

SENATE COMMUNITY AFFAIRS REFERENCES COMMITTEE

PUBLIC HEARING, 29 MARCH 2021

PARLIAMENT HOUSE, CANBERRA

Administrative Appeals Tribunal

Question 1

Hansard pages 2-3:

CHAIR: Thank you. Do you have statistics on the years the debts relate to or is that not something you pull out of the—

Mr Matthies: Senator, that's correct: we don't record that information in our case management system for applications—

CHAIR: You've given us information on 2018-19, 2019-20 and the year to date, which is much appreciated. Are you able to take on notice going back to 2015-16, 2016-17 and 2017-18 to give us, like you have here, the number of social security appeals or applications and the percentage that related to debt, so we can get a more longitudinal view?

Mr Matthies: Yes, Senator. The figures that we gave you today relate to Centrelink generally. That would be family assistance, social security, farm household support and student assistance as well.

CHAIR: If I remember correctly, you can't do the payments individually on the debts, can you? Is that correct?

Mr Matthies: In terms of the payment type, we can do it at that level.

CHAIR: If you could take that on notice, that would be appreciated—related to debts.

The response to the Honourable Senator's question is as follows:

The tables below set out information about:

- applications made to the Administrative Appeals Tribunal (AAT) for first and second review of decisions made by Centrelink under a family assistance, farm household support, social security or student assistance law (Centrelink decisions), and
- the subsets of those applications where at least one of the reviewable decisions was recorded by the AAT as being related to a debt.

The figures include applications involving decisions recorded as being related to a debt regardless of the basis for the overpayment and debt (e.g. application of the assets or income tests, compensation recovery or failure to meet qualification criteria). The figures include but extend beyond debts that may have been raised under the Income Compliance Program.

The following table sets out for the specified periods:

- the number of first review applications made to the Social Services and Child Support Division and second review applications made to the General Division for review of a Centrelink decision, and
- the number and proportion of those applications where at least one reviewable decision was recorded by the AAT as being related to a debt.

Information about the type of decision under review was not consistently captured in the case management systems used in the General Division prior to 2018–19.

| | 2015–16 | 2016–17 | 2017–18 | 2018–19 | 2019–20 | 2020–21 to 28 Feb |
|--|---------|---------|---------|---------|---------|----------------------|
| No. of 1st review applications | 13,201 | 14,949 | 10,913 | 14,091 | 13,040 | 7,111 |
| No. of 1st review applications with at least one reviewable decision related to debt | 3,364 | 5,323 | 4,366 | 5,699 | 5,567 | 2,231 |
| % of 1st review applications with at least one reviewable decision related to debt | 25% | 36% | 40% | 40% | 43% | 31% |
| No. of 2nd review applications | | | | 1,882 | 2,167 | 1,208 |
| No. of 2nd review applications where reviewable decision related to debt | | | | 683 | 978 | 554 |
| % of 2nd review applications where reviewable decision related to debt | | | | 36% | 45% | 46% |

The following tables set out for the specified periods:

- the number of first review applications made to the Social Services and Child Support Division for review of a Centrelink decision, categorised by the payment type recorded by the AAT as the first decision under review, and
- the number and proportion of those applications where at least one reviewable decision was recorded by the AAT as being related to a debt.

| Centrelink 1st review applications Payment type | 2015–16 | | | 2016–17 | | | 2017–18 | | |
|--|---------------------|----------------------------------|-------------------|---------------------|----------------------------------|-------------------|---------------------|----------------------------------|-------------------|
| | No. of applications | No. related to debt ^a | % related to debt | No. of applications | No. related to debt ^a | % related to debt | No. of applications | No. related to debt ^a | % related to debt |
| Age pension | 831 | 315 | 38% | 1,437 | 616 | 43% | 1,124 | 503 | 45% |
| Austudy payment | 269 | 167 | 62% | 354 | 239 | 68% | 285 | 216 | 76% |
| Carer allowance | 148 | 36 | 24% | 207 | 53 | 26% | 254 | 64 | 25% |
| Carer payment | 376 | 171 | 45% | 455 | 227 | 50% | 471 | 212 | 45% |
| Disability support pension | 6,525 | 301 | 5% | 6,197 | 453 | 7% | 3,610 | 324 | 9% |
| Family tax benefit | 1,563 | 864 | 55% | 1,934 | 1,213 | 63% | 1,715 | 1,088 | 63% |
| Jobseeker payment | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A |
| Newstart allowance | 1,286 | 447 | 35% | 1,796 | 1,003 | 56% | 1,429 | 741 | 52% |
| Parenting payment | 492 | 328 | 67% | 774 | 554 | 72% | 526 | 386 | 73% |
| Youth allowance | 780 | 344 | 44% | 879 | 520 | 59% | 787 | 518 | 66% |
| Other | 931 | 391 | 42% | 916 | 445 | 49% | 712 | 314 | 44% |
| TOTAL | 13,201 | 3,364 | 25% | 14,949 | 5,323 | 36% | 10,913 | 4,366 | 40% |

^a A single application for review may relate to more than one reviewable decision. In a small number of applications, the debt may relate to a different payment type from the payment type recorded for the first decision under review.

