid parenting payment of $12 895.21 because of her husband's income. The Tribunal held that the debt was divisible and that the respondent was responsible for the overpayments which accrued after the date of her bankruptcy. The amount which accrued before her bankruptcy ($597.53) was provable under s 82 of the *Bankruptcy Act 1966* (Cth) and was no longer recoverable under the 1991 Act (in the absence of fraud).

Debts incurred by fraud

In *Re SDSS and Malaj*,[40] the Department was seeking recovery by garnishee pursuant to s 1233 of the 1991 Act of a debt which wholly arose under the 1947 Act. The respondent argued that he had been released from the debt by operation of s 153 of the Bankruptcy Act. The Tribunal held that the debt was incurred by fraud and thus his discharge from bankruptcy did not release him from his debt to the Commonwealth because of s 153(2)(b). This provision states that the discharge of a bankrupt from bankruptcy does not release the bankrupt from 'a debt incurred by means of fraud'. Note that the Department cannot commence recovery action until after the debtor is discharged from bankruptcy.[41]

Part 5.4 — Non-recovery of debts

Part 5.4, 'Non-recovery of debts' (ss 1235–1237AB), provides for write-off and waiver of debts. The sections in this part are:

- s 1235, 'Meaning of *debt*' (debt recoverable under pt 5.2, the 1947 Act, an international social security agreement and the Fares Allowance Rules);
- s 1236, 'Secretary may write off debt';
- s 1237, 'Power to waive Commonwealth's right to recover debt';
- s 1237A, 'Waiver of debt arising from error';
- s 1237AA, 'Waiver of debt relating to an offence';

- s 1237AAA, 'Waiver of small debt';
- s 1237AAB, 'Waiver in relation to settlements';
- s 1237AAC, 'Waiver where debtor or debtor's partner would have been entitled to an allowance' (applies only to an entitlement of family payment, family allowance, parenting allowance and parenting payment);
- s 1237AAD, 'Waiver in special circumstances';
- s 1237AAE, 'Extra rules for waiver of assurance of support debts'; and
- s 1237AB, 'Secretary may waive debts of a particular class'.

Legislative history — Write-off and waiver

Under the 1947 Act, in s 251 (and earlier s 240), the Secretary was given a general discretion to waive or write off debts. The exercise of this discretion was shaped by principles developed by the Full Federal Court in *Hales*, discussed above.

Section 251 of the 1947 Act in essence was replaced by two sections in the 1991 Act: s 1236, dealing with write-off of debts; and s 1237, dealing with waiver. Section 1237 included a provision, s 1237(3), which empowered the Minister to give directions relating to the Secretary's power to waive debts. A similar provision was included in the 1947 Act, but no Directions were ever issued under that Act.

The Minister issued a Notice under s 1237(3) on 8 July 1991, taking effect from that date, and on 5 May 1992, this Notice was revoked and replaced with a new Notice taking effect from 18 May 1992. The Full Federal Court in *Riddell v SDSS*[42] ultimately determined that the Guidelines were invalid, as they improperly fettered the broad discretion in the section. In consequence, the principles developed in *Hales* continued to guide the exercise of the discretion until legislative amendments in 1993 (*Social Security (Budget and Other Measures) Legislation Amendment Act 1993* (Cth)), in 1996 (*Social Security Legislation Amendment (Carer Pension and Other Measures) Act 1995* (Cth)) and in 1997 (*Social Security Legislation Amendment (Budget and Other Measures) Act 1996* (Cth) (1 October 1997)). The 1996 and 1997 amendments were relatively beneficial, so there have not been difficulties around retrospectivity.

The write-off and waiver provisions have remained fairly stable since 1997 and a considerable body of cases now discuss the various provisions, making reference to the *Hales* principles and cases under the 1947 Act that are generally of historical interest only.

Write-off of debts

Section 1236, in its current form, provides:

> (1) Subject to subsection (1A), the Secretary may, on behalf of the Commonwealth, decide to write off a debt, for a stated period or otherwise.
>
> (1A) The Secretary may decide to write off a debt under subsection (1) 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.

In *SDSS v Hodgson*,[43] the Federal Court described the meaning of 'write-off':

> The power to 'write off' a debt stems from s 1236 of the 1991 Act. It seems that the expression 'write off' is used in an accounting sense, that is to say that action is taken to write off an existing liability in the accounting records of the Commonwealth dealing with social security: *cf AGC (Advances) Ltd v Commissioner of Taxation* (1975) 132 CLR 175. So used, the expression does not impact upon the liability of the person overpaid, although, as a practical matter, once a debt has been written off, it is unlikely that recovery would be pursued.[44]

A Note at the end of an earlier form of s 1236 explains the meaning of write-off in the following terms:

> Note: if the Secretary writes off a debt, this means an administrative decision has been made that, in the circumstances, there is no point in trying to recover the debt. In law, however, the debt still exists and may later be pursued.

