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Senate Standing Committee on Community Affairs
Parliament of Australia

Dear Committee

Thank you for the opportunity to make a submission on the Social Security and Other Legislation Amendment (Technical Changes No. 2) Bill 2025 (the Bill).

Retrospective laws

This Bill proposes retrospective laws that purport to validate past unlawful actions carried out by government agencies. These actions comprise the raising of likely inaccurate or erroneous social security debts against recipients through an unlawful process called income apportionment. Although the Bill describes these changes as 'technical' and the income apportionment matter has been described as 'complex,'[1] I do not regard these representations as accurate. As I will demonstrate below, income apportionment is not especially complicated. If it were, one might have expected some demurral from the agencies,[2] the Ombudsman, or the Solicitor-General[3] regarding the conclusion that income apportionment was unlawful. Instead, each of these public institutions seems to have found income apportionment to be unlawful. Part of this legislation is therefore 'curative' or 'remedial' in that it seeks to retrospectively validate and legalise the actions of government that were clearly unlawful.

Retrospective validation of past unlawful action is a poor way of regulating or 'regularising' wrongful past actions. If permitted at all, retrospective validation should be an absolute exception. Ordinarily, common law judges are bound to presume that legislation cannot

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1 Tanya Plibersek, Letter to Christopher Rudge, MC25-006170, 8 September 2025, https://www.rudge.tv/wp-content/uploads/2025/09/MC25-006170-Letter-from-the-Hon-Tanya-Plibersek-MP-Minister-for-Social-Services99.pdf.

2 I refer to Services Australia and the Department of Human Services and their predecessors as 'the agencies' throughout this submission.

3 The Commonwealth Ombudsman recommended advice be sought from the Solicitor-General in 2023: see Commonwealth Ombudsman, *Lessons in Lawfulness: Own Motion Investigation into Services Australia's and the Department of Social Services' Response to the Question of the Lawfulness of Income Apportionment before 7 December 2020* (Statement, 2 August 2023) 6 ('*Lessons in Lawfulness Statement*'). Whether that advice had been received or accepted was later said to be undisclosable: see Commonwealth, *Parliamentary Debates*, Senate, 6 November 2024, 109 (Bronwyn Worswick). The advice was later confirmed to have been received and relied upon: see Department of Social Services, Answer to Question on Notice No DSS SQ24-001036, Senate Community Affairs Legislation Committee, Supplementary Budget Estimates, 19 December 2024, 1; Services Australia, Answer to Question on Notice No SA SQ24-000471, Senate Community Affairs Legislation Committee, Budget Estimates, 25 July 2024, Attachment C: Services Australia, *Stage 1 Implementation Strategy for the Recommencement of Activities Impacted by Income Apportionment* (Strategy Document, April 2024) 2.

operate retrospectively. This presumption is especially strong where 'palpable injustice' would result from retrospective application of a law.[4] This presumption reflects several legal doctrines, including the principle of certainty (*lex certa*). Lex certa means that the law must be certain before citizens can be expected to comply with it. Obviously, retrospective laws are not certain at the time before they are made (when they do not exist). They are only certain in retrospect. They are therefore antithetical to the principle of certainty. A second doctrine connected to the presumption against retrospective laws is the principle of legality. This principle is usually applied to criminal laws. However, the principle of legality is also important for administrative lawmaking.[5] The principle means that citizens should not be punished or regulated arbitrarily or capriciously but instead only by fixed, predetermined law. Retrospective laws are neither fixed nor predetermined. These two principles help define the broader doctrine known as the 'rule of law'. Retrospective laws therefore generally offend or violate these principles and thus the rule of law.

Retrospective laws can still be validly legislated in Australia.[6] Parliament may pass them and the courts will apply them in special circumstances. It must be clear that the legislature intended those laws to apply retrospectively to 'facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.'[7] Valid retrospective laws also require a statement of 'necessary intendment.' This seems simply to mean that the force of the language of the law points to an intention that the law will apply retrospectively.[8]

That said, valid retrospective laws intrinsically represent an encroachment on the rights and freedoms of citizens they affect. As I will demonstrate, that holds for the laws in this Bill. In 2014, the Australian Law Reform Commission said that retrospective laws should only be legislated if they encroach upon the interests of citizens in a way that is necessary and in the public interest.[9] The committee must therefore ask: Are the encroachments that the provisions in this Bill will make on the rights, freedoms and interests of social security recipients necessary and in the public interest? And, referring to a point raised earlier, would a 'palpable injustice' arise from this Bill, and will that mean it might also be, if passed into law, liable to be declared partly or wholly invalid in some circumstances? I will discuss these matters further below.

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4 *Attorney-General of New South Wales v World Best Holdings Ltd* (2005) 63 NSWLR 557, 568–574 (Fullagar J).

5 See, eg, Guy Cumes, 'The Nullum Crimen, Nulla Poena Sine Lege Principle: The Principle of Legality in Australian Common Law' (2015) 39(2) *Criminal Law Journal* 77, 89–90.

6 See, eg, *R v Kidman* (1915) 20 CLR 425, 451 (Higgins J); *R v Snow* (1917) 23 CLR 256, 265 (Barton ACJ); *Ex parte Walsh and Johnson; Re Yates* (1925) 37 CLR 36, 86 (Isaacs J), 124–5 (Higgins J); *Millner v Raith* (1942) 66 CLR 1, 9 (Williams J); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 172 (Latham CJ); *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *University of Wollongong v Metwally* (1984) 158 CLR 447, 461 (Mason J), 484 (Dawson J); *Nicholas v The Queen* (1998) 193 CLR 173, 234 [149] (Gummow J).

7 *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ)

8 See *Worrall v Commercial Banking Co of Sydney Ltd* (1917) 24 CLR 28, 32 (Barton J).

9 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Report No 129, December 2015) ch 7.

Background to the income apportionment debacle: A 'genuinely held incorrect understanding of relevant legislative provisions'?

