SENATE LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE

REFERENCE ON 'THE IMPACT OF CHANGES TO SERVICE DELIVERY MODELS ON THE ADMINISTRATION AND RUNNING OF GOVERNMENT PROGRAMS'

SUBMISSION

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BACKGROUND

This submission is confined to issues associated with the July 2016 online compliance initiative ('OCI', commonly known as 'robo-debt') of the then Department of Human Services (i.e. term of reference (b)). It concentrates in particular on robo-debt's lack of legal foundation and integrity (term of reference (b)(i)); its resultant raising of large numbers of false debts ill-informedly or fearfully paid by vulnerable citizens (term of reference (b)(iii)); and the associated erosion and traducing of merits review rights of affected citizens (term of reference (b)(v)).

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

This submission simply conveys my main conclusions on the above three topics, with but a brief overview of the underlying reasoning. My elaboration of those reasons is already a matter of public record, at various levels of detail and accessibility to different readerships, in a number of recent publications.[1] I have therefore sought to cut straight to the main chase[2] and avoid repeating what to some may be thought to be arcane or tedious legal reasoning.

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

[2] This submission will not touch on other, 'lesser' flaws in robo-debt, such as that ATO data counted some employers twice or used business names rather than the employer names in Centrelink data. The scale and monetary

I am of course happy to elaborate or clarify the more condensed version of those conclusions if required.

1 A TOTAL LACK OF LEGAL FOUNDATION FOR REVERSAL OF ONUS OF PROOF OF ROBO-DEBTS UNABLE READILY TO BE CLARIFIED (TERM OF REFERENCE (b)(i))

Other than in the rare case where a supposed robo-debt is derived from application of an ATO tax average, calculated for a constant period of employment, involving a single employer who paid an identical amount each fortnight – robo-debts are always erroneous and always inflated. This is for two intersecting reasons. First because most commonly there are multiple employers in the supposed debt periods (running from 2010 onwards, or whatever later year of first payment of the social security claim), with varying or intermittent periods of employment, and varying hours and rates of pay for those claimant reporting fortnights. Second because when the ATO average from its 26 week blocks of employer data is applied to the 13 social security payment fortnights, by definition there is no offsetting for the 'income bank' entitlements which otherwise apply. When correctly calculated it is a matter of record from the 2017 Ombudsman's report and elsewhere that debts raised in the thousands of dollars frequently revert to zero or a few hundred dollars.[3]

Where the supposed debtor has received pay slips for their past periods of employment, and has kept or is readily able to re-obtain those records (or supply bank records) it is perfectly reasonable for Centrelink to invite the uploading of that information to set the record straight. This caveat is an important one, reflective of my view of where the balance point should have been set between automation and human decision-making had robo-debt been properly designed in accordance with the principles of the Administrative Review Council report on the subject,[4] or the almost universal consensus in academic scholarship internationally regarding the principles to follow to ensure transparency, administrative integrity and conformity to the rule of law.[5]

Where the supposed robo-debt debtor is unable to provide such records, however, there is no legal basis <u>at all</u> for the supposed debt amount to be raised as a debt. Centrelink, not the

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impact of those other flaws are dwarfed by the illegality of reversing the onus and permitting the use of averages; and deflect attention from the core concerns with the scheme.

[3] Sometimes a slightly larger true debt figure if an applicant has misunderstandingly reported take-home rather than gross earnings; smaller debt amounts where mismatches between payment fortnight dates and dates of fortnights to which payments related, or reporting only after tax amount when receiving it in their account rather than the 'when earned' date required under the income test. Further, Commonwealth Ombudsman, 'Centrelink's Automated Debt Raising and Recovery System' (Canberra: Commonwealth Ombudsman, Commonwealth Ombudsman, April 2017) <http://www.ombudsman.gov.au/__data/assets/pdf_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf>.

