

Senate Standing Committee on Community Affairs

INQUIRY INTO CENTRELINK'S COMPLIANCE PROGRAM

PUBLIC HEARING 29 March 2021

ANSWER TO QUESTION ON NOTICE

Services Australia

Topic: Withdrawn Requests to Review AAT Decisions

Question reference number: IQ21-000030

Member: Deborah O'Neill

Type of question: Written

Date set by the committee for the return of answer: 21 May 2021

Number of pages: 2

Question:

With reference to Services Australia's response to Question on Notice SA SQ20-000207 (Budget Estimates – 29 October 2020):

- a) Please provide the case numbers for each of the two decisions referred to in that response.
- b) Please provide copies of the two Tribunal decisions (i.e. the decisions made by the first level of the Social Services & Child Support Division) that are referred to in that response (with any necessary redactions in relation to personal information).
- c) In respect of the application for review that was withdrawn on 27 June 2018, what was the "other information" that the debt was recalculated on the basis of?
- d) What is the current status of the application for review that, at the time of the Department's response, had "not yet been determined by the Tribunal"? If a decision has been made, please provide a copy of that decision too.

Answer:

- a) Decision One
 - Administrative Appeals Tribunal (Social Services and Child Support Division) (AAT1) reference: 2018/A119369
 - Administrative Appeals Tribunal (General Division) (AAT2) reference: 2018/3212
- Decision Two
 - Administrative Appeals Tribunal (Social Services and Child Support Division) (AAT1) reference: 2019/B136983 and 2019/B137071
 - Administrative Appeals Tribunal (General Division) (AAT2) reference: 2019/5448

b), c)

Decision One

2018/A119369 is at Attachment A. An appeal with respect to this matter (2018/3212) was withdrawn on 27 June 2018. The debt was recalculated with reference to payslip records.

b), d)

Decision Two

On 31 March 2021, the AAT2 set aside the AAT1 decision (2019/B136983 and 2019/B137071) and substituted a decision that the Respondent had a recoverable Newstart Allowance debt of \$13,223.82. The AAT2 decision 2019/5448 is at Attachment B. The AAT1 decision contains protected information subject to strict secrecy provisions under the social security legislation and it cannot be adequately de-identified when provided with the un-redacted AAT2 decision at Attachment B. Because the AAT2 decision is publicly available it cannot be de-identified in order to protect the information contained in the AAT1 decision. Provision of the AAT1 decision would have the effect of disclosing that protected information of the customer.

Senate Standing Committee on Community Affairs

INQUIRY INTO CENTRELINK'S COMPLIANCE PROGRAM

PUBLIC HEARING 29 March 2021

ANSWER TO QUESTION ON NOTICE

Services Australia

Topic: Copies of AAT Decisions

Question reference number: IQ21-000031

Member: Deborah O'Neill

Type of question: Written

Date set by the committee for the return of answer: 21 May 2021

Number of pages: 1

Question:

With reference to Services Australia's response to Question on Notice SA SQ20-000208 (Budget Estimates – 29 October 2020), please provide copies of each of the 11 decisions listed in Attachment A of that response (with any necessary redactions in relation to personal information).

Answer:

Please find attached copies of the 11 decisions referred to in Attachment A to Services Australia's response to Question on Notice SA SQ20-000208 (Budget Estimates – 29 October 2020). The decisions have been redacted to remove personal information.

Attachment A: 2016-P093220

Attachment B: 2016-S096189

Attachment C: 2017-M107198

Attachment D: 2019-M132945

Attachment E: 2017-B114674

Attachment F: 2016-S101538

Attachment G: 2016-M091102

Attachment H: 2016-S094257

Attachment I: 2017-P109475

Attachment J: 2018-M118345

Attachment K: 2018-M126228



**Administrative
Appeals Tribunal**

IQ21-000031 - Attachment A

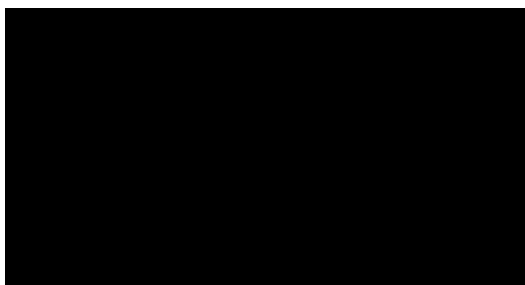
**DECISION AND
REASONS FOR DECISION**

Social Services & Child Support Division

REVIEW NUMBER	2016/P093220
APPLICANT	[REDACTED]
OTHER PARTIES	Secretary Chief Executive Centrelink
TRIBUNAL	Mr D Gillespie, Member
DECISION DATE	15 June 2016
DECISION POSTED	22 June 2016

DECISION

The decision under review is affirmed.



Mr Gillespie
Member

REASONS FOR DECISION

BACKGROUND

1. ██████████ was in receipt of newstart allowance at all material times.
2. On 12 November 2015, Centrelink decided to raise and recover a newstart allowance debt of \$2,865.01 for the period 27 July 2010 to 7 February 2011.
3. ██████████ requested a review and, on 11 February 2016, an authorised review officer varied the Centrelink decision, finding that ██████████ was overpaid newstart allowance in the amount \$2,642.15. The authorised review officer did not apply a debt penalty to the debt.
4. ██████████ applied to the Tribunal for a review of the Centrelink decision on 22 March 2016. His application for review was heard on 15 June 2016. ██████████ attended the hearing by phone.

ISSUES

5. The issues for the Tribunal to determine are:
 - 1) whether ██████████ owes the debt to the Commonwealth; and, if so,
 - 2) whether the debt should be recovered.

CONSIDERATION

6. The legislation relevant to this application is found in sections 1223, 1228B, 1236, 1237A and 1237AAD of the *Social Security Act 1991* ("the Act").
7. It is not in dispute that ██████████ was employed by ██████████ during the debt period and failed to fully declare his earnings. His earnings during the debt periods are also not in dispute. ██████████ submitted that the earnings from ██████████ were not accurately included as the Australian Taxation Office had provided a half year figure but he had only been employed by that employer for 8 days during the debt period.
8. The Tribunal checked the calculations used by Centrelink. It averaged the pay of \$45,427 for the period 31 January 2011 to 30 June 2011 over 151 days, producing a daily rate of \$300.84. This rate was then used for the period 31 January 2011 to 7 February 2011 to produce an earnings rate of \$2,406.73. In lieu of a payslip which accurately set out exactly what was earned in the period, the Tribunal finds that Centrelink has accurately performed the earning calculation.
9. The Tribunal finds that those earnings were not fully taken into account in the calculation of the rate of payment of ██████████ newstart allowance. The Tribunal has checked the

Centrelink calculations and arrived at the conclusion that the resulting overpayment has been correctly calculated.

10. The Tribunal is satisfied that [REDACTED] has been overpaid newstart allowance in the amount and for the period calculated by the authorised review officer. These overpayments are debts to the Commonwealth under subsection 1223(1) of the Act, which states:

Debts arising from lack of qualification, overpayment etc.

1223(1) Subject to this section, if:

- (a) a social security payment is made; and
- (b) a person who obtains the benefit of the payment was not entitled for any reason to obtain that benefit;

the amount of the payment is a debt due to the Commonwealth by the person and the debt is taken to arise when the person obtains the benefit of the payment.

11. As the debt exists, the Tribunal must decide whether it should be recovered.
12. Under section 1236, recovery of a debt can be written off – in other words, recovery can be temporarily suspended – but only if certain strict conditions are met, such as the person’s whereabouts are unknown or they have no capacity to repay the debt. However, none of the criteria set out in section 1236 exist in the current case so write off is not allowed.
13. The Act allows for waiver of debts - in other words, permanent non-recovery - in limited circumstances. Subsection 1237A(1) states:

ADMINISTRATIVE ERROR

1237A(1) Subject to subsection (1A), the Secretary must waive the right to recover the proportion of a debt that is attributable solely to an administrative error made by the Commonwealth if the debtor received in good faith the payment or payments that gave rise to that proportion of the debt.

14. For section 1237A to apply, a debt must be solely the result of administrative error by Centrelink and be received in good faith.
15. [REDACTED] submitted that his earnings varied enormously because for much of the debt period he worked casually. He struggled to accurately calculate his income declarations. However he did not suggest this amounted to Centrelink error in any way and so the Tribunal has determined that this head of waiver has no application in this matter.

16. The Tribunal also considered waiver under section 1237AAD, which states:

Waiver in special circumstances

1237AAD The Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that:

- (a) the debt did not result wholly or partly from the debtor or another person knowingly:
 - (i) making a false statement or false representation; or
 - (ii) failing or omitting to comply with a provision of this Act or the 1947 Act; and
- (b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and
- (c) it is more appropriate to waive than to write off the debt or part of the debt.

17. Courts and Tribunals have been reluctant to assign a precise meaning to the phrase “special circumstances”. It is generally agreed, however, that for special circumstances to exist there must be something out of the ordinary about a person’s case that makes it unreasonable for them to have to repay their debt. In *Groth v Secretary, Department of Social Security* (1995) 40 ALD 541, Kiefel J, at 545, summarised this as follows:

The phrase “special circumstances”, it has been said, although imprecise is sufficiently understood not to require judicial gloss: *Beadle’s* case (at 60 ALR 229; 7 ALD 674), and for present purposes it is sufficient to observe that it would require something to distinguish [the applicant’s] case from others, to take it out of the usual or ordinary case ... It would of course follow that if one were to conclude that something unfair, unintended or unjust had occurred that there must be some feature out of the ordinary.

18. ██████████ appears to be capable of managing recovery by instalments at the current rate of \$60 per fortnight. In the view of the Tribunal, there are no special circumstances warranting waiver under paragraph (b) of section 1237AAD. The debt therefore cannot be waived under this section.

19. As recovery cannot be written off or waived, the Tribunal finds that ██████████ debt must be recovered.

DECISION

The decision under review is affirmed.



**Administrative
Appeals Tribunal**

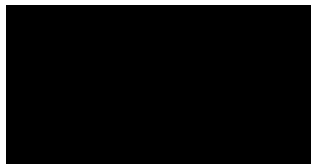
**DECISION AND
REASONS FOR DECISION**

Social Services & Child Support Division

REVIEW NUMBER	2016/S096189
APPLICANT	[REDACTED]
OTHER PARTIES	Secretary Chief Executive Centrelink
TRIBUNAL	Ms D Benk, Member
DECISION DATE	5 August 2016
DECISION POSTED	16 August 2016

DECISION

The decision under review is affirmed. This means the application is not successful.



D Benk

Member

REASONS FOR DECISION

BACKGROUND

1. Following unsuccessful internal reviews by Centrelink, ██████████ lodged an application for review on 7 June 2016 to the Administrative Appeals Tribunal – Social Services and Child Support Division (the tribunal) requesting that a debt raised by Centrelink of youth allowance on 23 November 2015 totalling \$3,876.53 for the period 23 November 2013 to 24 June 2014 (the debt period) be waived due to administrative error or alternatively the special circumstances of the case.
2. The matter was heard in Sydney on 5 August 2016. Both ██████████ and the tribunal had papers provided by Centrelink marked folio 1 to 38. Prior to the hearing, ██████████ gave the tribunal a completed statement of financial circumstances which was discussed and considered in decision making. A copy has been forwarded to Centrelink.

ISSUES AND CONSIDERATION

3. The issues for the tribunal to determine are:
 - (i) whether there is any overpayment of youth allowance during the debt period; and if so
 - (ii) whether there is any debt due to the Commonwealth; and if so
 - (iii) whether any debt should be fully recovered;
 - (iv) whether any debt should be temporarily deferred (written off)
4. The legislation relevant to this appeal is found within social security law, in particular the *Social Security Act 1991* (“the Act”) and the *Social Security (Administration) Act 1999* (“the Administration Act”).
5. Section 540 of the Act provides the general qualifications for youth allowance.
6. Section 1067G of the Act provides for the rate calculator for youth allowance. It provides to the effect that a person’s income is taken into account in the calculation of youth allowance rate.
7. There is no dispute that ██████████ was in receipt of youth allowance during the debt period and was employed. ██████████ said that the debt was over three years ago and she cannot be exactly certain as to what transpired but believes that there were a combination of

factors that may have resulted in the overpayment. Firstly, she recalls reporting income from [REDACTED] via the web but then received a letter stating that she did not need to report her income. She thought that this was strange but was not going to question the advice of Centrelink. She does recall that the letter said if her circumstances changed that she had to notify of the change. [REDACTED] thinks that she may have told Centrelink about her commencement of employment with [REDACTED] but cannot remember. She understands that income from this company and some of the income from [REDACTED] was not taken into account for her youth allowance benefits but maintains that she did everything that Centrelink told her to do.

8. [REDACTED] said that she did not try and mislead Centrelink. She thought that she was doing things right. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
9. [REDACTED] asked the tribunal to check the debt calculations as she cannot believe that the debt is so high. She knows she was entitled to youth allowance benefits and understands that she was able to work but does believe the calculation of the debt was inflated. She did not dispute the records provided by the Australian Taxation Office. The tribunal notes that in the calculation of the debt, Centrelink have taken the annual income as reported by the Australian Taxation Office and averaged it on a fortnightly basis. Whilst it is preferable to undertake a week by week calculation, the tribunal finds that Centrelink had no other option in this matter given the passing of time and [REDACTED] lack of contemporaneous reporting.
10. The tribunal carefully reviewed the taxation records and the debt calculations of Centrelink found between folios 14 and 27 and found the overpayment calculations recorded by Centrelink correct.
11. Section 1223 of the Act provides that if a person is paid a social security payment to which he or she is not entitled for any reason, then the amount of the overpayment is a debt owing to the Commonwealth. As a result the tribunal finds that [REDACTED] does owe the Commonwealth the amount as stated in paragraph 1.
12. There are limited provisions in the Act for waiving the right to recover all or part of a debt. One of these, subsection 1237A(1) of the Act, allows for waiver of recovery where the

proportion of a debt was attributable solely to administrative error on the part of the Commonwealth and was received by the debtor in good faith.

13. The law about 'sole error' is very strict. Any contributory actions of the debtor (even if minor, such as leaving part of a form blank), or a failure to make expected enquiries, may prevent it being found to be 'solely' due to administrative error. In this case, [REDACTED] said she was taken off reporting requirements. She thought that this was unusual but did not question it. There is no record in the file that she notified Centrelink of any fluctuations in her income from [REDACTED] or her commencement of employment with [REDACTED]. For this reason, the tribunal cannot find the overpayment was solely as a result of administrative error and waiver under this section cannot apply.
14. Section 1236 of the Act provides for temporary deferral of recovery (i.e. write off) of a debt for a specific period of time. As [REDACTED] is currently working, albeit reduced hours, relief under this provision cannot apply.
15. Section 1237AAD of the Act provides a discretion by which recovery of all or part of a debt may be waived due to the "special circumstances" of the case (other than financial hardship alone), and where the person or another person did not knowingly make a false statement or representation, or fail or omit to comply with a provision of the Act. The tribunal is satisfied [REDACTED] acted honestly and did not engage in any conduct to obtain a social security advantage. This finding allows the tribunal to explore waiver under this provision.
16. Courts and tribunals have been reluctant to assign a precise meaning to the term "special circumstances". It is generally accepted, however, that for special circumstances to exist there needs to be something which distinguishes a person's case from the ordinary or usual case – see *Angelakos v Secretary, Department of Employment and Workplace Relations* [2007] FCA 25. In *Groth v Secretary Department of Social Security* [1995] FCA 989 the Federal Court observed that if one were to conclude that something unfair, unintended or unjust had occurred then there must be some feature out of the ordinary.
17. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
18. [REDACTED] said that the lapse of time between the raising of the debt and the alleged overpayment should be taken into account as she was shocked to learn that she had been overpaid and had no notice until the debt was raised and this has been a significant setback

for her. She confirmed her accommodation is stable and that she has no unusual expenses associated with daily living.

19. Overall the tribunal finds that [REDACTED] is a well-motivated and genuine individual who over three years ago received overpayments of youth allowance due to a number of factors in which she played no conscious role. Without wishing to trivialise her current difficulties and challenges, the evidence before the tribunal did not demonstrate any circumstances that are particularly unusual or that would make it unjust or unreasonable for her to repay the money in instalments to which she was not entitled but to which she had the benefit, as her circumstances are not markedly different from many other claimants.

DECISION

The decision under review is affirmed. This means the application is not successful.



**Administrative
Appeals Tribunal**

**DECISION AND
REASONS FOR DECISION**

DIVISION: Social Services & Child Support Division

REVIEW NUMBER: 2017/M107198

APPLICANT: [REDACTED]

OTHER PARTIES: Secretary
Chief Executive Centrelink

TRIBUNAL: Ms T Hamilton-Noy, Member

DECISION DATE: 2 June 2017

DECISION

The tribunal affirms the decision under review. This means the application is not successful.