Amendments by the *Social Security Legislation Amendment (Budget and Other Measures) Act 1996* (Cth), which commenced on 1 October 1997, substantially restricted the ambit of the write-off powers under the Act. The end result of this is that write-off is not particularly useful to most recipients, as the debt will be recovered from their payment in an amount which usually is manageable for the customer. Write-off may still be important for a debtor who is not currently on benefit.

Waiver — administrative error

Section 1237A(1), 'Waiver of debt arising from error', provides:

> (1) Subject to subsection (1A), 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.
>
> Note: Subsection (1) 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).

Section 1237A(1A) provides that subs (1) only applies if:

> (a) the debt is not raised within a period of 6 weeks from the first payment that caused the debt; or
>
> (b) if the debt arose because a person has complied with a notification obligation, the debt is not raised within a period of 6 weeks from the end of the notification period;
>
> whichever is the later.

The key elements of this waiver are:

- 'attributable solely to';
- 'administrative error'; and
- 'received in good faith'.

In *SDEETYA v Prince*[45] (*Prince*), a student cancelled his entitlement to Austudy in December but payments continued to be made for several months thereafter. After six weeks, the student became aware of the continuing payments and contacted the Department of Education Employment Training and Youth Affairs (DEETYA) repeatedly in an attempt to have the payments stopped. Payment was finally cancelled after the student's MP contacted DEETYA on his behalf. The Federal Court held that the money was not

received in good faith at any time (even before he became aware of the payments) because he knew he had no entitlement to Austudy.

Prince has been consistently followed and applied in a great many cases since 1997.

Waiver — special circumstances

Section 1237AAD reinstated waiver in 'special circumstances' provided:

- the debt did not result from the debtor or another person knowingly making a false statement or representation, or failing to comply with the Act (s 1237AAD(a));
- there were special circumstances (other than financial hardship alone) that made it desirable to waive (s 1237AAD(b)); and
- it was more appropriate to waive than to write off the debt (s 1237AAD(c)).

The addition of 'knowingly' makes it clear that the provision is not intended to catch situations such as in *McAuliffe v SDSS*[46] and *Re King and SDSS*[47] where objectively the statements were untrue but this was not known to the debtor.

In *SDSS v Hales*,[48] French J discussed the breadth of the discretion in s 1237AAD:

> The concept of special circumstances is broad. A constellation of factors, including financial circumstances, may fall within it. The express exclusion of financial hardship alone as a special circumstance is an indicator that it would otherwise be included. This gives some measure of the range of circumstances which will qualify as special. But as a matter of grammar and ordinary logic, the exclusion of financial hardship alone as a special circumstance does not mandate its inclusion in the range of matters constituting such circumstances for the purpose of enlivening the Secretary's discretion. …
>
> The evident purpose of s 1237AAD is to enable a flexible response to the wide range of situations which could give rise to hardship or unfairness in the event of a rigid application of a requirement for recovery of debt. It is inappropriate to constrain that flexibility by imposing a narrow or artificial construction upon the words. It may be that there will be few cases in which the Secretary will be satisfied that there are special circumstances in the absence of financial hardship. It may be that there are few cases in which having found special circumstances to exist, the Secretary would exercise the discretion to waive in the absence of financial hardship. But to anticipate the limits of the categories of possible cases by imposing on the language of the section a fetter upon its application which is not mandated by its words, is to erode its useful purpose.[49]

In *Hales*, the Court observed that 'the exclusion of financial hardship alone as a special circumstance does not mandate its inclusion in the range of matters constituting such circumstances for the purpose of enlivening the Secretary's discretion'[50] and also rejected the Secretary's argument that, if it was not appropriate to write off a debt, the Tribunal was precluded from waiving the debt.

There have been differences of opinion in the Tribunal about whether a notional entitlement to another payment could be relevant special circumstances. In *Oberhardt v SDEEWR*,[51] Spender J held that notional entitlement should not be excluded from the range of relevant considerations in deciding whether there are 'special circumstances' to waive a debt under s 1237AAD.

