Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

DIVISION:	**Social Services & Child Support Division**
REVIEW NUMBER:	**2016/S104681**
APPLICANT:	**[The Applicant]**
OTHER PARTIES:	**Secretary, Department of Human Services** **Chief Executive Centrelink**
TRIBUNAL:	**Professor Terry Carney AO, Member**
DECISION DATE:	**Wednesday 8 March 2017**

DECISION

On Wednesday, 8 March 2017, the Tribunal decided to *set aside* the decision to raise and recover an overpayment debt of Youth allowance in the amount of $7,452.76 for the period 8 July 2010 to 6 June 2012, and *send it back to be redetermined* in light of directions that:

1. No debt or debt component is able to be founded on extrapolations from Australian Tax Office records;
2. The earnings components of any recalculated debts as may be raised must be based on and confined to any fortnightly salary records obtainable in the exercise of statutory powers to do so (if set in train); and
3. Debt amounts (if any) as so varied are recoverable debts (not able to be waived).

Any references appearing in square brackets indicate that information has been removed from this decision and replaced with generic information so as to protect the privacy of the individuals consistent with sections 147 and 168 of the Social Security (Administration) Act 1999

REASONS FOR DECISION

WHAT IS THE BACKGROUND TO THIS APPLICATION?

1. This review is about the decision of the Department of Human Services (better known as 'Centrelink') to raise and recover an overpayment debt of Youth allowance (subsequently 'YA') in the amount of $7,452.76 for the period 8 July 2010 to 6 June 2012, based on apportionment of annualised Australian Tax Office ('ATO') information about earnings.
2. [The applicant] believes she should not owe any debt because she always accurately reported her earnings in a timely fashion. Centrelink for its part argues that in the absence of payslips kept by [the applicant], it is appropriate to extrapolate annual ATO earnings figures as average amounts of income in relevant YA rate calculation payment periods.
3. The prior history of the decision I am reviewing today is that Centrelink raised the debt in a decision of 1 February 2016. When [the applicant] challenged that decision it was reviewed by an authorised review officer (subsequently 'ARO') who on 29 November 2016 agreed with the decision to raise the debt. [The applicant] applied for review by this Tribunal on 14 December 2016.
4. In reviewing Centrelink's decision of 29 November 2016 my task is to 'step into the shoes' of the previous decision-maker, and determine what is the correct and preferable decision under the law.
5. I heard [the applicant's] application for review in [State] on Friday 3 March 2017. [The applicant] participated in the hearing by conference telephone, giving her information on affirmation. Because Centrelink had requested and been granted an extension to not later than 16 March in which to respond to questions posed in orders issued on 15 February 2017, my decision was adjourned.
6. My decision was made on Wednesday, 8 March 2017 after receipt of Centrelink's supplementary submission the previous day.

WHAT ARE THE ISSUES TO BE DECIDED?

7. The main question to be decided in this application is whether [the applicant] has been overpaid YA, and if so, in what amount and whether that debt is recoverable.
8. The relevant provisions of the *Social Security Act 1991* and the *Social Security (Administration) Act* 1999, are discussed in more detail under 'What is the Law and How has the Tribunal Applied It?' below.

CONSIDERATION

What did [the applicant] tell the Tribunal and how does it relate to other evidence?

9. [The applicant] explained that during the period of the alleged debt she had held four part-time jobs while studying as a student. Only one of these positions (and then only for portion of the time) had involved a 'regular' shift: [Employer 1] from 2011-2012.

10. All the other jobs (and [Employer 1] in 2010) had involved variable shifts, some on a weekday (usually a Thursday) others on a Saturday or Sunday, of varying durations depending on employer need, and of irregular patterns due to the professional practice obligations of her study program (Folio 5 confirms) or times she was unavailable due to study for exams, catch-up study if she fell behind, and illness (she suffers from [medical condition]). She no longer retained payslips for any of these jobs, given how long ago the employment had taken place. (Centrelink did not advise that such records be kept for more than a few months at the relevant time).

11. In amplification of these points [the applicant] explained that her first employment had been with [Employer 2] (a distance from where she was studying, so she worked roughly only every second week or so, due to the travel involved). All the other jobs had been in or closer to [her] University ([Employer 1] being the most convenient of all, nearby to where she was living). Her second job, with [Employer 3], had been brief (a few weeks). This was because they 'let her go' due to not being able to accommodate variable availability because of her university commitments.

12. The work at [Employer 1] had been the longest and most convenient of her jobs. It started as irregular shifts, sometimes a Thursday, sometimes one of the weekend shifts, varying in duration. This was the pattern from 2010 until in 2011 when she was offered a regular shift day. The work with [Employer 4] was relief [work], when she was available to fill an absence due to illness or other circumstances.