Ms Hamilton-Noy
Member

REASONS FOR DECISION

BACKGROUND

1. This review relates to a decision by the Department of Human Services (Centrelink) to raise and recover parenting allowance and parenting payment debts and to recover part of the debts by way of garnishee from [REDACTED] income tax return refund.
2. [REDACTED] was in receipt of parenting allowance from July 1997 to March 1998 and was then in receipt of parenting payment from March 1998 onwards.
3. On 9 August 2006 an employee of Centrelink made a decision to raise and recover a parenting allowance debt of \$5,636.26 for the period 3 July 1997 to 19 March 1998 on the basis of [REDACTED] partnership income.
4. On 10 August 2006 an employee of Centrelink made a decision to raise and recover a parenting payment debt of \$11,850.89 for the period 20 March 1998 to 30 June 2004 on the basis of [REDACTED] partnership income.
5. On 10 January 2007 an employee of Centrelink made a decision to raise and recover a parenting payment debt of \$3,657.67 for the period 29 July 2006 to 13 December 2006 on the basis of income earned by [REDACTED] from her employment with [REDACTED]
6. On 13 December 2016 and 20 December 2016 Centrelink sent [REDACTED] correspondence about garnisheeing her income tax return refund to repay some of the debts. An amount of \$18,671.10 was garnisheered from the income tax return refund.
7. [REDACTED] requested an internal review of these decisions and on 10 February 2017 an authorised review officer affirmed the decisions under review.
8. On 15 February 2017 [REDACTED] made application to the Administrative Appeals Tribunal for an independent review of the Centrelink decision. The hearing was held on 2 June 2017, on which date the applicant attended the hearing and spoke to the tribunal in person. The tribunal had before it documents copied from [REDACTED] Centrelink file. A copy of the documents was sent to the applicant prior to the hearing and she confirmed receipt of the documents with the tribunal. The applicant provided a Statement of Financial Circumstances to the tribunal at the hearing which was also taken into account by the tribunal in making a decision in this matter.

CONSIDERATION

9. The statutory provisions relevant to this review are contained in the *Social Security Act 1991* (the Act) and the *Social Security (Administration) Act 1999* (the Administration Act). The legal issues for the tribunal in this case are:

- (i) Whether [REDACTED] owes debts to the Commonwealth for overpayment of parenting allowance and parenting payment in periods covering 3 July 1997 to 13 December 2006;
- (ii) Whether there is any reason that the debts should not be recovered by Centrelink; and
- (iii) Whether [REDACTED] income tax return refund was correctly garnisheed by Centrelink.

Issue 1 – Are there debts due to the Commonwealth?

Parenting allowance debt

10. The tribunal accepted from the evidence before it that [REDACTED] was paid parenting allowance in the period 3 July 1997 to 19 March 1998. Section 905 of the Act, as it then was as of July 1997, set out the qualification requirements for the payment of parenting allowance, and provided that a person was qualified where they were a member of a couple, had at least one parenting allowance child, met residency requirements and were in Australia, or otherwise satisfied the requirements of section 906 of the Act.
11. Section 937 of the Act then explained how the rate of parenting allowance was to be calculated and provided for a rate to be worked out in accordance with the Rate Calculator at section 1068A of the Act. The Rate Calculator provided for the income of a person and their partner to be taken into account in determining the rate of parenting allowance.
12. [REDACTED]
[REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] stated to the tribunal that she “doesn’t know” whether the income information contained on the Centrelink documents is correct and she had tried to find out what her accountant had supplied at the time. She stated that she had “always taken everything” to Centrelink. As to whether the partnership had been lodging income tax returns yearly at that time, the applicant stated she could not remember whether they had done so, or whether they had left their tax returns for several years. As to the frequency of discussions at the time with Centrelink about any income, [REDACTED] stated that she would have provided profit and loss statements and it would have been every year that she took Centrelink her financial documents.
13. The tribunal accepted from the evidence before it that [REDACTED] was paid parenting allowance in the period 3 July 1997 to 19 March 1998 without taking into account her partnership income. The tribunal had before it data-matched information provided by the Australian Taxation Office to Centrelink regarding [REDACTED] 1997/1998 financial year income and considered this the best evidence before it of the applicant’s income in this financial year, and accepted this information as correct. The tribunal accepted the Centrelink calculations that, as a result of not taking into account this income, [REDACTED] was overpaid parenting allowance of \$5,636.26 in the period 3 July 1997 to 19 March 1998.

14. Subsection 1223(1) of the Act provides that where a social security payment is made to a person, and the person who obtains the benefit of the payment was not entitled for any reason to obtain that benefit, the amount of the payment is a debt due to the Commonwealth by the person and the debt is taken to arise when the person obtains the benefit of the payment. The tribunal accepts that the overpayment of \$5,636.26 is a debt due to the Commonwealth pursuant to subsection 1223(1) of the Act.

Parenting payment debts

15. The tribunal accepted that [REDACTED] was then in receipt of parenting payment from March 1998 to December 2006.
16. Centrelink has raised a debt for the period 20 March 1998 to 30 June 2004 based on [REDACTED] partnership income and the tribunal had before it data matched information from the Australian Taxation Office about [REDACTED] income in this period and accepted this evidence as correct. The tribunal finds on the evidence before it that [REDACTED] was paid parenting payment from 20 March 1998 to 30 June 2004 without taking into account her partnership income. The tribunal accepted the Centrelink calculations that as a result she was overpaid \$11,850.89 in this period. The tribunal finds that this amount is a debt due to the Commonwealth under subsection 1223(1) of the Act.
17. The later parenting payment debt relates to income earned by [REDACTED] from [REDACTED], trading as [REDACTED]. [REDACTED] stated to the tribunal that she accepted she had been overpaid in this period as a result of not advising of her income. She had not realised she was required to and had “rung to apologise” and “got on top of that”. The tribunal had before it Payroll Advice information prepared by [REDACTED] and provided to Centrelink, and accepted that this correctly represented [REDACTED] income in the period under review.
18. The tribunal finds that [REDACTED] was paid parenting payment in the period 29 July 2006 to 13 December 2006 without taking into account her income from [REDACTED]. The tribunal accepted the Centrelink calculations that as a result she was overpaid \$3,657.67 and finds that this is a debt due to the Commonwealth under subsection 1223(1) of the Act.

Issue 2 – Is there any reason the debts should not be recovered?

19. Certain sections of the Act permit the waiving or write-off of recovery of a debt. Waiving recovery of the debt means that although the debt exists, a decision is made to forgo the legal right to recover the monies. This means that no recovery action is possible and the debt cannot be pursued at a later date. Write off means that, while the debt is recoverable, the recovery is delayed for a period of time.

Waiver – administrative error

20. Subsection 1237A(1) of the Act provides for waiver of a debt where the debt was caused solely by Commonwealth administrative error and the person received the payments in good faith.

21. The tribunal was provided "DOC" records of contact between [REDACTED] and Centrelink customer service staff and had particular regard to the records prepared in the periods under review. The records indicate that:

- [REDACTED] had provided information to Centrelink about her and her husband's income in August 1997 and March 1998 however there was no evidence of her having advised of her business income at this time;
- [REDACTED] was paid parenting payment from January 1999 based on 1997 business income of \$4,200. The tribunal did not have information about [REDACTED] 1996/1997 business income and was unable to ascertain whether this was correct or not;
- In June 1999 a note was made that a copy of the personal and business tax returns had not been provided and [REDACTED] parenting payment was to be suspended;
- In August 1999 [REDACTED] income was updated using the 1997/1998 business tax return;
- In March 2001 [REDACTED] advised Centrelink she was awaiting personal and business tax returns for herself and her partner for the 1999/2000 financial year;
- In June 2002, 2000/2001 financial statements were received;
- There was no other information on the Centrelink records about the provision of business income information until 2006 when the debts were raised.

22. The tribunal finds from this evidence that the debts have not arisen due to sole administrative error on the part of Centrelink and finds that waiver under subsection 1237A(1) of the Act is not available to the applicant in this case.

Waiver – special circumstances

23. The tribunal next considered waiver in special circumstances, which is set out in section 1237AAD of the Act. This section allows for waiver of part or all of a debt subject to the tribunal being satisfied that:

- The debt did not result wholly or partly from the debtor or another person knowingly:
 - making a false statement or false representation; or
 - failing or omitting to comply with a provision of the social security law; and
- There are special circumstances (other than financial hardship alone) that make it desirable to waive; and
- It is more appropriate to waive than write off the debt or part of the debt.

24. The term "special circumstances" is not defined in the legislation. However, the Federal Court and the Administrative Appeals Tribunal have considered the issue of special circumstances on a number of occasions. In every case, the individual circumstances of the case were examined to determine whether the circumstances were such that it would

be unjust, unreasonable or inappropriate for the debt to be recovered. In particular, the Full Court of the Federal Court in the matter of *Dranichnikov v Centrelink* [2003] FCAFC 133 determined that whether there are special circumstances in a particular case is dependent on whether there are circumstances that would distinguish the case from the usual case.

25. [REDACTED]

[REDACTED]

27. [REDACTED]

28. The tribunal carefully considered the circumstances of the applicant and, having regard to her circumstances and to the totality of the circumstances surrounding the manner in which the debts have arisen in this case, was not persuaded that special circumstances are established. The tribunal concluded that waiver under section 1237AAD of the Act is not available to the applicant.

Write off

29. Finally, the tribunal considered whether write off of the debt is available, under section 1236 of the Act. This section provides as follows:

- (1) Subject to subsection (1A), the Secretary may, on behalf of the Commonwealth, decide to write off a debt, for a stated period or otherwise.

(1A) The Secretary may decide to write off a debt under subsection (1) if, and only if:

(a) the debt is irrecoverable at law; or

(b) the debtor has no capacity to repay the debt; or

(c) the debtor's whereabouts are unknown after all reasonable efforts have been made to locate the debtor; or

(d) it is not cost effective for the Commonwealth to take action to recover the debt.

30. Subsection 1236(1B) of the Act relates to debts which are irrecoverable at law, as provided for in paragraph 1236(1A)(a), and states that:

(1B) For the purposes of paragraph (1A)(a), a debt is taken to be irrecoverable at law if, and only if:

(b) there is no proof of the debt capable of sustaining legal proceedings for its recovery; or

(c) the debtor is discharged from bankruptcy and the debt was incurred before the debtor became bankrupt and was not incurred by fraud; or

(d) the debtor has died leaving no estate or insufficient funds in the debtor's estate to repay the debt.

31. The Guide to Social Security Law at 6.7.2.30 notes that entering into bankruptcy does not eliminate the debt, however the debt ceases to be due and payable for the duration of the bankruptcy. After discharge from bankruptcy, the former bankrupt is released from most debts. This is reflected at paragraph 1236(1B)(c) of the Act which provides that a debt under the Act will be irrecoverable at law where the debtor is discharged from bankruptcy and the debt was incurred before the discharge and was not incurred by fraud.

32. [REDACTED]

33. The tribunal has found, above, that there is little evidence of [REDACTED] providing information about her partnership income to Centrelink, despite her assertion that she had done so on a regular basis. Her evidence to the tribunal was that she had not provided information about her earnings from [REDACTED]

34. The tribunal noted that in the period each of the debts was incurred, [REDACTED] was sent letters from Centrelink advising her of her notification obligations, including the requirement to advise of any changes to income. The tribunal did not find the applicant gave her

evidence about the provision of business income to Centrelink in a credible manner and noted that, in the period under review, Centrelink appears to have made several attempts to obtain the information in question, including suspending [REDACTED] parenting payment on occasion until she provided the information requested by Centrelink. The tribunal considered from this evidence that the applicant was aware of the requirement to provide information about her [REDACTED] to Centrelink and failed to provide the information in a timely manner, or to provide any information at all from 2002 onwards. The tribunal noted the applicant's evidence acknowledging she had not declared income from [REDACTED] [REDACTED] when she was required to do so.

35. The tribunal finds that there were clear indications given to [REDACTED] that she was required to provide information about her income to Centrelink, including suspending her payment on occasion until she provided requested information, and that she failed to provide information about her earnings from the partnership business on a regular basis. The tribunal considered that [REDACTED] deliberately or recklessly failed to provide Centrelink with the information she was aware she had to provide. The tribunal finds that the debts were caused by fraudulent action or inaction on the part of [REDACTED]. The effect of this finding is that the debts under review could only be temporarily written off until [REDACTED] [REDACTED]. The bankruptcy therefore does not have any effect on Centrelink's ability to recover the debts, or to the garnishee action, discussed below.
36. The tribunal then considered whether the remaining amounts of the debts can be written off for a period of time under the other provisions of section 1236 of the Act, however, considering [REDACTED] ongoing income level, the tribunal considered that the requirements for write off are not met in this case.
37. As there are no other relevant provisions for waiver or write off of the debts, the decision by Centrelink to raise and recover a parenting allowance debt of \$5,636.26 for the period 2 July 1997 to 19 March 1998, a parenting payment debt of \$11,850.89 for the period 20 March 1998 to 30 June 2004 and a parenting payment debt of \$3,657.67 for the period 29 July 2006 to 13 December 2006 is legally correct and this decision is affirmed.

Issue 3 – Garnishee of the income tax return refund

38. [REDACTED] stated to the tribunal that she was disputing the garnishee of her income tax return on the basis that Centrelink had plenty of opportunity to provide her with information so she could discuss the debts with someone. She stated that she had received notice of the first debt in 2006 and had questioned this on the telephone repeatedly. She found the garnishee in late 2016 very difficult and "almost had a cardiac arrest"; at the time the family had been given two weeks to vacate their rental property and had to move in with her parents. The money that was garnisheed was needed for their [REDACTED] [REDACTED].
39. The tribunal accepted from the Centrelink documents and evidence given by the applicant that the following notices and discussions had occurred regarding the debts:
 - [REDACTED] was sent a letter in March 2002 about a debt for part of the period under review relating to her self-employment and business income. The letter was sent to

██████████, where ██████████ stated to the tribunal she had resided at the time;

- ██████████ had been sent a letter on 9 August 2006 advising her of the debt of \$5,636.23;
- ██████████ had been sent a letter on 10 August 2006 advising her of the debt of \$11,850.89;
- These letters had been sent to an address in ██████████, where ██████████ stated she was residing as of August 2006. Despite her opening submissions to the tribunal that she recalled receiving notice of the first debt in 2006, when the letters were put to her later in the hearing, she stated that she cannot remember receiving the letter about the debts but that whatever she received she would have rung Centrelink in response;
- ██████████ contacted Centrelink on 14 August 2006 by telephone regarding recovery action for the debts. The record of this contact was: "inquiry re debt calc. referred to odm to discuss. Would not discuss repayment of account at time of call". The tribunal took ██████████ to this record of contact and she stated that she doesn't remember this and has always contacted Centrelink to discuss her circumstances;
- ██████████ was sent a letter on 10 January 2007 advising her of the debt of \$3,657.67;
- ██████████ was sent a letter on 19 January 2010 advising her of debts owed totalling \$23,718.44. The letter stated that no arrangement had been made to extend the time for payment of the amount and that if the amount remained outstanding and no arrangements were put in place to finalise the account, Centrelink would consider further recovery action. This may include recovery from her wages, tax refund, bank account or other income; referral of the account to a private debt collector; or taking the matter to court;
- ██████████ was sent a letter on the same terms dated 16 November 2010 advising payment of \$7,088.59 was due, and providing the same information as the above letter;
- The letters in 2010 were sent to ██████████, which ██████████ stated was her correct address at the time. She stated that she recalled receiving the letters and would have rung Centrelink at the time to see what she could organise. She can't remember the conversations she has had with Centrelink about the debts, but her intention has always been to do the right thing. As to what arrangements she had made to repay the debts after the 2010 letters, she stated that at some stage when she rang Centrelink back, she would have agreed to repay \$20 or \$40 per week. As to when this arrangement started, she stated she can't remember and thinks she moved again after this time;

- On 13 December 2016 a letter was sent to [REDACTED] containing the following information:

Information about the recovery of your Centrelink debt

We are writing to you about your Centrelink debt. Our records show that the outstanding amount is **\$29,014.32**.

To help with the recovery of outstanding Centrelink debts, we can request the Australian Taxation Office to withhold or garnishee money from tax refunds or similar payments that may be due to you from the Australian Taxation Office.

After careful consideration, a decision has been made to request the Australian Taxation Office to withhold **\$21,084.79** or the total of the money due to you, whichever is smaller, from your tax refund. Once this has occurred, the Australian Taxation Office will advise us of the amount deducted and we will reduce the outstanding amount of your debt.

This is a notice of decision made under section 1233 of the *Social Security Act 1991*. Information about what to do if you disagree with this decision is on the back of this letter.

- On 20 December 2016 a letter was sent to [REDACTED] containing the following information:

Information about the recovery of your Centrelink debt

We are writing to you about your Centrelink debt. Our records show that the outstanding amount is \$18,635.66.

To help with the recovery of outstanding Centrelink debts, we can request the Australian Taxation Office to withhold or garnishee money from tax refunds or similar payments that may be due to you from the Australian Taxation Office.

After careful consideration, a decision has been made to request the Australian Taxation Office to withhold **\$10,706.13** or the total of the money due to you, whichever is smaller, from your tax refund. Once this has occurred, the Australian Taxation Office will advise us of the amount deducted and we will reduce the outstanding amount of your debt.

This is a notice of decision made under section 1233 of the *Social Security Act 1991*. Information about what to do if you disagree with this decision is on the back of this letter.

- The letters of 13 December 2016 and 20 December 2016 were sent to [REDACTED]. [REDACTED] evidence was that at the time she was living in [REDACTED]. The family had been living in [REDACTED] until October 2016 and had had their mail redirected after they were given notice to vacate. She stated that, despite the mail redirection, she didn't receive the first letter, and that she had received the second letter in January 2017;

- The tribunal asked about how much of the debts had been repaid at the time of the garnishee, to which ██████████ stated she can't remember and doesn't know. As to whether it was quite a bit of the debt or not much of the debt, she stated she doesn't know.