| Centrelink 1st review applications Payment type | 2018–19 | | | 2019–20 | | | 2020–21 to 28 February | | |
|--|---------------------|----------------------------------|-------------------|---------------------|----------------------------------|-------------------|------------------------|----------------------------------|-------------------|
| | No. of applications | No. related to debt ^a | % related to debt | No. of applications | No. related to debt ^a | % related to debt | No. of applications | No. related to debt ^a | % related to debt |
| Age pension | 1,128 | 445 | 39% | 1,058 | 358 | 34% | 802 | 171 | 21% |
| Austudy payment | 453 | 352 | 78% | 396 | 305 | 77% | 133 | 79 | 59% |
| Carer allowance | 285 | 67 | 24% | 305 | 83 | 27% | 165 | 30 | 18% |
| Carer payment | 557 | 290 | 52% | 588 | 312 | 53% | 258 | 78 | 30% |
| Disability support pension | 5,348 | 447 | 8% | 3,713 | 431 | 12% | 2,256 | 164 | 7% |
| Family tax benefit | 1,685 | 1,166 | 69% | 1,689 | 1,234 | 73% | 1,073 | 752 | 70% |
| Jobseeker payment | N/A | N/A | N/A | 374 | 0 | 0% | 521 | 15 | 3% |
| Newstart allowance | 1,947 | 1,178 | 61% | 1,896 | 1,073 | 57% | 485 | 264 | 54% |
| Parenting payment | 685 | 527 | 77% | 742 | 555 | 75% | 364 | 232 | 64% |
| Youth allowance | 1,065 | 789 | 74% | 1,167 | 717 | 61% | 407 | 209 | 51% |
| Other | 938 | 438 | 47% | 1,112 | 499 | 45% | 647 | 237 | 37% |
| TOTAL | 14,091 | 5,699 | 40% | 13,040 | 5,567 | 43% | 7,111 | 2,231 | 31% |

^a A single application for review may relate to more than one reviewable decision. In a small number of applications, the debt may relate to a different payment type from the payment type recorded for the first decision under review.

The following table sets out for the specified periods and categorised by payment type:

- the number of second review applications made to the General Division for review of a Centrelink decision, and
- the number and proportion of those applications where the reviewable decision was recorded by the AAT as being related to a debt.

| Centrelink 2nd review applications | 2018–19 | | | 2019–20 | | | 2020–21 to 28 February | | |
|------------------------------------|---------------------|---------------------|-------------------|---------------------|---------------------|-------------------|------------------------|---------------------|-------------------|
| | No. of applications | No. related to debt | % related to debt | No. of applications | No. related to debt | % related to debt | No. of applications | No. related to debt | % related to debt |
| Age pension | 177 | 76 | 43% | 180 | 71 | 39% | 109 | 38 | 35% |
| Austudy payment | 38 | 31 | 82% | 51 | 46 | 90% | 21 | 21 | 100% |
| Carer allowance | 40 | 15 | 38% | 56 | 24 | 43% | 30 | 8 | 27% |
| Carer payment | 76 | 44 | 58% | 116 | 75 | 65% | 52 | 27 | 52% |
| Disability support pension | 931 | 78 | 8% | 902 | 99 | 11% | 445 | 57 | 13% |
| Family tax benefit | 179 | 124 | 69% | 208 | 162 | 78% | 193 | 165 | 85% |
| Jobseeker payment | N/A | N/A | N/A | N/A | N/A | N/A | 43 | 1 | 2% |
| Newstart allowance | 202 | 136 | 67% | 227 | 163 | 72% | 96 | 71 | 74% |
| Parenting payment | 78 | 61 | 78% | 136 | 118 | 87% | 85 | 69 | 81% |
| Youth allowance | 59 | 48 | 81% | 106 | 97 | 92% | 34 | 27 | 79% |
| Other | 102 | 70 | 69% | 185 | 123 | 66% | 100 | 70 | 70% |
| Total | 1,882 | 683 | 36% | 2,167 | 978 | 45% | 1,208 | 554 | 46% |

SENATE COMMUNITY AFFAIRS REFERENCES COMMITTEE

PUBLIC HEARING, 29 MARCH 2021

PARLIAMENT HOUSE, CANBERRA

Administrative Appeals Tribunal

Question 2

Hansard page 3:

CHAIR: Thank you. Do you record the number of appeals, following the second review, made to the Federal Court?

Mr Matthies: Yes, we do. In terms of applications for second review decisions to the Federal Court, yes—in relation to Centrelink decisions, generally.

CHAIR: So, can you tell us that for 2018-19, 2019-20 and 2020-plus? Then I will ask you to take the other years on notice so that we can get that as a bundle of information for the previous years. Does that make sense?

Mr Matthies: Yes. It depends on the level of granularity. At the second review level, we only began to collect information about applications relating to a debt in a systemic way from 2018-19—that is, from 1 July 2018. For periods prior to that, the data isn't aligned in the same way as it is for first review. But it is from that period on.

CHAIR: Okay.

Mr Matthies: In terms of the information about appeals to the Federal Court, we have the figures for appeals from Centrelink second review decisions generally, but are you also seeking information about those that related to debt?

CHAIR: Yes.

Mr Matthies: We will look to see what we can provide. We will need to interrogate our systems in relation to that.

The response to the Honourable Senator's question is as follows:

The table below sets out the number of applications lodged in the Federal Court of Australia in the specified periods in relation to decisions made by the General Division of the Administrative Appeals Tribunal (AAT) in applications for second review of decisions made by Centrelink under a family assistance, farm household support, social security or student assistance law.

| Period | No. lodged^a |
|---------------------|-------------------------------|
| 2015–16 | 19 |
| 2016–17 | 20 |
| 2017–18 | 23 |
| 2018–19 | 19 |
| 2019–20 | 9 |
| 2020–21 to 31 March | 7 |

^a Some figures may vary from earlier published figures due to late notification of court applications and correction of data errors in AAT systems.

The information available in the AAT's case management and related systems does not allow the provision of reliable data on the number of applications that may have concerned a decision related to a debt.