[4] Administrative Review Council, 'Automated Assistance in Administrative Decision Making' (Canberra: Administrative Review Council, 2004) <https://www.arc.ag.gov.au/Documents/AAADMreportPDF.pdf>

[5] Eg, Henrik Palmer Olsen et al, 'What's in the Box? The Legal Requirement of Explainability in Computationally Aided Decision-Making in Public Administration ', (2019) University of Copenhagen, iCourts Working Paper Series No. 162; Monika Zalnieriute et al, 'From Rule of Law to Statute Drafting: Legal Issues for Algorithms in Government Decision-Making' in Woodrow Barfield (ed.), *Cambridge Handbook on the Law of Algorithms* (Cambridge: Cambridge University Press, 2019) forthcoming [Available at SSRN: https://ssrn.com/abstract=3380072].

supposed debtor, bears the legal onus of establishing any such debt. In abbreviated conclusionary form,[6] this is because:

1. Section 1222A(a) of the *Social Security Act 1991* exhaustively confines debts to those created by another section of the Act (a debt 'if and only if' this is so). There is thus no scope for the operation of the common law 'Auckland Harbour Board' principle in creating a social security debt;

2. Section 1223 creates a debt if a person has received more than their correct payment for any fortnight of their working age payment;

3. An average doesn't speak to its constituent parts (if it did Bradman nearly made a century in his last innings) and so Centrelink has no relevant information at all about the state of affairs in each relevant constituent fortnight, as legally required for a debt under the Rate Calculators (eg Benefit Rate Calculator B for Newstart);

4. The Full Federal Court in *McDonald* [1984] FCA 59; 1 FCR 354 laid down the principles for determining when Centrelink or an applicant bears the 'practical onus' of establishing a matter; and here the onus is squarely with Centrelink, but it has no relevant evidence at all to discharge that onus;

5. Moreover, when the issue at stake is a 'weightier one', the High Court's Briginshaw principle insists on more extensive proof than mere balance of probability in reaching the requisite 'satisfaction'. Here that principle (from [1938] HCA 34; (1938) 60 CLR 336) is clearly in play: an allegation of a false or inflated debt affects a person's credit rating, and for lawyers, their fitness for admission; and carries significant moral stigma). So it would need more than just 'some' evidence (and an ATO derived average is no evidence at all);

Therefore:

a) There is no legal basis at all for government statements such as that 'there is a legal obligation' to raise debts, or that there is nothing 'contrary to law' about robo-debt in raising such purported debts. Debts can lawfully be raised only on the basis of compliance with the above principles, including by Centrelink using its compulsory powers to obtain PAYE or bank records, as was previously done for a proportion of the 7% of data matches resulting in debt matches pre the introduction of robo-debt (which of course, without any real Centrelink investigation, now automatically raises the 93% as debts); and

b) It is also thus a breach of model litigant protocols for Centrelink to continue to ignore the multiple AAT1 reversals of debts made solely on the basis of the above illegality reasoning when conducting internal but statutory ARO reviews or pursuing debts at AAT1; Centrelink never once electing to test those overruling's in AAT2, where there would be a public hearing and publicly available published reasons. Nor ever even having hinted at what its supposed alternative legal foundation for robo-debt is supposed to be.[7]

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[6]   The full legal reasoning is found in: Carney, 'A New Digital Future', above n 1; to similar effect Peter Hanks, 'Administrative Law and Welfare Rights: The 40-year story from Green v Daniels to "robot debt recovery"' (2017) 89 *AIAL Forum* 1.
[7]   Before determining my first robo-debt invalidation on the AAT in early 2017 I directed that I be provided with written arguments on all of the points set out above, and also invited (I could not require) oral argument on

Because a robo-debt raised without adequate proof of the debt is not a lawful debt there is no basis for its recovery under social security law. Not having a legal foundation (or accuracy of calculation) renders it more aptly described as an unlawful impost or tax.

2   RAISING OF LARGE NUMBERS OF FALSE DEBTS ILL-INFORMEDLY OR FEARFULLY PAID BY VULNERABLE CITIZENS (TERM OF REFERENCE (b)(iii))

Robo-debt intimidates people into believing that they have a lawful debt which they must repay or see offset against their tax refund, when there may be a nil or at most a much lower debt amount.