40. The tribunal notes that it is not able to review all decisions made by Centrelink. Section 151 of the Administration Act (the equivalent provision of which was previously contained in section 1253 of the Act) provides the powers of the tribunal on review and confines the Tribunal's review powers to specified Centrelink decisions. In *Walker v Secretary, Department of Social Security* [1997] FCA 589, the Full Federal Court looked at the operation of section 1253 of the Act in relation to a garnishee case and the powers of the tribunal (then called the Social Security Appeals Tribunal) and stated as follows:

We therefore think that s 1253(4) should be read as permitting the SSAT to review decisions within s 1253(4) for any error of fact or law, but as preventing the SSAT, even where it identifies error in such a decision, from making any decision of its own on the merits. That is the sole province of the Secretary. But that the SSAT cannot do more than set aside an erroneous DSS decision within s 1253(4) and remit it to the DSS for reconsideration does not absolve the SSAT from examining the DSS decision for error. It follows that the only orders the SSAT may make on the review it can conduct of decisions within s 1253(4) are either to affirm the decision or to set it aside and, if it sets the decision aside to remit the decision for reconsideration, with or without non-binding recommendations.

It is with some diffidence that we have reached this conclusion. Section 1253(4), however, neither permits unrestricted merit review by the SSAT of the various decisions of the Secretary referred to in the subsection nor does it prohibit all review of those particular decisions. It is not possible to discern why this intermediate approach was adopted with respect to the unrelated decisions listed in s 1253(4). But the subsection is, in our opinion, intractable insofar as it can only be read as providing for a limited review of the decisions there referred to which is less expansive than full merit review, but a review nonetheless.

41. The case of *Walker* indicates that the tribunal, in reviewing the garnishee action by Centrelink, cannot undertake full merits review of the decision. It can, however, assess whether the action was undertaken according to law.
42. Paragraph 1230C(1)(e) of the Act provides that debts due to the Commonwealth are recoverable by means of garnishee notice. This section is, however, subject to section 1230C(2) of the Act, which provides that, subject to subsection (3), a debt is recoverable by garnishee notice only if the Commonwealth:
- (a) has first sought to recover the debt by means of a method mentioned in paragraph (1)(a), (b) or (c); and
 - (b) can establish that the person who owes the debt:
 - (i) has failed to enter into a reasonable arrangement to repay the debt; or

- (ii) after having entered into such an arrangement, has failed to make a particular payment in accordance with the arrangement.

43. The tribunal finds that ██████ had contact with Centrelink in August 2006 regarding the debt and refused at that time to discuss repayment of the debt with Centrelink. The tribunal finds that Centrelink sent further correspondence to ██████ during 2010 attempting to make arrangements to recover the debt and finds that no response was received to this correspondence. The tribunal is satisfied that Centrelink had first sought to recover the debts by means of repayments pursuant to paragraph 1230C(1)(c) of the Act. The tribunal did not accept ██████ evidence that she responded to correspondence from Centrelink setting up a repayment arrangement of \$20 to \$40 per week at that time. The tribunal finds that the requirements set out in subsection 1230C(2) of the Act are met in this case.
44. Section 1233 provides the legislative preconditions for a garnishee notice being issued. This section states, in relevant part, as follows:

- (1) If a debt is recoverable from a person (in this section called the **debtor**) by the Commonwealth under section 1227A or 1230C of this Act, under the 1947 Act or under the Social Security (Fares Allowance) Rules 1998, the Secretary may by written notice given to another person:
 - (a) by whom any money is due or accruing, or may become due, to the debtor; or
 - (b) who holds or may subsequently hold money for or on account of the debtor; or
 - (c) who holds or may subsequently hold money on account of some other person for payment to the debtor; or
 - (d) who has authority from some other person to pay money to the debtor;

require the person to whom the notice is given to pay the Commonwealth:

- (e) an amount specified in the notice, not exceeding the amount of the debt or the amount of the money referred to in the preceding paragraph that is applicable; or
 - (f) such amount as is specified in the notice out of each payment that the person becomes liable from time to time to make to the debtor until that debt is satisfied; or
 - (g) such percentage as is specified in the notice of each payment that the person becomes liable from time to time to make to the debtor until that debt is satisfied.
- (2) The time for making a payment in compliance with a notice under subsection (1) is such time as is specified in the notice, not being a time before the money concerned becomes due or is held or before the end of the period of 14 days after the notice is given.

45. The tribunal obtained information from Centrelink following the hearing about the details of the garnishee action, and was provided the following information:
- We garnisheed \$18,671.10
 - \$5,636.23 Debt 8072956 on 20/12/16
 - \$10,378.66 Debt J8054338 on 16/12/16 and \$1,412.23 on 20/12/16
 - \$1,243.98 Debt J8087342 on 20/12/16
46. The tribunal noted that the letter sent to [REDACTED] by Centrelink on 13 December 2016 advising of the decision to recover an amount from her income tax return refund was issued within 14 days of the amount that was garnished on 16 December 2016. The subsequent letter sent to the applicant on 20 December 2016 was sent on the same day that further amounts were garnished. The requirement set out in subsection 1233(2) of the Act is met in this case.
47. In these circumstances, the tribunal is satisfied that the correspondence sent to [REDACTED] on 13 December 2016 and 20 December 2016 were notices for the purposes of section 1233, outlined above. The garnishee action was therefore taken in accordance with the legal requirements. The Centrelink decision to garnish the above amounts is also legally correct and is also affirmed.

DECISION

The tribunal affirms the decision under review. This means the application is not successful.



**Administrative
Appeals Tribunal**

IQ21-000031 - Attachment D

**DECISION AND
REASONS FOR DECISION**

DIVISION: Social Services & Child Support Division

REVIEW NUMBER: 2019/M132945

APPLICANT: [REDACTED]

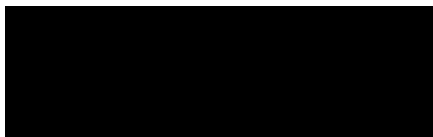
OTHER PARTIES: Secretary
Chief Executive Centrelink

TRIBUNAL: Member A Ducrou

DECISION DATE: 10 May 2019

DECISION:

The decisions under review are affirmed.



Member A Ducrou

REASONS FOR DECISION

BACKGROUND

1. This review is about whether [REDACTED] owes debts to the Commonwealth for newstart allowance he received.
2. On 9 September 2016 a Department of Human Services (Centrelink) officer made a decision to raise and recover a debt of \$4,149.81 from [REDACTED] for newstart allowance overpaid to him from 28 July 2010 to 29 June 2011. On 15 September 2016 a Centrelink officer made a decision to raise and recover a debt of \$10,515.66 from [REDACTED] for newstart allowance overpaid to him from 14 July 2011 to 18 June 2015. The debts were calculated based on information that Centrelink received from the Australian Taxation Office (ATO) about [REDACTED] earnings.
3. [REDACTED] requested a review. He provided documents to Centrelink. On 23 March 2017 an authorised review officer decided to affirm the decisions made on 9 September 2016 and 15 September 2016. On 18 January 2019 [REDACTED] applied to this tribunal by telephone for independent review of the authorised review officer's decision.
4. The tribunal conducted a hearing on 10 May 2019. [REDACTED] attended the hearing by conference telephone. He gave oral evidence at the hearing on oath and made oral submissions. Centrelink provided the tribunal with documents from its paper and electronic records for [REDACTED] (1,579 pages). [REDACTED] provided documents to the tribunal prior to and at the hearing. The documents from Centrelink were copied to [REDACTED] and copies of the documents from [REDACTED] (numbered A1 to A10) were provided to Centrelink. The tribunal made its decision on 10 May 2019.

ISSUES

5. The statutory provisions relevant to this review are set out in the *Social Security Act 1991* (the Act) and the *Social Security (Administration) Act 1999* (the Administration Act).
6. The issues which arise in this case are:
 - Does [REDACTED] owe debts to the Commonwealth for newstart allowance that he received? And, if so,
 - Is there any reason why some or all of the debts should not be recovered?

CONSIDERATION

Issue 1 – Does [REDACTED] owe debts to the Commonwealth for newstart allowance that he received?

7. Entitlement to newstart allowance is governed by the provisions of the Act and the Administration Act. The rate of newstart allowance is affected by a person's income. Under

financial situation deteriorated as he had previously worked as a [REDACTED] and he could not do that type of work when he lost his licence. He could not work as a [REDACTED] even after he got his licence back because he could only drive when [REDACTED]. He could not find consistent work. Mainly he worked through [REDACTED]. He has not been able to get payroll information from his former employers. When he contacted them about getting records he was told that they had not kept his records. Some of his employers have closed down. Some have changed their names.

12. [REDACTED] provided documents to Centrelink about his earnings. Payroll records from some employers were included in his documents. [REDACTED] also provided PAYG summary statements from employers and bank statements. The information in the documents that he provided was consistent with the information that Centrelink had received from the ATO. Based on the documentary evidence the tribunal finds that [REDACTED] received employment income from the following entities during the periods under consideration:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

13. The tribunal was satisfied that [REDACTED] received employment income from those entities as advised by the ATO to Centrelink. The Centrelink documents included records of the earnings that [REDACTED] had reported. [REDACTED] did not dispute the accuracy of the records. Based on the documentary evidence the tribunal finds that the earnings that [REDACTED] reported to Centrelink did not correspond with the ATO-advised earnings income.
14. Centrelink applied the payroll records and the bank statements that [REDACTED] provided where available in calculating [REDACTED] employment income for the relevant instalment periods. Where [REDACTED] had not been able to provide payroll records or bank statements Centrelink used the ATO information to calculate his employment income. In the circumstances the tribunal considered that where no other earnings information was provided the ATO-provided information was the best available evidence of [REDACTED] ordinary income from his employment. The tribunal was satisfied that the approach that Centrelink took in calculating the overpayments was both conservative and appropriate. Based on the available evidence the tribunal was satisfied that the correct amounts of [REDACTED] employment income were not taken into account in the newstart allowance that he received from 28 July 2010 to 29 June 2011 and from 14 July 2011 to 18 June 2015 and that this resulted in [REDACTED] being overpaid newstart allowance for those periods.
15. Section 1222A of the Act provides that an amount that is overpaid is a debt due to the Commonwealth if, and only if a provision of the Act expressly provides that the overpayment is a debt. Under subsection 1223(1) of the Act where a social security payment is made to a person who was not entitled for any reason to that payment, then that payment is a debt due to the Commonwealth. Newstart allowance falls within the definition of "social security payment" set out in subsection 23(1) of the Act. The tribunal concluded that under subsection 1223(1) of the Act [REDACTED] owes recoverable debts due to the Commonwealth for newstart allowance overpaid to him. The debt amounts are \$4,149.81 for the newstart allowance overpaid from 28 July 2010 to 29 June 2011 and \$10,515.66 for the newstart allowance overpaid from 14 July 2011 to 18 June 2015.

Issue 2 – Is there any reason why some or all of the debts should not be recovered?

16. The Act provides for debts to be written off or waived in certain specified situations. When a debt is written off, it means that an administrative decision has been made either temporarily or permanently to refrain from undertaking recovery action for the money owed. The debt is not extinguished and enforcement proceedings may be instituted at a later stage. When a debt is waived the debt exists but a decision is made to forgo the legal right to recover the money owed. If a debt is waived no recovery action is possible and the debt cannot be pursued at a later date.
17. Based on the available evidence the tribunal was satisfied that the mandatory statutory requirements set out in section 1236 of the Act for writing off the debt were not met in this case.
18. Subsection 1237A(1) of the Act provides that recovery of the proportion of a debt that is attributable solely to administrative error on the part of the Commonwealth must be waived

if the debtor received the overpayments in good faith. For this provision to apply, the tribunal must be satisfied that the *only* reason for the debt arising was Commonwealth administrative error. The tribunal was satisfied that the evidence established that [REDACTED] [REDACTED] was overpaid newstart allowance because he provided inaccurate information about his earnings to Centrelink. The tribunal was not satisfied that the debts resulted from administrative error on the part of Centrelink or another part of the Commonwealth. Therefore, the tribunal concluded that the requirements in subsection 1237A(1) of the Act for waiver of recovery of the debts were not met. The debts cannot be waived under subsection 1237A(1).

19. The tribunal considered whether recovery of the debt should be waived under section 1237AAD of the Act, which provides for the waiver of recovery of debts in specified situations including where there are special circumstances. The requirements that must be met for section 1237AAD to apply are:
 - The debt did not result wholly or partly from the debtor or another person knowingly making a false statement or false representation or failing or omitting to comply with a provision of the Act; and
 - It is more appropriate to waive than to write off the debt or part of the debt.
20. The term “special circumstances” is not defined in the legislation. However, the Federal Court and the Administrative Appeals Tribunal have considered the issue of special circumstances on a number of occasions. In every case, the individual circumstances of the case were examined to determine whether the circumstances were such that it would be unjust, unreasonable or inappropriate for the debt to be recovered. In particular, the Full Federal Court in the matter of *Dranichnikov v Centrelink* [2003] FCAFC 133 determined that whether there are special circumstances in a particular case is dependent on whether there are circumstances that would distinguish the case from the usual case. Further, the Federal Court in *Angelakos v Secretary, Department of Employment and Workplace Relations* [2007] FCA 25 emphasised that it is not the intention of Parliament that the exercise of this discretion be confined to the “exceptional” case, but rather that there be something that distinguishes the case from the ordinary or usual case. For special circumstances to exist there must generally be some factors, apart from financial hardship alone, which distinguish the case and set it apart from other similar cases.
21. The tribunal examined the evidence concerning [REDACTED] circumstances carefully. [REDACTED]

[REDACTED]

[REDACTED]

22.

[REDACTED]

23. The tribunal appreciated the difficulties that [REDACTED] faced in reporting his earnings accurately given his variable working arrangements with pay periods that did not always align with Centrelink's reporting and instalment periods. However, these matters commonly apply to many recipients of newstart allowance. The tribunal accepted that [REDACTED] lacked understanding of the requirements of the social security law and that it was difficult for him to attend to his reporting obligations due to his limited education. However, these matters are also not unusual for people who receive newstart allowance. It was evident from Centrelink's records that in addition to being sent correspondence that explained his reporting requirements Centrelink advised [REDACTED] verbally on at least one occasion that he was required to report his gross earnings before tax. [REDACTED]

[REDACTED] However, the tribunal observed that [REDACTED] demonstrated the capacity to work during that time, albeit in non-stable

employment. Based on the available evidence the tribunal was not persuaded that [REDACTED] [REDACTED] circumstances were sufficiently unusual or uncommon as to constitute special circumstances that warranted waiver of the debts in full or in part or to depart from the general rule that payments to which a person is not entitled should be recovered. Therefore, the tribunal has concluded that section 1237AAD of the Act did not apply and that the debts are recoverable from [REDACTED]

DECISION

The decisions under review are affirmed.



**Administrative
Appeals Tribunal**

IQ21-000031 - Attachment E

**DECISION AND
REASONS FOR DECISION**

DIVISION: Social Services & Child Support Division

REVIEW NUMBER: 2017/B114674

APPLICANT: [REDACTED]

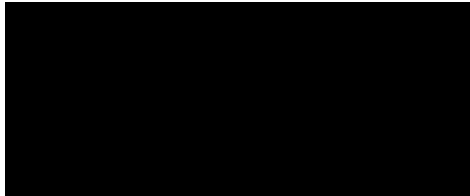
OTHER PARTIES: Secretary
Chief Executive Centrelink

TRIBUNAL: Member P Jensen

DECISION DATE: 16 November 2017

DECISION:

The decision under review is affirmed.



Member P Jensen

REASONS FOR DECISION

1. On 31 October 2016, Centrelink decided to raise and recover a youth allowance and newstart allowance debt of \$29,413.79 for the periods from 2 September 2010 to 14 September 2011 and from 31 January 2013 to 17 June 2015. ██████████ sought review of that decision. An authorised review officer noted an error in the original calculation and increased the debt to \$30,072.01. ██████████ sought further review and I heard the matter on 16 November 2017. I spoke to ██████████ by phone.
2. Youth allowance and newstart allowance are both income-tested: sections 1067G and 1068 of the *Social Security Act 1991* (“the Act”). There is no dispute that Centrelink originally paid ██████████ youth allowance and newstart allowance at rates that were calculated on the basis that she was earning particular rates of income that were in fact less than she was actually earning. She consequently received more youth allowance and newstart allowance than she was entitled to receive. The authorised review officer calculated that she was overpaid \$27,338.21. ██████████ did not dispute that calculation and I accept it as correct.
3. The authorised review officer also imposed a 10% penalty pursuant to section 1228B. The authorised review officer’s key finding was that ██████████ recklessly provided false information to Centrelink concerning her earnings and the entire overpayment arose because of her provision of that false information.
4. ██████████ was employed by ██████████ and ██████████ ██████████. She was employed by ██████████ ██████████. Apart from a few payslips, ██████████ did not provide, and Centrelink did not obtain, the relevant payroll records. Instead, Centrelink calculated the overpayment on the basis on information that it obtained from the Australian Taxation Office and an assumption that ██████████ earned her wages at a constant average rate during her periods of employment during any given financial year. That methodology involves some assumptions and it is appropriate to resolve any uncertainty that arises from those assumptions in ██████████ favour. Nevertheless, the difference between ██████████ earnings and her declared earnings is enormous. For example, during the period from 3 January 2013 to 17 June 2015, she earned \$50,185 but only declared \$5,574.
5. The authorised review officer noted:

You requested a review because you claim that you were going through extreme personal difficulties and have now been diagnosed with ██████████

6. ██████████
██████████

██████████ ██████████ ██████████
██
██
██

7. The hearing papers include a medical certificate dated 20 July 2017 which states that ██████████ suffers from one condition: ██████████. The "date of onset" has been left blank.
8. The authorised review officer concluded that ██████████ demonstrated ability to maintain long term employment during the periods in question was inconsistent with any assertion that her mental state had prevented her from accurately reporting her earnings to Centrelink. I respectfully agree with that conclusion.
9. At the hearing ██████████ also submitted, apparently for the first time, that she had correctly reported her earnings to Centrelink via a smartphone app and a fault in the app had incorrectly recording the correct information that she had provided. In the absence of any further evidence on point, I do not accept ██████████ evidence on that issue.
10. The magnitude of the discrepancy between what ██████████ earned and what she declared she is earned is such that I conclude, on the balance of probabilities, that ██████████ under-reported her earnings on an ongoing basis during the periods in question and she was at least reckless in providing that false information. The requirements of section 1228B of the Act are satisfied and a 10% penalty applies to the overpayment.
11. The overpayment of \$27,338.21 and the penalty of \$2,733.80 constitute a debt of \$30,072.01: sections 1223 and 1228B of the Act.
12. The Act contains sections that allow for the recovery of debts to be waived in certain circumstances. Two sections with potential application to ██████████ circumstances are sections 1237A and 1237AAD.
13. Section 1237A allows for the recovery of a debt to be waived if it is attributable solely to Commonwealth administrative error and it was received in good faith. The debt is attributable to the false information that ██████████ provided to Centrelink. It is not attributable to Commonwealth administrative error. Recovery of the debt cannot be waived pursuant to section 1237A.
14. Section 1237AAD allows for the recovery of a debt to be waived if certain requirements are satisfied including a requirement that there are "special circumstances (other than financial hardship alone) that make it desirable to waive". ██████████ stated that she is receiving newstart allowance and living in shared accommodation. She said she has not worked since December 2016. (As an aside, when ██████████ applied for review by the Tribunal on 1 September 2017, ██████████ ██████████ ██████████
██████████
██████████ ██████████ ██████████ ██████████) The Tribunal registry sent a Statement of Financial Circumstances to ██████████ to complete and return. She did not return the document. At the hearing she said she has no savings. She said she has many debts but was unable to list them. She said they total approximately \$60,000. I have doubts about the veracity of ██████████ evidence.

