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RE: INQUIRY INTO CENTRELINK COMPLIANCE PROGRAM

We welcome and appreciate the opportunity to make a submission in relation to the inquiry into Centrelink's compliance program.

Preliminary Consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander people across Queensland. The founding organisation was established in 1973. We now have 26 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander people.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout the entirety of Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by four and a half decades of legal practise at the coalface of the justice arena and we therefore believe we are well placed to provide meaningful comment. Not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

THE DEFICIENCIES IN THE CENTRELINK COMPLIANCE PROGRAM

Our comments pertain to the Centrelink prosecutions which follow from the decision by Centrelink to raise a debt; the allegation against citizens that they have obtained a financial benefit premised on the alleged debt; and the decision to prosecute.

With respect to this aspect of the Centrelink Compliance Program, there have been two significant investigations undertaken by the Commonwealth Ombudsman in relation to the raising of debts and the decision to prosecute by Centrelink:

*Centrelink's Automated Debt Raising and Recovery System (2017)*¹ which reviewed the Department of Human Services' online compliance intervention system for debt raising and recovery, and the follow up implementation report in 2019;² ("The 2017 Report")

*Centrelink and Commonwealth Director of Public Prosecutions, Review of Circumstances Leading to a Fraud Conviction (2010).*³ ("The 2010 Report")

Those two reports trace the significant deficiencies in the Centrelink Compliance Program and identify what needs to be done to correct it. Unfortunately, the circumstances and issues raised in those two reports continue to impact upon those who are unfairly targeted in the Centrelink Compliance Program.

The very fundamentals of the debt recovery system, including its legality,⁴ have been criticised and the ongoing failure to fix such is concerning.⁵ In the 2010 investigation, the Commonwealth Ombudsman noted the limits of their inquiries which was confined to examining the administrative steps that led to the prosecution and to highlight the flaws in the process. It was not within the remit of the Commonwealth Ombudsman's office to examine the continuation of the prosecution past that point nor was it within the jurisdiction of the Ombudsman to investigate the decisions made by courts.⁶ We do not raise any issue with the ethics of the Commonwealth Director of Public Prosecutions (The CDPP) and can cite instances where proper fairness has been accorded to defendants by commonwealth prosecutors, however in our view an external review should be conducted which can cover all steps in proceedings from claim to finalisation in court. Such a review should be assisted by an eminent lawyer and ethicist to examine the ethics of the continuation of arguably flawed prosecutions and the impact upon the role of the Commonwealth as a model litigant in the conduct of those prosecutions.

The interaction between the administrative deficiencies and the court processes is illustrated by the 2010 investigation by the Commonwealth Ombudsman into the prosecution of Ms Z. Ms Z was

¹ Available at http://www.ombudsman.gov.au/__data/assets/pdf_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf

² Available at http://www.ombudsman.gov.au/__data/assets/pdf_file/0025/98314/April-2019-Centrelinks-Automated-Debt-Raising-and-Recovery-System.pdf

³ *Centrelink and Commonwealth Director of Public Prosecutions, Review of Circumstances Leading to a Fraud Conviction (2010)* available at http://www.ombudsman.gov.au/__data/assets/pdf_file/0021/29442/onlinecentrelink-dpp_fraud-conviction.pdf

⁴ P. Hanks, 2017 National Lecture on Administrative Law: *Administrative Law and Welfare Rights: A 40-year Story from Green v Daniels to 'Robot Debt Recovery'* AIAL Forum No 89. T. Carney, *Robo-debt Illegality, the Seven Veils of Failed Guarantees of the Rule of Law*, 44 Alternative Law Journal 4 (2019), ABC News "Centrelink Robo-Debt System is 'Extortion' says Former Tribunal Member", 27 June 2019.

⁵ T. Carney, *Bringing Robo-debts Before the Law: Why it's Time to Right a Legal Wrong*, 58 Law Society of NSW Journal (2019).