In the *Lessons in Lawfulness* statement, the Ombudsman found that the agencies'[10] 'incorrect and unlawful use of income apportionment arose due to the agencies genuinely holding an incorrect understanding of relevant legislative provisions.'[11] I question this assessment. The reports resulting from the Ombudsman's two own-motion investigations do not refer to an important policy developed by DSS and adopted by the agencies, which I think led to income apportionment. The policy places in a dim light the proposition that the agencies had a 'genuinely held' misunderstanding of the law in this period.

Although internet records only go back to 2016, the policy probably stretches back much further.[12] The policy was brought to the attention of Parliament legislators five years ago. In 2020, the Parliamentary Library referred to and quoted from the policy in a Bills Digest for the very amendment to social security law that put an end to income apportionment.[13] The amendment introduced legislation to permit the single-touch payroll (STP) system to be incorporated into the welfare system's operations and it also ended income apportionment calculation method by changing the assessment of employment income from 'first earned, derived or received' to when it is 'paid'.[14] Crucially, the digest also identified the rationale for the old 'earned' method, showing that it was based on an anti-fraud policy adopted to prevent people deferring income to a later date so as to manipulate their entitlement periods. The policy was contained in early versions of the internal *Social Security Guide* and was expressed as follows:

> As a matter of policy, income test assessment is generally based on whichever event occurs first, which is usually when people earn the money. This is because assessing earnings only when received would create inequities, as it would enable some people to defer receiving their earnings until the income would have less impact on their income support entitlement. This would place people who can defer receipt of income in a better financial position than those paid on a regular basis.[15]

In essence, the policy was designed to preclude compliance officers (hereafter 'officers') from undertaking the income test assessment on a 'when received' basis out of fear that doing

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[10] Hereinafter, 'the agencies' refers to Services Australia and the Department of Human Services and their predecessors.

[11] Commonwealth Ombudsman, *Lessons in Lawfulness Statement* (n 3) 9.

[12] Department of Social Services, *Guide to Social Security Law* (Version 1.221, 16 May 2016) [4.3.3.05] 'Employment Income — First Earned, Derived, Received' http://guides.dss.gov.au/guide-social-security-law/4/3/3/05, archived at *Wayback Machine* (24 June 2016).

[13] Michael Klapdor, 'Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Bill 2020' (Bills Digest No 85, 2019–20, Parliamentary Library, Parliament of Australia, 24 February 2020) https://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/7203508/upload_binary/7203508.pdf ('*Simplifying Income Reporting Bill Digest*').

[14] Ibid.

[15] Department of Social Services, *Guide to Social Security Law* (Version 1.253, 20 March 2019) [4.3.3.05] 'Employment Income - First Earned, Derived, Received' https://web.archive.org/web/20190419163835/http://guides.dss.gov.au/guide-social-security-law/4/3/3/05.

so would permit recipients to defer their pay to later dates and thereby avoid proper means test-based reductions in their welfare benefits. I will illustrate below.

A person working 2 days a week might be entitled to a welfare benefit, such as Youth Allowance. They might ask their employer to pay them a lump sum at the end of the month instead of paying them at the end of each fortnight (as is standard practice). If the employer agreed to defer the employees' income, the employee would

- receive the full amount of a welfare benefit payments to which they are entitled the first fortnight of the month (entitlement period), when they received zero income; and
- see a reduction in their benefit payment when the 'lump sum' windfall was received by them in the second fortnight of the month.

If there was no evidence as to when the person *earned* the income (for whatever reason), then it was possible, under the law before 2020,[16] that the employee's income would be assessed only by reference to when it was *received*, and thus by reference to the deferred payment period (the second fortnight). In that circumstance, the person would have received full welfare benefits in the first fortnight and reduced or zeroed benefits in the second fortnight. Overall, this may mean that the employee was better off ('in a better financial position') than if they had been paid on a regular basis and their entitlements had been calculated by reference to what they *earned* in each fortnight (or in each entitlement period).

The concern or fear that some welfare recipients would exploit their ability to defer their pay to secure additional welfare benefits formed the basis of this internal policy. But the policy also seems to have meant that recipients had to report income on a 'when earned' basis. This policy was single-mindedly maintained by DSS, even though 'the difficulty presented to payment recipients in needing to estimate income earned ahead of being paid, particularly for those with fluctuating income, [had been] a longstanding issue of concern.'[17] The same problems had been raised in the AAT in 2009.[18] And, in 2001, the Australian Council of Social Service had said that, where recipients were accused of a 'failure to correctly declare income,' this was

> compounded by the long standing problem relating to the definition of income itself in the social security legislation. Defining income as 'any money earned, derived or received' rather than simply as money 'received', places enormous difficulties on thousands of social security recipients every week.[19]

The policy of preferentially calculating debts on a 'when earned' basis – and even the requirement that recipients had to report their income on a 'when earned' basis – was not adopted as a mere misunderstanding of the law. It was well-known to the agencies that this policy created and compounded recipients' ability to report their income and it was obviously

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[16] For example, under s 1073B of the *Social Security Act 1991* (Cth) (as at 2019).

[17] Klapdor, '*Simplifying Income Reporting Bill Digest*' (n 13).

[18] *Michalak and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2009] AATA 299, cited in Klapdor, '*Simplifying Income Reporting Bill Digest*' (n 13).

[19] Australian Council of Social Service (ACOSS), 'Ending the Hardship: Submission to the Independent Review of Breaches and Penalties in the Social Security System' (ACOSS INFO 316, 17 December 2001) 7, cited in Klapdor, '*Simplifying Income Reporting Bill Digest*' (n 13).

maintained despite the law permitting income to be calculated on a 'when derived' or 'when received' basis.