Part 5.5 — Departure prohibition orders

Part 5.5, 'Departure prohibition orders' (ss 1240–1260), was inserted into the Social Security Act by item 13 in sch 13 to the *Budget Savings (Omnibus) Act 2016* (Cth) (No 55/2016), commencing on 1 January 2017. The measure was intended to protect the integrity of

outlays through welfare payments, and encourage welfare debtors to repay their debts, by using departure prohibition orders (DPOs) (similar to the arrangements applying in the child support legislation) to prevent targeted debtors from leaving Australia. DPOs will be used for debtors who persistently fail to enter into acceptable repayment arrangements.

Part 5.5 has seven divisions:

- div 1, 'Secretary may make departure prohibition orders' (s 1240);
- div 2, 'Departure from Australia of debtors prohibited' (s 1241);
- div 3, 'Other rules for departure prohibition orders' (ss 1242–1245);
- div 4, 'Departure authorisation certificates' (ss 1246–1251);
- div 5, 'Appeals and review in relation to departure prohibition orders and departure authorisation certificates' (s 1252–1255);
- div 6, 'Enforcement' (ss 1256–1258); and
- div 7, 'Interpretation' (ss 1259–1260).

The Explanatory Memorandum discussed the measure:

> **Outline of chapter**
>
> Schedule 13 of the Bill introduces departure prohibition orders so that, in certain cases where a person does not have a satisfactory arrangement in place to repay their social security, family assistance, paid parental leave or student assistance debt(s), they may be prevented from leaving Australia without either having wholly paid their debt(s) or making satisfactory arrangements to pay. This system will closely mirror the existing departure prohibition order system in place under the *Child Support (Registration and Collection) Act 1988* (Child Support Registration and Collection Act). Targeted debtors will largely comprise ex-recipients of social welfare payments but may also apply to other social welfare payment recipients in limited circumstances.
>
> **Background**
>
> This Part amends the *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act), *Paid Parental Leave Act 2010*, *Social Security Act 1991* and *Student Assistance Act 1973* to introduce departure prohibition orders to prevent debtors under these Acts from leaving the country. Departure prohibition orders will not be made without consideration of all the circumstances and only where the Secretary believes on reasonable grounds that it is appropriate to do so. Where a departure prohibition order is in force, the Secretary can vary or revoke the order, or can issue a departure authorisation certificate allowing the person to depart the country for a specified period of time.
>
> Departure prohibition orders were introduced into the *Child Support Registration and Collection Act* in 2000. Currently, there are approximately 120,000 child support customers with child support debts. However, there are only some 2,000 departure prohibition orders in place — that is, departure prohibition orders apply to less than two per cent of all debtors. Departure prohibition orders are only invoked when all reasonable administrative actions have been undertaken to recover the child support debt from the paying parent.
>
> While the number of social welfare payment debtors is significantly higher than the number of child support debtors, it is anticipated that the departure prohibition orders will only be issued in the most extreme social welfare payment debt cases.[52]

Departure prohibition orders under the child support legislation

Section 1240 is based on and is similar to s 72D of the *Child Support (Registration and Collection) Act 1988* (Cth), which provides that the Child Support Registrar may make a DPO on grounds similar to s 1240(1)(a)–(c).

In *Whittaker v Child Support Registrar*,[53] Lindgren J discussed the nature and purpose of a DPO:

> … Generally speaking, the terms of s 72D(1) show that a DPO is intended to 'ensure' that a person does not depart from Australia without either wholly discharging his or her child support liability or making arrangements satisfactory to the Registrar for its discharge. While a DPO is not security in a proprietary sense, it is security in a broader sense of a procedure designed to prevent recovery being frustrated.
>
> It may be that the present submission is intended to distinguish between a purpose of preventing a particular imminent departure from Australia and a more general prevention of any departure from Australia. In my view even the latter is within para (b) of s 72D(1) [s 1240(1)(c)]. That is to say, that paragraph is satisfied if the Registrar believes on reasonable grounds that it is 'desirable' to make the DPO for the purpose of 'ensuring' (a strong word: see Troughton v Deputy Commissioner of Taxation [2008] FCA 18; (2008) 66 FCR 9 at [20]) that the person does not depart at any time in the future from Australia for any foreign country without first discharging the child support liability or making arrangements satisfactory to the Registrar for its discharge.[54]

The DHS *Annual Report 2015–16* reported on the amount of child support debts collected under DPOs: $6.2 million (2013–14); $6.7 million (2014–15); and $7.9 million (2015–16). It did not provide any other data such as the number of orders.

