SENATE COMMUNITY AFFAIRS REFERENCES COMMITTEE

REFERENCE ON 'CENTRELINK'S COMPLIANCE PROGRAM'

SUBMISSION

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BACKGROUND

I thank the Committee for agreeing to accept this late submission.

I write as a leading academic authority on social security law (Emeritus Professor of Law University of Sydney, specialising in social security) and draw on nearly 40 years of experience sitting on social security appeals on the Social Services and Child Support division of the Administrative Appeals Tribunal and its predecessor the Social Security Appeals Tribunal.

SUBSTANTIVE ARGUMENTS

This submission addresses term of reference (j), dealing with the 'use and legality' of the July 2016 online compliance initiative ('OCI', known as 'robo-debt') in raising overpayment debts.

It asserts two things:

1(a)   Overpayment debts of youth allowance ('YA') or newstart allowance ('NSA') must be calculated as successive fortnightly *amounts* of income, adjusted for any carry forward income bank adjustments (there is no other basis) and

1(b)   An ATO *average* of fortnightly income is mathematically incapable of ever establishing an overpayment debt except where the person had one unchanged income over the debt period; a data match discrepancy only triggers Centrelink powers of inquiry.

2(a)   Centrelink fully bears the burden of proof of establishing any recoverable debt (the onus cannot be reversed), which debt must be based on reliable information about income amounts for each and every fortnight of the overpayment period, and so

2(b)   Failure to discharge that onus renders the debt unlawful.

These points have been more fully elaborated elsewhere,[1] so what follows is a brief overview.[2] Other matters of public concern,[3] which are dealt with under other terms of reference for this inquiry, are not addressed here because in my opinion they cannot at all correct for the fatal mathematical and legal defects canvassed above.

1   AN OVERPAYMENT OF A WORKING AGE PAYMENT SUCH AS YA OR NSA MUST BE CALCULATED ON THE BASIS OF SUCCESSIVE FORTNIGHTLY *AMOUNTS* OF INCOME (AS ADJUSTED FOR INCOME BANK CREDITS[4])

Overpayments can be calculated only on the basis of each fortnightly *amount* of income, after accounting for any carry forward income bank adjustments, and an ATO *average* of fortnightly income is incapable of establishing a debt unless the person had one job with unchanged income over the debt period. ATO data-matches are a basis for Centrelink inquiry but never a sufficient basis for establishing a recoverable debt.

The steps underlying this are as follows:

1. In social security a debt is a debt 'if and only if' another provision of the Act makes it so (*Social Security Act 1991* section 1222A(a)),[5] and it becomes a debt if for instance a person is paid other than their correct entitlement (s 1223);

2. The correct entitlement must be determined in accordance with the relevant Rate Calculator (eg Benefit Rate Calculator B for NSA[6]) which stipulates that

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[1]   Principally and most fully canvassed in Terry Carney, 'The New Digital Future for Welfare: Debts without legal proofs or moral authority?' (2018) (March) *UNSW Law Journal Forum* 1 <http://www.unswlawjournal.unsw.edu.au/the-forum/>;   See also: Terry Carney, 'Robo-Debt Illegality: A   failure   of   rule   of   law   protections'   on   *AUSPUBLAW*   (30 April)<https://auspublaw.org/2018/04/robo-debt-illegality/>; Terry Carney, 'Social Security and Robo-debt' on *AUSTAXPOL* (5 June 2018)<http://www.austaxpolicy.com/social-security-robo-debt/>; Terry Carney, 'Robo-debt Illegality: The seven veils of failed guarantees of the rule of law?' (2019) 44 *Alternative Law Journal* 4; Terry Carney, 'Danger! Election 2016 delivered us Robodebt. Promises can have consequences' on *The Conversation* (16 May)<https://theconversation.com/danger-election-2016-delivered-us-robodebt-promises-can-have-consequences-117191>; Terry Carney, 'Bringing Robo-debts Before the Law: Why it's time to right a legal wrong' (2019) 58 *Law Society Journal of NSW* 68.

[2]   A longer submission, covering some additional issues, was lodged with the Senate Legal and Constitutional Affairs References Committee for its reference on 'The impact of changes to service delivery   models   on   the   administration   and   running   of   Government   programs' https://www.aph.gov.au/DocumentStore.ashx?id=eed25cdd-45e3-4ff0-9b4f-0ac2de168a19&subId=668811.

[3]   These concerns include that ATO data counted some employers twice or used business names rather than the employer names in Centrelink data.

[4]   Carney, 'A New Digital Future', above n 1 p. 5 note 18 of that paper.