The agencies clearly had knowledge that these other options for income assessment were permitted under the law, because the policy guidance directed them away from utilising those other options. Thus, the policy stood in the way of DHS compliance officers using the law, as they could have done, to determine a recipients' income in the most appropriate way based on when the evidence indicated it was 'earned, derived or received' (under s 1073B, for instance). Instead, it made officers assess income only (or preferentially) through the prism of when it was 'earned.'

The legislature did not propose (before 2020) that the social security law (eg, s 1073B) should be changed to accommodate DSS's policy concerns. A proposed law could have constrained recipients from deferring their pay for the purposes of maximising their social security benefits. Instead, DSS adopted its own anti-fraud policy to ensure that the law was applied in a particular way. The policy biased the debt calculation process all in one direction, and made any evidentiary deficiencies (eg, the absence of payslips) a secondary consideration.

Why did DSS try and shape the law in their own way? Avenues were and are available to respond to fraud via the criminal law. Where DHS officers believed a recipient was knowingly receiving benefits greater than their legal entitlement, they could have referred that recipient the CDPP for prosecution (and such officers probably did so on many occasions).[20] However, DSS was seemingly not satisfied with a responsive mechanism and sought to 'read in' to the law a pre-emptive anti-fraud mechanism on a speculative policy basis. As I have suggested, DSS thus created a policy that reframed the law in their own bespoke terms. That DSS 'reframing' of the provision was a narrower than the plain and ordinary meaning of the provision. But this policy did not emanate from or rely on a legal 'reading' or a specific legal 'interpretation' or 'construction' of s 1073B. the policy language does not indicate, for instance, that DHS officers were bound calculate entitlements only on a 'when earned' basis because the word 'earned' appears first in the relevant provision in s 1073B.[21] Instead, DSS avowedly produced the policy in adopting an anti-fraud posture – not because the agencies had concluded on legal advice that the provision should or must be read in that way.

[20] Under the *Criminal Code Act 1995* (Cth) sch 1 s 135.2(1) or under the other dishonesty or fraud provisions in that *Code*.

[21] This was an argument advanced in the *FTXB* litigation with reference to the method statement in the *Social Security Act 1991* (Cth) pt 3.6, module A, point 1067G-H23. The argument was advanced not simply on the basis that the word 'earned' appears first but because the word 'first' appears in the collocation in that method statement. Point H23 relevantly states that 'ordinary income is to be taken into account in the fortnight in which it is first earned, derived or received. See *FTXB and Secretary, Department of Social Services (Social services second review)* AATA 3021 (28 August 2024) [5], [92], [96], [120].

Why was income apportionment unlawful?

As I have said, the anti-fraud policy required administrators to assess recipients' income (preferentially) on a 'when earned' basis. As became clear in the *FTXB*/*Chaplin* litigation,[22] the policy was seemingly applied single-mindedly even when there was uncertain evidence about when income was earned. However, it was not contrary to social security law to assess income on a 'when earned' basis. Nor was it unlawful to apply income apportionment in accordance with the limitation imposed by the law under s 1073B. But it should be noted that the expression 'income apportionment' is not an expression that could or can be found the *Social Security Act 1991* (Cth). It is a shorthand that refers to a process that was called in the statute the 'daily attribution of employment income' at s 1073B – until the section was amended in 2020. The daily attribution of income under the pre-2020 s 1073B (ie, income apportionment) was lawful, provided it was done within the statutory limits. The pre-2020 section 1073B actually *required* an officer to calculate a recipient's welfare benefit

- by reference to a sum of money that was 'earned, derived or received' during an instalment period; and
- by deeming[23] that sum of money to be 'an amount of employment income worked out by dividing the total amount of the employment income ... by the number of days in the period.'[24]

In other words, social security law required officers to apportion, average or attribute a 'daily rate' of income to the recipient by dividing the total amount of income they earned, derived or received during an instalment period by the total number of days in that instalment period.

Where the agencies seem to have gone wrong is in relation to the word 'instalment period.' Officers appear to have failed to have lawfully applied the 'daily attribution' requirement prescribed under s 1073B in that they misunderstood or overlooked the statutory limitations of the provision. Indeed, officers appear to have used s 1073B as a broad licence to generate evenly balanced income records rather than as a straightforward accounting tool constrained by fixed periods. Officers used s 1073B to divide an amount of income that was earned, derived or received by a recipient within a particular period of *any* length by the total number of days in that period of any length. For example, an officer might look at a recipient's payslip. The the payslip might run from 1 January to 31 January (31 days). The payslip might record that the recipient earned $3,100 over that 31-day period but it might not disclose *when* the income was earned. Instead, it might only disclose that the person worked 31 hours in total.

The officer would then proceed to use s 1073B to divide that total amount of income earned ($3,100) by the days in the period (31) and therefore conclude that the receipient 'earned' $100 on each day in the period. They would thus attribute to the recipient a 'daily rate' and

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[22] The *Chaplin* case (*Chaplin v Secretary, Department of Social Services* [2025] FCAFC 89) appears to be subject to a High Court appeal. This will depend on whether the applicant is granted special leave to appeal: see *XWMP and Secretary, Chief Executive Centrelink (Social security second review)* ARTA 1789, (Senior Member Hamilton-Noy).

[23] I am reading the words 'taken to be' in the pre-2020 version of *Social Security Act 1991* (Cth) s 1073B(1) as a deeming provision that requires the officer to transform a whole sum of money into an evenly divided sum in accordance with the section's limitations.

[24] *Social Security Act 1991* (Cth) s 1073B (as at 2019).

thus believes that they have lawfully applied s 1073B. However, the word 'instalment period' in s 1073B cannot consist of 31 days; and they would therefore have acted unlawfully. Why?

First, the definition of 'instalment period' under section 23 of the *Social Security Act 1991* (Cth) is as follows:

> instalment period, in relation to a person, means a period that is determined by the Secretary under section 43 of the *Social Security (Administration) Act 1999* to be an instalment period of the person.