13. [The applicant] discussed with me the periods when she knew she definitely had not worked at all, due to being interstate ([specified locations]) or in [State] undertaking work practice placements as part of her degree (the middle three of the five on the table provided by her University at Folio 5 of the Centrelink papers). These 12 weeks in total all fell within the period of the alleged debt (the first and last of the five placements fell outside the period or were when she was not employed at all). [The applicant] also told me that she made herself unavailable in the lead up to semester exams (so twice yearly), again on a couple of occasions where she fell behind in a unit or two, and whenever she experienced one of her bad [medical conditions].

14. I accept all of this evidence and find on the basis of it that [the applicant's] employment income was at all times variable in terms of its likely fortnightly remuneration.

15. Turning to other matters, [the applicant] explained that she felt that her privacy had been breached by the phone message left on the [workplace] booking message service in September 2016 (see Folio 74 for details). I explained that this was not a matter the Tribunal could entertain, explaining the options available within Centrelink and outside if she wished to pursue it further. [The applicant] also advised that she could not reconcile the amount of YA stated by Centrelink to have been paid in the debt period with the amounts shown on ATO records for 2010-11 ($8,007) and 2011-12 ($3,776).

16. We also discussed the basis on which Start up Scholarships are paid (the need to be qualified in a particular very narrow period) and the broad nature of the order I had issued to Centrelink inviting a submission on various matters, including the procedures and powers of the Tribunal and any further delays which might occur in making my decision.

17. On the issues related to recoverability of any debt, [the applicant] agreed, after discussion with me, that there was no sole (or indeed any contributing) Centrelink error involved in *generating* any overpayment debt as may or may not be found. Regarding her circumstances, [the applicant] told me that the household income is around $100,000 a year. They have heavy mortgage expenses, but their budget is in mildly positive territory, even though she is now studying again (for a [related] qualification due to very limited openings for her [specialty] degree). Their savings are around $8,000 and, apart from her [specific medical condition], their health is good.

18. For convenience, most of this and other evidence (and my findings about it), particularly those relating to the financial and other circumstances of [the applicant], are dealt with in the context of how the law applies, as discussed under the next main heading.

What is the law and how has the Tribunal applied it?

What are the conditions for payment of Youth allowance?

19. YA is paid to people who are seeking work or who are students undertaking approved courses full-time and who make acceptable progress in their studies.

20. The rate of payment of YA is calculated in accordance with the Youth Allowance Rate Calculator.[1] The Calculator adjusts the rate of payment in line with any changes in earned income in each relevant fortnight.

21. Centrelink has relied on extrapolated 'fortnightly average' earnings in various periods, based on ATO records of earnings at various times.

22. This review presents for resolution what, in my experience, is a previously unprecedented issue: namely whether fortnightly earnings and any overpayment based on the difference between such 'earnings' and the amount previously paid in that fortnight (based on [the applicant's] reporting from time to time) can provide a secure legal basis for finding an overpayment or determining its quantum.

23. Published decisions of the General Division of this Tribunal and decisions of the Courts elaborate the meaning of some aspects of the law about social security payments, and will occasionally be referred to by me in the endnotes to these Reasons.[2] However I was not able to locate much by way of prior jurisprudence to guide the resolution of the issue posed in the previous paragraph, beyond the decision of the Full Court of the Federal Court in *McDonald* regarding the requirement to be 'satisfied' of the issues pertinent to a review (there being no onus of proof as such).[3]

24. So, because significant questions were raised about this and related matters, on 15 February 2017 I exercised my powers[4] to require Centrelink to make written (and any oral) submissions about a number of questions:

    - the legal foundation for the Tribunal being persuaded to accept that there is a debt for particular YA fortnights based on annualised ATO data, including the evidentiary basis for such a finding in light of the 'Briginshaw principle' and/or the 1984 Full Federal Court ruling in *McDonald*;
    - whether consideration was given to exercise of powers to obtain wage records from the four employers and if so why those powers were not utilised in light of an apparent fluctuation in the earnings being reported by the applicant (Folios 34-35);
    - whether the Tribunal should attach any significance to the 'yes' and 'no' answers in the 'verified' column of the EASNs screen dump at Folios 34-36;
    - the implications for the debt calculation of the professional practice placement advice from [her university] on 25 November 2016 (Folio 5 of the papers), three of which fall within the debt period;
    - whether there is any further information regarding (or submission in relation to) the 4 January 2012 advice about the partner's commencement of employment (Folio 70), and what action was taken or not taken by Centrelink in regard to those earnings (an un-redacted page 76 showing the 9 word redaction at line 13 from the bottom should also be supplied;[5]
    - whether Centrelink wishes to make a submission about any choice which may or may not arise for the Tribunal between setting aside and setting aside with directions in the event that the debt is not affirmed, or exercise of any other of the powers of the AAT; and
    - any other matter that Centrelink may wish to include in any supplementary submission.