SENATE COMMUNITY AFFAIRS REFERENCES COMMITTEE

PUBLIC HEARING, 29 MARCH 2021

PARLIAMENT HOUSE, CANBERRA

Administrative Appeals Tribunal

Question 3

Hansard page 3:

Senator O'NEILL: Do you have any sense of the scale of Mr Barry's work with his review of what you call debt and I would call robodebt?

Ms Leathem: We would have the figures about the number of decisions that he's made in specific periods, but we would have to interrogate the data to see if we could break it down into the types of decisions, including debt.

Senator O'NEILL: Could you take that on notice and give me as much detail as your system allows.

The response to the Honourable Senator's question is as follows:

Member Barry was appointed as a part-time member of the Administrative Appeals Tribunal (AAT) on 25 February 2019. He began performing duties with the AAT in June 2019 and has exclusively undertaken first reviews of decisions made by Centrelink in the AAT's Social Services and Child Support Division.

In the period from June 2019 to 29 March 2021, Member Barry finalised 4 applications that involved the review of 5 decisions relating to overpayments of disability support pension, family tax benefit and parenting payment. In relation to all 5 decisions, the AAT's case management system records that the primary issue concerned application of the income test. However, from a review of the information available to the AAT:

- only one of the applications appears to relate to the Income Compliance Program, including use of the Check and Update Past Income system, and
- the decision made by Centrelink to raise the debt was based on other evidence about earnings that was provided by the applicant.

SENATE COMMUNITY AFFAIRS REFERENCES COMMITTEE

PUBLIC HEARING, 29 MARCH 2021

PARLIAMENT HOUSE, CANBERRA

Administrative Appeals Tribunal

Question 4

Hansard page 5:

Senator O'NEILL: Has the deputy president, Karen Synon, reviewed Mr Barry's decisions? It's clear that every single decision that Mr Barry made in which he found against an applicant is probably subject to challenge on the basis that Mr Barry had a clear and inherent conflict of interest that he didn't declare when he didn't declare his lobbying status.

Ms Leathem: I would have to take that on notice. I'm not aware of whether the deputy president has reviewed some or all of his decisions. I will make inquiries.

The response to the Honourable Senator's question is as follows:

Since being assigned to be the Division Head of the Social Services and Child Support Division in December 2020, Deputy President Synon has considered the general nature of the work undertaken by the more than 80 members who review decisions in the Social Services and Child Support Division, including Member Barry. Deputy President Synon has not instituted a process to undertake a comprehensive examination of the decisions made by any individual member.

SENATE COMMUNITY AFFAIRS REFERENCES COMMITTEE

PUBLIC HEARING, 29 MARCH 2021

PARLIAMENT HOUSE, CANBERRA

Administrative Appeals Tribunal

Question 5

Hansard pages 7-8:

CHAIR: I want to go to the issue about whether there was a conflict of interest or an ability to do his job. I'm wondering: could you provide a copy of the letter, and, if that's not possible, is it possible to provide us with an understanding of what the difference was between the ability to do the job and the inclusion on the register and the conflict of interest?

Ms Leathem: I'm happy to see what we can provide to be able to explain the distinction between those provisions, yes.

The response to the Honourable Senator's question is as follows:

Sections 11 and 14 of the *Administrative Appeals Tribunal Act 1975* (AAT Act) deal with different matters:

- section 11(2) deals with whether a part-time member is engaging in paid employment that conflicts or may conflict with the proper performance of their duties
- section 14 deals with whether a member has an interest that could conflict with the proper performance of their functions in relation to a particular proceeding.

Section 11 of the AAT Act provides as follows:

11 Outside employment

- (1) A full-time member must not engage in paid employment outside the duties of his or her office without the President's approval.*
- (2) A part-time member must not engage in any paid employment that, in the President's opinion, conflicts or may conflict with the proper performance of his or her duties.*
- (3) This section does not apply in relation to the holding by a member of an office or appointment in the Defence Force.*

Under section 14 of the AAT Act, if a member who is, or is to be, a member of the Tribunal for the purposes of a proceeding has a conflict of interest in relation to the proceeding, the member:

- must disclose the matters giving rise to that conflict to the parties and to the AAT President, and
- must not take part in the proceeding or exercise any powers in relation to the proceeding unless the parties and the President consent.

If the President otherwise becomes aware that a member has a conflict of interest in relation to a proceeding, the President may direct the member not to take part in the proceeding or

must ensure the member discloses the matters giving rise to the conflict to the parties. Section 14(2) sets out that a member has a conflict of interest in relation to a proceeding if the member has any interest, pecuniary or otherwise, that could conflict with the proper performance of the member's functions in relation to the proceeding.

Section 11(2) of the AAT Act is not limited in its terms to conflicts of interest and allows the President to undertake a broad assessment of whether there is or may be any kind of conflict between a part-time member's paid employment and the performance of their duties. This contrasts with section 14(2) which deals with whether a pecuniary or other interest could conflict with the performance of a member's functions in relation to a particular proceeding. Whether a member has a conflict of interest within the meaning of section 14(2) requires consideration of the interest in the particular circumstances of the proceeding.

SENATE COMMUNITY AFFAIRS REFERENCES COMMITTEE

PUBLIC HEARING, 29 MARCH 2021

PARLIAMENT HOUSE, CANBERRA

Administrative Appeals Tribunal

Question 6

Hansard page 8:

Senator O'NEILL: Could you have a look at the evidence you've given here today and confirm this for me in writing—or change, for the public record, if it's not correct: my understanding is that nothing stops the AAT from contacting applicants whose decisions may have been affected by Mr Barry's conflict of interest.