Departure prohibition orders under the Social Security Act

Section 1240 in div 1 authorises the Secretary to make a DPO prohibiting a person from departing from Australia for a foreign country if circumstances set out in paras (a)–(c) apply. Section 1241 imposes a penalty of imprisonment for 12 months for departure from Australia knowingly or recklessly in breach of a DPO.

The *Guide to Social Security Law*[55] sets out policy for administration of DPOs; however, this is little more than a summary of the legislative provisions and does not give a great deal of additional insight to when and how the discretion should be exercised. The Explanatory Memorandum states that DPOs 'will only be issued in the most extreme social welfare payment debt cases' and the practicalities of the scheme suggest that this is likely to be the case for reasons including that:

- many debtors who travel overseas will still be on social security payments. If the payment is fully portable (for example, the Age Pension), debt recovery can be easily achieved by deductions from instalments of payments. Where the payment is portable only for a short period, data-matching with the Department of Immigration and Border Protection usually ensures that the recipient's departure overseas is quickly discovered by Centrelink and payment is suspended — a saving to the Department considerably larger than any likely fortnightly repayment amount under pt 5.3
- a DPO would be more likely where the person is no longer in receipt of income support payments and there are reasonable prospects of recovering the debt through DPO action — for example, because the debtor has assets or has prospects of a significant income while overseas. Likely triggers for a DPO will be if the debtor is transferring assets offshore (either directly or indirectly) or they have sufficient resources to live offshore (for example, family, assets, employment or business).

Where a DPO has been issued, there will be substantial pressure on the debtor to pay the debt in full or to negotiate with the Secretary to have a departure authorisation certificate (DAC) issued on one of the grounds in s 1247 or by giving security for the debtor's return to Australia (s 1248).

Appeals and reviews in relation to departure prohibition orders

Section 1252 in div 5 provides that a person aggrieved by the making of a departure prohibition order may appeal to the Federal Court or the Federal Circuit Court against the making of the order. Section 1254 provides that the Court may, in its discretion:

(a) make an order setting aside the order; or
(b) dismiss the appeal.

Section 1255(1) provides that an application may be made to the AAT for review of a decision of the Secretary under s 1244 ('Revocation and variation of departure prohibition orders'), s 1247 ('When Secretary must issue departure authorisation certificate') and s 1248 ('Security for person's return to Australia'). Section 1255(2) provides that pts 4 and 4A of the *Social Security (Administration) Act 1999* (Cth) does not apply in relation to these decisions. Accordingly, there will be no internal review or social security first review by the Tribunal in departure prohibition order matters.

Extended meaning of 'Australia' for departure prohibition orders

Section 1260(1) in div 7 provides that, for the purposes of pt 5.5, 'Australia', when used in a geographical sense, includes the external territories. This disapplies the definition of 'external Territory' in s 23(1) in pt 1.2 of the Social Security Act. Section 1260(2)(b) provides that 'external Territory' has the meaning given by s 2B of the *Acts Interpretation Act 1901* (Cth), which states:

> ***external Territory*** means a Territory, other than an internal Territory, where an Act makes provision for the government of the Territory as a Territory.

This has the effect of permitting travel to Norfolk Island, Cocos (Keeling) Islands and Christmas Island if a DPO is in force.

Part 6, Social Security (Administration) Act — offences

Social security offences may be prosecuted under the *Crimes Act 1914* (Cth) or the *Criminal Code* (*Criminal Code Act 1995*) as an alternative to use of pt 6 of the Social Security (Administration) Act.

Under the Crimes Act, the more serious offences were prosecuted as indictable offences, often under former ss 29B, 29C or 29D of that Act:

> **False representation**
>
> **29B** Any person who imposes or endeavours to impose upon the Commonwealth or any public authority under the Commonwealth by any untrue representation, made in any manner whatsoever, with a view to obtain money or any other benefit or advantage, shall be guilty of an offence.
>
> Penalty: Imprisonment for 2 years.
>
> **Statements in applications for grant of money etc.**
>
> **29C** A person who, in or in connexion with or in support of, an application to the Commonwealth, to a Commonwealth officer or to a public authority under the Commonwealth for any grant, payment or allotment of money or allowance under a law of the Commonwealth makes, either orally or in writing, any untrue statement shall be guilty of an offence.
>
> Penalty: Imprisonment for 2 years.
>
> Fraud
>
> **29D** A person who defrauds the Commonwealth or a public authority under the Commonwealth is guilty of an indictable offence.

> Penalty: 1,000 penalty units or imprisonment for 10 years, or both.