25. Centrelink supplied a supplementary submission addressing these matters on Tuesday 7 March 2017, soon after its requested extension period had been granted. The submission elected not to include any additional matters (the last dot point above) and did not make any submission about which of my powers I might select in the event that I was not able to affirm the decision (the second last dot point above).

26. With regard to the redactions on Folio 76 (supplied and I conclude not a material redaction), Centrelink's submission was:

> Department records show that [the applicant] attended the [named] Service Centre on 4 January 2012 to notify the department of [her husband's] earnings. [The applicant] was advised to report [her husband's] earnings via online services.

> On 4 January 2012, [the applicant] reported, via online services, [her husband's] earnings from the employer, [Employer 4]). [The applicant] reported earnings in the amount of $533.95 for the fortnight ending 4 January 2012 and the earnings were immediately applied to [the applicant's] department record. [The applicant] continued to report [her husband's] earnings to the department on a fortnightly basis. [The applicant] reported fortnightly earnings of approximately $1,500 to $1,600 on a regular basis until 7 November 2012.
>
> [The applicant's husband's] earnings from [Employer 4] were not altered when calculating and raising [the applicant's] Youth Allowance debt.

27. In short, Centrelink is indicating that [the applicant's husband's] earnings were reported in the period and that the alleged debt calculation was based on those earnings.

28. Regarding the 12 weeks of professional placements falling within the alleged debt period, the submission urged me to accept that:

> There are no implications for the debt calculation of the professional practice placement advice from [the applicant's] University. The advice, in and of itself, does not prove that [the applicant] did not earn income from the employers in question. For example, [the applicant] may have been paid leave entitlements by one or more of the employers while on professional placement.

29. I reject the thrust of that particular submission, to the extent that it is asserting that *no* adjustment could be contemplated based solely on this information. I do accept that *some* payments may have been received during those 12 weeks (indeed there is some evidence of that in [the applicant's] declarations of earnings at Folios 34-35). But I conclude that it stretches credibility to suggest that there would be enough leave or other such payments to cover 12 weeks of non-working, or that this would match the ATO averaged fortnightly figure utilised in the debt calculation.

30. In response to the question about whether any significance should be attached to the 'verified' column in the debt calculation figures at Folios 34-36, Centrelink's submission was that I should attach no significance, since '*[t]he coding of the earnings as 'verified' pertains to verification received from the Australian Taxation Office*'. I accept this general explanation, and have concluded that the issue is not material to my decision in the present instance. (I would however observe that the explanation leaves a question as to why 'no' is the answer to verification over the period 30 March 2011 to 21 December 2011 and between 4 January 2012 and 7 November 2012).

31. The question about whether or not consideration had been given to using Centrelink's powers compulsorily to obtain wage information from employers, was answered rather indirectly, by reference to changed practice and other matters. The submission read, with my underlining and bolding:

> The responsibility has always rested on Centrelink recipients to provide correct information in relation to their payments. Section 66A of the *Social Security (Administration) Act* outlines the general requirements to inform of a change of circumstance.

> The department's website provides clear advice about recipient's responsibilities and the importance of telling the department if their circumstances change. It is a normal part of the department's responsibilities and processes to check to see if a recipient has fulfilled their obligation to advise of a change in circumstance.
>
> One way of doing this is through data matching with the Australian Taxation Office and this has been occurring since 1990.
>
> The department engages with recipients where there is a difference in the income the recipient reported to the department and the income recorded by the Australian Taxation Office.
>
> Section 68 of the *Social Security (Administration) Act* outlines that the Secretary may require [a] person to provide information about a matter that might affect the payment to the person of the social security payment.
>
> The responsibility to explain any differences between the income identified from data matching and the information held by the department is, and has always been, on the recipient **in the first instance**.
>
> Previously, where a recipient failed to respond or was unable to provide the required information, the department would request additional information from third parties on their behalf. Recipients now carry more of that responsibility. **Department staff may help recipients gather information and navigate through the process**.
>
> [The applicant] contacted the department on 14 April 2016. During this conversation, [the applicant] was provided with an explanation of how the debt occurred and she was advised that if she provided the department with payslips for the relevant periods the debt could be reassessed. Further information was not provided and a review was requested.
>
> The Authorised Review Officer (ARO) also noted that [the applicant] stated there were times she did not work as she was on interstate placements as part of her university degree. This information was not available to the ARO at the time of review however the ARO did write and advise [the applicant] that the debt may be reconsidered if further information is lodged with the department.

