Additional Comments from Opposition senators

1.1 The Opposition makes additional comments with respect to the public interest immunity claim made during the hearing for examination of the Social Services portfolio on 5 March 2020, by Senator the Honourable Anne Ruston, Minister for Families and Social Services, in response to questions about the number of income compliance debts in a cohort identified by Services Australia.

1.2 The circumstances of the claim are detailed in the committee report, and the report notes that the Minister provided information on the grounds of the specific harm that could occur should such information be made public:

> the specific harm to the public interest that could result from disclosure of the particulars of the class action claim is undue prejudice to the Commonwealth in relation to current litigation relating to the income compliance program. The current class action relating to the income compliance program includes a claim of unjust enrichment and a claim for damages based in negligence against the Commonwealth. The Commonwealth's ability to respond to these proceedings may be prejudiced if the applicants or their solicitors are made aware of matters covered by this public interest immunity claim. Disclosure of the details of the class identified by Gordon Legal could also enable a proximate quantum of the claim to become known. This could adversely affect the Commonwealth's position with respect to the resolution of the claim. The possible prejudice to the Commonwealth's ability to respond to the claims in the class action successfully exists even though parliamentary privilege would apply to evidence given by a minister or an official during an estimates hearing or in response to questions on notice.[1]

General comments

1.3 The 'cohort' referred to in the 5 March hearing is potentially the subject of a class action led by Gordon Legal. According to Gordon Legal, the class action, which will be considered by the Federal Court with over 10,000 applicants, 'argues that the Commonwealth Government has taken money from Centrelink recipients unjustly. The Court is asked to determine whether the more than 570,000 debts raised issued by Centrelink after 1 July 2015 lawfully entitle it to recover the amounts claimed. The Court has also been asked to determine whether the so-called collection fees levied by Centrelink should be refunded and whether those who have repaid all or part of those amounts should be paid interest. Finally, the Court has been asked to determine whether the persons affected are entitled to compensation for any distress or inconvenience caused'.

1.4 In its defence to the class action the Commonwealth Government has acknowledged that there was no legal basis in the social security law for debts to be

---

1 *Committee Hansard*, 5 March 2020, p. 141.

raised using income averaging alone. In relation to the negligence claim, it has submitted that it does not owe social security recipients a duty of care.

1.5 The class action follows a judgement by the Federal Court in *Amato v The Commonwealth* which confirmed that the compliance program was unlawful. The Commonwealth Government consented to orders that found: the issuing of a compliance debt by 'averaging' of Australian Taxation Office data, addition of a 10 per cent penalty fee based on the information at hand, and garnishee of a tax refund under the circumstances – were unlawful. The Government agreed to pay the plaintiff $92 in interest on the amount that was unlawfully taken.

1.6 The *Amato* case tested claims by legal experts that there was no basis for the use of income averaging in the Social Security Law. The relevant provisions, 1222A(a) and s 1223 of the *Social Security Act 1991* do not provide a basis for income averaging to be used as evidence upon which to raise a debt, and Centrelink is obliged to establish that there is a difference between the amount paid and the amount to which a person was entitled. In 2017 alone there were at least five judgements by members of the Administrative Appeals Tribunal's Social Security Division recommending that debts using income averaging were not lawfully raised. How these judgements were received and whether or not legal advice was provided to the Commonwealth at any point in the compliance program's development and implementation was of interest to Opposition senators during the 5 March 2020 estimates hearing.

1.7 The social detriment of the compliance program and the use of income averaging in the process to raise compliance debt have also been well established. In the April 2017 report *Centrelink's automated debt raising and recovery system*, the Commonwealth Ombudsman acknowledged that many of the debts were false or greatly inflated. The application of income averaging in debts against individuals with insecure, 'lumpy' or variable income has been recorded as particularly problematic. The harms associated with raising false or inaccurate debts against current or former social security recipients have been outlined in many of the submissions made by advocacy organisations and social security rights groups to the Community Affairs References Committee's Inquiry into *Centrelink's Compliance program*.