⁶ 2010 Report, paragraphs 2.53 and 2.56.

wrongly accused of a fraudulent pattern of behaviour.⁷ The Commonwealth Ombudsman's investigation of her prosecution unpacked the multiple errors that led to the prosecution and conviction of Ms Z. These errors are not unique to the case of Ms Z. Administrative deficiencies noted by the Ombudsman included:⁸

- The claim form completed by Ms Z was not provided in full to the CDPP or the Court. In the portion not provided, Ms Z had declared the employment from which she derived income that was not elsewhere declared on the claim form.
- There were other relevant items of evidence in Centrelink's records that were not brought to the attention of the CDPP or the Court. They included statements about Ms Z's employment and cessation of employment, and (possibly) a spreadsheet detailing her earnings.
- It was unclear where on the claim form completed by Ms Z that she should have declared commission earnings of the type she received.
- It was unclear whether Ms Z's earnings (sporadic and uneven commission payments) were subject to fortnightly reporting, and if she was given a clear direction to this effect.
- The account into which the commission earnings were paid was declared by Ms Z to Centrelink, but this was not made clear by Centrelink or the CDPP.
- The interview conducted by Centrelink with Ms Z prior to it providing a prosecution brief to the CDPP was inadequate. Centrelink failed to clarify the nature of the employment that Ms Z had declared.
- It would have been difficult for Ms Z to clarify, in the income and assets statement provided to her by Centrelink, whether the amounts stated included the commission earnings she had received.
- Information provided by Centrelink to the CDPP suggesting that Ms Z had a previous overpayment debt was misleading, and did not explain an off-setting amount that was payable to her by DVA.

There can be deficiencies around the decision to prosecute and making a judgment about whether there is evidence of a fraudulent intention. The lessons to be drawn from the prosecution of Ms Z and others are:

- Centrelink customers in receipt of New Start Allowance or a pension can experience difficulty in accurately reporting their employment earnings if they work casual, irregular hours.⁹
- There are multiple approaches to calculating debt¹⁰ and those can rightly resolve in favour of the Centrelink recipient. It is not just Centrelink recipients who get confused about the Centrelink calculations, as noted by the Ombudsman, the CDPP has difficulty understanding the annualised income amounts shown on some advices.¹¹
- The Ombudsman noted multiple deficiencies in the administration of the case of Ms Z (outlined below) and commented, "As this was a fraud investigation with potentially grave consequences for the customer, we consider that all statements and claims made by Ms Z should have been thoroughly checked"¹²

⁷ 2010 Report, Para 2.41

⁸ 2010 Report, Para 3.5

⁹ 2010 Report, Para 2.31. It would be a highly beneficial use of technology if some assistance could be provided to design an app to assist those who receive irregular payments. It is noted in the 2010 Report that the ongoing confusion about how to calculate and advise Centrelink was enough to make Ms Z give up work altogether. Para 2.35. Numerous matters have been before the Court where the information was reported but was deemed to have been entered in the wrong section of the form. The forms should also be redesigned

¹⁰ 2010 Report, Paras 2.32, 2.34

¹¹ 2010 Report, Para 2.48. They are not alone, defence lawyers find it opaque as well.

¹² *Ibid*, Para 2.2.5

- The Ombudsman noted disregard for potentially exculpatory information for Ms Z.¹³ This was especially important where Ms Z might not have been fully aware of the documents held by Centrelink and provided to the CDPP or other information on Centrelink records that might have supported her defence.¹⁴

Systemic issues which existed prior to the introduction of the online compliance intervention (“OCI”) system¹⁵ for raising and recovering debt persist and contribute towards the current deficiencies in debt recovery.

- Centrelink customers in receipt of New Start Allowance or a pension can experience difficulty in accurately reporting their employment earnings if they work casual, irregular hours.¹⁶
- Correct information can be supplied by Centrelink recipients but it is entered, in the view of Centrelink on the “wrong” part of the form,¹⁷ this is due in part to the design of the form.¹⁸
- Clients supply information to Centrelink but not all of it is necessarily recorded.¹⁹ or kept.²⁰
- Centrelink culls documents that are potentially exculpatory.²¹

It is not enough to say that prosecution of the matters in Court is the proper forum for the resolution of these sorts of cases²² when there are deficiencies that prevent the proper defence of these matters.