32. In essence the above submission answers the question as 'no'; namely that consideration was not given to the exercise of a power such as section 192 of the *Social Security (Administration) Act 1999* (subsequently *SS(A)A 1999*).

33. For reasons later explained, I have found that the changed practice as outlined above (the underlined third last paragraph), does not absolve Centrelink from its legal obligation to obtain sufficient information to found a debt in the event that the 'first instance' contact with the recipient is unable to unearth the *essential* information about *actual* fortnightly earnings.

34. [The applicant] no longer held payslips for July 2010 to July 2012 (frankly there would be few citizens who do, and Centrelink's then website advice was only to keep such records for a short time). In such cases I have found that it is Centrelink's obligation to obtain the information (the reference to assistance in gathering the information and 'navigating the system' is sufficient in my opinion only in situations where the person is experiencing difficulties in loading documents, or where information is very readily to hand).

35. It is a matter of record that when [the applicant] did supply the information referred to in the final paragraph, Centrelink has chosen not to change the

decision, as it was able to do, instead urging me to find that information not to be material to the size of the debt (see paragraph 28 of my Reasons above).

36. The submission made with regard to issues of proof will be dealt with in conjunction with my discussion of the law, below.

What is the law about determining whether there is an overpayment and settling the size of any such debt?

37. *A question of proof of a debt rather than the threshold for enquiries?:* This question, I conclude, is concerned *not* with the circumstances which may give rise to doubts or concerns sufficient to motivate Centrelink *enquiries and investigations* (where the legislation sets negligible thresholds to the exercise of powers to require provision of information, such as that the information be 'considered [that it] may be relevant' to a social security issue[6]) *but rather* in what circumstances a decision-maker (including this Tribunal) can find that there is an overpayment.

38. That narrower question is the one addressed by Full Court of the Federal Court in *McDonald*.[7] As explained by the Court, there is no 'onus' of proof on either party (neither on Centrelink nor an applicant for review).[8]

39. *The McDonald standard of satisfaction:* Elaborating on the way a Tribunal 'steps into the shoes' of the maker of the decision under review, Woodward J wrote:

> It must act on the material which is before it but, as I have already pointed out, it is not bound by rules of evidence and may inform itself on any matter in such manner as it thinks appropriate.
>
> It is true that facts may be peculiarly within the knowledge of a party to an issue, and a failure by that party to produce evidence as to those facts may lead to an unfavourable inference being drawn – but it is not helpful to categorize this common sense approach to evidence as an example of an evidential onus of proof. The same may be said of a case where a good deal of evidence pointing in one direction is before the Tribunal, and any intelligent observer could see that unless contrary material comes to light that is the way the decision is likely to go. Putting such cases to one side there can be no evidential onus of proof in proceedings before the AAT unless the relevant legislation provides for it….
>
> If the AAT finds itself in a state of uncertainty after considering all the available material, unable to decide a question of fact either way on the balance of probabilities, it will be necessary for it to analyse carefully the decision it is reviewing. If, for example, it is a decision whether or not to cancel a pension in the light of changed circumstances, then it has failed to achieve the statutory requirement of reaching a state of mind that the pension should be cancelled. If, on the other hand, it is a decision, to be made in the light of fresh evidence, whether or not the pension should ever have been granted in the first place, then it has failed to be satisfied that the person ever was permanently incapacitated for work.[9] [my underlining]

40. Or as Jenkinson J (who differed from Woodward on the outcome of failing to be 'satisfied' of a matter on the particulars of the case at hand) put it, after explaining that, unlike courts who may '*determine a matter against a party on whom lies the onus of proof, and who fails to offer any proof… without further enquiry*' this Tribunal must still determine the question on the merits even where it:

> may find itself unpersuaded either that a circumstance exists or that it does not exist. (The same may be said of a past or a future circumstance.) The … administrative authority will determine, by reference to the substantive law, whether it is the **existence or** the **non-existence** of the circumstance which is determinative of the question for decision.[10] [my underlining and bolding]

41. *What is the outcome if something is not established to the McDonald level?:* While care should always be taken not to misrepresent the meaning when reducing passages like this to simple propositions, this has been variously stated as meaning that unless a decision-maker is satisfied about pertinent facts or criteria then the status quo prevails.[11] Or to put it another way, if unable to satisfy itself about key matters, then a 'default' outcome might result.