In *R v Evans*,[56] the New South Wales Court of Criminal Appeal held that deliberate silence could amount to a 'representation' for the purposes of s 29B. The Court noted that:

> Whether failure to disclose information involves, or amounts to a representation, depends upon the circumstances of the case.
>
> Whether suppression of the truth involves suggestion of falsehood is, in any given case, a question of fact. (at 142 FLR 320)

Under the *Criminal Code*, the relevant offences are found in pt 7.3, 'Fraudulent conduct', and pt 7.4, 'False or misleading statements'.

In *Poniatowska v Commonwealth DPP*,[57] the Full Court of the South Australian Supreme Court held that s 135.2 of the *Criminal Code* does not support a prosecution for the offence of obtaining financial advantage where there was an omission to comply with a notice given under pt 3 of the *Social Security (Administration) Act 1999* (Cth):

> In summary, we are of the view that s 135.2 does not define any duty or obligation relevant to an offence committed by way of an omission. The DPP does not rely on any notice issued to the appellant for the purpose of establishing such a duty; nor was it suggested that the duty was to be found elsewhere in the *Administration Act*. The approach of the *Administration Act* is to provide for the issuing of notices by the department requiring information and to impose a penalty punishable by imprisonment for a failure to comply with such notices. The *Administration Act* does not create a separate 'stand alone' obligation. We have explained why we consider that s 135.2 does not impose a relevant obligation.[58]

In *Commonwealth Director of Public Prosecutions v Poniatowska*,[59] the High Court dismissed an appeal. By the time the decision was handed down, the *Social Security and Other Legislation Amendment (Miscellaneous Measures) Act 2011* (Cth) (No 91/2011) had been enacted, with a retrospective commencement of 20 March 2000. This Act made the debts recoverable, but it does not support the many *Criminal Code* convictions entered between 12 June 2001 and 14 August 2011 or any subsequent prosecutions based on notices subsequently validated by the Act.

Reparation Orders and recovery of debts

It is open to the CDPP to request a sentencing court to impose a Reparation Order either for the amount of the social security debt or the proportion of it covered by the charges. The amount of the order is paid to the Commonwealth. Reparation Orders are not sought in all cases; they seem to be sought more often in more serious cases prosecuted under the *Criminal Code*. A court may also issue a Forfeiture Order when the convicted person holds assets acquired as a result of committing the offence.

This contrasts with New Zealand practice where Associate Professor Marriot[60] observed that the Ministry of Social Development (MSD) does not seek reparation orders in social welfare prosecutions, stating 'Reparation order not sought: the Ministry will recover the full amount of the overpayment directly from the Defendant'.

In the case of joint offenders, the Reparation Order may be made against both parties on a joint and several basis; however, the court has a discretion to apportion the loss between co-offenders on the basis of relative culpability or length of offending.[61]

A debt which is subject to a Reparation Order may subsequently be waived under pt 5.4 of the Act; however, the waiver does not modify the order of the court, which stands with full force. There are some differences in the cases on the 1947 Act about the relationship

between waiver and the continuing effect of Reparation Orders, but it was suggested by the AAT in *Re Anderson and SDSS*[62] that the Secretary should not seek to enforce a recognisance where the applicant, relying on a waiver, did not repay monies in the time specified in her recognisance.

Where the amount of the Reparation Order is less than the total amount of the debt, it is important to look closely at the basis of sentencing and the judge's remarks to see if payment of the amount in the Reparation Order extinguished the whole of the debt.[63] There is now also a specific waiver provision in s 1237AA of the 1991 Act for debts relating to an offence requiring waiver where the sentencing judge has imposed a longer custodial sentence because the offender was unable or unwilling to repay the debt: see the discussion above.

The *Memorandum of Understanding Centrelink and Commonwealth Director of Public Prosecutions 1999* states:

> **Part 9: Criminal Assets**
>
> …
>
> **B: Reparation**
>
> 9.5 The DPP will seek a reparation order in any case in which a defendant is convicted, or a case is found proven, unless there is some reason why reparation should not be sought in the particular circumstances of the case.
>
> 9.6 Unless otherwise agreed, reparation will be sought for the full amount outstanding in relation to the charges and without specific repayment orders or time frames.
>
> 9.7 Where a case involves more than one defendant, the DPP will, if possible, seek reparation on the basis that the defendants are jointly and severally liable for the debt.
>
> **C: Recovering the Proceeds of Crime**
>
> ***The role of the DPP***
>
> 9.8 It is part of the DPP's function to pursue and recover the proceeds of Commonwealth crime. The function is not exercised in every criminal case.
>
> 9.9 In deciding whether to exercise its criminal assets function, the DPP will consider whether the following conditions are satisfied:
>
> a) if it is alleged that the defendant obtained a significant financial benefit from the relevant crime;
>
> b) if the defendant owns or controls assets against which recovery action can be taken; and
>
> Either
>
> I) it appears that the normal processes of Commonwealth debt recovery are not available or are likely to be less effective than action by the DPP; or
>
> II) there is a need to co-ordinate recovery action with the criminal process.[64]

Endnotes

1 *Re Green and SDSS* [1988] AATA 706; 16 ALD 187.
2 *Director-General of Social Services v Hangan* [1982] FCA 262; 45 ALR 23; 70 FLR 212; 5 ALN N4.