Substance of the claim

1.8 The Minister has identified prejudice to the Commonwealth's position in legal proceedings as the possible harm. *Odgers' Australian Senate Practice* (Odgers) lists grounds for public interest immunity claims that have attracted some measure of acceptance in the Senate, subject to the circumstances of particular cases, the inclusion of an explanation of the harm to be caused, and without acceptance of distorted or exaggerated versions of the grounds. Prejudice to legal proceedings is one such ground.

1.9 Odgers goes on to articulate ‘that there are two ways in which the production of information to the Senate or a committee could cause prejudice to legal

proceedings' (page 662). The first of these is 'a reasonable apprehension that disclosure of some information could prejudice a trial which is in the offing by influencing magistrates, jurors or witnesses in their evidence or decision-making' (page 662). This does not appear to be a relevant aspect in this instance.

1.10 Odgers states 'The second way in which the production of information to the Senate or a committee could cause prejudice to legal proceedings is that it could create material which, by reason that it is unexaminable in court proceedings because of parliamentary privilege, could create difficulties in pending court proceedings' (page 663). Given the statement of the minister that 'The possible prejudice to the Commonwealth's ability to respond to the claims in the class action successfully exists even though parliamentary privilege would apply to evidence given by a minister or an official during an estimates hearing or in response to questions on notice', this ground also does not appear to be applicable in this instance.

1.11 The Government's claim appears to be grounded not in prejudice to legal proceedings, but in prejudice to the Commonwealth's position in those proceedings. This is different, and not a validly accepted ground for a public interest immunity claim. As the former Clerk of the Senate, Harry Evans, said in a letter that was incorporated into the Hansard record of evidence to the Senate Economics Legislation Committee on 2 June 1998, 'It is inherent in any free constitution, however, that governments will have the additional 'disadvantage' of accountability to the legislature and the public'. At the very least, the Government should provide a more detailed statement of the grounds for the conclusion that it would not be in the public interest to disclose the information or document to the committee and the harm to the public interest that could result from the disclosure of the information or document.

Process

1.12 The 2005 guidance prepared by the former Clerk of the Senate, Harry Evans, states:

> If at the end of this process the committee is left with a public interest immunity claim maintained by a minister on a sufficiently articulated ground, the committee should report the facts to the Senate in such terms as the committee considers appropriate. It is suggested that this be done even if all members of the committee conclude that the claim was validly raised. The basis of this is that the Senate should be aware of claims which have been made. Also, the committee itself cannot apply any remedy to a claim which is maintained to this extent; only the Senate can apply any remedy, and it is open to any senator to initiate further consideration of the matter by the Senate.

1.13 This needs to be read in conjunction with the subsequent 2009 Cormann Order relating to public interest immunity claims, which indicates in paragraph (5) that:

> If, after considering a statement by a minister provided under paragraph (3), the committee concludes that the statement does not sufficiently justify the

withholding of the information or document from the committee, the committee shall report the matter to the Senate.[2]

1.14 It is the view of Opposition senators that the statement by the Minister did not sufficiently justify the withholding of the information from the committee. However, despite the decision of a majority of the committee to the contrary, in keeping with the terms of the Cormann Order and the guidance from the former clerk, the Opposition believes it would have been reasonable in this instance for the Committee to resolve to refer the matter to the Senate for determination.

Conclusion

1.15 Opposition senators are of the view that committee should have resolved to refer the public interest immunity claim to the Senate for determination, in accordance with the Cormann Order. Opposition senators will further explore the merits of this public interest immunity claim in the Senate at an appropriate time. In the meantime, Opposition senators urge the Government to reconsider its claim and release the material requested. To do so would be in the public interest.

Senator McCarthy
Senator for the Northern Territory

Senator Polley
Senator for Tasmania

Senator O'Neill
Senator for New South Wales

2 The Senate, *Standing Orders and other orders of the Senate*, January 2020, Procedural Orders of Continuing Effect, 10–Public interest immunity claims, p. 132.