Ms Leatham: I'd have to take that on notice so we can consider whether we have the ability to do that and under what circumstances we would do that. I don't want to be writing to people without a clear understanding that we've got the ability to actually do something in relation to that.

The response to the Honourable Senator's question is as follows:

Member Barry has exclusively undertaken first reviews of decisions made by Centrelink in the Social Services and Child Support Division of the Administrative Appeals Tribunal (AAT).

It would be open to the AAT to write to the parties in applications decided by Member Barry if the AAT determined it would be appropriate to do so. As the AAT cannot reopen cases that have been finalised by the Tribunal except in very limited circumstances, any communication from the AAT would likely advise the parties that they may apply for a second review of the Centrelink decision if they have not already done so.

A party must apply for a second review of a decision of the Social Services and Child Support Division within 28 days. Given the passage of time, parties seeking further review would likely need to apply to the AAT to extend the time for making the application under section 29(7) of the *Administrative Appeals Tribunal Act 1975*. Each other party would be notified of the application and asked to advise whether or not they oppose it. A Tribunal member may grant an extension of time if satisfied that it is reasonable in all the circumstances to do so. A range of factors may be taken into account, including the reason for the delay in applying, prejudice to any other party and the strength of the applicant's case for setting aside the Centrelink decision. An extension of time may or may not be granted depending on the circumstances of each case.

A second review of a Centrelink decision is dealt with in the AAT's General Division and is a de novo merits review. The AAT's task on second review is not to consider whether the decision made by the Social Services and Child Support Division was the correct or preferable decision or whether that decision may have been affected by a legal error. If an application to extend the time for making an application were granted, the Tribunal would consider the matter afresh taking into account the information before it.

SENATE COMMUNITY AFFAIRS REFERENCES COMMITTEE

PUBLIC HEARING, 29 MARCH 2021

PARLIAMENT HOUSE, CANBERRA

Administrative Appeals Tribunal

Question 7

Hansard page 9:

Senator O'NEILL: In the interests of transparency for the Australian people, who we all serve—and I know that you take that very seriously, I'm sure, in your work—when a government is being told by its own Administrative Appeals Tribunal on a regular basis—that's what we have to assume at this point—that unlawful activity was occurring, that to me should have triggered something. It's inexplicable that it hasn't come forward. Could you take on notice any decisions from the AAT that use the word 'unlawful' and are related to robodebt. If there are any others, I'd be interested in them as well, but I want you to do that search, Mr Matthies.

Mr Matthies: We can search for those key words, but that won't necessarily capture all of the decisions that relate to a decision that was raised through the online compliance intervention system or its later iterations. Obviously we can search, based on those particular key words, but that won't necessarily capture all of the decisions that give rise or are related to this particular program.

Senator O'NEILL: I'm sure that, as the experienced professional that you are, and given the access to the data management and databases that you have, you would take on that task in good faith and provide this committee, the Senate of the Australian parliament, with as fulsome a report as is possible to tell us the truth about what went on with the AAT with regard to robodebt and the AAT's decision-making. Are you happy to do that, Mr Matthies?

The response to the Honourable Senator's question is as follows:

AAT case management systems and the ISYS decision search tool

Case management systems

The Administrative Appeals Tribunal (AAT) inherited a number of case management systems when it amalgamated with the Migration Review Tribunal, Refugee Review Tribunal and Social Security Appeals Tribunal on 1 July 2015. The AAT continues to use separate legacy systems for managing:

- applications for first review of Centrelink, child support and paid parental leave decisions in the Social Services and Child Support Division – a system known as AMS, and
- applications for second review of these decisions in the General Division – a system known as TRACS.

The AAT relies on the systems to facilitate the management of individual cases as well as to support caseload monitoring and reporting.

For applications for review of decisions made by Centrelink under a family assistance, farm household support, social security or student assistance law (Centrelink decisions), both AMS and TRACS have data fields to record the following information about the decisions to which

the applications relate:

- the payment type
- the type of decision (e.g. cancellation of payment, debt, rate of payment, rejection of claim or suspension of payment)
- for some types of decision, the primary issue under review.

There are limitations with the data recorded about the Centrelink decisions under review, including:

- this information only began to be consistently recorded for applications for second review lodged in the General Division from 1 July 2018
- decisions can involve more than one type of issue under review but the systems only allow one value to be entered, and
- for decisions recorded as being related to a debt, no information is recorded about how the debt was raised or calculated, including whether it arose as part of the Income Compliance Program or relied on averaging any Australian Taxation Office (ATO) income data.

Cases affected by the Income Compliance Program could only be identified by a manual review of individual case records.

ISYS decisions search tool

The AAT's ISYS decisions search tool enables the text of written statements of reasons for decisions made by the AAT to be searched using words, phrases and Boolean search terms. ISYS is not linked to any of the AAT's case management systems and the AAT has no system that can undertake searches across the case management systems and the repositories of written decisions which ISYS can search.

Searches, or sets of searches, using ISYS can be used to identify groups of decisions of potential relevance but a manual review of individual decisions is required to confirm actual relevance as generic search terms may generate irrelevant results. Specific terms may generate results in which a term is used only incidentally, or is specifically mentioned as irrelevant in the particular decision.

Searches conducted using ISYS

The ISYS tool was used to conduct searches of written statements of reasons for decision made from 1 July 2015 to 29 March 2021 in the following decisions repositories:

- decisions made in the Freedom of Information, General, National Disability Insurance Scheme, Security, Small Business Taxation, Taxation and Commercial, and Veterans' Appeals Divisions of the AAT, and
- decisions made in the Social Services and Child Support Division.