15. [REDACTED] has received public money to which she was not entitled because she at least recklessly failed to fully disclose her earnings over an extended period of time. She is currently in receipt of an income support payment and Centrelink is recovering the Centrelink debt via very modest fortnightly withholdings. [REDACTED] claims to be in financial hardship. As section 1237AAD expressly states, financial hardship alone cannot constitute special circumstances that would make it desirable to waive recovery of the debt. Viewing [REDACTED] circumstances as a whole, they do not satisfy the requirements of section 1237AAD. The Centrelink debt will have to be repaid.

DECISION

The decision under review is affirmed.



**Administrative
Appeals Tribunal**

IQ21-000031 - Attachment F

**DECISION AND
REASONS FOR DECISION**

DIVISION: Social Services & Child Support Division

REVIEW NUMBER: 2016/S101538

APPLICANT: [REDACTED]

OTHER PARTIES: Secretary
Chief Executive Centrelink

TRIBUNAL: Mr P White, Member

DECISION DATE: 6 February 2017

DECISION:

The decisions under review are affirmed.

[REDACTED]

Member P White

REASONS FOR DECISION

BACKGROUND

1. On 29 August 2016, a delegate of the Department of Human Services (Centrelink) reviewed ██████████ entitlements to newstart allowance and youth allowance during the 2011, 2012 and 2013 financial years, following data matches with the Australian Taxation Office.
2. Centrelink decided to raise and recover the following debts against ██████████
 - Newstart allowance debt of \$3,015.83 for the period 7 December 2011 to 27 March 2012;
 - Newstart allowance debt of \$1,359.79 for the period 25 June 2012 to 1 March 2013; and
 - Youth allowance debt of \$2,454.55 for the period 13 April 2013 to 25 October 2013.
3. On 29 September 2016, an authorised review officer affirmed the original decisions. The authorised review officer was unable to contact ██████████ to discuss the reviews.
4. ██████████ applied for review by the Administrative Appeals Tribunal (the tribunal) on 29 September 2016. His application stated that it had been lodged by his mother “because he ██████████ and works long hours”.
5. The tribunal spoke to ██████████ and his mother, ██████████ by conference telephone on 6 February 2017. The proceedings were recorded and ██████████ and his mother gave evidence on affirmation. Both ██████████ and the tribunal had 274 pages of material from ██████████ Centrelink file, for the purposes of the review.

CONSIDERATION

Issue 1: Are there debts to the Commonwealth?

6. The statutory provisions relevant to this review are set out in the *Social Security Act 1991* (the Act) and the *Social Security (Administration) Act 1999* (the Administration Act).
7. The rate of newstart allowance to which ██████████ was entitled depended on his fortnightly gross income. Section 643 of the Act states that a person’s rate of newstart allowance is worked out using the Benefit Rate Calculator B at the end of section 1068 of the Act. The Rate Calculator contains an income test that can reduce the amount of allowance payable to a person, depending on the person’s ordinary income. The definition of “ordinary income” is contained in section 8 of the Act and includes income earned from employment. ██████████ was not partnered during the debt period, so it is only necessary to consider his income, as it may have affected his rate of newstart allowance.

8. Section 1073B of the Act explains that employment income earned by a social security recipient in a particular instalment period (referred to as a Centrelink payment fortnight) is taken to be earned across each day of the fortnight, to arrive at a daily rate of income. Section 1073C of the Act states that the daily rate can then be used to work out a fortnightly or annual rate of income. This means that when applying the Rate Calculator in assessing the rate of newstart allowance payable to a person, the employment income that the person earns in each instalment period is used to assess the rate of newstart allowance that is payable to the person.
9. The two newstart allowance debts of \$3,015.83 and \$1,359.79 are alleged to have arisen because ██████████ failed to declare earnings from employment during the debt periods.
10. In relation to the youth allowance debt of \$2,454.55, sections 556 and 1067G of the Act set out how to determine the person's rate of youth allowance and the effective income on the maximum payment rate. The income test applied to youth allowance is analogous to that applied to newstart allowance. This debt was also raised due to undeclared earnings.
11. A Centrelink note to file dated 31 August 2016 records the following:

Why does the Customer want the decision reviewed?

Customer is appealing the debts raised ... for the following reason. The explanation given at the time mentions dates, employers and amounts so as to justify the reason for the debts. The Customer has timelines and old employer dates that don't add up to the dates and information provided in this explanation. Customer is of the opinion that incorrect information has been processed and would like to correct this.

The Customer advised they wish to supply new dates and evidence, however no information was supplied and three phone calls to the Customer were attempted and we were unable to reach. ... (emphasis added)
12. ██████████ and ██████████ denied that they had been asked to provide any information, including payslips. The tribunal is inclined to accept the accuracy of the Centrelink note, because it was written contemporaneously with events. ██████████ told the tribunal that his mother represented him in his dealings with Centrelink. He also said that he had spoken to the employers concerned. In the view of the tribunal, ██████████ and his mother have had ample opportunity to provide payslips and specific submissions to Centrelink about the calculation of the debt. The tribunal considered whether the review should be adjourned to enable ██████████ to provide information about detailed fortnightly income. In particular, this would require Centrelink to have access to payslips. The tribunal decided not to take that course. It is by no means certain that the debts would be reduced by the use of detailed fortnightly payroll information. Centrelink has certainly averaged some of the income over relevant pay fortnights, but ██████████ is able to take advantage of income free areas, with that type of methodology. Further, he has promised to obtain this information and has failed to do so.
13. The debts in this case arose when Centrelink undertook data matches with the Australian Taxation Office. The information received suggested that ██████████ had not declared all

of his earnings from multiple employers during the debt periods. [REDACTED] was afforded an opportunity to comment and to provide information in respect of the ATO data matches. He promised to respond, but failed to do so. The authorised review officer was also unable to contact him. [REDACTED] claims he was not contacted by Centrelink, but nothing turns on that. The tribunal accepts that Centrelink had been attempting to contact him, but was unsuccessful and the calls were not returned.

14. The relevant data matches are set out in Centrelink file notes dated 12 August 2016. The hearing papers also contain MultiCal Debt Calculators for each of the three debts. Centrelink has also used software called the Casual Earnings Apportionment Tool which allocated [REDACTED] gross income into relevant Centrelink pay fortnights for the purposes of sections 1073B and 1073C of the Act, to which the tribunal has already referred. Centrelink has to apply a fortnightly income test for both the newstart allowance and youth allowance debts.
15. In the view of the tribunal, it is virtually impossible to undertake a manual check of every fortnight under review, because of the variables involved in doing the calculations. The MultiCal Debt Calculator allows for Working Credits, CPI increases, income free areas and other variables. There is no suggestion of any data entry error, other than a generalised or abstract complaint that “the figures do not add up”. The other complicating factor is that [REDACTED] appeared to have had several employers at the one time on the Centrelink case. The only practical way to undertake an overpayment calculation is through the use of computer software. [REDACTED] told the tribunal that he did not have any payslips, which he could have provided to the tribunal or Centrelink. He said that he had contacted his employers and had been advised that they had not been approached by Centrelink. He did nothing further about getting the payslips.
16. He denied that any of his jobs overlapped timewise. That is likely to be true. Centrelink has averaged out his income, so that there is an appearance of overlapping between the jobs. Nevertheless, that does not mean that the debts have been unfairly calculated.
17. The first debt of newstart allowance is in the amount of \$3,015.83 and is for the period 7 December 2011 to 27 March 2012. During that time, [REDACTED] had [REDACTED], namely [REDACTED]. Centrelink was able to identify the gross amounts paid by these employers for specific periods because of the ATO data match.
18. It appears that Centrelink has used fortnightly income information where that is available, but has otherwise averaged the gross earnings over each of the relevant fortnights in which [REDACTED] worked for particular employers. In the view of the tribunal, that is an acceptable methodology in the absence of any information from [REDACTED] about specific fortnightly rates of pay.
19. The Centrelink note to file dated 12 August 2016 records that [REDACTED] was born [REDACTED]. He started on newstart allowance on 10 March 2010. The Centrelink record suggests that he has a history of not declaring earnings and has had three previous debts raised against him. He was cancelled off newstart allowance on

22 September 2010 because it was found that his income exceeded the income ceiling limits. At hearing, ██████ adamantly denied that he had incurred any previous debts prior to the current debts under review. The Centrelink Debt List suggests otherwise.

20. The tribunal has carefully read the notes to the calculation of the first newstart allowance debt which are recorded in the Centrelink file on 12 August 2016. The tribunal is satisfied that Centrelink officers applied a great deal of care in the calculation of the debts and generally made favourable allowances for ██████. If there was any ambiguity it was usually determined in his favour. The tribunal has also perused the MultiCal Debt Calculations and the Casual Earnings Apportionment Tools. The MultiCal Calculator shows that ██████ rate of newstart allowance reduced to nil in most of the fortnights under review, once the income disclosed by the ATO data match was taken into account. A similar observation applies to his youth allowance debt of \$2,454.55.
21. In relation to the ██████, ██████ declared \$930 to Centrelink but the ATO data match showed that he earned \$1,618.16. In relation to ██████, he earned \$986.56 but declared \$395. For ██████ he declared nothing, but earned \$5,470.25.
22. In relation to the second newstart allowance debt from 23 June 2012 to 1 March 2013, he declared \$4,198 for ██████ but his actual gross income was \$6,817.96. A Centrelink note to file dated 8 October 2016 lists all of ██████ disclosures to Centrelink and contrasts those figures with the information received from the Australian Taxation Office. It is not necessary to repeat them all, as they are listed. ██████ has been fairly put on notice about the nature of the Centrelink case and has not offered a particularised response to these specific allegations.
23. In the view of the tribunal, there is no reason for it to review the Centrelink debt calculations with a critical eye or with fine grained analysis. ██████ does not point to any specific error, despite the tribunal asking him to point to any such error.
24. The tribunal concludes that the overpayments have been correctly raised and calculated. Any overpayment is a debt to the Commonwealth under section 1223 of the Act.

Issue 2: Should recovery of the debts be waived?

25. Certain sections of the Act provide for a debt to be written off or waived. When a debt is written off, it means that an administrative decision has been made either to temporarily or permanently refrain from undertaking recovery action, for the money owed. This does not mean that the debt is extinguished, rather that enforcement proceedings may be instituted at a later date. The write off provisions are contained in section 1236 of the Act. Based on the available evidence, the tribunal concludes that the statutory requirements for write off are not met in the circumstances of this case, as ██████ whereabouts are known to Centrelink and he has the capacity to repay the debt by instalments. His ordinary repayment schedule is \$40 per fortnight, but he has also made one off payments of up to \$1,380.45, probably from his income tax refund. ██████ has complained about that recovery measure, but it is not a reviewable decision.

26. ██████████ was sent recipient notices under section 68 of the Administration Act which required him to tell Centrelink about his earnings on a fortnightly basis. He obviously failed to comply with those recipient notices.
27. Section 1237AAD of the Act provides for the waiver of recovery in the special circumstances of the case, provided the person did not knowingly contravene any provision of the Act and it is more appropriate to waive than write off (defer) recovery of the debt. The word “knowingly” refers to actual, rather than constructive knowledge. The tribunal is satisfied that ██████████ knowingly contravened provisions of the Act. There are repeated failures on the part of ██████████ to properly declare his earnings. At the very least, he turned a blind eye to the need to accurately disclose income, when he was earning it.
28. The term “special circumstances” is not defined in the legislation. The Federal Court and the Administrative Appeals Tribunal General Division have considered the issue of special circumstances on many occasions. In every case, the individual circumstances of the case were examined to determine whether the circumstances were such that it would be unjust, unreasonable or inappropriate for the debt to be recovered. Whether or not there are special circumstances in a particular case is dependent on whether or not there are circumstances that would distinguish the case from the usual case. In the tribunal’s view, it is also appropriate when considering the exercise of the discretion to have regard to the objects of the Act in the recovery of social security overpayments. It is not the intention of Parliament that the exercise of this discretion be confined to the “exceptional” case, but rather that there is something that distinguished the case from the ordinary or usual case. Further, for special circumstances to exist, there must be some factors apart from financial hardship alone, which distinguish the case and set it apart from similar cases. The courts have emphasised the importance in maintaining a flexible approach to this discretion.
29. Even if the tribunal were to find that ██████████ did not knowingly contravene provisions of the Act, it is of the view that there are no special circumstances which would warrant waiver of recovery of all or part of these debts. ██████████ ██████████ ██████████ ██████████. He has been repaying the debts through debt collectors at \$40 per fortnight. The taxpayer is ordinarily entitled to expect that debts should be recovered. ██████████ lives independently and does not have any dependants. The debts should be recovered by modest instalments.

DECISION

The decisions under review are affirmed.



**Administrative
Appeals Tribunal**

IQ21-000031 - Attachment G

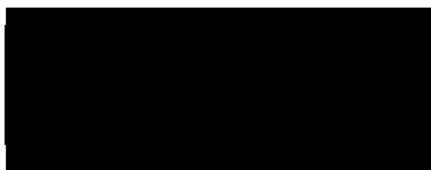
**DECISION AND
REASONS FOR DECISION**

Social Services & Child Support Division

REVIEW NUMBER	2016/M091102
APPLICANT	[REDACTED]
OTHER PARTIES	Secretary Chief Executive Centrelink
TRIBUNAL	Ms A Ducrou, Member
DECISION DATE	22 March 2016
DECISION POSTED	31 March 2016

DECISION

The decision under review is affirmed.



Ms Ducrou
Member

REASONS FOR DECISION

BACKGROUND

1. This review is about whether [REDACTED] should repay debts for youth allowance overpaid to her.
2. On 7 October 2015 a Department of Human Services officer (Centrelink) decided to raise and recover a debt of \$5,594.08 from [REDACTED] for youth allowance overpaid to her for the period 4 August 2011 to 14 August 2013. On 8 October 2015 a Centrelink officer decided to raise and recover a debt of \$2,018.42 from [REDACTED] for youth allowance overpaid to her for the period 15 February 2014 to 20 June 2014.
3. [REDACTED] requested a review. On 1 December 2015 an authorised review officer decided to vary the decisions made on 7 October 2015 and on 8 October 2015. The authorised review officer decided that [REDACTED] had been overpaid youth allowance of \$3,894 for the period 4 August 2011 to 14 August 2013 and of \$334 for the period 24 February 2014 to 25 April 2014. The authorised review officer decided that debts for those amounts were to be recovered from [REDACTED]
4. On 28 January 2016 [REDACTED] lodged an application electronically with this tribunal for independent review of the authorised review officer's decision. The hearing was scheduled for 1:30 PM on 11 March 2016. [REDACTED] was sent a letter advising her of the hearing. On 10 March 2016 the tribunal registry received a request from [REDACTED] by email for the hearing to be rescheduled because of her study commitments. The request was referred to the member of the tribunal conducting the hearing who decided on 10 March 2016 to refuse to grant the request. The tribunal registry called the mobile telephone number that [REDACTED] had provided on 10 March 2016 but [REDACTED] did not answer the call. The tribunal registry left a message on [REDACTED] voicemail advising her that her request had been refused. The tribunal registry called [REDACTED] mobile telephone number on the morning of 11 March 2016 prior to the scheduled hearing time but [REDACTED] did not answer the call. [REDACTED] did not attend the hearing. The tribunal called [REDACTED] on 11 March 2016 at the scheduled hearing time but she did not answer the call. The tribunal made two further calls to [REDACTED] during the 30 minute period after 1:30 PM on 11 March 2016 but [REDACTED] did not answer the calls.
5. The review was deferred. A letter dated in 11 March 2016 from the tribunal registry was sent to [REDACTED] on that date. The letter advised [REDACTED] that her request for the hearing to be rescheduled had not been granted. The letter also advised [REDACTED] that several attempts have been made to contact her and that the review had been deferred to allow time for her to provide further written evidence and written submissions. The letter stated that any further written evidence and written submissions that [REDACTED] wished to be taken into account were required to be provided by 5:00 PM on 21 March 2016 and that the tribunal would then proceed to make its decision based on the evidence before it. [REDACTED] did not contact the tribunal in response to the letter sent to her on 11 March 2015 and she did not provide any documents to the tribunal.