When say a previously law abiding former student now in employment receives a letter from Centrelink stating that data from the Australian Tax Office about their past employment shows they owe a significant overpayment debt due to wrongly reporting income from what frequently were a number of episodic casual rates jobs from as far back as 2010, without any explanation of how the debt is being calculated, they are likely to both be very shocked and to think that the government 'must be right'.

Although now advised in their initial contact letter that this debt is based on average earnings and that they can upload pay slips from those years if they think it is wrong, few will remember that their payment was actually a 'fortnight by fortnight recalculation' of their legal entitlement, or appreciate how effective was the earnings bank in 'smoothing out' [avoiding overpayments] for periods of broken employment. Broken employment, varying hours and rates are of course very common in hospitality and other such categories of casual or part-time work undertaken by students and the unemployed. And they are unlikely to have kept those pay slips, not least because until late 2016 even Centrelink's own website recommended keeping them for just 6 months; or to remember the addresses of those employers (assuming they are still operating). Even professionals such as lawyers and accountants are rarely capable of making head nor tail of Centrelink documentation of the debt (of which more later) but the OCI system is administered not just to encourage initial engagement with the on-line interface but to encourage people to continue to do so. People who attend an office are referred back to OCI screens rather than given the opportunity to speak with and lodge documents, or give their explanation in person. Centrelink astoundingly does not entertain email communication. Telephone contact, apart from its long wait times, also usually pushes people back into the OCI on-line loop for a 'reassessment', and ARO review requests are often misheard or misdirected away from merits review avenues.

Commonly not until an ARO review is formally requested will alleged debtors receive any real detail about the basis of their calculation. Even then it is usually in the form of a few unspecific statements about 'information from the ATO or employers' not adequately explaining that this is just extrapolated to all income fortnights in dispute, with the only specific numbers, dates and periods being set out in the ADEX debt calculation sheets (where the very last of several columns will reveal 13 identical supposedly 'true earnings' being applied to 13 fortnightly periods – in fact just being entry of the ATO average – and then applied in supposed

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those points. Oral appearance was declined and no contrary written argument of substance was advanced by way of contradiction. No other contrary legal argument has yet been advanced by government.

contradiction of the person's often quite fluctuating fortnightly amounts now being questioned as 'untrue').[8] How is an ordinary social security recipient supposed to be able to grasp this?

My points here?

1. At an operational level the OCI system totally fails the transparency of debt calculation test.
2. At an operational level the OCI system de facto fails to provide merits review access to most of those confronted with an alleged robo-debt.
3. At an operational level only the most robust of mind and most 'social capital rich' of alleged debtors are in a position to comprehend and have their robo-debt correctly decided either internally by Centrelink or through external merits review; the vast bulk of debtors are too vulnerable and too ill-informed about the nature of their debt to seek its rectification.
4. At an operational level the consequence is that the most vulnerable of current or former social security recipients are repaying what is a totally false or highly inflated 'debt' amount – I hypothesise that in aggregate they constitute or account for a large proportion of the estimated $1.3billion reportedly raised to date, or the $3.7 billion over the forward estimates of anticipated program yield – giving substance to the concern that 'extortion is no way to balance the budget'.[9]

It is of course not being suggested here that these are the deliberately *intended* goals of OCI, but I am firmly of the opinion that they are a particularly egregious example of the underlined policy consequences commonly encountered in policy and program development. Here being a consequence of robo-debt's rushed design, unsatisfactory implementation, and subsequent poor monitoring and review.

As such, OCI effectively imposes a 'new tax' on many students and unemployed.[10]

3 EROSION AND TRADUCING OF MERITS REVIEW RIGHTS OF AFFECTED CITIZENS (TERM OF REFERENCE (b)(v))

Robo-debt has exposed serious deficiencies in the operation of all of the institutional checks and balances, including merits review and Parliamentary oversight bodies.[11]

So far as *access* to merits review is concerned, the operational design features (described under the previous head) have added new 'psychological stamina' hurdles to be negotiated by people seeking review, adding further steps to an already long and confusing access pathway (of 'original decision-maker review, ARO review and then AAT1 and AAT 2 merits review). These

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[8]   I have had professionally qualified applicants not understand this when I took them to ADEX documents at AAT hearings; and I since have experienced professionals still not grasp it all after my careful, if apparently still insufficient, explanations.