The Social Services and Child Support Division decisions repository contains written decisions relating to the review of Centrelink decisions, child support decisions and paid parental leave decisions. There were a total of 167 written decisions in which the term 'unlawful' appeared. To exclude child support decisions, the phrase 'chief executive centrelink' was added to the search.

Written decisions relating to second review of Centrelink decisions are included in the repository of decisions for the 7 AAT divisions noted above. There were a total of 914 decisions relating to all of these divisions in which the term ‘unlawful’ appeared. To exclude most decisions that do not relate to the second review of a Centrelink decision, the phrase ‘social services second review’ was added to the search as this phrase generally appears only in second reviews of Centrelink and paid parental leave decisions.

Searches 2, 4, 6 and 8 are likely to relate to first and second reviews of Centrelink decisions in the Social Services and Child Support Division and General Division respectively. Searches 2 and 6 may also include some paid parental leave decisions.

| Search terms used | | No. of decisions found |
|--|--|------------------------|
| Social Services and Child Support Division decisions repository | | |
| 1 | ‘unlawful’ | 167 |
| 2 | ‘unlawful’ and ‘chief executive centrelink’ | 132 |
| 3 | ‘unlawful’ and (‘robo’ or ‘robodebt’ or ‘robo debt’) | 31 |
| 4 | ‘unlawful’ and (‘robo’ or ‘robodebt’ or ‘robo debt’) and ‘chief executive centrelink’ | 29 |
| Freedom of Information, General, National Disability Insurance Scheme, Security, Small Business Taxation, Taxation and Commercial, and Veterans’ Appeals Divisions decisions repository | | |
| 5 | ‘unlawful’ | 914 |
| 6 | ‘unlawful’ and ‘social services second review’ | 58 |
| 7 | ‘unlawful’ and (‘robo’ or ‘robodebt’ or ‘robo debt’) | 2 |
| 8 | ‘unlawful’ and (‘robo’ or ‘robodebt’ or ‘robo debt’) and ‘social services second review’ | 1 |

Analysis of selected decisions

The AAT has manually reviewed:

- the 29 Social Services and Child Support Division decisions identified using the search string: ‘unlawful’ and (‘robo’ or ‘robodebt’ or ‘robo debt’) and ‘chief executive centrelink’, and
- the 1 General Division decision identified using the search string: ‘unlawful’ and (‘robo’ or ‘robodebt’ or ‘robo debt’) and ‘social services second review’.

In relation to 3 of the written decisions, the debts raised by Centrelink do not appear to relate to the Income Compliance Program:

- 1 General Division decision was included in the search results because the applicant referred in submissions to Centrelink’s ‘robo-recovery’ practices: see paragraph 42 of [2018] AATA 2746 published on the AustLII website
- 1 Social Services and Child Support Division dated 28 April 2020 was included in the search results because the applicant submitted that 2 debts raised were unlawful having regard to the outcome of *Amato v The Commonwealth of Australia* but the original decisions to raise the 2 debts were made prior to 1 July 2015

- 1 Social Services and Child Support Division decision dated 12 May 2020 was included in the search results because the applicant asserted the debt was a ‘robodebt’ but the information which led to the debts being raised related to non-employment income and appeared to have been provided to Centrelink by the applicant.

The remaining 27 written decisions made in the Social Services and Child Support Division concern debts in which the original discrepancy relating to income appeared to have been identified as a result of the use of ATO income data: 3 of these decisions were made prior to 19 November 2019 and 24 were made after that date.

In relation to 5 of these written decisions, the Tribunal found that the relevant decisions under review before the AAT had been made relying, at least in part, on averaging of ATO income data. In written decisions dated 1 November 2019, 17 February 2020, 6 July 2020, 10 July 2020 and 26 November 2020, the reviewable decisions were set aside.

In relation to the remaining 22 written decisions, the relevant decisions under review had not been made relying on averaging of ATO income data but were based on other information relating to income provided by the applicant or otherwise obtained by Centrelink such as pay information and bank statements: 3 cases were decided prior to November 2019; 6 cases were decided after November 2019 and prior to 29 May 2020; and 13 cases were decided in the period from June 2020 to March 2021. The Tribunal affirmed the relevant decisions under review in 14 cases. The decisions under review were varied or set aside in 8 cases:

- 3 cases were remitted to Centrelink for aspects of the debts to be recalculated
- the Tribunal decided that the right to recover all or part of the debt should be waived in 5 of the cases.

The different ways in which the word ‘unlawful’ appeared in each of the 30 written decisions can be summarised as follows:

- in 13 decisions the word ‘unlawful’ was used in general references to the outcome of *Amato v The Commonwealth of Australia* or other findings or observations regarding debts based on averaging of ATO income data
- in 13 decisions the applicant’s submissions were recorded as contending that a decision to raise the debt or another matter was unlawful
- in 3 decisions the Tribunal made a finding that the raising of all or part of a debt before the AAT was unlawful and in 1 decision the Tribunal held it was not persuaded that a debt was unlawful
- in 4 decisions ‘unlawful’ was used in contexts that did not relate to the Income Compliance Program.

The AAT estimates that manually reviewing and collating basic information relating to these 30 decisions required on average 30 minutes for each decision. Further effort was required to analyse and summarise the information. Reviewing the 160 further decisions relating to first and second reviews of Centrelink decisions in which the word ‘unlawful’ appears would involve a staff member working full time for approximately 2 weeks. The AAT considers this would involve an unreasonable diversion of resources.