6. The tribunal proceeded with the application based on the documents before it. Those documents were 305 pages that were provided by Centrelink from its electronic and paper file for [REDACTED]. The documents had been copied to [REDACTED] prior to the hearing. The tribunal made its decision on 22 March 2016.

ISSUES

7. The statutory provisions relevant to this review are set out in the *Social Security Act 1991* ("the Act") and the *Social Security (Administration) Act 1999* ("the Administration Act").
8. The issues which arise in this case are:
 - Was [REDACTED] overpaid youth allowance for the periods 4 August 2011 to 14 August 2013 and 24 February 2014 to 25 April 2014;
 - If [REDACTED] was overpaid youth allowance for those periods, are the overpayments debts due to the Commonwealth;
 - If so, is there any reason why all or part of the debts should not be recovered?

CONSIDERATION

Issue 1 – Was [REDACTED] overpaid youth allowance for the periods 4 August 2011 to 14 August 2013 and 24 February 2014 to 25 April 2014?

9. Entitlement to youth allowance is governed by the provisions of the Act and the Administration Act. The rate of payment of a person's youth allowance is calculated in accordance with section 1067G of the Act. Module H of the Rate Calculator includes an income test that, when applied, can reduce the amount of youth allowance payable to a person and requires a calculation of the person's "ordinary income". The definition of "ordinary income" is contained in section 8 of the Act and includes employment income.
10. Section 1073B of the Act explains that employment income earned by a social security recipient who has not reached age pension age in a particular instalment period (referred to as a Centrelink payment fortnight) is taken to be earned across each day of the fortnight to arrive at a daily rate of income. Section 1073C of the Act states that the daily rate can then be used to work out a fortnightly or annual rate of income. This means that when applying the Rate Calculator in assessing the rate of youth allowance payable to a person, the employment income that the person earns in each instalment period is used to assess the rate that is payable to the person.
11. Based on the documents that Centrelink provided the tribunal finds that [REDACTED] received youth allowance payments totalling \$11,351.93 for the period 4 August 2011 to 14 August 2013 and that she received youth allowance payments totalling \$1,208.67 for the period 24 February 2014 to 25 April 2014. The authorised review officer found that the full amounts that [REDACTED] had earned from her employment had not been taken into account in the rate of youth allowance that she had received for the above periods. The

authorised review officer's findings were based on payslips that [REDACTED] provided to Centrelink and on information from the Australian Taxation Office ("the ATO") about her earnings. The authorised review officer found noted that [REDACTED] had reported earnings to Centrelink. However, the authorised review officer found that she had not provided Centrelink with full details of her earnings.

12. There was nothing in the Centrelink documents that indicated that [REDACTED] disputed the accuracy of the information in the payslips or the ATO records. The tribunal accepted that the payslips, the ATO records and the records that Centrelink maintained for [REDACTED] [REDACTED] were accurate. The tribunal finds, based on those documents that [REDACTED] worked for [REDACTED] [REDACTED] during the period from 4 August 2011 to 14 August 2013 and that she worked for [REDACTED] during the period from 25 February 2014 to 25 April 2014. The tribunal finds that [REDACTED] gross earnings from her employment with [REDACTED] were as set out in the payslips and ATO records.

13. The tribunal checked the payslips that [REDACTED] provided for [REDACTED] and [REDACTED] against the figures used in the authorised review officer's calculations. The tribunal noted that the amounts of gross earnings in the payslips corresponded with the authorised review officer's figures. The authorised review officer used the PAYG records from the ATO and year to date earnings information to calculate [REDACTED] gross earnings for the pay periods for which payslips were not available. The authorised review officer averaged back pay that [REDACTED] received in February 2013 from [REDACTED] over the full period she worked there. The tribunal considered that the information that the authorised review officer used was the best available evidence of and reflected [REDACTED] earnings from [REDACTED] [REDACTED] and [REDACTED] accurately. Based on the available evidence the tribunal was satisfied that [REDACTED] gross earnings from [REDACTED] and [REDACTED] as calculated by the authorised review officer were correct. The tribunal noted that [REDACTED] did not provide Centrelink with payslips from [REDACTED]. The authorised review officer used PAYG records to calculate her gross earnings from [REDACTED]. The tribunal considered that in the absence of payslips or other employer-provided records the PAYG records were the best available evidence of and reflected [REDACTED] earnings from [REDACTED] accurately. The tribunal checked the authorised review officer's calculation of [REDACTED] [REDACTED] gross earnings against the PAYG records and was satisfied that the authorised review officer's calculations were correct.

14. The authorised review officer calculated [REDACTED] gross earnings as a daily rate. An example is set out in the table below.

Pay period ([REDACTED] payslips)	Gross wages ([REDACTED] payslips)	Earnings (daily rate)
06/02/2012 to 19/02/2012	\$479.84	\$34.27
20/02/2012 to 04/03/2012	\$655.73	\$46.84

15. The authorised review officer's apportionment of [REDACTED] gross earnings over the Centrelink instalment period commencing on 16 February 2012 and ending on 29 February 2012 is set out in the following table.

Employer pay period	Daily earnings (payslips)	Centrelink instalment period	Apportioned earnings
06/02/2012 to 19/02/2012	\$34.27	16/02/2012 to 19/02/2012 (4 days)	\$137.08
20/02/2012 to 04/03/2012	\$46.84	20/02/2012 to 29/02/2012 (10 days)	\$468.40

16. The table shows that [REDACTED] earnings for the instalment period from 16 February 2012 to 29 February 2012 totalled \$605.48 rounded to 2 decimal places. The tribunal checked the calculations and was satisfied that they were correct. The EANS online summary screen shows that [REDACTED] reported gross earnings of \$279.84 for that instalment period on 29 February 2014.
17. The Centrelink records confirm that [REDACTED] reported earnings to Centrelink regularly during the periods under review. The EANS online summary screens show that for some of the instalment periods [REDACTED] reported earnings that were higher than her actual earnings. However, for other instalment periods [REDACTED] reported earnings that were lower than her actual earnings. The Centrelink records were made at the time of reporting. The tribunal considered that the contemporaneous records maintained by Centrelink constituted the best available evidence of the earnings that [REDACTED] reported. Based on the available evidence the tribunal finds that [REDACTED] reported the amounts of earnings recorded in the EANS online summary screens. The amounts of earnings that [REDACTED] reported rather than her actual earnings were taken into account in assessing the rate of youth allowance that she received for the corresponding instalment periods. The tribunal concluded, based on the available evidence that as [REDACTED] did not report the full amounts of her actual gross earnings for all of the instalment periods from 4 August 2011 to 14 August 2013 and from 24 February 2014 to 25 April 2014 she was paid more youth allowance than she was entitled to receive.
18. The authorised review officer found that after taking into account the full amount of [REDACTED] actual gross earnings she was entitled to receive youth allowance of \$7,455.93 for the period 4 August 2011 to 14 August 2013 and youth allowance of \$874.67 for the period 24 February 2014 to 25 April 2014. The tribunal noted that the authorised review officer used the payslips that [REDACTED] provided when calculating her entitlement to youth allowance for those periods. This had the effect of reducing the amounts of the overpayments of youth allowance that Centrelink had calculated initially. The tribunal

examined the authorised review officer's calculations carefully and was satisfied that they were correct.

Issue 2 – Are the overpayments debts due to the Commonwealth?

19. Subsection 1223(1) of the Act states that if a social security payment, including youth allowance, is made to a person who was not entitled for any reason to that payment, then that payment is a debt due to the Commonwealth. For the reasons discussed above, and based on the tribunal's findings, the tribunal has determined that [REDACTED] was paid \$3,894 more youth allowance than she was entitled to receive for the period 4 August 2011 to 14 August 2013 and \$334 more youth allowance than she was entitled to receive for the period 24 February 2014 to 25 April 2014 because the full amounts of her earnings were not taken into account in assessing the youth allowance payments that she received for those periods. Therefore, the tribunal concluded that [REDACTED] owes debts to the Commonwealth of \$3,894 for youth allowance overpaid to her for the period 4 August 2011 to 14 August 2013 and of \$334 for youth allowance overpaid to her for the period 24 February 2014 to 25 April 2014.

Issue 3 – Is there any reason why all or part of the debts should not be recovered?

20. Certain sections of the Act provide for a debt to be written off or waived. When a debt is written off, it means that an administrative decision has been made either to temporarily or permanently refrain from undertaking recovery action for the money owed. This does not mean that the debt is extinguished, rather that enforcement proceedings may be instituted at a later stage. The write off provisions are contained in section 1236 of the Act. Based on the available evidence the tribunal has concluded that the statutory requirements are not met in the circumstances of this case. Therefore, the debt cannot be written off.
21. When a debt is waived this means that although the debt exists, a decision is made to forgo the legal right to recover the money owed. If a debt is waived no recovery action is possible and the debt cannot be pursued at a later date. Subsection 1237A(1) of the Act provides that the Secretary must waive the proportion of a debt that is attributable solely to administrative error on the part of the Commonwealth if the debtor received the overpayments in good faith. In *Sekhon v Secretary, Department of Family and Community Services* (2003) 76 ALD 105 Selway J commented that the requirement that the debt is due "solely" to administrative error meant that "*the only cause that objectively can be ascribed to the relevant debt is an administrative error*".
22. In her application for review, [REDACTED] submitted that the part of the debt attributable to the period for which she received a back payment of youth allowance should be waived under subsection 1237A(1) of the Act. [REDACTED] noted that the dates by which she was required to notify Centrelink of her earnings had already expired when the back payment (which she had not requested) was made on 8 April 2013. It was evident from the Centrelink documents that payment of [REDACTED] youth allowance was suspended in November 2012 and subsequently cancelled because information that Centrelink had requested had not been received. The Centrelink documents also show that as the result of

Centrelink receiving further information at a later time ██████████ received regular payments of youth allowance with effect from 28 March 2013 and that on 8 April 2013, she received a payment of arrears of youth allowance. The tribunal acknowledged that ██████████ ██████████ would not reasonably be expected to report her earnings to Centrelink when she was not receiving youth allowance. However, the tribunal was satisfied based on the information in the Centrelink documents that the decision to pay arrears of youth allowance to ██████████ resulted from Centrelink's receipt of information and that the decision to pay the arrears did not result from error on the part of Centrelink. Therefore, the tribunal concluded that the requirements of subsection 1237A(1) of the Act were not met in relation to the part of the debt attributable to the period for which the arrears were paid as submitted by ██████████

23. The tribunal went on to consider whether subsection 1237A(1) of the Act applied on any other basis. The tribunal noted that the Centrelink documents included copies of letters that Centrelink sent to ██████████ in relation to her youth allowance for the period under review. The letters required ██████████ to provide information about changes in her circumstances including changes in her employment situation and changes in her earnings. The reporting statements that Centrelink sent to ██████████ required her to notify Centrelink within 14 days if she had earnings to declare. The tribunal was satisfied that these documents were notices under subsection 68(2) of the Administration Act that identified the obligations placed on ██████████ to provide the specified information to Centrelink. Based on the available evidence the tribunal finds that the letters were sent to ██████████ at the postal addresses that she had provided to Centrelink. For the reasons already discussed the tribunal has found that ██████████ did not provide Centrelink with the full amounts of her gross earnings for the periods from 4 August 2011 to 14 August 2013 and 24 February 2014 to 25 April 2014. The tribunal acknowledged the practical difficulties that casual employees with varying hours of work and earnings face in reporting their full gross earnings to Centrelink accurately. However, the tribunal considered that ██████████ ██████████ actions in not reporting her gross earnings fully as required by the letters sent to her contributed to the circumstances that gave rise to the overpayments of youth allowance which resulted in the debts being raised. In light of this the tribunal was not satisfied that the debts were attributable solely to administrative error by Centrelink or any other part of the Commonwealth as required under subsection 1237A(1) of the Act. Therefore, the tribunal concluded that the debts cannot be waived in accordance with subsection 1237A(1).
24. The tribunal also considered whether the debts should be waived on the grounds of special circumstances. Section 1237AAD of the Act provides for a debt to be waived in certain circumstances if, amongst other things, there are special circumstances that warrant the waiver of all or part of the debt.
25. The term "special circumstances" is not defined in the legislation. However, the Federal Court and the Administrative Appeals Tribunal have considered the issue of special circumstances on a number of occasions. In every case, the individual circumstances of the case were examined to determine whether the circumstances were such that it would be unjust, unreasonable or inappropriate for the debt to be recovered. In particular, the Full

Federal Court in the matter of *Dranichnikov v Centrelink* [2003] FCAFC 133 determined that whether there are special circumstances in a particular case is dependent on whether there are circumstances that would distinguish the case from the usual case. In the tribunal's view it is also appropriate when considering the exercise of this discretion, to have regard to the objects of the Act in the recovery of social security overpayments. The Federal Court in *Angelakos v Secretary, Department of Employment and Workplace Relations* [2007] FCA 25 emphasises that it is not the intention of Parliament that the exercise of this discretion be confined to the "exceptional" case, but rather that there is something that distinguishes the case from the ordinary or usual case. Further, for special circumstances to exist there must be some factors, apart from financial hardship alone, which distinguish the case and set it apart from other similar cases.

26. [REDACTED] application for review did not indicate that her circumstances were unusual or out of the ordinary and she did not submit in her application that the debts should be waived under section 1237AAD of the Act. The Centrelink documents did not indicate that [REDACTED] was in unusual financial difficulty or that she was unable to meet her expenses (including the youth allowance debt repayments) or that special circumstances were present in her case. The tribunal noted that approximately one-quarter of the total of the youth allowance that [REDACTED] was overpaid for the period from 4 August 2011 to 14 August 2013 was attributable to the period for which she received the arrears payment. However, the tribunal was not persuaded from the evidence before it that there was anything unusual about the circumstances that resulted in the arrears being paid. Based on the available evidence the tribunal was not satisfied that [REDACTED] circumstances were sufficiently unusual or uncommon as to constitute special circumstances that warranted waiver of the debts in full or in part or to depart from the general rule that payments to which a person is not entitled should be recovered. Therefore, the tribunal has concluded that the debts cannot be waived under section 1237AAD of the Act.

DECISION

The decision under review is affirmed.



**Administrative
Appeals Tribunal**

IQ21-000031 - Attachment H

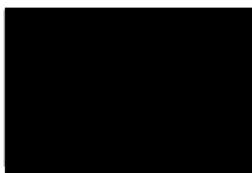
**DECISION AND
REASONS FOR DECISION**

Social Services & Child Support Division

REVIEW NUMBER	2016/S094257
APPLICANT	[REDACTED]
OTHER PARTIES	Secretary Chief Executive Centrelink
TRIBUNAL	Ms J Moir, Member
DECISION DATE	06 July 2016
DECISION POSTED	12 July 2016

DECISION

The decision under review is affirmed. This means the decision remains unchanged.



Ms Moir
Member

REASONS FOR DECISION

BACKGROUND

1. [REDACTED] was receiving newstart allowance in 2010 and again between 2012 and 2014. During these periods he was working for a number of different employers, namely, [REDACTED] and [REDACTED]. He declared income to the Department of Human Services – Centrelink and his rate of newstart allowance was calculated with regard to this.
2. In 2015 Centrelink received information via a data match from the Australian Taxation Office (ATO) which showed that [REDACTED] annual income from these employers was higher than the income he had declared to Centrelink. Centrelink spoke to [REDACTED] and invited him to provide further evidence regarding his income in these periods but nothing further was received. Centrelink averaged the annual income advised by the ATO and calculated that he had been overpaid in two separate periods. The debts calculated were \$282.67 arising in the period 9 September 2010 to 29 December 2010 and \$15,599.78 arising in the period 11 July 2012 to 25 June 2013. The date of the decision was 7 January 2016. Centrelink wrote to [REDACTED] about these debts on 5 February 2016.
3. [REDACTED] asked for the decision about the debts to be reviewed and an authorised review officer reconsidered the evidence, and decided on 7 April 2016 that the original decisions were correct.
4. On 17 April 2016 [REDACTED] asked this Tribunal to review the decisions and a letter notifying him of the hearing was sent on 23 May 2016. The hearing was held on 6 July 2016 and [REDACTED] attended with his brother [REDACTED].
5. The day before the hearing the Tribunal received an email from [REDACTED] advising that neither he (as representative for his brother) nor his brother had received the letter from the Tribunal notifying them of the hearing date. Instead they were aware of the hearing date and time because of the text message sent to the applicant's phone the day prior to the hearing. During the hearing, the Tribunal offered to defer the matter to allow [REDACTED] the opportunity to provide additional evidence in support of his application, but after some discussion, he and his brother confirmed that they did not want to provide further evidence and that no deferral was required.

ISSUES

6. The statutory provisions relevant to this review are found in the *Social Security Act 1991* (the Act) and the *Social Security (Administration) Act 1998*.
7. The issues which arise in this case are:

- Was [REDACTED] overpaid newstart allowance during the periods under review; and if so
- Must any debts he has incurred be repaid in full or in part?