In turn, section 43 of the current *Social Security (Administration) Act 1999* (Cth) then states that social security payments are to be made by instalments for periods 'not exceeding 14 days.'[25] This appears to legally define the maximum length of an 'instalment period' as 14 days.[26] On this basis, the use of s 1073B in the above example, where an officer uses the section to attribute a daily rate of income to a recipient over a period of 31 days, would be unlawful because s 1073B only allowed officers to attribute a daily rate of income to a recipient within an instalment period of 14 days or less.

As we have seen in the example above, the officer was dealing with a payslip consisting of a 31-day period. But why was the officer looking at a payslip at all (and not a bank statement)? I think this was because the payslip was the best source of evidence of when a recipient 'earned' their income. And the anti-fraud policy discussed above meant that recipients' entitlements were preferentially calculated on a 'when earned' basis.

But, as we have seen in the example, even a payslip might fail to particularise when income was earned. Nevertheless, because the policy was to always calculate entitlements on a 'when earned' basis, the preferred evidentiary source for applying s 1073B would have always been payslips rather than bank statements. The consequence appears to have been that payslips have long determined the length of the period for which attribution under s 1073B extended. If a payslip ran for 31 days, then the period over which s 1073B daily attribution was applied (unlawfully) would have been 31 days.[27] If a payslip ran for three months, then the daily attribution would have (unlawfully) applied to every day over the three months.

These practices were unlawful because daily attribution under s 1073B could only be applied over a 14-day period. And, as the Ombudsman's own-motion investigations also pointed out,[28] the unlawfulness problem also arises where the payslip period – even if it is coincidentally a 14-day payslip period – is not synchronous with the instalment period. Because the instalment period can only be a maximum of 14 days, if daily attribution is

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[25] Social Security (Administration) Act 1999 (Cth) s 43(1)(b).

[26] A submission on this point was advanced by the applicant in the Robodebt 'test case': see *Deanna Amato v The Commonwealth of Australia* (Federal Court of Australia, VID611/2019, 11 November 2019) [56.4] (Written Submissions of the Applicant) https://www.legalaid.vic.gov.au/sites/default/files/vla/submissions.pdf.

[27] This example is not as unusual as it may first appear. Where a casual employee might have deferred submitting a timesheet for three months because they only worked a few hours each week and did not want to 'charge' for less than, say, $100, they might have only submitted their claim for payment at the end of that three-month period.

[28] Commonwealth Ombudsman, *Lessons in Lawfulness Statement* (n 3) 10–11; Commonwealth Ombudsman, *Accountability in Action: Identifying, Owning and Fixing Errors - Services Australia and the Department of Social Services' Response to Addressing the Impacts of Unlawful Income Apportionment* (Report, December 2023) 1.

applied to a 14-day payslip period that is partially asynchronous with the 14-day instalment period, the attribution applied to those asynchronous days in the payslip period will be unlawful because they exist 'outside' of the 14-day instalment period within which the daily attribution can be lawfully performed.

Although I have argued that unlawful income apportionment was attributable to the anti-fraud policy that required officers to preferentially use payslips to determine when income was earned (rather than using bank statements to determine when it was received), I fully accept that unlawful income apportionment would have also arisen if bank statements were used more often as the source of evidence for income. This is because any income identified as 'income' because bank statement evidence showed it was 'received' into the recipient's bank account would also have been subject to a requisite daily attribution calculation under s 1073B. In applying s 1073B, a compliance officer would have also likely identified the 'instalment period' by reference to the days that spanned the period between the receipt of income in the bank statement and the next received amount from the same employer/payer.

For instance, if income was received on 31 January and then again on 28 February, the officer would likely have seen the instalment period for the February amount as consisting of 28 days from 1 February to 28 February. This would have been contrary to s 1073B. However, it is also possible, I suppose, that given that bank statements do not present clear 'pay periods' like payslips, that the officer might have also correctly and lawfully cross-referred the 'received' income to the true 'instalment period' (consisting of the Centrelink payment period) and therefore would have lawfully applied the daily attribution requirement under s 1073B to the February payment by dividing that payment total by reference to the proximate 14-day instalment period within which the payment was received.

I also accept that bank statements present their own issues in terms of identifying income, because they do not record the gross income received by the recipient and would therefore have to be 'grossed up' using an internal calculator.[29]

On a generous reading, it could be said that the anti-fraud policy acted as a forced blind spot that allowed for unlawful income apportionment to go unnoticed for many decades. If compliance calculations were ordinarily performed with payslips due to the anti-fraud policy, then the convenient but unlawful/mistaken identification of the finite payslip period (which might have been written on the payslip itself) *as* the relevant instalment period was probably sustained much longer than it would have been if the policy did not pre-select payslips as the income evidence of choice.

Why were the calculation tools not designed to prevent this?

The use of tools that are not fit for purpose is at the heart of the income apportionment debacle. The anti-fraud policy, together with the unrestricted ability to apply s 1073B in any way the officer wished by reference to the payslip period (or notional bank statement pay period), appears to have been facilitated or instrumentalised through the agencies' debt calculation software applications. These applications include the online (or, historically, the

[29] Disturbingly, the internal calculator used by departmental officers to gross up net income appears to involve an averaging method relying on ATO data, thereby reproducing its own version of Robodebt averaging: see Christopher Rudge, 'Centrelink's Net to Gross Earnings Calculator' (Blog Post, *Welfare Law in Australia*, 26 March 2021) https://welfarelaw.substack.com/p/centrelinks-net-to-gross-earnings.

'mainframe') debt explanation system known as ADEX, as well as the MultiCal reporting tool and the EANS reporting tool. While there are many historical versions of these applications, they have been used by compliance officers over many decades to generate debts 'manually.'[30]

However, just because the debts are calculated through a process of manual inputting, this does not mean that these calculations were mathematically or legally sound. Indeed, if the tools had been better designed with what is now known as 'traceability' to the constraint (of 14 days) prescribed by s 1073B (ie, if there was programming to prevent a payslip period being calculated under the relevant s 1073B instalment period), then compliance officers never would have been able to create these millions of unlawful and erroneous debts.