3 *Re Babler and Director-General of Social Services* [1982] 4 ALN N130; *Re Pepi and Director-General of Social Security* [1984] AATA 507; 7 ALD 155.
4 *Re Taylor and SDSS* [1986] AATA 166; 10 ALN N196.
5 [1983] FCA 81; 47 ALR 281; 78 FLR 373; 5 ALN N162.
6 Department of Social Security, *1990–91 Annual Report* (AGPS, 1991).
7 [1993] FCAFC 852; 47 FCR 111; 119 ALR 65; 18 AAR 344; 31 ALD 28.
8 [1997] FCA 1111; 26 AAR 27; 48 ALD 241.
9 Ibid.
10 [2004] FCAFC 166; 136 FCR 134, [37]–[40].
11 (1996) 68 FCR 491.
12 Noel Towell, 'Welfare crackdown a $270m flop: report', *Canberra Times*, 1 March 2017.
13 Lisa Marriott, 'Tax and Welfare in New Zealand: all are equal but some are more equal than others' (Presentation to the Tax and Transfer Payments Institute, ANU Crawford School, June 2017).
14 Department of Human Services, *Annual Report 2015–16* (AGPS, 2016) 3.3.
15 Ibid.
16 Commonwealth Director of Public Prosecutions, *Annual Report 2015–16* (AGPS 2016) p 33.
17 Grainne McKeever, 'Social Citizenship and Social Security Fraud in the UK and Australia' (2012) 46(4) *Social Policy and Administration* 465–482.
18 [1995] FCAFC 130; 56 FCR 354; 129 ALR 198; 36 ALD 513; 21 AAR 147.
19 Ibid.
20 [1999] FCA 375; 56 ALD 338.
21 [1924] AC 318.
22 Ibid 326–7.
23 *Re Sawyer and SDSS* [1988] AATA 763; 53 ALD 102.
24 *Re Sawyer and SDSS* [1996] AATA 383; 24 AAR 293; 44 ALD 86.
25 *Re Frugtniet and SDSS* [2004] AATA 996; 84 ALD 774.
26 Department of Human Services, *Annual Report 2015–16* (AGPS 2016) p 240.
27 Marriott, above n 13.
28 *Walker v SDSS* [1995] FCAFC 130; 56 FCR 354; 129 ALR 198; 36 ALD 513; 21 AAR 147 (Spender J).
29 *Walker v SDSS* [1997] FCA 589; 75 FCR 493; 147 ALR 263; 48 ALD 512; 25 AAR 258.
30 *Re King and SDSS* [1994] AATA 144.
31 *Taylor v SDSS* [1988] 18 FCR 322; 79 ALR 327; 14 ALD 655.
32 [1998] FCA 323; 82 FCR 100; 50 ALD 162; 27 AAR 106.
33 [1988] 18 FCR 322; 79 ALR 327; 14 ALD 655
34 [2008] AATA 964; 49 AAR 291.
35 *Re Caudell and SDEEWR* [2008] AATA 196.
36 [2007] AATA 1690.
37 [2008] AATA 349.
38 *Bankruptcy Act 1966* (Cth) s 153(2)(b).
39 *Re SDFaCS and Grindlay* [2005] AATA 91.
40 *Re SDSS and Malaj* [1993] AATA 181; 31 ALD 391.
41 *Re Civitareale and SDFaCS* [1999] AATA 486; 57 ALD 451; 29 AAR 505.
42 (1993) 42 FCR 443.
43 [1992] FCA 510; 37 FCR 32; 108 ALR 322; 27 ALD 309; 15 AAR 563.
44 Ibid 42.
45 [1997] FCA 1565; 152 ALR 127; 26 AAR 385; 50 ALD 186.
46 [1991] FCA 346; 23 ALD 284; 13 AAR 462.
47 [1994] AATA 144.
48 [1998] FCA 219; 82 FCR 154; 51 ALD 695; 153 ALR 259; 26 AAR 51.
49 Ibid 162.
50 Ibid.
51 (2008) FCA 1923; 174 FCR 157; 106 ALD 36.
52 At p 157.
53 [2010] FCA 43; 264 ALR 473.
54 Ibid [291]–[292].
55 Australian Government, *Guide to Social Security Law*, 20 September 2017, 6.7.2.100.
56 [1998] NSWCA 60401/1997.
57 [2010] SASCFC 19.
58 Ibid [38].
59 [2011] HCA 43.
60 Marriott, above n 13.
61 *R v Theodossio & Said* [1998] QCA 421.
62 [1993] AATA 172; 31 ALD 155.
63 *Re SDSS and Wornes* [1997] AATA 476.
64 Commonwealth Director of Public Prosecutions, *Memorandum of Understanding Centrelink and Commonwealth Director of Public Prosecutions 1999*, 9.5–9.9.