CONSIDERATION

8. Newstart allowance is an income support payment made in accordance with Part 2.12 of the Act. Section 643 states that the rate of payment for a person who is not a member of a couple is calculated with reference to the Rate Calculator at section 1068B. This provides that a person's payment is calculated using either an income test or an assets test, depending on which leads to the lower rate of payment. The rate of payment is calculated based on gross fortnightly income.

Was [REDACTED] overpaid newstart allowance during the periods under review?

9. At the hearing [REDACTED] said that he recalled that he always declared his income to Centrelink but said that he thought that the information from his former employers did not seem correct. For example, he showed the Tribunal a letter from [REDACTED] (which he later provided to the Tribunal by email).
10. The Tribunal was told that [REDACTED] memory of the period is not clear, and that because of the lack of notice for the hearing he had not had the opportunity to go through his records. As stated earlier, in relation to all matters on which [REDACTED] said that he could not recall or had not had the opportunity to check his records, he was offered the opportunity to have time to provide additional evidence.
11. [REDACTED] said that the debts must be incorrect because they have been calculated by averaging annual income figures over the year
12. [REDACTED] said that he was not sure that the debt for September – December 2010 was correct because [REDACTED] and [REDACTED] and [REDACTED] are all the same organisation, and income was reported by the ATO for both [REDACTED] and [REDACTED]. He said that this might mean that the same income was recorded twice. However the Tribunal noted that the income amounts reported by the ATO for these two entities were different; which did not support conclusion that this income had been incorrectly reported twice for the same employer under different names.
13. [REDACTED]
14. In relation to [REDACTED] [REDACTED] said that his employment was terminated in May 2012 because of lack of work. He started work for the same employer casually in 2014 but

could not recall when. This information was confirmed in a letter dated 4 July 2016 signed [REDACTED] which stated that a separation certificate was issued to him on 19 May 2012. The letter from [REDACTED] said that it was not possible to provide copies of all [REDACTED] payslips for the relevant period but noted that some payslips had been given to him. However these were not provided to the Tribunal. [REDACTED] again expressed disbelief that he had earned \$28,242 from [REDACTED] in the 2013/14 year particularly given that he did not recommence work there until 2014. However he declined the opportunity to provide any evidence available to him such as the payslips he did have, tax returns, PAYG forms or even his bank statements showing his nett pay, which could have provided the Tribunal with some sound basis to doubt the evidence from the ATO.

15. The Tribunal considered the evidence about [REDACTED] income which was relied upon by Centrelink and which came from the ATO. This shows that in the 2012/13 financial year [REDACTED] was paid a total of \$26,271 for work with [REDACTED] and \$4,045 from [REDACTED]. Centrelink has recorded that he declared \$7,570 income in that year. In the 2013/14 financial year he is reported to have earned \$28,242 from [REDACTED] and \$6,633 from [REDACTED]. Centrelink has recorded that he declared \$7,928 income.
16. [REDACTED] conceded that he may have inadvertently declared his income incorrectly.
17. Although [REDACTED] does not think that the income reported by the ATO sounds correct, he has not provided any evidence which would give the Tribunal a basis to find that the information is incorrect. The Tribunal noted that the Centrelink records show that [REDACTED] was given the opportunity to provide payslip evidence before the original decision was made and also before the authorised review officer made their decision, but he did not provide anything. The Tribunal is satisfied that [REDACTED] has had sufficient opportunity to respond to the evidence regarding his income which he disputes. The letter which purports to be from [REDACTED] does not provide sufficient detail to be of benefit: it is not on letterhead, the name of the person signing the letter is illegible; and whilst it refers to [REDACTED] ceasing work (and being issued a separation certificate) dated 19 May 2012 and not recommencing work until 2014, this is not consistent with ATO information which indicates income of \$4,045 from this employer of in the 2012/13 financial year. Overall the Tribunal did not find this letter to be a reliable source of evidence.
18. The Tribunal noted [REDACTED] concern that the debts were calculated based on an averaged income amount rather than his actual income fortnight to fortnight. Although it would be preferable to use the fortnightly income figures, this information is not available and so the debt has been calculated with the best available information. Averaging the income in this way might lead to some inaccuracies in the debt from fortnight to fortnight but the Tribunal is satisfied that it provides the best calculation of the overpaid amounts given the available evidence.
19. On balance, the Tribunal is satisfied from the available evidence that [REDACTED] was paid more newstart allowance than he was entitled to in the periods identified by Centrelink because he had a higher income from his employment than he declared to Centrelink. The Tribunal has checked, and accepts Centrelink's calculation of the debts for both periods.

20. Section 1223 of the Act provides that if a person is paid in excess of their correct entitlement “for any reason” the amount so paid is a debt to the Commonwealth. Subsection 1223(1) states:

1223.(1) Subject to this section, if:

- (a) a social security payment is made; and
- (b) a person who obtains the benefit of the payment was not entitled for any reason to obtain that benefit;

the amount of the payment is a debt due to the Commonwealth by the person and the debt is taken to arise when the person obtains the benefit of the payment.

21. Therefore the Tribunal was satisfied that [REDACTED] has incurred debts to the Commonwealth of \$282.67 arising in the period 9 September 2010 to 29 December 2010 and \$15,599.78 arising in the period 11 July 2012 to 25 June 2013.

Must any debts he has incurred be repaid in full or in part?

22. Debts to the Commonwealth must be recovered from a person unless they satisfy specific provisions contained in Part 5.4 of the Act. The Secretary may “write off” or “waive” recovery of a debt. Where a debt is written off, under section 1236 of the Act, recovery of the debt is merely postponed. The debt still exists and may be recovered later. Where all or part of a debt is waived on the other hand, it ceases to exist.

23. Section 1236 relevantly says:

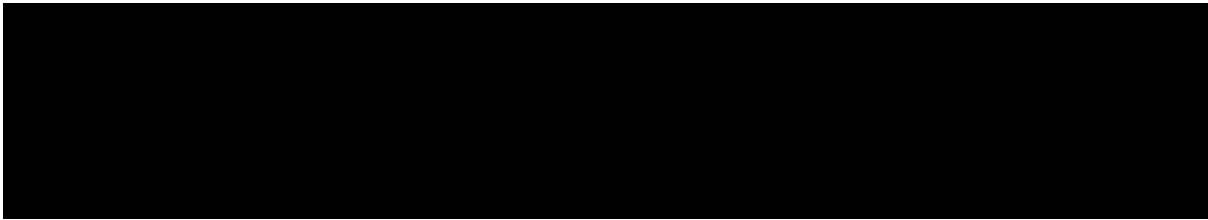
1236.(1) Subject to subsection (1A), the Secretary may, on behalf of the Commonwealth, decide to write off a debt, for a stated period or otherwise.

1236.(1A) The Secretary may decide to write off a debt under subsection (1) if, and only if:

- (a) the debt is irrecoverable at law; or
- (b) the debtor has no capacity to repay the debt; or
- (c) the debtor’s whereabouts are unknown after all reasonable efforts have been made to locate the debtor; or
- (d) it is not cost effective for the Commonwealth to take action to recover the debt.

24. Section 1236 further defines the provisions of subsection 1236(1A). [REDACTED]

[REDACTED]



- 25. Although [REDACTED] has a modest income, his expenses are not high and there is no reason to conclude that making repayments at a suitable level would cause him severe financial hardship. The Tribunal is not satisfied that the debt can be written off.
- 26. Section 1237A of the Act provides that the Secretary may waive all or part of a debt where it was caused solely by administrative error. Section 1237A relevantly says:

Waiver of debt arising from error

Administrative error

(1) Subject to subsection (1A), the Secretary must waive the right to recover the proportion of a debt that is attributable solely to an administrative error made by the Commonwealth if the debtor received in good faith the payment or payments that gave rise to that proportion of the debt.

Note: Subsection (1) does not allow waiver of a part of a debt that was caused partly by administrative error and partly by one or more other factors (such as error by the debtor).

- 27. The law about “sole error” is very strict. Contributory actions of the debtor (even if minor, such as leaving part of a form blank), or a failure to make expected enquiries, may prevent it being found to be “solely” due to administrative error (see *Re Wendt* (1999) 53 ALD 153, at [158] and *Re McAvoy* (1997) 44 ALD 721 at [729]).
- 28. Although [REDACTED] suggested that the information Centrelink has relied on in calculating the debts is not reliable, there is no submission and no evidence that the debts were caused by Centrelink error. The Tribunal is satisfied that section 1237A cannot apply in [REDACTED] case, and the debt cannot be waived under this provision.
- 29. The Tribunal considered whether it was possible to waive all or part of the debt under section 1237AAD of the Act which says:

1237AAD. The Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that:

- (a) the debt did not result wholly or partly from the debtor or another person knowingly:
 - (i) making a false statement or false representation; or
 - (ii) failing or omitting to comply with a provision of this Act or the 1947 Act; and

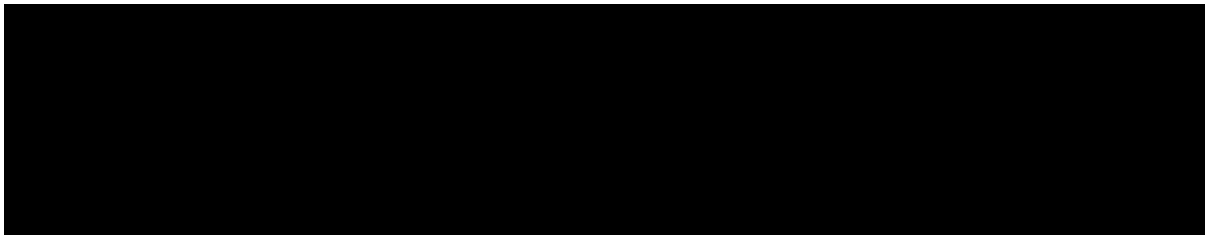
(b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and

(c) it is more appropriate to waive than to write off the debt or part of the debt.

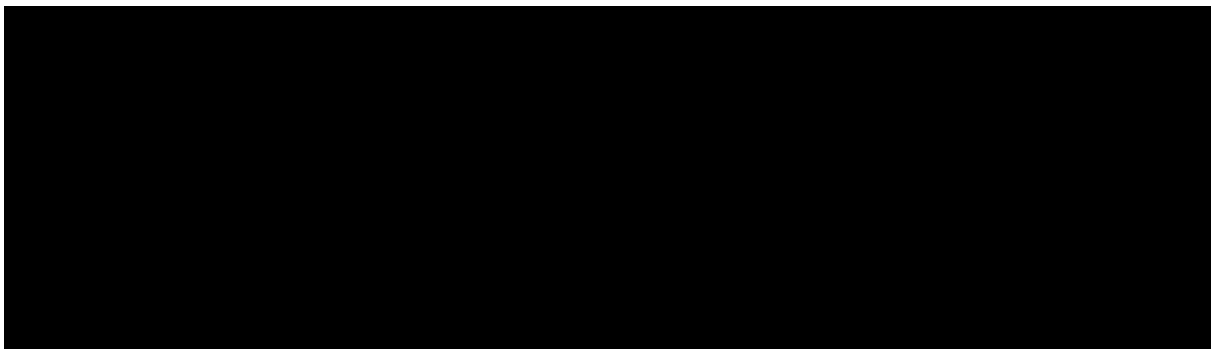
30. Paragraph 1237AAD(b) requires that a person must have “special circumstances (other than financial hardship alone)”. The term "special circumstances" is not defined in the legislation. The Federal Court and the AAT have considered the issue of special circumstances on a number of occasions. In every case, the individual circumstances of the case were examined to determine whether the circumstances were such that it would be unjust, unreasonable or inappropriate for the debt to be recovered. In particular, the Full Court of the Federal Court in the matter of *Dranichnikov v Centrelink* [2003] FCAFC 133 determined that whether there are special circumstances in a particular case is dependent on whether there are circumstances that would distinguish the case from the usual case. In the Tribunal’s view it is also appropriate when considering the exercise of this discretion, to have regard to the objects of the Act in the recovery of social security overpayments. The Federal Court in *Angelakos v Secretary, Department of Employment and Workplace Relations* [2007] FCA 25 emphasises that it is not the intention of Parliament that the exercise of this discretion be confined to the “exceptional” case, but rather that there is something that distinguishes the case from the ordinary or usual case. Further, for special circumstances to exist there must be some factors apart from financial hardship alone, which distinguish the case and set it apart from other similar cases.

31. In considering this waiver provision, the Tribunal is also mindful of the purpose of the social security system, the Parliament’s intention that payments are made on the basis of need and that debts should generally be recovered unless there are special circumstances. This means that social security recipients who receive money they are not entitled to receive are generally expected to repay it unless repayment would be unjust, unreasonable or inappropriate in the particular circumstances.

32.



33.



[REDACTED]

[REDACTED]

36. The Tribunal noted that the events [REDACTED] foreshadowed, whilst possible, are not an accurate reflection of his actual circumstances and do not provide a basis to find that there are special circumstances to waive the debt.
37. The Tribunal is sympathetic to [REDACTED] difficult circumstances, including his health and financial problems, but notes that there is nothing particularly "special" about his circumstances which would warrant waiver of the debt. Many people have health problems, and without diminishing the impact of these on [REDACTED] day to day life, he is able to work full-time, albeit with some difficulty at times. Similarly, although his income is modest, his expenses are also modest, as he is fortunate to live rent free and to have negotiated reasonable repayment arrangements for his other debts.
38. The Tribunal is not satisfied that there is any basis to apply section 1237AAD of the Act to waive any part of [REDACTED] debt.

DECISION

The decision under review is affirmed. This means the decision remains unchanged.

[REDACTED]



**Administrative
Appeals Tribunal**

IQ21-000031 - Attachment I

**DECISION AND
REASONS FOR DECISION**

DIVISION: Social Services & Child Support Division

REVIEW NUMBER: 2017/P109475

APPLICANT: [REDACTED]

OTHER PARTIES: Secretary
Chief Executive Centrelink

TRIBUNAL: Member W Kennedy

DECISION DATE: 31 July 2017

DECISION:

The decision under review is affirmed.



Member W Kennedy

REASONS FOR DECISION

BACKGROUND

1. This review is about ██████████'s newstart allowance (NSA). Relevant to this review ██████████ was granted NSA with effect from 23 November 2010.
2. Following a data match with the Australian Taxation Office (ATO), on 7 September 2016 the Department of Human Services – Centrelink (the Department) decided to raise and recover a debt of \$4,766.97, being an overpayment of NSA for the period from 7 December 2010 to 8 August 2012.
3. On 17 October 2016 ██████████ requested that the decision to raise and recover the debt be reviewed. On 1 March 2017 an authorised review officer (ARO) decided to affirm the decision but to reduce the total to \$4,706.97. The ARO recalculated the debt on the basis that one of the payment summaries provided by the ATO was duplicated. The ARO decided that the overpayment was caused by ██████████'s failure to fully report his income and that there was no basis on which the resulting debt could be waived or written off.
4. On 10 April 2017 ██████████ applied to this Tribunal. The application was heard and determined on 31 July 2017. ██████████ attended the hearing by telephone and gave his evidence under an affirmation. The Tribunal had before it documents supplied by the Department, which were numbered 1 to 540. The documents were also supplied to ██████████ prior to the hearing.

ISSUES

5. The issues for determination by the Tribunal are:
 - whether ██████████ has been overpaid newstart allowance and, if so,
 - whether the resulting debt must be repaid.

CONSIDERATION

6. The relevant law covering this application is found in the *Social Security Act 1991* (the Act) and the *Social Security (Administration) Act 1999* (the Administration Act).
7. ██████████ was granted NSA under section 593 of the Act. Section 643 of the Act provides that the rate of NSA is calculated using Benefit Rate Calculator B found at the end of section 1068 of the Act. The calculation is a complex one. Relevant to this case, in order for the calculation to be done correctly a person's income must be accurately entered.
8. In calculating ██████████'s NSA the Department took into account the income reported by ██████████. At the hearing ██████████ said that he regularly provided the Department with accurate information about his income. He said that the Department's calculations were

incorrect because when he earned most of the money he was not even receiving NSA. He said that when he was working for [REDACTED] he knew he was earning too much and that he did not claim NSA.

9. A comparison of [REDACTED] payment summaries with the records of his reporting to the Department shows that while [REDACTED] was receiving NSA he under-reported his income. In the period from 1 July 2011 to 30 June 2012, throughout which [REDACTED] was receiving NSA, he reported income of \$1,868.30 (folios 228 to 301) but his actual income as reported by the ATO was \$4,771.00 (folios 57, 58, 59, 61 and 62). Some of the payment summaries show dates of employment which cover only part of the financial year, however they do not show the distribution of income within the particular period or employment. Only payslips or a payroll summary would provide that information and [REDACTED] said that he did not have any such information. In calculating the extent of the overpayment the Department has apportioned the income within the periods nominated on the payment summaries (folio 43).
10. The period from 1 July 2010 to 30 June 2011 is still more problematic because [REDACTED] was only granted NSA with effect from 7 December 2010 and thus the period prior to that is outside of the debt period. The documentation shows that during the period from 7 December 2010 to 30 June 2011 [REDACTED] reported income of \$1,295.45 (folios 202 to 224, 499 and 523). During the period from 1 July 2010 to 30 June 2011 [REDACTED]'s income as reported by the ATO was \$12,926.00 (60). In order to determine whether [REDACTED] was overpaid during this period it is necessary to determine the amount of income [REDACTED] earned from 7 December 2010. At the hearing [REDACTED] said that he only kept his payslips for a few years and that he had changed banks and no longer had access to bank statements from the time. [REDACTED] said that his "main gripe" was not whether or not he was overpaid but the amount of time that it has taken for the Department to raise the debt. He said that it was unreasonable to expect him to keep records for nearly seven years.
11. Although the precise numbers cannot be determined without payslips or bank statements, the Tribunal is satisfied that for at least part of the period, and possibly the entire period, the Department was not aware of [REDACTED]'s full income, that the calculation of his rate of payment was therefore incorrect and that [REDACTED] was overpaid. The Tribunal has examined the calculations of the Department and finds that the methodology that it has used to apportion [REDACTED]'s income is entirely defensible. It is possible that if [REDACTED] were able to provide payslips the calculation would produce a larger debt.
12. Subsection 1223(1) of the Act states:

Debts arising from lack of qualification, overpayment etc.