This exercise undertaken by the AAT indicates the challenges involved in using ISYS to search Social Services and Child Support Division and General Division written decisions to seek to identify decisions relating to debts raised under the Income Compliance Program. To

prepare comprehensive information about AAT decision-making relating to the Program would require the AAT to review and collate information about a large number of decisions. By way of example, the AAT's records indicate that there were 5,954 applications finalised in the Social Services and Child Support Division in the period from 1 July 2015 to 31 March 2021 in which:

- there was at least 1 decision under review recorded as being related to a debt under the *Social Security Act 1991*, and
- a decision was made under section 43(1) of the *Administrative Appeals Tribunal Act 1975* to affirm, vary or set aside a decision under review.

The subset of applications in which the AAT has recorded that a primary issue under review related to the application of the income test – which may or may not relate to the Income Compliance Program– is 2,935.

SENATE COMMUNITY AFFAIRS REFERENCES COMMITTEE

PUBLIC HEARING, 29 MARCH 2021

PARLIAMENT HOUSE, CANBERRA

Administrative Appeals Tribunal

Question 8

Hansard page 10:

Senator O'NEILL: That takes me to my last question in this section. It's clearly in the public interest to know how many times the tribunal told the government, through the department, that the scheme designed by Mr Morrison in 2015 as the Minister for Social Services, known as the robodebt scheme, was illegal. He continued and expanded it as the Treasurer in 2016 and since went on to preside over it as the Prime Minister. On notice, could you please provide me with a detailed explanation of the tribunal's case management system and how the search function works? I really want to know how we can make it as easy as possible for the tribunal to search through its systems and identify robodebt related decisions. My first suggestion is: start with the word 'unlawful'. Find out every single time this government's been told by the AAT that there is unlawful activity going on. If that extends beyond robodebt, so be it; we'll find out about more skulduggery. But, for robodebt, absolutely—I want to know every single time: the dates, when it happened, who was involved. I want as much detail as possible.

The response to the Honourable Senator's question is as follows:

Please see the Administrative Appeals Tribunal's response to Question 7.

SENATE COMMUNITY AFFAIRS REFERENCES COMMITTEE

PUBLIC HEARING, 29 MARCH 2021

PARLIAMENT HOUSE, CANBERRA

Administrative Appeals Tribunal

Question 9

Hansard page 11:

CHAIR: I have a couple more questions on numbers which you will need to take on notice. Last week in Senate estimates, we went through the number of decisions that had been varied from the original decision. Are you able to tell us: for the years that you've given us the data and the percentage, where at least one decision was related to debt, are you able to break down the numbers that were varied from the department's decision?

Mr Matthies: Yes, Senator.

CHAIR: Thank you. That's for all of the years for which you provided the data and the ones that you're going to provide, 2015-16, 2016-17 and 2017-18. That would be appreciated. How many were set aside and substituted? The other thing is: how many were sent back to Centrelink because people hadn't used the review provisions within Centrelink? And how many were sent back to Centrelink to make a new decision?

Mr Matthies: We'll look at the level of granularity in the system, just around setting aside and substituting a new decision or setting aside and remitting for reconsideration. We'll certainly look at what information we can provide to you—so, in general, in relation to Centrelink debt matters for those years, the number that were varied or set aside.

The response to the Honourable Senator's question is as follows:

The table below sets out for the specified periods:

- the number of decisions made by Centrelink under a family assistance, farm household support, social security or student assistance law (Centrelink decisions) that were the subject of applications finalised in the Social Services and Child Support Division of the Administrative Appeals Tribunal (AAT),
- the number of those decisions where the type of decision was recorded by the AAT as being related to a debt, and
- the outcomes recorded by the AAT for decisions recorded as being related to a debt.

The figures include all decisions recorded as being related to a debt, regardless of the basis on which the debt was raised (e.g. application of the assets or income tests, compensation recovery or failure to meet qualification criteria). The figures include but extend beyond debts that may have been raised under the income compliance program.

In relation to decisions made by the AAT to set aside a decision under review, the case management system used in the Social Services and Child Support does not distinguish between setting aside the decision and substituting a new decision, and setting aside the decision and remitting the matter to Centrelink for reconsideration.

| Applications finalised and outcomes | 2015–16 | 2016–17 | 2017–18 | 2018–19 | 2019–20 | 2020–21 to 28 Feb |
|--|---------|---------|---------|---------|---------|----------------------|
| No. of Centrelink decisions | 14,365 | 15,398 | 14,168 | 15,152 | 16,175 | 7,715 |
| No. of Centrelink decisions where decision related to a debt | 4,136 | 5,385 | 6,429 | 6,746 | 7,401 | 2,951 |
| Centrelink decisions where decision related to a debt – by outcome | | | | | | |
| <i>Decision affirmed^a</i> | 1,889 | 2,219 | 2,828 | 2,449 | 2,708 | 1,406 |
| <i>Decision varied^a</i> | 128 | 205 | 189 | 173 | 227 | 67 |
| <i>Decision set aside^a</i> | 1,170 | 1,215 | 1,694 | 1,473 | 1,915 | 746 |
| <i>Dismissed by consent^b</i> | 1 | 15 | 7 | 6 | 11 | 3 |
| <i>Dismissed by Tribunal^c</i> | 107 | 216 | 242 | 200 | 250 | 130 |
| <i>No jurisdiction – no internal review^d</i> | 503 | 917 | 700 | 1,532 | 1,665 | 313 |
| <i>No jurisdiction – other^e</i> | 61 | 122 | 69 | 104 | 75 | 40 |
| <i>Withdrawn by applicant</i> | 277 | 476 | 700 | 809 | 550 | 246 |

^a Applications finalised by a decision of the AAT under section 43 of the *Administrative Appeals Tribunal Act 1975* (AAT Act).