The Robodebt connection(s)

Although Ministers, officials and the Ombudsman have been at pains to distinguish income apportionment from Robodebt, the distinction is not as clear-cut in my mind as it appears to be in those of others.[31] As noted earlier, income apportionment was very clearly raised in the submissions of the applicants in the Robodebt test case of *Amato v The Commonwealth of Australia*.[32] The applicants noted that

> Section 1073B provided for averaging of income earned by a person receiving social security payments over an 'instalment period'. An 'instalment period' could not exceed 14 days. The effect of s 1073B was to produce an average daily rate of income for each day in the instalment period. Section 1073C then provided that '(a) the rate of the person's employment income on a fortnightly basis for that day may be worked out by multiplying that amount by 14; and (b) the rate of the person's employment income on a yearly basis for that day may be worked out by multiplying that amount by 364'. Sections 1073B and 1073C do not authorise apportionment of the kind done under the EIC [Robodebt] program.

Moreover, the unlawfulness of income apportionment under section 1073B had been consistently recognised in the former Administrative Appeals Tribunal (Tier 1) (AAT1) from as early as 2016. Indeed, in many of the cases in which debts were dismissed as invalid because they contravened s 1073B, the debts in question were actually robodebts. In other words, the evidence used to calculate the recipient's income (on a 'when earned' basis) derived not from a payslip but from ATO income data; and yet the Tribunal members invalidated the debts because they were contrary to s 1073B (ie, income apportionment debts). Of course, robodebts were not declared to be unlawful in the class action consent orders of Davies J because they contravened s 1073B or were income apportionment debts. Rather, robodebts were found to be invalid because, in respect of those debts, the

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[30] See, eg, Australian National Audit Office, *Centrelink Fraud Investigations* (Report No 10 of 2010–11, 30 September 2010) 8, 127.

[31] See, eg, Amanda Rishworth and Bill Shorten, 'Statement on Historic Income Apportionment' (Media Release, 2 August 2023) https://ministers.dss.gov.au/media-releases/11731; Commonwealth, *Parliamentary Debates*, Senate, 27 February 2025 (Matt Flavel); Commonwealth Ombudsman, *Lessons in Lawfulness Statement* (n 3) [9].

[32] *Amato v The Commonwealth of Australia* (Federal Court of Australia, VID611/2019, 27 November 2019) (Davies J) ('*Amato*').

> information before the decision-maker acting on behalf of the [Secretary of DSS] was not capable of satisfying the decision-maker that: (a) a debt was owed by the Applicant to the Respondent, within the scope of s 1222A(a) and s 1223(1) of the *Social Security Act 1991* (Cth) in the amount of the reassessed alleged debt... [33]

It may well have been that these robodebts were declared unlawful because they contravened s 1073B in the same way that income apportionment debts are now regarded as unlawful. Evidence of this overlap in juridical principle originates from the first Robodebt class action proceedings, where the applicants asserted that the Commonwealth knew of the existence of robodebts because some 76 AAT1 cases had alerted the Commonwealth to the unlawfulness of these robodebts.[34] These 76 cases were later summarised in Appendix 9 of the Final Report of the Royal Commission into the Robodebt Scheme, where they were presented as evidence that the AAT1 members had repeatedly found that certain debts calculated under the Robodebt scheme were unlawful.[35] Interestingly, however, many of these cases contain findings they were income apportioned contrary to the 14-day constraint under s 1073B. In other words, many of the invalidated 'robodebts' in the AAT cases were invalidated not because they were 'incapable of satisfying the decision-maker.

For instance, in one case,[36] Member Harvey was explicit as to the robodebt's invalidity due to unlawful income apportionment contrary to s 1073B:

> The relevant Rate Calculator... requires regard to be had to the person's fortnightly amount of income and section 1073B requires that a person's income in a particular instalment fortnight is taken to be earned evenly on each day in the fortnight.

The member then concluded,

> A calculation of her rate according to law must have regard to her income in each distinct instalment fortnight, not to her average fortnightly amount, viewed over a tax year.

In another 2016 decision, [37] Member Kennedy provided a clear explanation of the lawful and unlawful application of s 1073B:

> the correct methodology is to assess payments [the Applicant] earns, derives or receives in a given instalment period (being a fortnight) as having been earned, derived or received in that instalment period... There is no provision for those payments to be applied to another instalment period'. This directly contradicts the practice of averaging annual income across multiple fortnights.

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[33] *Amato* (n 32).

[34] *Prygodicz v Commonwealth* (Federal Court of Australia, VID1252/2019, 17 September 2020) 29–32 (Second Further Amended Statement of Claim) https://gordonlegal.com.au/app/uploads/2023/08/200914-second-further-amended-statement-of-claim-2fasoc-stamped.pdf.

[35] See *Royal Commission into the Robodebt Scheme: Final Report* (Report, 7 July 2023) vol 2, Appendix 9, lxix–cccxxxv.

[36] AAT Review Number 2016/A097377, 19 November 2016, summarised in *Royal Commission into the Robodebt Scheme: Final Report* (Report, 7 July 2023) vol 2, Appendix 9, xcv.

[37] AAT Review Number 2016/S099385, 15 November 2016, summarised in *Royal Commission into the Robodebt Scheme: Final Report* (Report, 7 July 2023) vol 2, Appendix 9, xcv.

By 2017, the language had grown even stronger. Member Horsburgh found that apportioning ATO income equally over employment periods was 'contrary to the provisions of that section [1073B] and the Act supplies no alternative method.' The member described the results of misapplying s 1073B as 'artificial and arbitrary.'[38] Of the 76 cases presented in the original robodebt class action as evidence of the Commonwealth's knowledge of the unlawfulness of robodebt before 2019, in 26 of those cases the members referred to the contravention of s 1073B (unlawful income apportionment) as a reason or the reason why the robodebt was unlawful.[39] Indeed, the number of cases in which s 1073B is cited in this way could be higher, as only the summaries of these cases have been published publicly.