- (1) Subject to this section, if:
 - (a) a social security payment is made; and
 - (b) a person who obtains the benefit of the payment was not entitled for any reason to obtain that benefit;

the amount of the payment is a debt due to the Commonwealth by the person and the debt is taken to arise when the person obtains the benefit of the payment.

...

13. As ██████ received the benefit of the payment and he was not entitled to obtain that benefit, a debt has arisen.
14. The Tribunal considered whether the debt could be written off. If a debt is written off, the debt may not be recovered at this time. However the debt still exists and may be recovered at a later time. Section 1236 of the Act makes provision for writing off debts:

Secretary may write off debt

- (1) Subject to subsection (1A), the Secretary may, on behalf of the Commonwealth, decide to write off a debt, for a stated period or otherwise.
- (1A) the Secretary may decide to write off a debt under subsection (1) if, and only if:
- (a) the debt is irrecoverable at law; or
 - (b) the debtor has no capacity to repay the debt; or
 - (c) the debtor's whereabouts are unknown after all reasonable efforts have been made to locate the debtor; or
 - (d) the debtor is not receiving a social security payment under this Act and it is not cost effective for the Commonwealth to take action to recover the debt.

15. The Tribunal has no reason to believe that the debt is irrecoverable at law. ██████'s financial circumstances are difficult and his capacity to ultimately repay the debt is limited. However ██████'s whereabouts are known and, as he is currently in receipt of benefits, the debt may be repaid through appropriately modest instalments. ██████ has already begun repaying the debt. It is therefore not possible to write off the debt.

16. The Tribunal then considered whether the debt could be waived. If a debt is waived the debt ceases to exist and may not be subsequently recovered. Sections 1237 through 1237AB of the Act describe the circumstances under which a debt may be waived. In the case of this application the Tribunal considered that only sections 1237A and 1237AAD of the Act might apply. Section 1237A states:

Waiver of debt arising from error

- (1) Subject to subsection (1A), the Secretary must waive the right to recover the proportion of the debt that is attributable solely to an administrative error made by the Commonwealth if the debtor received in good faith the payment or payments that gave rise to that proportion of the debt.
- (1A) Subsection (1) only applies if:
- (a) the debt is not raised within a period of 6 weeks from the first payment that caused the debt; or

- (b) if the debt arose because a person has complied with a notification obligation, the debt is not raised within a period of 6 weeks from the end of the notification period;
whichever is the later.

17. Although noting ██████'s insistence that he provided the Department with accurate information as to his income, the Tribunal must conclude that the debt was caused by ██████'s failure to fully report his income and therefore section 1237A of the Act cannot be applied to ██████'s benefit.

18. The Tribunal then considered whether the debt could be waived under section 1237AAD of the Act: This section says:

Waiver in special circumstances

The Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that:

- (a) the debt did not result wholly or partly from the debtor or another person knowingly:
 - (i) making a false statement or a false representation; or
 - (ii) failing or omitting to comply with a provision of this Act, the Administration Act or the 1947 Act; and
- (b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and
- (c) it is more appropriate to waive than to write off the debt or part of the debt.

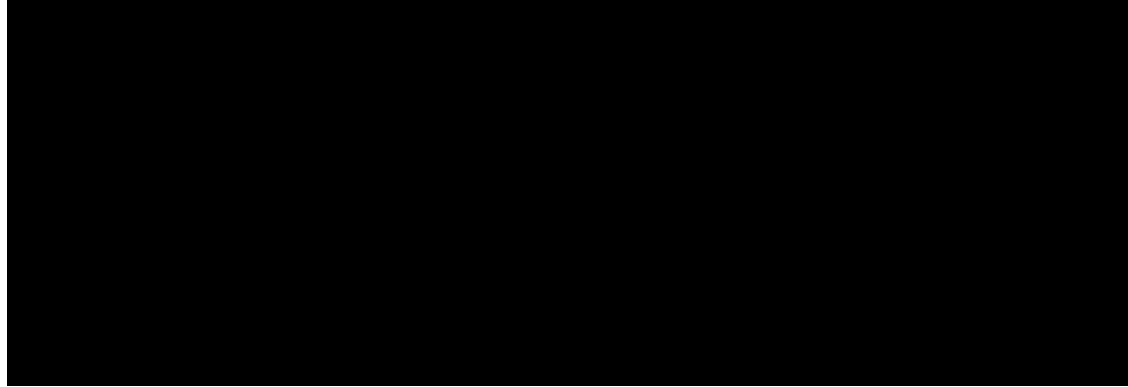
19. The meaning of "special circumstances" has been considered by the Administrative Appeals Tribunal in *Re Beadle and the Director-General of Social Security* [1984] AATA 176 (*Beadle*):

An expression such as 'special circumstances' is by its very nature incapable of precise or exhaustive definition. The qualifying adjective looks to circumstances that are unusual, uncommon or exceptional.

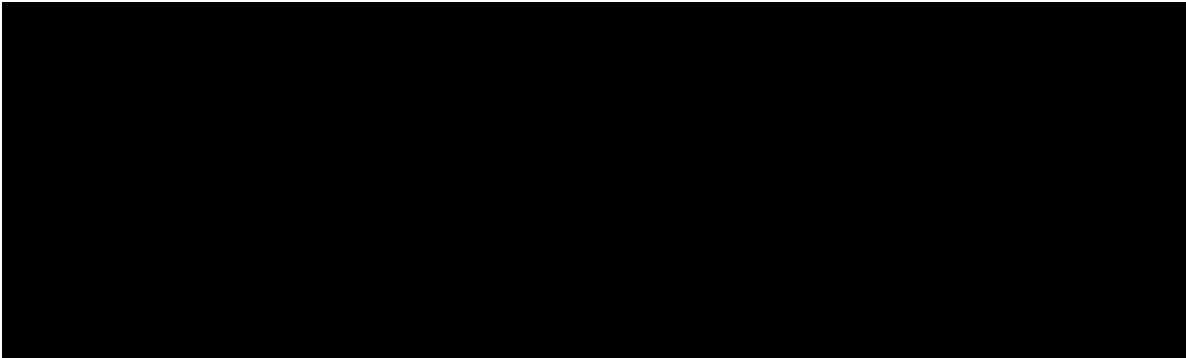
20. The Federal Court in *Angelakos v Secretary, Department of Employment and Workplace Relations* [2007] FCA 25, emphasised that it is not the intention of Parliament that the exercise of this discretion be confined to the "exceptional" case, but rather that there is something that distinguishes the case from the ordinary or usual case. The Full Federal Court in *Dranichnikov v Centrelink* [2003] FCAFC 133 determined that whether there are special circumstances in a particular case depends on whether there are circumstances that would distinguish the case from the usual. For special circumstances to exist there must be some factors, apart from financial hardship alone, which distinguish the case and sets it apart from other cases.

21. The evident purpose of section 1237AAD is to enable a flexible response to the wide range of situations which could give rise to hardship or unfairness in the event of a rigid application of a requirement for recovery of debt.

22.



23.



24. The courts have set a very high bar for the exercise of the special circumstances discretion. While [REDACTED]'s circumstances are unfavourable, they are neither uncommon nor exceptional. Having careful regard to the legislation and to the decided cases the Tribunal concludes that the requirement for waiver under paragraph 1237AAD(b) of the Act that there be "special circumstances (other than financial hardship alone) that makes it desirable to waive" and the requirement found in *Beadle* that the circumstances be "unusual, uncommon or exceptional" are not met and that therefore the debt cannot be waived under section 1237AAD of the Act.

25. As there are no other provisions that would allow waiver of the debt the Tribunal concludes that [REDACTED] must repay the debt.

DECISION

The decision under review is affirmed.



**Administrative
Appeals Tribunal**

IQ21-000031 - Attachment J

**DECISION AND
REASONS FOR DECISION**

DIVISION: Social Services & Child Support Division

REVIEW NUMBER: 2018/M118345

APPLICANT: [REDACTED]

OTHER PARTIES: Secretary
Chief Executive Centrelink

TRIBUNAL: Member R Perton

DECISION DATE: 01 June 2018

DECISION:

The Tribunal affirms the decisions under review.



Member R Perton

REASONS FOR DECISION

BACKGROUND

1. [REDACTED] was receiving austudy payments between 10 October 2011 and 22 November 2012. She was in receipt of newstart allowance (NSA) from 16 November 2013 to 5 January 2014 and then a recipient of Austudy from 6 January 2014 to 27 June 2014.
2. [REDACTED] is a diligent worker and during the periods cited above worked in several jobs, mainly in hospitality. However she only declared the income to Centrelink for some of her employment. Eventually reconciliation was undertaken between Centrelink's records of earnings and the records of the Australian Taxation Office.
3. On 15 December 2015 Centrelink determined that [REDACTED] income had led to overpayments. Debts to the Commonwealth of \$7,309.62 in relation to Austudy overpayments and \$4,036.60 for NSA were levied.
4. On 13 October 2017 an authorised review officer of Centrelink affirmed the decisions.
5. On 8 January 2018 [REDACTED] lodged an application for review with this Tribunal. [REDACTED] accepted that there may be a debt but was concerned that the passing of the years and the closure of some employers meant that she was unable to obtain evidence of the detail of some of her job earnings to ascertain if the amounts were correct on a fortnightly basis. As a casual employee, her earnings were not consistent throughout the debt periods. She was also concerned that her tax return had been put towards repayment of Centrelink debts without her consent.

LEGISLATION AND ISSUES

6. The statutory provisions relevant to this review are found in the *Social Security Act 1991* (the Act) and the *Social Security (Administration) Act 1999*.
7. Section 8 of the Act provides a definition of income which includes earnings from employment.
8. Section 1067L of the Act provides the method for calculating the rate of austudy and section 1068 sets how earnings affect the amount of NSA to which a person is entitled.
9. Section 1223 of the Act states that if a person is paid more than his/her entitlement, the extra amount that he/she received becomes a debt to the Commonwealth.
10. Section 1236 of the Act allows for write off of a debt. This is a deferral of payment for certain limited reasons and does not wipe out any of the debt. Sections 1237A and 1237AAD of the Act allow for waiver of part or all of the debt where it has arisen solely

because of administrative error or because of *special circumstances* on the part of the person who has incurred the debt.

11. The issues which arise in this case are:

- Has ██████ incurred a debt for Austudy and NSA? If so,
- Should recovery of all or part of the debt be waived?

CONSIDERATION

12. ██████ told the Tribunal she had been studying and working mainly as a barmaid in the years in question. She is still studying now but is not receiving social security benefits.
13. ██████ said that \$3,000 was taken out of her tax return as part settlement of the debt. She said she was quite distressed over that and also discovering that one of her employers, now deregistered, had not paid her superannuation contributions.
14. ██████ said that she thought that she did not have to declare her additional earnings if she was below the tax threshold of \$30,000 per annum.

15.

16. Centrelink provided details of ██████ earnings from particular employers by comparing her declared employment to Centrelink and the tax details provided from various businesses which employed her. These were discussed during the hearing.

Has ██████ incurred a debt for austudy and NSA?

17. Section 1223 of the Act states that if Centrelink pays more to a person than she is entitled to receive, the overpayment becomes a debt to the Commonwealth.
18. The Tribunal accepts the calculations that Centrelink has undertaken as to the amount of the overpayment are likely, on the balance of probabilities, to be correct. It notes, however, that the lack of payslips and the time that has passed since then makes it very difficult, and in some cases impossible, to assess the exact amount for each employer for each fortnight.
19. ██████ accumulated a debt to the Commonwealth of \$7,309.62 in relation to Austudy overpayments and \$4,036.60 in relation to NSA during the relevant periods.

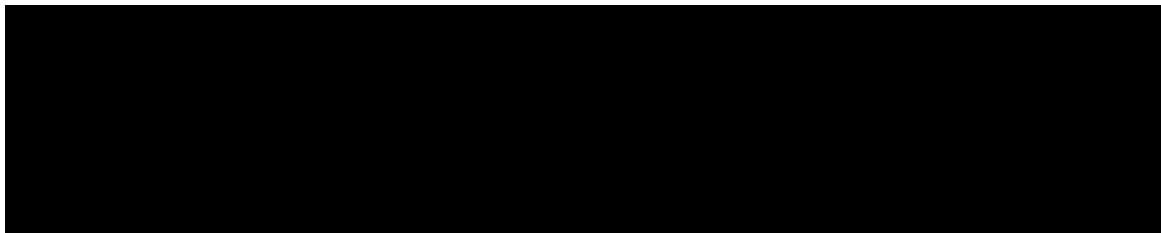
Should recovery of all or part of the debt be waived?

20. Section 1236 of the Act provides for the write off of a debt in certain specified circumstances. When this occurs, it means that an administrative decision is made to

refrain temporarily or permanently from undertaking recovery action for the money owed. However, the debt is not extinguished and enforcement proceedings may be instituted at a later stage. Based on the available evidence the Tribunal is satisfied that the mandatory statutory requirements were not met in the circumstances of this case. Therefore, the debt cannot be written off.

21. Section 1237A of the Act provides for the possibility of waiving a debt where it is attributable solely to administrative error made by the Commonwealth. This debt has arisen primarily because much of [REDACTED] income was not declared at the time it was received.
22. There is no evidence before the Tribunal that the overpayment was solely due to error on Centrelink's part. The Tribunal finds that the debt is not attributable solely to administrative error on the part of the Commonwealth.
23. Section 1237AAD of the Act provides that the decision-maker may waive all or part of a debt where there are *special circumstances*. The requirements that must first be met for section 1237AAD to apply in addition to the *special circumstances* requirement are:
 - The debt did not result wholly or partly from the debtor or another person knowingly making a false statement or false representation or failing or omitting to comply with a provision of the Act; and
 - It is more appropriate to waive than to write off the debt or part of the debt.
24. The Tribunal is not satisfied that the debts arose because of [REDACTED] knowingly failing to notify Centrelink of her actual income, but she did not make much effort to check whether her assumptions of what income should be declared were correct. Centrelink sent her correspondence about the need to report her income, but she claimed not to have received or read the instructions about telling the agency about all her income from various sources.
25. The term *special circumstances* is not defined in the legislation. However, the Federal Court has considered the issue of *special circumstances* in a number of cases. In particular, the Full Federal Court in the matter of *Dranichnikov v Centrelink* [2003] FCAFC 133 determined that whether there are *special circumstances* in a particular case is dependent on whether there are circumstances that would distinguish the case from the usual case.
26. In the Tribunal's view it is also appropriate, when considering the exercise of this discretion, to have regard to the objects of the Act in the recovery of social security overpayments. The Federal Court in *Angelakos v Secretary, Department of Employment and Workplace Relations* [2007] FCA 25 emphasises that it is not the intention of Parliament that the exercise of this discretion be confined to the "exceptional case", but rather that there is something that distinguishes the case from the ordinary or usual case. Further, for *special circumstances* to exist there must be some factors, apart from financial hardship alone, which distinguish the case and set it apart from other similar cases.

27.



The Tribunal finds that [redacted] debts should not be waived due to special circumstances.

DECISION

The Tribunal affirms the decisions under review.



Administrative
Appeals Tribunal

IQ21-000031 - Attachment K

**DECISION AND
REASONS FOR DECISION**

DIVISION: Social Services & Child Support Division

REVIEW NUMBER: 2018/M126228

APPLICANT: [REDACTED]

OTHER PARTIES: Secretary
Chief Executive Centrelink

TRIBUNAL: Mr J Nalpantidis, Member

DECISION DATE: 12 November 2018

DECISION:

The decision under review is set aside and the matter is sent back to the Chief Executive Centrelink for reconsideration in accordance with the directions that the debt is to be recalculated on the basis of the tribunal's findings regarding [REDACTED] income from [REDACTED] outlined at paragraph 28 of this statement of reasons.

The recalculated debt, if any, is recoverable from [REDACTED]

[REDACTED]

Member J Nalpantidis

REASONS FOR DECISION

BACKGROUND

1. This review is about whether [REDACTED] was paid more newstart allowance than he was entitled to receive and if so, whether he has a recoverable debt to the Commonwealth.
2. On 12 November 2013, the Department of Human Services (Centrelink) decided to raise and recover a newstart allowance debt from [REDACTED] in the amount of \$5,591.37 for the period 6 November 2012 to 15 July 2013 (the original decision).
3. On 31 May 2018 [REDACTED] requested a review of the decision and the matter was referred to an authorised review officer who on 15 August 2018 affirmed the original decision.
4. On 29 August 2018, [REDACTED] lodged an application with the tribunal for an independent review of Centrelink's decision.
5. The tribunal heard the matter on 26 October 2018. [REDACTED] provided oral evidence under affirmation in person. The tribunal was provided with relevant documents from [REDACTED] Centrelink file and computer records (464 pages). The Centrelink documents were sent to [REDACTED] prior to the hearing.
6. The matter was deferred for [REDACTED] to provide financial information in support of his evidence that his income in the relevant period was less than what was ascribed to him by Centrelink.
7. On 9 November 2018 [REDACTED] provided further information from his income tax returns in 2012/2013 and 2013/2014, and accompanying documents (A1 to A11). A copy of this information was provided to Centrelink.
8. On 12 November 2018 the tribunal made its decision.

