QUESTION ON NOTICE

SENATE COMMUNITY AFFAIRS REFERENCES COMMITTEE INQUIRY ON CENTRELINK'S COMPLIANCE PROGRAM

As requested during my evidence at the Committee hearing in Melbourne on Wednesday, 9 October 2019, I briefly amplify why I conclude that section 66A of the *Social Security (Administration) Act* 1999 does not provide any lawful basis for any relevant aspect of the OCI's (known as robo-debt) purported reversal of the onus of proof of debts.

The contention that it did so provide was contained in the Submission from Services Australia: see submission #20 at p 15. That submission does not elaborate any reasoning as to why the section might have this effect. Indeed it pitches its reference to the provision quite low, as merely showing that OCI was 'consistent' with the section rather than a *foundation* for it.

The section in question provides the basis for requiring an applicant for social security, or someone currently in receipt of such a payment, to notify a specified change of circumstances within 14 days of that event.

The reason section 66A is in my opinion no legal foundation for OCI is that it is not what can be termed an 'apples and apples' engagement with the statutory and common law regime governing establishment and proof of a debt (outlined in my formal Submission). In other words it does not deal with the same 'subject matter' and thus makes no incursion on strong protections cast around establishment and proof of debts. In more detail:

1. The section is not about debt recovery at all, but at most about the 'date of effect' of the consequences of timely or late advice: it is designed to prompt speedy advice of changes and reward people who do so;
2. The predicate of the section is that there is a *change* of circumstances. If the original reporting of income is accurate and timely there is no 'change' to trigger the operation of the section. The supposed obligation to revalidate past reporting lacks any predicate if there has been no change in reality (as distinct from some Centrelink supposition derived from a mathematically unsound average).
3. The section is directed at the *consequences* of timely or otherwise reporting of a change, and is not phrased to generate any ongoing *legal duty* to assume the onus of disproving allegations of debt (whatever the practical advantages may be of cooperating in doing so in the simple case), and
4. The historical precursor provisions to section 66A were on the statute book when *McDonald* was decided by the Full Federal Court (see my Submission at p 3 for

details of the effect of this case), and no exception to the principles enunciated about Centrelink bearing the practical onus of proving matters such as debts was canvassed in that case, or even alluded to.

There may be other points that would arise in the knowledge of any expanded reasoning which might be advanced by the Services Australia, or that I would add after deeper reflection on it. However the citing of section 66A arose after my main Submission was drafted, and to the best of my knowledge is the first time in over two years that this provision (or any other legal foundation) has been advanced in purported support of OCI using averaging and purporting to reverse the onus of proof.

Professor Terry Carney

Thursday, October 10, 2019