A final note on the connection between robodebt and income apportionment comes from Stuart Robert's evidence in the Royal Commission into the Robodebt Scheme. Mr Robert described an example where a person for '25 fortnights of the year ... earned nothing, but [in] the 26th fortnight ... earned $1 million.' Mr Robert noted that this was 'a somewhat ridiculous example' but it was still 'illustrative' because 'you are entitled to welfare for 25 fortnights. But for the last fortnight, you are not.'[40] Although it may have been clear to Mr Robert that it was unlawful to average the income of the recipient across the whole year, it was also unlawful to apportionment the 'earned' income of $1 million even one day beyond or outside of the 14-day instalment period in which the windfall was earned, derived or received. It would have been prima facie lawful under s 1073B to conclude that the person earned $71,428.57 per day over the relevant instalment period.

The general approach of the Bill to remedying the income apportionment debacle

This Bill adopts a similar approach to that previously taken to remedy and 'validate' another historical error of government in social security in 2011. I have written a detailed history of that matter, which I call the omissions affair, in an article published earlier this year.[41] In summary, the 'omissions affair' was a major legal error that led to approximately 15,000 people being wrongfully convicted of social security offences between 1991 and 2011.

In response to an appeal decision delivered by the Full Court of the Supreme Court of South Australia in 2010,[42] the Commonwealth Parliament passed, in 2011, 'curative' retrospective legislation through the *Social Security and Other Legislation Amendment (Miscellaneous Measures) Act 2011* (Cth). This law inserted a new section (s 66A) into the social security legislation that created a 'stand-alone legal duty' requiring recipients to report changes in circumstances; however, that duty was applied retrospectively in that it was said to commence on 20 March 2000. In the High Court appeal[43] that followed the appeal decision in the full court of the Supreme Court of South Australia, the Commonwealth (the applicant) lost because the welfare recipient was found not to have been under an identifiable legal duty to act. The Court found that for an omission to be criminal, the law must impose a duty to

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38 AAT Review Number 2017/S111003, 30 August 2017, summarised in *Royal Commission into the Robodebt Scheme: Final Report* (Report, 7 July 2023) vol 2, Appendix 9, cclvii.

39 See Christopher Rudge, 'Lessons in Lawfulness', *Welfare Law in Australia* (Blog Post, 10 August 2023) https://welfare.substack.com/p/lessons-in-lawfulness.

40 *Royal Commission into the Robodebt Scheme*, Transcript of Proceedings, 2 March 2023 (Stuart Rowland Robert) 4210 [15]–[30].

41 Christopher Rudge, 'Convict and Forget? The Failure to Remediate 15,000 Wrongful Criminal Convictions in Social Security' (2025) 48(2) *University of New South Wales Law Journal* 502.

42 *Poniatowska v Director of Public Prosecutions (Cth)* (2010) 107 SASR 578.

43 *Director of Public Prosecutions (Cth) v Poniatowska* (2011) 244 CLR 408.

perform the act. The offence she was charged with did not itself create that duty, and the prosecution had failed to contend or prove one existed elsewhere in law.

Following this decision, in the 2013 High Court case *Director of Public Prosecutions (Cth) v Keating,*[44] the High Court of Australia unanimously found that this attempt at retrospective criminalisation was effectively invalid. Their Honours held that the new duty created by the retrospective legislation could not be retrospectively applied to past conduct because the legal obligation to report income had to exist at the same time as the failure to report. The High Court famously described the government's attempt to impose the duty backwards in time as a 'statutory fiction.'[45]

It may be felt that this historical episode provides a working emplate for the current Bill. However, the 'omissions affair' demonstrates a 'palpable injustice' the likes of which should not be repeated. As I observe in my article, although the High Court delivered a clear ruling that would have invalidated some 15,000 convictions, there has nevertheless been no real effort on the part of the government, including the CDPP, to remediate these miscarriages of justice or to assist those affected. The current Bill's approach to the income apportionment issue mirrors this problematic history of using retrospective laws to correct systemic government errors at the expense of citizens' rights and the rule of law, particuarly in relation to the conceded fact that many people were convicted in relation to debts affected by income apportionment.

Criminal convictions

The number of people confirmed to have been involved in criminal prosecutions for offences where the associated debt was calculated using unlawful income apportionment is 159. However, the calculation of that figure was the result of a specific review process detailed in an official response to a question on notice from the Commonwealth Director of Public Prosecutions (CDPP).[46] On 5 May 2023, the CDPP searched its records for all 'finalised' Services Australia prosecutions from the preceding five years (ie, since 1 May 2018). This initial search identified 1,856 cases. From that pool, the CDPP isolated the cases where the individual was still subject to an active court order (such as a good behaviour bond or reparation order) as of 15 May 2023. This narrowed the list to 365 matters. This list of 365 cases was sent to Services Australia, as only they could determine if the debt calculation involved income apportionment. Between September and October 2023, Services Australia confirmed that 159 of these cases were affected.

However, due to the CDPP's reduction of the caseload to only those subject to an 'active court' order, a vastly misleading impression appears to be created of the true number of people who may have been charged, prosecuted and convicted of social security fraud for debts affected by income apportionment historically. I would assume, based on historical data examined in my article on the Omissions Affair, that most people charged and/or convicted for debts affected by income apportionment were dealt with under s 135.2(1) of the *Criminal Code Act 1995* (Cth). While officials were careful to clarify in Senate hearings that these 159

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[44] *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459.

[45] Ibid 478 [46]–[47] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[46] Commonwealth Director of Public Prosecutions, *Answer to Question on Notice No SBE24-054* (Senate Legal and Constitutional Affairs Legislation Committee, Supplementary Budget Estimates, 8 November 2024).

individuals were not convicted *for* the act of income apportionment itself were convicted for offences such as welfare fraud (eg, knowingly failing to report income), this distinction does not really make a difference, because the debt for which they were charged may be inaccurate or perhaps even wholly erroneous, in which case the omission to report the alleged income might also be a nullity.