42. In the Federal Court case of *Harris*,[12] after indicating that parties might be expected to provide material such as a 'properly prepared application', Gyles J observed (omitting references), that:

> The AAT stands in the shoes of the Department and is in precisely the same situation as the decision maker. The fact that, as a practical matter, it chooses to conduct quasi-adversarial proceedings and does not have available direct access to medical specialists for the purposes of investigation, does not change the nature of the function being performed by it. The provisions of s 33 of the AAT Act give ample scope for the AAT to arrange investigation of a claim. The decision maker is bound to use his or her best endeavours to assist the AAT to make its decision […]. The AAT has inquisitorial powers and may exercise them where appropriate. […] It is not, of course, every case that will require such measures. In general, an applicant for a benefit must satisfy the decision maker of the necessary criteria. However, cases such as this [a DSP application] may demand such an approach [i.e. active steps].[13]

43. Gyles J was there dealing with an application for the disability support pension, but the point about being mindful of the activist or 'inquisitorial' powers and procedures available to the Tribunal, and of course to Centrelink, is a pertinent one.

44. *What is the effect of the 'nature' or 'effect' of the matter being decided?:* Finally, there is another important principle to consider in a case such as the present, known by the name of the High Court ruling as the *Briginshaw principle.*[14]

45. This principle maintains the *same* test of satisfaction (civil balance of probabilities) but states that the *strength* of the evidence needed to reach that level of satisfaction varies according to the 'nature' or the 'effect' of what it is that is to be established.

46. As a matter of common understanding, an allegation of a debt has moral and practical consequences (on credit worthiness standing and ratings advice[15]). It is well accepted therefore that establishment of a debt and its size is a matter which leads to an 'upwards variation' in the strength of material required.[16]

47. Or as Dixon J expressed himself in *Briginshaw*:

> Reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of the given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced in inexact proofs, indefinite testimony, or indirect inferences...[17] [my underlining]

48. *What has Centrelink argued about these matters?*:

49. The supplementary submission did not delve deeply into the above matters (and Centrelink did not take up the option of also putting oral argument to me), but had the following to say (with my underlining):

> Both the 'Briginshaw Principle' and/or the 1984 Full Federal Court ruling McDonald support the evidentiary basis for the decision to raise the debt. The 'Briginshaw Principle' for noncriminal activities required that the balance of probabilities be considered and that a standard of proof is required to determine that sufficient evidence is available to substantiate the allegation. The 1984 Full Federal Court ruling on Mcdonald addresses where the onus of proof lies. It states that Tribunals are not bound by rules of evidence but may inform itself on any matter in such a manner as it thinks appropriate, including statutes, natural justice and common sense. The function of the Tribunal was to determine for itself, upon the material before it, whether the decision was correct. It also states that the onus of proof lies with claimant however that **this can be obscured by the duties required of the Director-General**.
>
> In the 2011/12 financial year [the applicant] was on Youth Allowance for the full year. It was identified that she declared income of $10,428 to the department however her employer advised the ATO she earnt $20,175. Weighing up the balance of probabilities the customer has been overpaid. The department has evidence of the earnings derived from employment and as [the applicant] did not provide further information as requested, the debt was calculated with the information at hand i.e. the income details and dates from the PAYG statement.
>
> Further, when taking into account the Mcdonald ruling, the Tribunal should consider the material supplied at the hearing to determine if the decision is correct. [The applicant] may provide further information which may result in a reassessment of the debt however, if this is not forthcoming the Tribunal can rely on income details provided by the ATO. As part of the reassessment and review process the department has indicated to [the applicant] that if additional information is provided by her, this can be considered further in regard to the debt raised.

50. The final paragraph of this extract properly reflects the 'model litigant' and the statutory requirement that decision-makers must use their '*best endeavours to assist the Tribunal to make its decision in relation to the proceeding*'.[18] The key passages underlined above broadly mirror the legal analysis I have set out in more detail above, but there is one aspect that calls for comment.

51. Any suggestion that there is an onus of proof on claimants in the legal sense would be wrong (and is probably not being suggested) but the underlined passage is rather ambiguous about what is sometimes called the 'practical' or 'common sense' aspect of failure to reach a state of satisfaction about a given matter (applying any 'heightened' standard in applying the balance of

probabilities test). This 'default' (as I have termed it) always must be determined in light of the structure of the legislation. The bolded phrasing of claimant burden 'being obscured by' other provisions is simply a wrong choice of words, in that it implies rarity or some clouding or 'gloss' on a basic 'onus'. The default is always a product of the legislation, *whichever* way it falls, as *McDonald* makes very clear.