^b Applications dismissed by consent under section 42A(1) of the AAT Act.

^c Applications dismissed under section 42A(2) (non-appearance at a case event), 42A(5) (failure to proceed with an application or to comply with a direction of the AAT) and section 42B(1) of the AAT Act (application is frivolous, vexatious, misconceived, lacking in substance, has no reasonable prospect of success or is an abuse of the process of the AAT).

^d Applications finalised on the basis that the decision is not subject to review by the AAT because no internal review decision has been made.

^e Applications finalised on the basis that the decision is not subject to review by the AAT for a reason other than that at note ^d, the applicant does not have standing to apply for a review, the application has not been made within a prescribed time limit or the AAT has refused to extend the time for applying for a review.

SENATE COMMUNITY AFFAIRS REFERENCES COMMITTEE

PUBLIC HEARING, 29 MARCH 2021

PARLIAMENT HOUSE, CANBERRA

Administrative Appeals Tribunal

Question 10

Hansard page 12:

CHAIR: If you could, take on notice how many you didn't deal with. But should I then understand, from your answers to the questions from Senator O'Neill, that you didn't go back to look at the cases that you had handled previously?

Ms Leatham: It was the matters that were still on foot that we sought to expedite, if you like. We didn't reopen matters that had already been determined, but the agency, I understand, have a separate process in relation to any finalised matters.

Senator O'NEILL: Could we get a list of the 28 matters?

Ms Leatham: We can take that on notice, yes.

...

CHAIR: Thank you. Senator O'Neill has already asked for the 28 matters. Were you able to identify those as income compliance matters?

Ms Leatham: They were ones that were described as being impacted by the decision that had been made. I couldn't tell you with precision how they were described, but we would be able to, when we respond on notice, tell you what the parameters were.

The response to the Honourable Senator's question is as follows:

Applications made to the Administrative Appeals Tribunal (AAT) for review of decisions made by Centrelink under a family assistance, farm household support, social security or student assistance law (Centrelink decisions) are first dealt with in the AAT's Social Services and Child Support Division. An application can be made to the AAT's General Division for a second review of a decision made by the AAT on first review to affirm, vary or set aside a Centrelink decision. Representatives of Services Australia do not appear before the AAT in first reviews but are active participants in all aspects of second reviews.

The announcements made by the Australian Government relating to the Income Compliance Program in November 2019 and May 2020 and the orders made by the Federal Court of Australia on 27 November 2019 in *Amato v The Commonwealth of Australia* had no automatic direct effect on applications before the AAT. Any debt that was the subject of a decision under review before the AAT continued to exist and the AAT was required to deal with applications in accordance with the requirements of the *Administrative Appeals Tribunal Act 1975* (AAT Act) and the social security law. If Centrelink varied or substituted a decision under review before the AAT under section 126 of the *Social Security (Administration) Act 1999* (Administration Act), Centrelink was required to notify the AAT and the application to the AAT was taken to be an application for review of the varied or substituted decision.

Members of the Social Services and Child Support Division were informed of the Australian Government announcements and the outcome of the *Amato* case on 28 November 2019 and 1 June 2020 respectively. The AAT's task continued to be to determine the correct or preferable

decision on the evidence before the Tribunal. If the member could not be satisfied that there was a valid debt or of the correct quantum of a debt, it was open to them to set aside the decision and either remit it for reconsideration or substitute a new decision in its place. If Services Australia made a further decision to the effect that there was no longer a debt, applications remained on foot in the Tribunal until the applicant withdrew the application or the application was otherwise finalised.

From December 2019, the Social Services and Child Support Division implemented a triage process to identify applications for first review of Centrelink debt decisions involving averaging of Australian Taxation Office (ATO) income data that could be referred to an expedited hearing. All new applications and all applications on hand as at 10 December 2019 recorded as relating to a debt under the *Social Security Act 1991* were examined. Following the announcement on 29 May 2020, the Social Services and Child Support Division sought to identify impacted cases before the Tribunal so that enquiries could be made of Services Australia about the status of the debt.

In relation to applications for second review of Centrelink decisions in the General Division, the representatives of Services Australia were able to inform the AAT about cases impacted by the announcements and the outcome of the *Amato* case. Further steps to be taken in those cases could then be discussed with the parties as required.

On 13 August 2020, Services Australia provided to the AAT a list of impacted cases: the list related to 28 applications for first review in the Social Services and Child Support Division and 19 applications for second review in the General Division said to be current as at 31 July 2020. These were identified by Services Australia as being ‘in scope for a refund’.

The 28 applications for first review related to applications with the following numbers: 2019/A142181; 2019/B141953; 2019/M137080; 2019/M138664; 2019/M140103; 2019/M140959; 2019/M141194; 2019/S138737; 2019/S144984; 2020/A146742; 2020/A148162; 2020/A149022; 2020/B151851; 2020/B152057; 2020/B152077; 2020/B152436; 2020/M146055; 2020/M147386; 2020/M147919; 2020/M148002; 2020/M151082; 2020/M151222; 2020/M151391; 2020/M151640; 2020/M151835; 2020/S150429; 2020/S151568; and 2020/S152184.