[5]   There is therefore no common law basis for creating a debt, such as by applying the 'Auckland Harbour Board' principle (*Auckland Harbour Board v The King* [1924] AC 318). Further Carney, 'A New Digital Future', above n 1, p. 10.

this is based on the amount of income in each and every *particular* fortnight (ie the fortnightly *amounts* of income); and

3. It is basic math that an ATO average of fortnightly income cannot speak to its individual constituent parts wherever income fluctuates (if this were not so, Bradman nearly made a century in his last innings, not a duck). So ATO data match figures are not relevant to that task of establishing the correct fortnightly amounts (it constitutes 'no legally acceptable' evidence at all).

4. So no correctly calculated 'amount entitled' can be determined. Reliance on the ATO income averages therefore leads to false or highly inflated 'debts'.

When correctly calculated it is a matter of record from the 2017 Ombudsman's report and elsewhere that ATO averaged robo-debts raised in the thousands of dollars frequently revert to zero or a few hundred dollars.[7]

2 THERE IS NO LEGAL FOUNDATION FOR REVERSAL OF CENTRELINK'S ONUS OF PROOF OF ESTABLISHING ANY ROBO-DEBTS NOT VOLUNTARILY CLARIFIED BY PRODUCTION OF CLIENT PAYSLIP RECORDS)

An ATO data-match can raise sufficient doubt about the correctness of past payments as to warrant Centrelink inquiry, either by asking for any payslip records still held by the person or by exercising the formal powers to require employers or banks to supply information.[8]

Where the supposed robo-debt debtor is unable to provide such records, however, there is no legal basis at all for the supposed debt amount to be raised as a debt. This is because Centrelink, not the supposed debtor, bears the legal onus of establishing any such debt.

In abbreviated form,[9] this is because:

1. The Full Federal Court long ago enunciated principles for determining who bears the 'practical' onus of proof[10] and on those principles the onus of establishing a debt squarely and entirely lies with Centrelink;[11] and

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[6]   *Social Security Act 1991* s 1068 [as applied by s 643].

[7]   Larger amounts where for instance take-home rather than gross earnings were reported, much smaller if payment fortnights do not quite fully align with pay days or date income was 'earned' as distinct from received in hand: further, 'Centrelink's Automated Debt Raising and Recovery System' (Canberra: April 2017) http://www.ombudsman.gov.au/__data/assets/pdf_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf   especially at p. 8 and note 15 in that report.

[8]   See Carney, 'A New Digital Future', above n 1, pp. 9-10 and note 49 in that paper.

[9]   See generally, Carney, 'A New Digital Future', above n 1; to similar effect Peter Hanks, 'Administrative Law and Welfare Rights: The 40-year story from Green v Daniels to "robot debt recovery"' (2017) 89 *AIAL Forum* 1.

2. A High Court principle[12] insists on more extensive proof than mere balance of probability to reach the requisite 'satisfaction' when the issue is one such as raising a debt[13] (because in this case it has credit-rating, moral and even professional admission implications).

It follows that there is not a shred of support for government claims such as that 'there is a legal obligation' to raise debts, or that there is nothing 'contrary to law' about raising such purported robo-debts. Debts can lawfully be raised *only* on the basis of compliance with the above principles (and it is a breach of model litigant or 'good governance' principles[14] for Centrelink to continue to pursue such debts on any other basis in the AAT).

In short, OCI presently effectively imposes an unlawful 'new tax' on many current and past students and unemployed.[15]

CONCLUSION

Technological advances such as AI do offer many advantages. On balance I remain a supporter of AI roll-out in social security. But robo-debt's poor design and failure to subscribe to the rule of law (a proper legal foundation and proper processes), has severely undermined public trust and confidence in such initiatives.

In my opinion OCI should be suspended until measures are taken fully to address these concerns, and compensate those adversely affected by its operation to date.

Terry Carney

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[10] See *McDonald v Director-General of Social Security* [1984] FCA 59; 1 FCR 354. ATO averages furnish no relevant evidence at all to discharge that onus.

[11] For technical details of the reasoning, Carney, 'A New Digital Future', above n 1, pp. 5-6.

[12] The Briginshaw principle, from the case of the same name: see [1938] HCA 34; (1938) 60 CLR 336.

[13] This is elaborated in Carney, 'A New Digital Future', above n 1, pp. 7-8.

[14] For discussion Carney, 'A New Digital Future', above n 1, p 9 and note 42 in that paper.

[15] The revenue impost over Budget out years has been estimated at up to $3.7 billion, though actual collections to date cast some doubt on the ability to achieve those targets: Carney, 'Bringing Robo-debts Before the Law: Why it's time to right a legal wrong', above n 1, p. 69.