52. As explained below, if on the present facts (as I have found) Centrelink is unable to advance sufficiently convincing proofs of a debt or debt amount, then no debt arises in law. It is not a matter of the alleged debtor having advanced further information (though in practice this may be the most efficient way of clarifying it). Rather it is that Centrelink has not established the proposition it was required to establish (here a reliance on a methodology incapable, other than in rare instances of unchanging fortnightly income, of addressing the architecture of the fortnightly rate payments).

53. The middle paragraph of the submission as last extracted above is, in short, sufficient to warrant consideration of application of Centrelink's information gathering powers (see paragraph 37 of my Reasons) but does not, *standing on its own,*[19] support the raising of a debt.

How does this part of the law apply to [the applicant's] alleged debt?

54. The short answer to my question is that the law results in there being no provable overpayment or overpayment quantum on the facts before the Tribunal.

55. The reason it does not establish either an overpayment or its quantum is due both to the lack of sufficient strength of evidence and to simple mathematics.

56. The lack of strength of evidence flows from my characterisation of the overpayment 'methodology' (actually an administrative algorithm as I understand) — involving extrapolation of ATO employment income information over a period, divided to produce an average fortnightly, and then applied to YA payment periods to raise a debt — as, at best, raising no more than the sufficient doubt about the accuracy of past payments as to warrant the exercise of powers of enquiry held by Centrelink (or indirectly by this Tribunal: see paragraph 42 of these Reasons above). It is too uncertain, and too slight a basis to satisfy the *Briginshaw* standard in a fortnightly rate debt matter.

57. The simple mathematics, once my finding of variable and at times episodic weekly earnings is taken into account and feed into the legislative context of a requirement to determine a fortnightly YA rate based on earnings attributable to that fortnight, as further moderated by any reduction of raw gross earnings figures by reference to the 'earnings bank' provisions[20] — is that almost any speculated figure between no debt and the alleged debt amount is capable of being calculated.

58. An overpayment, if any overpayment exists, depends on how 'lumpy' is the true earnings pattern (i.e. compared to the invalid assumption of 'constant' earnings in every fortnight, including the 12 weeks when I have found it was impossible

for [the applicant] to have performed work for her employers: see paragraph 28 above).

59. I therefore find no proven overpayment of any quantum. The foundation on which the suggested overpayment rests falls well below even the '*inexact proofs*' and '*indirect inferences*' which Sir Owen Dixon found to be an unacceptable form of proof of such matters in *Briginshaw* (see paragraph 47 above). Within the terms of *McDonald,* given the structure of overpayment provisions and overpayment debts the failure to establish the overpayment leads to the default of no debt (see paragraph 40 and the preceding paragraph above).

60. The next question is which of the powers of the Tribunal I should exercise.

What power have I decided to use in giving effect to my decision?

61. The main powers available to the Tribunal are:

    a) to set the decision aside and substitute no debt;[21]

    b) to set the decision aside and send it back to be redetermined in accord with directions;[22]

    c) to adjourn the proceedings and exercise Tribunal powers to seek information directly;[23]

    d) or to adjourn the proceedings and exercise powers to require Centrelink to supply the Tribunal with such employment records it can obtain.[24] (Unlike other divisions of the AAT, the special power of 'remittal' for reconsideration 'at any stage of a proceeding for review', is not an option here, because the *Administrative Appeals Tribunal Act 1975* (subsequently '*AATA 1975*') withdraws that power,[25] leaving the last mentioned power to require Centrelink to use its powers).

62. I determined that the complexity of earnings investigations, and the lack of information about the contact details of the employers, rendered resort to the direct inquisitorial powers of the Tribunal (option (c) above) — as envisaged in *Harris* (see paragraph 42) — to be inappropriate.

63. Option (a) on the above list, of setting the debt aside and substituting a decision that there is no debt, was seriously entertained. No rules would have prevented Centrelink from making any fresh, securely grounded decision about a new debt (broadly speaking there are no estoppel or res judicata barriers to prevent this[26]). However I concluded that such a decision was not in the public interest or consistent with AAT objectives. First because it would appear 'odd' to ordinary people that a 'no debt' decision could later be raised afresh; secondly, because lack of proof of the current debt does not mean that there is no other debt amount to be investigated.

64. Option (d) on the above list, that of adjourning to await the results of a Tribunal direction to Centrelink to exercise its powers to compel production of information (section 192 *SS(A)A 1999*) was also seriously considered. However I was mindful of the need for this Tribunal to be expeditious, and of the ability for such a requirement to be incorporated as a direction (option (b)).

65. Option (b) was therefore the one I decided was appropriate in all the present circumstances (as set out in more detail at the end of my Reasons).

66. In light of my findings of no overpayment, strictly it is not necessary for me to consider whether an overpayment became a debt, and if so whether that debt is recoverable. However for completeness I will briefly do so.