Issues following the introduction of the OCI: the use or misuse of data matching to raise debts

A debt arises when a person receives a benefit such as the Newstart allowance or the Parenting Payment, to which they are not entitled or they receive a benefit at a higher rate than the correct rate, because the person’s other income was higher than recorded by Centrelink. For example, Newstart is based on an individual’s income as defined in s 8 of the *Social Security Act 1991* which is the individual’s income during the relevant fortnight for which the allowance is paid. The OCI employs an algorithm which uses data from the ATO to average out a person’s yearly income and then crossmatch this with income reported to Centrelink. If this does not match, the system automatically issues a debt notice to the recipient. There are several flaws with this system. Firstly there are different definitions of income under the income tax laws as compared to the Social Security Legislation. Secondly irregular payments to recipients which result in peaks and troughs in

¹³ *Ibid*, as noted at Paras 2.36, 2.37, 2.38

¹⁴ *Ibid*, Para 2.56

¹⁵ Less affectionately known as the “robo-debt” system.

¹⁶ 2010 Report Para 2.31. It would be a highly beneficial use of technology if some assistance could be provided to design an app to assist those who receive irregular payments. It is noted in the 2010 Report that the ongoing confusion about how to calculate and advise Centrelink was enough to make Ms Z give up work altogether. Para 2.35. We are aware of a number of matters which have been before the Court where the information was reported but was deemed by Centrelink to have been entered in the wrong section of the form. The forms should also be redesigned

¹⁷ *Ibid*, Para 2.1

¹⁸ *Ibid*, Paras 2.4, 2.5

¹⁹ Described at para 2.21 of the 2010 Report. The Ombudsman was unable to conclude whether the spreadsheet had or had not been supplied to Centrelink.

²⁰ Centrelink has two categories of document storage, documents that are to be maintained on the client’s permanent file and other documents that are to be “batch-stored”. Batch-stored documents only need to be maintained for two years. As identified by the ANAO, sometimes Centrelink staff do not differentiate between documents that should be batch-stored and those required to be maintained on a customer’s permanent file: ANAO, Audit Report No 26. *Management of Fraud and Incorrect Payment in Centrelink*, para 4.31

²¹ 2010 Report, Para 2.21 illustrates record keeping problems experienced by clients. Centrelink batch stores some documents and then culls them from the system. It becomes near impossible for Centrelink recipients to prove what information was supplied by them to Centrelink because the records are incomplete and/or have been destroyed. The unfairness flowing from the destruction of records is not treated as a reason to refrain from prosecution.

²² As stated by the CDPP in response to the draft 2010 Report. See para 2.56

the fortnightly periods will inevitably lead to mismatches which are not indicative of debt. An example is given in the 2017 Report:²³

Mr S's complaint: On 23 October 2016, Mr S received a letter from Centrelink telling him he owed a Newstart Allowance debt of \$3 777.43 for the 2011-2012 financial year. The debt arose due to a discrepancy between earnings he had reported to Centrelink and income information from the ATO for the period. In 2011-2012, Mr S told us he worked on a casual basis as a security guard and his income changed each fortnight depending on the shifts he worked. He stated he only claimed Newstart allowance during periods he did not work. He was concerned Centrelink incorrectly averaged his income across his period of employment. Mr S complained to us on 21 December 2016. He told us Centrelink had told him if he wished to dispute the debt, he needed to provide copies of his payslips. He did not have these and the employer he worked for was no longer in business. He reports that Centrelink told him it would not accept copies of his bank statements as evidence²⁴. On 4 January 2017, after Mr S asked for a reassessment and provided further updates to his employment income, his debt was reduced to zero. Investigation outcome: we investigated Mr S's complaint. DHS told us it had averaged his income over the period of employment, as Mr S confirmed his information online on 22 October 2016. If he had provided a breakdown for the periods of employment, this information would have been used to assess his entitlement.