The AAT confirmed that 11 of the 28 first review applications identified by Services Australia were current at 17 August 2020. Information was requested from Services Australia about whether they had made further decisions to vary or substitute the decisions under review under section 126 of the Administration Act. Where no information was received about a changed decision, the AAT generally proceeded to perform a first review of the decision. Of the 11 applications:

- 4 applications were withdrawn by the applicant and 3 applications were dismissed by the Tribunal: there was information available to the AAT in 6 of the applications that Services Australia had made further decisions relating to the debts under section 126 of the Administration Act
- in one application the Tribunal affirmed the decision under review finding that the debt calculations were correct based on information other than averaging of ATO income data: on a subsequent second review, the parties agreed to settle the proceedings under section 181 of the Administration Act on the basis that the right to recover part of the debts be waived
- in one application the Tribunal found, following the provision of further information by Services Australia, that the debt calculations were correct based on information

other than averaging of ATO income data but set aside the decisions under review and substituted decisions to waive recovery of 50% of the debts: on a subsequent second review, the Tribunal made a decision in accordance with terms of agreement reached by the parties that one of the debts be written off in full as irrecoverable at law and also noted that Centrelink had made further decisions relating to the other debts under section 126 of the Administration Act

- in one application the Tribunal set aside the decision under review which had relied on information other than averaging of ATO income data and determined that the debt should be recalculated based on additional information but that, once recalculated, the right to recover the debt be waived
- one application remained current at 30 April 2021 awaiting the provision of further information from Services Australia about the debts.

The AAT confirmed that 18 of the 19 second review applications identified were current as at 17 August 2020. The further conduct of those cases was discussed with the parties as required. Of the 18 applications:

- 14 applications were withdrawn and one application was dismissed by the Tribunal: there was information available to the AAT in 14 of the applications that Services Australia had made further decisions relating to the debts under section 126 of the Administration Act
- in 2 applications the parties agreed to settle the proceedings under section 181 of the Administration Act: in 1 application it was noted that Centrelink had made a further decision under section 126 of the Administration Act in respect of one debt and the right to recover the second debt was waived and in the other application the right to recover the debt was waived
- in one application the Tribunal affirmed the decision under review finding there were overpayments constituting a debt on the basis of calculations using information other than averaging of ATO income and that neither part nor all of the debt should be written off or waived: see [2021] AATA 246 published on the AustLII website.

SENATE COMMUNITY AFFAIRS REFERENCES COMMITTEE

PUBLIC HEARING, 29 MARCH 2021

PARLIAMENT HOUSE, CANBERRA

Administrative Appeals Tribunal

Question 11

Hansard page 12:

CHAIR: Thank you. Could you also provide—I presume you will need to do this on notice—the number of appeals that the department made to decisions?

Ms Leathem: So secretary appeals from second review?

CHAIR: Yes.

Mr Matthies: In relation to debt matters generally?

CHAIR: First and second reviews. Is that possible?

Ms Leathem: I think we could only do SSCSD appeals rather than debt appeals.

CHAIR: You couldn't do debt appeals?

Mr Matthies: We may potentially be able—but only from the 2018-19 year going forward—to identify those secretary appeals that related to a decision concerning a debt. We should be able to identify that but not the further nature of the type of debt or how it arose. We would have that information about debt matters generally.

The response to the Honourable Senator's question is as follows:

The table below sets out for the specified periods:

- the number of applications made to the General Division of the Administrative Appeals Tribunal (AAT) for second review of a decision made by Centrelink under a family assistance, farm household support, social security or student assistance law that were lodged by the Secretary of the Department responsible for administering the relevant legislation, and
- the subset of those applications where the reviewable decision was recorded by the AAT as being related to a debt.

The figures include applications involving any decision recorded as being related to a debt, regardless of the basis on which the debt was raised (e.g. application of the assets or income tests, compensation recovery or failure to meet qualification criteria). The figures include but extend beyond debts that may have been raised under the income compliance program.

| | 2018–19 | 2019–20 | 2020–21 to 31 March |
|--|---------|---------|------------------------|
| No. of 2nd review applications lodged by the Secretary of a Department | 42 | 119 | 110 |
| No. of applications where reviewable decision related to debt | 15 | 66 | 68 |

SENATE COMMUNITY AFFAIRS REFERENCES COMMITTEE

PUBLIC HEARING, 29 MARCH 2021

PARLIAMENT HOUSE, CANBERRA

Administrative Appeals Tribunal

Question 12

Hansard page 13:

Senator O'NEILL: Between 1 March 2017 and 27 November 2019 did a tribunal member ever approach the president seeking agreement to refer the question of whether as a matter of law, under the Social Security law, it was possible to found a debt based on extrapolations from the ATO data?

Ms Leathem: Not to my knowledge. I'll invite Mr Matthies to tell us whether he is aware of anything of that nature.

Mr Matthies: Certainly not that I'm aware of, but I think we'd have to confirm that on notice.

Ms Leathem: Yes. We could certainly ask the president.

Senator O'NEILL: So you will confirm with the president whether, between 1 March 2017 and 27 November 2019, he was ever approached seeking agreement to refer the question of whether as a matter of law, under the Social Security law, it was possible to found a debt based on extrapolations from the ATO data and whether he ever had conversations with any of the AAT members who raised concerns with him about matters related to what is now known widely as robodebt, the illegal collection of money from Australia's people by its own government?

Ms Leathem: We will take that on notice.

The response to the Honourable Senator's question is as follows:

To the best of the knowledge of the Administrative Appeals Tribunal (AAT), the President of the AAT was not asked between 1 March 2017 and 27 November 2019 to agree to refer to the Federal Court of Australia under section 45 of the *Administrative Appeals Tribunal Act 1975* a question of law arising in a proceeding relating to whether a debt may be founded under the social security law on the basis of extrapolations from Australian Taxation Office data.

To the best of Justice Thomas's recollection, since his appointment to the AAT on 27 June 2017 he has not had conversations with any AAT members about concerns relating to what is now known as 'robodebt'.