When does a debt arise and was there a 'debt' of [the applicant's] YA?

67. Section 1222A of the *SSA* 1991 provides that a debt only arises if another provision of the legislation makes it a debt.

68. So far as creation of a legal debt of a 'social security payment' like YA is concerned, the relevant part of the law reads:

> 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.
>
> (1AB) Without limiting by implication the circumstances to which paragraph (1)(b) applies apart from this subsection, a person who obtained the benefit of a social security payment is taken not to have been entitled to obtain the benefit if the payment should not have been made for any one or more of the following reasons:
>
> (a) the payment was made to the person by mistake as a result of a computer error or an administrative error;
>
> (b) the person for whose benefit the payment was intended to be made was not qualified to receive the payment;
>
> (c) the payment was not payable;
>
> (d) the payment was made as a result of a contravention of the social security law, a false statement or a misrepresentation;
>
> (e) the payment was made in purported compliance with a direction or authority given by the person who was entitled to obtain the benefit of the payment but the direction or authority had been revoked or withdrawn before the payment was made;
>
> (f) the payment was intended to be made for the benefit of someone else who died before the payment was made.

69. The next question is how the size of any debt is calculated. In a case like the present the debt calculation software utilised by Centrelink incorporates all the relevant rules found in the Rate Calculator. The program and associated calculations adjust for factors such as maximum payment rates, and other special rules.

70. In the present case I have found no overpayment (there being no reliable earnings information to feed into the Calculator).

71. The next question is whether any debt would have been recoverable.

What is the law about waiver of debts?

72. The rules about waiver of social security debts (such as YA) are found in subsection 1237(1) of the *SSA 1991*. This section provides that debts must or may

be waived, in whole *or part*, but 'only in the circumstances described in sections 1237A to 1237AAD'.

73. These sections provide that a debt must be waived if:

- It arises 'solely from' administrative error and the monies were received in 'good faith': subsection 1237A(1); and the error was not detected within 6 weeks (subsection 1237A(1A)); or
- The debt has already been taken into account by a court in imposing a longer custodial sentence for any offence: subsection 1237AA(1); or
- The debt arose from an underestimate, in good faith, of the value of a property which was difficult to value: subsection 1237A(2); or
- The debt is for less than $200 and it is not cost effective to pursue it: (subsection 1237AAA(1), unless it is more than $50 and able to be recovered by deductions from ongoing social security payments: subsection 1237AAA(2); or
- It is the difference between the amount originally claimed and the 'settlement amount' agreed on between the parties in a civil action for recovery of the amount: subsection 1237AAB (1); or a settlement in the Administrative Appeals Tribunal: subsection 1237AAB(2); or
- The Commonwealth has received 80% of the sum, agrees to accept this in full satisfaction of the debt and the person lacks the capacity to pay the balance: subsection 1237AAB(3); or
- The amount is the amount of a family tax benefit or former family payment due to, but not claimed by the person (or their partner) during the overpayment period in question: section 1237AAC).

74. The only provision for consideration in the present application is the first of these dot points and the discretionary, 'special circumstances' waiver power outlined below.

What is the law about sole Centrelink error and good faith receipt?

75. If a debt is due entirely to Centrelink error and the overpayment money has been received in good faith, the law prevents its recovery, as just explained in the list above.

76. <u>*What is the meaning of good faith'?*</u>: The legal test of good faith receipt hinges on whether the person actually had an honest belief of entitlement at that time, as the Federal Court made clear in *Prince.*[27] In law, 'good faith' is simply the converse of bad faith. It turns on the state of mind of the person when the money is physically received (or discovered in an account).

77. Good faith may be negated by actual knowledge of lack of entitlement (or other 'irregularity'), or by a reckless disregard for such consequences.[28] *Wilful* blindness will serve to impute lack of good faith in the person, but only when it hints at *bad faith*: the situation where a person deliberately chooses not to inform themselves of matters, or deliberately chooses not to allay doubts in their mind.

78. I am satisfied that at all times [the applicant] has acted in good faith throughout in relation to her payments (as she mentioned at hearing, she promptly advised commencement of the relationship with her now husband).