In any event, even if there was a debt, then the unlawful income apportionment method used to calculate the quantum of the debt may have also affected the size of the debt in a substantive way, thus rendering it possible or likely that, had the debt been calculated lawfully,

- no charges would have been laid; or
- no conviction would have been recorded; or
- no or a reduced community service order would have been ordered; or
- no or a reduced custodial sentence would have been ordered.

It is crucial that any remedial action with respect to income apportionment deal with the wicked problem of unsound historical criminal convictions due to income apportionment-affected errors, which likely stretches back to 1991. This Bill does not do this at all; and, for the same reasons expressed by the Ombudsman in their submission, I think the Bill is entirely inadequate as a purported remediation effort in respect of the income apportionment debacle.

Yet another disturbing aspect of the seemingly vastly underestimated number of people whose prosecutions and/or convictions were affected by income apportionment (159) is that the determination of the number of people prosecuted only went back to 2018. If we assume that no income apportionment occurred after 2020, when the 2020 legislation (identified above) was passed, then this figure of 159 consists of the number of prosecuted people for income apportioned debts over only about two years – or roughly 80 per year. Given that income apportionment goes back to 1991 and this transpired over 29 years, it is plausible to think that about 2,320 people (80 per year for 29 years) have been prosecuted and/or convicted for debts affected by income apportionment. If this figure is anywhere near correct (and, again, I think it would be a vast underestimate based on the problems identified with the 159 figure), then it is inadequate in the extreme to think that this Bill's provisions properly address the true implications of unlawful income apportionment for those in our community who are most vulnerable.

In many ways, the harm inflicted by income apportionment could be much greater for many than was inflicted by many on robodebt; after all, no robodebt victims who were class members in the class action would have been prosecuted or convicted of a criminal offence, because, in order to be an eligible class member in the first and second class action, victims of robodebt were required not to have cooperated with the agencies. Those who did cooperate with the agencies did not ultimately have 'robodebts' because, when they supplied their payslips and/or bank statements, those robodebts were converted into ordinary debts based on evidence. Of course, there will probably be a cohort of people who co-operated with a robodebt notice and then, upon providing documents to the agencies, had income apportionment applied to their records so as to generate an income apportionment-affected debt. Some of these co-operators may even have been charged with criminal offences. In this circumstances, one can imagine a person who received a Robdoebt notice, co-operated with it, was then subject to income apportionment, and then was charged and prosecuted and convicted of a criminal offence. Such a succession of events is not fanciful; however, it is

dismaying to imagine. The Bill should include provisions that enable people in such a terrible situation as this to be facilitated in seeking a legal remedy. The worst situation for such a person would be for them to accept a $600 resolution payment only to find that their avenues for criminal appeal have been forfeited.

Indeed the implications of a person accepting the resolution payment are of great concern. It does not appear clear to me whether the person forfeits their rights to appeal the income apportioned debt or to appeal any criminal conviction that may have arisen in respect of the income apportioned debt. This should be clarified and no such forfeiture should be the consequence of the resolution payment scheme created by this Bill.

Schedule 1

The Bill proposes inserting several new definitions into subsection 23, which is the Dictionary. These definitions have the effect of defining, among other things: work income (as 'Division 2' or 'Division 3' income); and entitlement periods, both for youth allowance and farm household support ('FHS'), as administered under a previous farm support policy. Notably, entitlement periods appear not to have been defined in the *Social Security Act 1991* (Cth) (*SS Act*) before now, despite the term being used once in the Act.[47] It is a shame that the concept of an entitlement period was not better understood previously, because the income apportionment debacle appears to have emanated from confusion as to when an entitlement period is as compared to the statutory concept of an instalment period.

The new definitions are then enlivened at various points of the substantive amending provisions. The amendments in Pt 3.11 address 'income earned from employment between 1 July 1991 and 6 December 2020'. Although there have been reports that income apportionment applied to income earned prior to 1991, I accept that the figures relied on for that contention, which are drawn from a Question on Notice,[48] relate not to income apportionment debts but to all outstanding social security debts from all causes. That being so, Pt 3.11 attempts to address all known income apportionment-affected debts by validating them.

Division 2 of the Pt 3.11, as noted in the simplified outline at s 1112, purports to validate any administrative action that would have been invalid 'merely because income apportionment was used in relation to [a person's] income [reports or information] for the purposes calculating social security benefits and social security pensions, youth training allowance and former farm household support.' The way in which this validation occurs is discussed below.

Section 1113

The definition of entitlement period, discussed earlier, has effects under the amended s 1113. Unlike specified pension entitlement periods[49], which are calculated by reference to the pension payday and ending on the day before the next pension payday, entitlement periods for other non-specified pension-related entitlement periods are said to be periods determined

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47 Although seemingly only once: see *Social Security Act 1991* (Cth) s1044(3).

48 See Commonwealth, Parliament, Senate, Community Affairs Legislation Committee, *Supplementary Budget Estimates 2024-25*, Answer to Question on Notice No SA SQ24-000807, 6 November 2024.

49 There are 14 such specified pensions listed in the definitions under *Social Security Act 1991* (Cth) s 1112; they include, for instance, the disability support pension and the age pension.

by the relevant Secretary.[50] This is an unusual definition, which cuts across the rule of law. It is altogether arbitrary; and it seemingly would allow the relevant Secretary to determine the length of an entitlement period in any way they wish. The definition thus introduces a roving and chameleon-like noun – entitlement period – into the law. This is a statutory fiction, and its purpose seems to be to enable the Secretary to create an entitlement period of any length so as to avoid any consequences arising from defining the entitlement period by reference to its actual historical length or quantum. As noted by the Commonwealth Ombudsman, most such entitlement periods will have consisted of 14 days in the period between 1 July 1991 and 6 December 2020. However, this definition allows the actual entitlement period under which a person's payments were provided in that historical period to become pliable and malleable retrospectively. No doubt this definition is designed to allow the Secretary to expand the scope of the validation mechanism created by this Bill to any historical situation. Like a blank slate, the word can be given any meaning the Secretary deems appropriate way to enable invalidity to be overcome.