PROCEEDING IN CERTAINTY: TAX RULINGS

David W Marks QC*

The value of the ability to proceed in certainty, when preparing a tax return or making an agreement, is recognised by the Commonwealth's system of private binding tax rulings. But the utility of, and the ability to obtain, a ruling has recently been questioned by the agency involved. One key is the accuracy of the facts laid out for the Australian Taxation Office's (ATO's) consideration. Another key is the ATO's confidence in the facts so laid out by the applicant. The ATO has been proactive in seeking solutions and has engaged with practitioners. Issues include resourcing and timeliness; the ability to state facts sufficiently and accurately; who should be the master of the 'facts' when making a ruling; what the ATO should do if it has no confidence in the facts as presented; and the extent to which the ATO can be expected to engage with an applicant for a ruling in delivering a useful product.

Income tax is self-assessed, either (for corporate entities) as a matter of law or (for other entities such as individuals) in a substantial sense. In the latter case, the Commissioner of Taxation generally accepts a return on its face.[1]

The former model of assessment was for the Commissioner of Taxation's officers to look through a return and supporting documents, and themselves to make a calculation or 'assessment' of the tax due.[2] We have not seen that, on a mass basis, for more than two decades. There will be no return to that system.

There are penalties for making an incorrect statement in a tax return.[3] Even when an entity engages a tax agent to prepare the return, the statement is attributed to the entity[4] and there is only a limited safe harbour applicable to an entity who has given everything relevant to the registered tax agent or BAS agent.[5]

There are other penalties applicable to actions and omissions under the tax laws. Further, a taxpayer has a reputational risk if it falls into dispute with a revenue authority (regardless of the merits of the dispute).

The tax laws are complex.[6] The reach of those laws is wide, into every sector of the economy, including the third sector. The agency administering the laws is large. It has a range of skills and expertise within its ranks, which can be called upon to meet needs. Those caught by the laws likewise have a diverse range of abilities. Their advisers are more or less resourced. Small businesses and unsophisticated individuals can find themselves with a complex tax issue.[7] Some citizens have a risk profile such that they prefer to disclose an arrangement, and have the agency's view, before filing a return.[8] Some deals cannot proceed economically unless the agency's view is known.[9]

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Thus, in the move to self-assessment, the Commonwealth provided a system of binding private rulings, in part to address the risk of penalty associated with lodgement of an incorrect return. The reports and recommendations at the time, in the early 1990s, will be examined later in this article.

As we have seen, a second matter calling for an ability to apply to the Commissioner for advice relates to prospective transactions. Some transactions will proceed regardless of the taxation consequences. It is then a matter of correctly preparing a return, which may in fact involve deliberately misstating the return in favour of the Commissioner so as to avail the objection and appeal process once the Commissioner issues an assessment (or an assessment is deemed issued, for corporate entities). Of course, it is open to an entity to apply to the Commissioner for advice, which will be issued before the return must be completed and filed, but that does not assist with the transaction that must be priced (or rejected) based on tax consequences.

Where the transaction is sensitive to the tax consequences, the parties to the transaction may each apply to the Commissioner for advice about its consequences. Prior to a system of private rulings in Australia, this was done by applying for an Advance Opinion. In my observation, the system worked well, and the Commissioner would generally not depart from an opinion he expressed, except for good reason.[10] For a matter to proceed with greater certainty, including as to price and terms, a system of private binding rulings was nevertheless thought desirable.