In Mr S's case, he did not realise a debt based on ATO income data may be higher due to averaging. He 'accepted' the ATO data online, because it was the correct annual figure.

Many more Centrelink recipients simply accept the truth of the assertion by Centrelink from the presumptive debt.

In the 2017 review the Ombudsman recommended that more information be included on the letters including making the compliance helpline more prominent and to mention the possibility of a debt earlier. The Ombudsman recommendation was that there be a clear explanation of the concept of averaging. Specifically, letters should explain that if the customer does not go online or if they accept the ATO data, their income will be averaged over periods for which income has not been verified and debts based on averaged ATO income may be less accurate, especially if the customer's income was fluctuating or intermittent. The aim of recommendation 2(c) is to ensure people receive sufficient information about why it may be in their best interests to provide income related information rather than relying on Australian Taxation Office (ATO) information for the calculation of any debt. The Office is not satisfied that recommendation 2(c) is met at this time.

The Ombudsman also recommended that DHS should provide an improved debt explanation in all compliance debt outcome letters within the next 12 months, irrespective of whether the customer completed the review online or through the assistance of a compliance officer.

The Legal Questions Remain

The Ombudsman was satisfied, from their close engagement with the Department, that significant improvements have been made to the overall system and that fairer processes are in place. However, given the limits of the Ombudsman's functions, the question remains to be asked and

²³ 2010 Report, Para 3.21

²⁴ We note that in the case of Mr S it should have been possible to supply him or his advisors with an online calculator to use the amounts in his bank statement to see if he potentially had a debt and to advise that the data matching assumptions could be invalid.

considered as to whether a debt can be created presumptively or whether DHS can shift the function of complex fact finding to the individual and require the individual to disprove the existence of a debt²⁵.

The debts raised by the OCI system are presumptive debts which do not arise under the definitions contained in the *Social Security Act 1991* (Cth). The end result of this is that many of the debts are not properly raised and consequently debt notices are sent for inaccurate and non-existent debts.

The onus then falls on Centrelink recipients to prove their income and that they have not been overpaid. As a cohort, many are on benefits because they struggle with literacy and numeracy issues and are unfamiliar with the processes required to successfully defend these matters.²⁶ As noted by the Commonwealth Ombudsman's Office in the 2017 report, the effect of the changes to the OCI program has been to shift complex fact finding and data entry functions from the Department to the individual.

As a basic minimum of fairness, an organisation pressing for a debt should be articulating the existence of a debt, provide an adequate description of how the debt is calculated, and carry the burden of proof for establishing the debt.

CONCLUSION

It is deeply unfair when a citizen has made genuine efforts to satisfy the demands of Centrelink and has made the same genuine efforts to submit a tax return to be accused of fraud because of a faulty calculation based on the information supplied in the tax return. When debts are prosecuted, the prosecution submissions, reflecting the instructions from Centrelink, generally submit that the offence only came to light because of data-matching. That often does not accurately reflect the situation, rather reflects a series of unfair assumptions contained in the OCI. There is a legitimate expectation that the Commonwealth act fairly with respect to the raising of debts by Centrelink.

We thank you for the opportunity to provide a submission to the Inquiry.

Yours faithfully,

Shane Duffy – Chief Executive Officer

²⁵ P. Hanks, 2017 National Lecture on Administrative Law: *Administrative Law and Welfare Rights: A 40-year Story from Green v Daniels to 'Robot Debt Recovery'* AIAL Forum at pp 9,10,12

²⁶ As noted in the 2017 Report, "Most people receiving income support payments would not have a detailed understanding of social security income tests or the debt calculation process, nor should they be expected to. In our view, the OCI system does not clearly state it uses the averaging method or explain this may be inaccurate in some cases."