For instance, could the Secretary determine that an entitlement period consists only of 1 day? In circumstances where Sunday income was clearly earned based on a payslip identifying appropriate penalty rates, and where the Sunday fell on one fortnight or another, this may prevent difficulties or opportunities for a calculation. In this circumstance, cleaving off the Sunday period and calling it an 'entitlement period' in its own rate, and then saying that for that notional 'entitlement period' the 'earned income can be assessed' would be an entirely artificial exercise lacking in any connection to reality.

There is also a question arising from this: whether the actual applied meaning of an entitlement period, as it may come to be applied case to case, will be revealed to the social security recipient on the (re)calculation of their entitlements for the purposes of the offer of a specific quantum of resolution payment. Will those seeking a resolution payment of the maximum of $600, for instance, be able to determine how this roving definition of entitlement period has been applied in their case, and thus to oversee the basis on which their resolution payment has been calculated? I will address this point further below.

Section 1114

Given the 'roving' definition of an entitlement period, which I am calling a statutory fiction, the general income apportionment method statement in s 1114 becomes pliable in the hands of the Secretary. The method consists of four steps, with the third step involving the entitlement period as a variable.

The definition in s 1113(b) requires entitlement periods to be 'a period determined by the relevant Secretary in relation to which an instalment of a social security benefit or a social security pension is paid.' Although this arguably anchors the entitlement period to actual payment instalments, the Secretary's has discretion to determine entitlement periods of varying lengths and timing.

[50] That being the Secretary of the Department of Social Services or the other secretaries relevant to the administration of the *Farm Household Support Act 1992* (Cth) or *Student Assistance Act 1973* (Cth) at the time those Acts and programs were relevantly in force.

For example, take a person who earns $1,400 within a 14-day payroll period (1–14 January). If, under s 1114, the Secretary determines there is a short entitlement period of 7 days that overlaps with the full payroll period, the method could apply as follows:

- Step 1: $1,400 ÷ 14 days = $100 per day
- Step 2: 14 days of payroll period fall within the entitlement period
- Step 3: $100 × 14 days = $1,400 total amount
- Step 4: $1,400 ÷ 7 days = $200 per day

By contrast, if the Secretary determines a longer entitlement period of 28 days, encompassing the same payroll period, the method could apply as follows:

- Steps 1–3: Same $1,400 total amount
- Step 4: $1,400 ÷ 28 days = $50 per day

This demonstrates how the arbitrary definition of entitlement periods allows the Secretary to manipulate daily income assessments from $50 to $200 using identical source data.

More concerning is the Secretary's control over which of the three 'approaches' in Division 3 applies in any given case, as this effectively allows the Secretary to select the most advantageous calculation method for the government by determining what information is considered 'identifiable' or 'held.'

In order to ensure this submission can be submitted on time, I will summarise the remainder of my response in bullet points:

Schedule 2 – Debt Waivers

- Part 1 expands the waiver criteria to include debts where false statements were 'justified in the circumstances'; this overdue reform creates a discretionary exception, and that is welcomed;
- Part 2 increases small debt waiver threshold from current levels to $250; while this is positive, it does nothing for income apportionment debts which might exceed this amount;
- Part 3 provides a one-off waiver for small debts under $250 as held in Services Australia records but not yet raised; this is an administrative housekeeping provision rather than meaningful remediation.

Schedule 3 – the Income Apportionment Resolution Scheme

- Item 2(5) requires 'effective acceptance' that 'releases and forever discharges the Commonwealth from all liability' this forces an entitlement resolution payment recipient to completely waive their legal rights, which appears to be more than what is 'necessary' and 'in the public interest' given that the public interest would be served by the restitution of victims of the income apportionment debacle; it is also possible that a 'palpable injustice' could arise from this provision, such as if a person who has been wrongly convicted could not bring any claim against the Commonwealth in any circumstances;

    - it should be clarified, here, that claims to do not extend to criminal appeals brought against the CDPP in respect of social security offences arising from income apportionment-affected debts;
- item 3(1)(g) permits the Minister to determine resolution payment amounts by legislative instrument; there is no parliamentary oversight or vote of the compensation quantum and it can seemingly be changed on the Minister's say so;
- item 3(1)(f) permits Minister to determine someone is 'not entitled' to payment despite meeting criteria; this represents an arbitrary ministerial veto power;
- other items under 3 are similarly concerning in that it effectively permits the Minister to withhold or otherwise manipulate resolution payments on a seemingly unconstrained and unprincipled basis;
- item 6(2) excludes normal Social Security Act review processes, such that there is no independent merits review of scheme decisions;
- I note that there is no minimum or maximum compensation amount specified in primary legislation, in contrast with the $200 and $600 figure mentioned in explanatory materials; when these figures are specified, they should be increased significantly.

Overall assessment of the Bill

- The proposed waiver provisions are long overdue and welcome; however, the Bill creates a comprehensive legal immunity for the Commonwealth following three decades of unlawful administrative action;
- the resolution scheme is designed to minimise government liability through forced waivers and administrative barriers;
- the criminal conviction implications have been entirely ignored despite potentially affecting thousands; and
- the Bill generally replicates the response to the Omissions Affair, adopting the same pattern of retrospective validation without meaningful accountability.

As can be seen, in the interests of a timely submission I have summarised my analysis in these final paragraphs. However, should I be able to submit a further or supplementary submission later, I would be interested in doing so.

Sincerely

Christopher Rudge