Matters considered by government in introducing private binding rulings

The move toward self-assessment of income tax formally began in the 1986-87 year. By 1989-90, companies and superannuation funds were subject to full self-assessment, as opposed to the 'first stage' self-assessment that had begun a few years earlier:

> The essential difference between first stage and full self assessment is that, under the latter system, the taxpayer goes the one step further than ascertaining the taxable income by also calculating the tax payable on that income and remitting that amount to the ATO with a return that contains only limited information. The ATO does not issue an assessment on the basis of the return lodged.[11]

As at the present date, individuals remain at 'first stage' self-assessment.

The 1990 Consultative Document identified a number of advantages, including 'the elimination of receipt, checking and handling of bulky paper returns'. That was estimated to reduce costs of return processing, which in 1989-90 were about $80 million.[12]

Rather:

> [There would be] a shift in emphasis from processing work [which] allows the ATO to devote its resources to more productive tasks by helping taxpayers to meet their obligations, for example, through enhanced enquiry and advisory services, and more generally, by focusing more closely on taxpayer needs, or by taking enforcement action against those who don't comply.[13]

The 1990 Consultative Document recorded 'strong support among professional and other bodies for extending self-assessment arrangements', but the 'support' was conditioned on changes including legislative changes for 'greater taxpayer certainty under the law'. Accordingly, the intention was to 'authorise the issue of general Taxation Rulings and Private Rulings that are binding on the Commissioner of Taxation, and make Private Rulings subject to review by the AAT or a court'.[14]

The Commonwealth went on to explain what was proposed in relation to rulings, again emphasising that this was not 'a further way of producing uncertainty'.[15] The idea would be for a system of private rulings and general taxation rulings to be given effect, the Commissioner being bound by both. In relation to private rulings, there would then be a system by which a person dissatisfied could object and then seek review or appeal the objection decision. There would then be limits on the ability of the taxpayer to contend for a different outcome from the subject of the private ruling, to ensure finality.[16]

There would be consequences for the taxpayer (although I note that there have been changes to legislative arrangements over the years) if the taxpayer declined to follow a ruling, including a private ruling.[17]

An Information Paper was issued in August 1991, further fleshing out the intention of the Commonwealth.[18]

One point which must have arisen during consultation was whether a taxpayer would be able to request a private ruling on the application of the general anti-avoidance provisions contained in pt IVA of the *Income Tax Assessment Act 1936* (Cth). As we will see, the key provisions in that Part provide a number of unweighted criteria for the Commissioner to evaluate in deciding whether to make a determination. The making of such a determination triggers the potential for adjustment to tax liability and special penalty arrangements. The 1991 Information Paper says:

> Taxpayers will be able to request Rulings on Part IVA issues, but will be required to specifically and separately address all the matters listed in each of the sub-paragraphs of paragraph 177D(b), where applicable. The Ruling may state that no guarantee will be given that the taxation consequences sought will be achieved, or that it should not be assumed that the arrangements will not be challenged by the Tax Office. In both cases the reasonably arguable position will not be affected. The Tax Office will not enter into correspondence or discussion aimed at establishing how schemes devised to exploit perceived loopholes in the law might be structured or altered to facilitate marketing of the scheme.[19]

This perhaps jumps a little ahead. The Commissioner was not going to be empowered to make rulings in the abstract. Rather, the idea was to have private rulings which addressed 'the taxation consequences arising from a transaction, act or event which is proposed to take place or has already taken place'.[20] Thus, in applying for a ruling, the taxpayer had to detail the transaction, et cetera, and it was anticipated that 'copies of all relevant documents or copies of extracts, draft documents … and flow charts of funds' would be provided.[21]

The Taxation Laws Amendment (Self Assessment) Bill 1992 was introduced into the House of Representatives on 26 May 1992. This was part of a package of measures (foreshadowed in the 1990 Consultative Document and the 1991 Information Paper), as noted in the second reading speech by the Minister Assisting the Treasurer.[22]

The second reading speech says, materially:

> Taxpayers who are genuinely uncertain about the tax effect of a completed or proposed arrangement would be able to seek a Private Ruling from the Commissioner. The Commissioner will be bound by the ruling to the extent that the tax that would be payable by the taxpayer would be reduced to reflect the tax that would be payable under the ruling. …
>
> A taxpayer will be able to have an unfavourable Private Ruling … reviewed by the AAT or courts. When the review process is finalised, the decision of the AAT or the court will be legally binding and conclusive as to the application of the ordinary provisions of the legislation to an actual arrangement not relevantly different from the proposal or arrangement to which the Private Ruling related. …
>
> The new system of binding and reviewable rulings will promote certainty for taxpayers, and thereby reduce their risks and opportunity costs.[23]