[9]   Peter Martin, 'Extortion is no Way to Fix the Budget', *Sydney Morning Herald* (Sydney), Thursday 12 April 2018 <https://www.smh.com.au/politics/federal/extortion-is-no-way-to-fix-the-budget-20180411-p4z8x2.html>.

[10]   My June 2018 post about robo-debt on AUSTAX was the second most downloaded over the year.

[11]   The full gamut is dealt with in Carney, 'Robo-debt Illegality', above n 1. As there described, reliant as they necessarily were on submissions, the Parliamentary Committee missed fully engaging the legality point but only due to a lack of a social security specific submission on point.

are serious matters, and have ramifications for other automation projects in train, but their rectification is for another day.[12]

Of greatest immediate concern, in my view, is the way it has been possible for robo-debt to avoid being subject to a *publicly available* AAT decision invalidating a debt on the basis of a finding of a lack of legally sustainable proof of that debt. This is not for want of AAT decisions which do precisely that. For there is an unknown number, which I would estimate numbers as some hundreds, of decisions invalidating robo-debts on the basis of the reasoning I have already outlined. These have all stayed private only because they were decided at first level review (AAT1) where hearings and reasons are not made public, and because not a single one of those many invalidations was challenged by Centrelink, by proceeding to a public hearing and the publicly available reasons for decision which would issue on review by the general division (AAT2). Nor has Centrelink changed its practice of continuing to defend robo-debt cases when challenged at AAT1, in failing to advert to any legal foundation for raising a debt solely on the basis of ATO averages, and in not mentioning that a contrary view has been adopted by the AAT (and always accepted by Centrelink despite the availability of AAT2). This latter is a breach of the model litigant policy in my opinion. Indeed, in my view it is a breach even when the statutorily independent authorised review officer acts in a similar way.

Overseas commentators would describe all of this as a policy of 'administrative non-acquiescence' with the decisions made by rule of law institutions such as merits review tribunals or courts.[13] It is a policy which, if that is what is being adopted, unquestionably undermines trust in government administration and in the external review bodies and courts alike. And even if inadvertent, it does so by giving the appearance that justice is being subverted in this way. Public trust in government administration and other institutions is already at a worryingly low level, as most recently remarked by Hon Kenneth Hayne.

There are several ways in which the integrity of AAT review can be restored, one of which is that the Social Services and Child Support Division of the AAT exercises its power to publish some (anonymised) robo-debt rulings. Immediate application of the model litigant policy to all AAT reviews (and preferably also ARO reviews) is another crucial step.

CONCLUSION

As someone strongly predisposed towards taking full advantage of the potential of AI in government administration I fear that robo-debt's design and other flaws have seriously weakened public trust in government and associated institutions, while at the same time raising large sums of revenue from vulnerable people least in a position to pay an entirely false, or highly inflated, 'debt' which is raised without any proper legal foundation or proper processes.

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[12] Not least because a number of the Callinan Review recommendations would further exacerbate those access to justice barriers, as correctly anticipated in the submission of the Department of Human Services to that inquiry: Ian Hon Callinan, 'Report: Review: section 4 of the Tribunals Amalgamation Act 2015 (CTH)' (Canberra: Attorney-General's Department Australia, 2018/19) <https://www.ag.gov.au/Consultations/Documents/statutory-review-tribunals-act-2015/report-statutory-review-aat.pdf>.

[13] Michael J Froehlich, 'Administrative Nonacquiescence in Judicial Decisions' (1984) 53 *George Washington Law Review* 147; Carolyn A Kubitschek, 'Social Security Administration Nonacquiescence: The need for legislative curbs on agency discretion' (1988) 50 *University of Pittsburg Law Review* 399; Miriam R Rubin and Karen Ann Naughten, 'Government Nonacquiescence Case in Point: Social Security Litigation' (1986) 2 *Touro Law Review* 197.

I therefore urge the Committee to recommend terminating OCI in its present form until measures have been taken fully to address at least the three matters covered in this submission, and provide avenues to reopen past unlawful debt recoveries.

Terry Carney

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