ISSUES

9. The tribunal will determine the following:
 - has [REDACTED] been paid more youth allowance than he was entitled to receive in the relevant period? If so,
 - is the overpaid amount a debt to the Commonwealth? If so,
 - are there any reasons why the debt should not be recovered?

CONSIDERATION

10. The law that applies in the present matter is contained in the *Social Security Act 1991* (the Act) and the *Social Security (Administration) Act 1999* (the Administration Act).

Issue 1 – Does [REDACTED] owe a debt to the Commonwealth?

11. Section 643 of the Act provides that the rate of newstart allowance is worked out under section 1068 of the Act.
12. The rate of social security payments, such as newstart allowance, is based on a number of factors, including whether a person is qualified for the payment, whether the person is a member of a couple, the income and assets of the person (and their partner) and the number of dependent children. If a person is partnered, then their rate of social security payment is affected by their partner's financial circumstances.
13. For the income test, a person's "ordinary income" is calculated. Subsection 8(a) of the Act provides the meaning of income in relation to a person, as an income amount earned, derived or received by the person for the person's own use or benefit. Section 1072 of the Act provides that a person's ordinary income is the person's gross income from all sources, including income from financial assets.
14. As for the reporting regime, generally employment income is reported fortnightly.
15. There is no dispute [REDACTED] was employed with the following employers in the relevant period: [REDACTED]
16. The following table lists [REDACTED] verified earnings as shown in the Centrelink material:

Employer	Period	Declared Income	Actual Income	Verified by
[REDACTED]	19 November 2012 to 17 June 2013	\$1,990	\$2,055	Employer
[REDACTED]	18 February 2013 to 30 June 2013	\$0	\$485	Australian Taxation Office (ATO)
[REDACTED]	14 November 2012 to 14 November 2012	\$0	\$495	ATO
[REDACTED]	30 November 2012 to 30 November 2012	\$0	\$175	ATO

[REDACTED]	31 May 2013 to 31 May 2013	\$0	\$750	ATO
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17. There is no dispute [REDACTED] was a part shareholder and director of [REDACTED]. The company was incorporated on 11 December 2011 and according to the company financial statements and income tax return for 2011/2012, [REDACTED] was paid wages of \$9,850 for the 2011/2012 financial year. As the company was incorporated on 11 December 2011, Centrelink applied this income for the period 11 December 2011 to 30 June 2012. On the basis of his income being \$9,850 from 11 December 2011 to 30 June 2012, Centrelink calculated [REDACTED] annualised income of \$17,798. [REDACTED] provided a statement to Centrelink on 10 July 2013 that "there was no change to my trust", Centrelink took this to mean that [REDACTED] had the same income from [REDACTED] for [REDACTED] in the 2012/2013 financial as the year before. Centrelink therefore applied an annualised income of \$17,798 from [REDACTED] to [REDACTED] in the 2012/2013 financial year.
18. [REDACTED] disagreed with the income from [REDACTED], which was attributed to him by Centrelink. He was supposed to be paid \$1,000 per week by [REDACTED], but the business was not going well and he was not paid this money. That is why he claimed Centrelink payments. It took Centrelink many months to pay him and in June 2013 he was paid a lump sum amount going back to November 2012. He did not actually earn \$684 per fortnight from [REDACTED] (which is the fortnightly rate for an annualised figure of \$17,798) as ascribed by Centrelink. His wages and income tax return would not reflect the figure applied by Centrelink in relation to his income from [REDACTED]. A PAYG summary from [REDACTED] would show how much he was actually paid and the tax he paid. He had not completed his income tax return for 2012/2013 when he spoke to Centrelink in July 2013, and then the business "went bust" so no income tax return was done for 2012/2013. He was unable to therefore provide the information requested by Centrelink and he referred Centrelink to the liquidator for [REDACTED] who he expected had information about his earnings.
19. [REDACTED] estimated he may have earned some \$5,000 in the period 2011 to 2013 from [REDACTED]. The tribunal referred [REDACTED] to the financial statements for [REDACTED] for the financial year ending 2012 which list wages paid to him at \$9,850. His recollection was that he was not paid that amount but would accept what is on the financial statement. Nevertheless, he did not get that amount (annualised) in the following financial (2012/2013) year.
20. Following the hearing [REDACTED] provided further information to the tribunal which included income tax returns for 2012/2013 and 2013/2014 and PAYG summaries. This information includes a PAYG summary listing [REDACTED] gross income from [REDACTED] in the period 1 July 2012 to 30 June 2013 as \$7,450 with tax withheld of \$395. Clearly this is much less than the figure of \$17,798 which Centrelink deemed was [REDACTED] income from [REDACTED] in 2012/2013, and was applied to the

debt calculations. The tribunal finds [REDACTED] income in 2012/2013 from [REDACTED] was \$7,450.

21. [REDACTED] employment income is income for the purposes of social security and must be taken into account in assessing his rate of newstart allowance. The Centrelink records of [REDACTED] declared income, as compared to his actual income (as outlined at paragraph 16 above), indicate he incorrectly declared his income throughout the relevant period.
22. The tribunal accepts that [REDACTED] actual income for the relevant periods was greater than the amount he had previously declared to Centrelink.
23. Subsection 68(2) of the Administration Act requires a person receiving a social security payment to notify Centrelink of any event or change of circumstances that may affect their payment. This includes advising Centrelink of their combined income or any change in their combined income. Section 72 of the Administration Act provides that the person must advise of these changes within 14 days.
24. The tribunal accepts that [REDACTED] did not correctly notify Centrelink of his income throughout the relevant period. [REDACTED] rate of newstart allowance in the relevant period was therefore not calculated in accordance with section 1068 of the Act, taking into account his correct income, and he was paid more than the amount he was entitled to receive.
25. The Centrelink material includes debt calculations for the relevant period which show that in its debt calculations, Centrelink applied an annual income of \$17,798 from [REDACTED], which was averaged at \$684 per fortnight. The tribunal has found that [REDACTED] had annual income of \$7,450 in 2012/2013 (the relevant period), which equates to an average of \$286 per fortnight.
26. The rate calculator for newstart allowance requires the calculation of income on a fortnightly basis and according to section 1073 of the Act ordinary income is to be taken into account in the fortnight in which it is first earned, derived or received. Incorrectly assigning income to a different fortnight can result in a skewing of the rate payable and as a consequence any debt. The tribunal has previously noted that it is not always possible to obtain evidence of a person's weekly or fortnightly income and in such instances the approach has been to average the income amounts across all fortnights in the period covered by the amount. In *Halls and Secretary, Department of Education, Employment and Workplace Relations* [2012] AATA 802 (Halls) the tribunal considered that it was appropriate for Centrelink (the relevant department's delivery agency) to use an averaging method to calculate fortnightly income because in the circumstances it was the best available information that could be provided by the employer and the applicant. In *Provan and Secretary, Department of Families, Community Services and Indigenous Affairs* [2006] AATA 831 (Provan) the issue of averaging fortnightly income was considered appropriate however this was in circumstances where the employer had shut down and Mr Provan did not have any pay advice or other information that would assist in working out his periodic income.

27. The averaging method applied by Centrelink in this case is potentially unreliable as [REDACTED] fortnightly earnings may have varied throughout the relevant period, and the “averaging” approach applied by Centrelink may not have reflected [REDACTED] actual earnings from [REDACTED].
28. On the best available information, noting [REDACTED] was not able to provide any further information about variations in his fortnightly income from [REDACTED], the tribunal accepts the averaging method applied by Centrelink. In relation to [REDACTED] income [REDACTED] is appropriate in the circumstances of this particular case, using an annualised figure of \$7,450 (which equates to \$286 per fortnight) as reflected in [REDACTED] income tax returns, rather than Centrelink’s deemed annualised income of \$17,798 (or \$684 per fortnight).
29. The tribunal considers that the debt will need to be recalculated, in line with the tribunal’s findings in relation to [REDACTED] income from [REDACTED] being \$286 per fortnight in the relevant period.
30. Section 1223 of the Act sets out that a debt to the Commonwealth will arise when a person obtains the benefit of a social security payment but was not entitled, for any reason, to that payment. In [REDACTED] case, the recalculated overpayment in line with the tribunal’s direction, if any, constitutes a debt owed to the Commonwealth by [REDACTED].

Is the overpayment a debt?

31. Section 1223 of the Act sets out that a debt to the Commonwealth will arise when a person obtains the benefit of a social security payment but was not entitled, for any reason, to that payment. In [REDACTED] case, the recalculated overpayment in line with the tribunal’s direction, if any, constitutes a debt owed to the Commonwealth [REDACTED].

Is there any reason to not recover the debt?

32. The next issue considered by the tribunal was whether or not the debt should be waived or written off.
33. Part 5.4 of the Act sets out the provisions whereby debts to the Commonwealth may be waived or written off. Waiving recovery of the debt means that, although the debt exists, a decision is made to forgo the legal right to recover the monies. This means that no recovery action is possible and the debt cannot be pursued at a later date. Write off means that recovery of the debt is delayed for a specified period of time.

Write off

34. The tribunal considered whether it was possible to write off the debt under section 1236 of the Act. If a debt is written off, an administrative decision is made not to seek recovery of a debt at this time. Circumstances where a debt may be written off are if the debt is not recoverable at law; the person has no capacity to repay the debt; their whereabouts are unknown after all reasonable efforts have been made to locate them; or it is not cost

effective to recover the debt. This does not mean that the debt no longer exists – recovery action may be instituted at a later stage.

35. [REDACTED] is currently employed and receives approximately \$1,700 gross per fortnight; he is not currently in receipt of Centrelink payments. Centrelink is not currently recovering the debt. The tribunal is satisfied that [REDACTED] has some capacity to repay the debt, as recalculated, albeit it is open for him to negotiate a repayment schedule with Centrelink. As none of the requirements in section 1236 of the Act are met in [REDACTED] case, the debt, as recalculated, cannot be written off under section 1236 of the Act.

Administrative error waiver

36. Subsection 1237A(1) of the Act states that a debt must be waived where the debt was caused solely by Commonwealth administrative error and the person received the payments in good faith. The debt cannot however be waived under this section unless both these requirements are met.
37. For this subsection to apply in the present case, the tribunal must be satisfied that [REDACTED] debt is attributable solely to administrative error by the Commonwealth (that is, Centrelink).
38. This section does not allow waiver if the debt was caused partly by administrative error and partly by error on the part of the recipient. The Administrative Appeals Tribunal in the case of *Ward and SDFaCS* [2000] AATA 212 stated that the word “solely” means “exclusively”, “only” or “to the exclusion of all else”. In that case Deputy President Forgie said:

This means that the Secretary’s duty to waive does not extend to those debts which are attributable to errors or other factors which are independent of the Commonwealth’s administrative error. It makes no difference that those other errors or factors are minor.

39. The tribunal has found [REDACTED] did not correctly advise Centrelink of his income, which he was required to.
40. As [REDACTED] did not correctly advise Centrelink of his income, the tribunal is unable to conclude that he was overpaid in the relevant period as a consequence of sole administrative error on the part of Centrelink. Accordingly, the waiver provisions in subsection 1237A(1) of the Act cannot apply to waive the debt.

Special circumstances waiver

41. Another ground considered by the tribunal for waiver of the debt was pursuant to section 1237AAD of the Act which provides that the right to recover all or part of a debt may be waived if there are “special circumstances (other than financial hardship alone)” which make it desirable to waive the debt, and if other criteria are met, namely:
- that the debt did not result wholly or partly from the debtor or another person knowingly making a false statement or representation or failing or omitting to comply with a provision of the Act; and

- it is more appropriate to waive than to write off the debt or part of the debt.
42. There is no material before the tribunal that [REDACTED] deliberately or intentionally provided false information or omitted to advise Centrelink of his circumstances in relation to his income. The tribunal therefore went on to consider whether special circumstances apply in [REDACTED] case which warrant waiver of the debt, in part or in whole.
 43. The term “special circumstances” is not defined in the Act. The Federal Court and the Administrative Appeals Tribunal have considered the issue of special circumstances on a number of occasions. In every case, the individual circumstances of the case were examined to determine whether they were such that it would be unjust, unreasonable or inappropriate for the debt to be recovered. The Federal Court in *Angelakos v Secretary, Department of Employment and Workplace Relations* [2007] FCA 25 emphasised that it is not the intention of Parliament that the exercise of this discretion be confined to the “exceptional” case, but rather that there is something that distinguishes the case from the ordinary or usual case. The Full Federal Court in the case of *Dranichnikov v Centrelink* [2003] FCAFC 133 determined that whether there are special circumstances in a particular case depends on whether there are circumstances that would distinguish the case from the usual. Further, for special circumstances to exist there must generally be some factors, apart from financial hardship alone, which distinguish the case and set it apart from other similar cases.
 44. In considering this waiver provision, the tribunal is also mindful of the purpose of the social security system, the Parliament’s intention that payments are made on the basis of need and that debts should generally be recovered unless there are special circumstances.
 45. In the case of *Davy and Secretary DEWR* [2007] AATA 1114 DP Forgie noted that special circumstances:

...are not merely directed to the person’s own circumstances. Rather, they are directed to those that are “special circumstances...that make it desirable to waive”. That necessarily requires a consideration of the person’s individual circumstances but also a consideration of the general administration of the social security system. Waiver of the debt would mean that Mr Davy would have had the benefit of part of his DSP in circumstances in which he was not entitled to it...He has had the benefit of the money and there is no injustice in requiring him to repay the money of which he has had the benefit but not the entitlement.

46. [REDACTED]

47.



48. The tribunal carefully considered all of the matters put forward by [REDACTED] including the manner in which the debt arose, his personal circumstances, his health and his financial situation. Taking into account all of the matters put forward, the tribunal does not consider that [REDACTED] circumstances are “special” such that it would be unfair or inappropriate to recover the debt. The provisions in section 1237AAD were therefore not applied to waive the debt in this case.

DECISION

The decision under review is set aside and the matter is sent back to the Chief Executive Centrelink for reconsideration in accordance with the directions that the debt is to be recalculated on the basis of the tribunal’s findings regarding [REDACTED] income from [REDACTED] [REDACTED], outlined at paragraph 28 of this statement of reasons.

The recalculated debt, if any, is recoverable from [REDACTED]

Senate Standing Committee on Community Affairs

INQUIRY INTO CENTRELINK'S COMPLIANCE PROGRAM

PUBLIC HEARING 29 March 2021

ANSWER TO QUESTION ON NOTICE

Services Australia

Topic: AAT Member Decisions

Question reference number: IQ21-000032

Member: Deborah O'Neill

Type of question: Written

Date set by the committee for the return of answer: 21 May 2021

Number of pages: 2

Question:

With reference to Services Australia's response to Question on Notice SA SQ20-000212 (Budget Estimates – 29 October 2020):

a) Was the decision by Member Carney (Review No 2016/S104681) on 8 March 2017 referred by Services Australia to DSS in accordance with the Standing Operation Statements and the process described in that response?

- i. If not, why not?
- ii. If so, what was the outcome of that referral?

b) Was the decision by Member Carney (Review No 2016/S104394) on 20 April 2017 referred by Services Australia to DSS in accordance with the Standing Operation Statements and the process described in that response?

- i. If not, why not?
- ii. If so, what was the outcome of that referral?

c) Was the decision by Member Carney (Review No 2017/M113469) on 25 August 2017 referred by Services Australia to DSS in accordance with the Standing Operation Statements and the process described in that response?

- i. If not, why not?
- ii. If so, what was the outcome of that referral?

d) Was the decision by Member Carney (Review No 2017/S112884) on 7 September 2017 referred by Services Australia to DSS in accordance with the Standing Operation Statements and the process described in that response?

- i. If not, why not?
- ii. If so, what was the outcome of that referral?

e) Was the decision by Member Carney (Review No M112147 & M112302) on 7 September 2017 referred by Services Australia to DSS in accordance with the Standing Operation Statements and the process described in that response?

i. If not, why not?

ii. If so, what was the outcome of that referral?

f) More generally, how many Robodebt-related decisions (where “Robodebt” is defined by reference to the Commonwealth’s Defence in the Robodebt class action) have been referred by Services Australia to DSS in accordance with the Standing Operation Statements and the process described in that response?

Answer:

(a) to (e) Services Australia (the Agency) did not refer review number matters 2016/S104681, 2016/S104394, 2017/M113469, 2017/S112884 or M112147 & M112302 to the Department of Social Services (DSS).

All Social Services and Child Support Division of the Administrative Appeals Tribunal (AAT1) changed decisions are reviewed by the Agency and recommendations are made on a case basis as to whether further review of a decision by the Administrative Appeals Tribunal (General Division) should be sought. Where the application of the ‘Standing Operation Statements – Social Security Litigation’ agreed between the Agency and DSS does not support a Secretary appeal, the Agency is not required to forward to DSS a changed AAT1 decision for consideration. In each of the cases referred to in IQ21-000032, the Agency accepted and implemented the AAT1’s decision.

f) The requested number of decisions is not known. That information is not readily available and obtaining it would involve an unreasonable diversion of resources. For example, the Agency reviewed 2,650 set aside decisions of the AAT1 in the 2019-20 financial year alone.