79. *What is the meaning of 'sole error'?*: As explained in Federal Court the test of sole error is a strict one, calling for a 100% contribution to the origin of the debt.[29] In that case, Justice Wilcox criticised the AAT for not being sufficiently strict about this, writing that:

> [I]t seems to me, the Tribunal failed to consider the significance of the inclusion, in s 1237A(1), of the word 'solely'. For the subsection to have effect, the 'proportion' of the debt … must be 'attributable solely' to administrative error. It is not enough that, in the absence of administrative error, the debt would not have arisen. Administrative error must be the sole cause, not merely one of multiple causes.[30]

80. It is irrelevant that the contributing error which breaks the Centrelink chain causation is a minor one[31] unless '*those other errors or factors follow as a result of the Commonwealth's administrative error (i.e. they are incidental to the Commonwealth's error), then it may be that the debt is attributable solely to the Commonwealth's administrative error*'.[32]

81. It is well settled by court and AAT decisions that receipt of a letter from Centrelink, which letter contains sufficient information to raise a doubt or concern about the correctness of a payment — even if not actually capable of being understood by or not having actually been read by the actual recipient of that letter — serves to introduce an 'additional' cause of the portion of the overpayment arising on and after that date. While no doubt out of accord with some community views of what is 'fair', this is nevertheless the law. Thus in *Re Chalmers*[33] Senior Member Bean of the AAT concluded that sole error ceased to operate after receipt of an 'account statement' type letter from Centrelink.[34]

82. There was no suggestion of Centrelink error in the generation of any overpayment, had I found one.

83. I now turn to briefly to debt waiver under the special circumstances discretion, as now discussed.

What is the law about waiver for 'special circumstances'?

84. The 'special circumstances' provision for social security payments such as age pension (section 1237AAD) provides that a debt 'may' be waived:

> 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 a false representation; or
>
> (ii) failing or omitting to comply with a provision of this 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.

85. <u>*What is the meaning of 'knowingly'?*</u>: The 'gateway' test in subsection 1237AAD(a) has been found to be one which calls for showing an *actual awareness* (or guilty intent) which is associated with the action or inaction of the debtor, even if that awareness is different from a "fraudulent intent".[35]

86. I find that [the applicant] genuinely did not doubt that she was being paid correctly. So I find that she did not knowingly do or fail to do something within the meaning of this part of the subsection. Consequently the door remains open for consideration of special circumstances waiver.

87. 'Special circumstances' as mentioned in subsection 1237AAD(b) of the *SSA 1991*, refers to the debtor's personal circumstances. It is intended to be interpreted flexibly and the phrase covers a wide variety of possibilities, including matters serving to take the case out of the usual or ordinary pattern, or otherwise producing a result which is unjust, unreasonable or otherwise inappropriate in the context of the statutory purpose.

88. The legal position as just outlined has been established in a number of Federal Court rulings.[36] As the Federal Court observed, the phrase is not confined to 'exceptional' situations, provided there is something that distinguishes the case.[37]

89. In addition to more usual combinations of factors, such as financial hardship or health, departmental error may be counted among the factors which may lead to a finding of special circumstances.[38] Such combinations of departmental mistakes and other factors may be found to be special.[39]

90. Finally, any exercise of the discretion once special circumstances are established is not confined to the position of the applicant, but includes considerations going to the 'general administration of the social security system', such that public money has been spent when the law did not permit it, or errors and poor administration'.[40]

Are [the applicant's] circumstances 'special'?

91. The answer to this question, had it arisen (and it did not) would have been 'no'.

92. [The applicant's] finances did not constitute financial hardship as defined, so this could not have been a special circumstance. [The applicant] and [her husband's] health was sound, so this would not have been a special circumstance. No other relevant matter was advanced as a possible special circumstance

93. Consequently I would have been unable to contemplate the exercise of the waiver discretion (the gate would have been effectively 'locked', preventing me from entering what some Tribunal members have called the 'paddock of discretion').

Should any debt be written off?

94. The answer to this question would also have been 'no', as now explained.

95. The power to write off a social security debt (which, contrary to usual language in this case merely 'defers' its recovery), is now highly restricted. Section 1236 provides:

> 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.
>
> (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.
>
> (1B) For the purposes of paragraph (1A)(a), a debt is taken to be irrecoverable at law if, and only if:
>
> (a) the debt cannot be recovered by means of deductions from a person's youth training allowance, or legal proceedings, or garnishee notice, because the relevant 6 year period mentioned in section 1231, 1232 or 1233 has elapsed; or;
>
> (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 discharge 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.

96. In light of [the applicant's] circumstances I would have concluded that write off was not more appropriate.

Decision

On Wednesday, 8 March 2017, the Tribunal decided to *set aside* the decision to raise and recover an overpayment debt of Youth allowance in the amount of $7,452.76 for the period 8 July 2010 to 6 June 2012, and *send it back to be redetermined* in light of directions that:

1. No debt or debt component is able to be founded on extrapolations from Australian Tax Office records;
2. The earnings components of any recalculated debts as may be raised must be based on and confined to any fortnightly salary records obtainable in the exercise of statutory powers to do so (if set in train); and
3. Debt amounts (if any) as so varied are recoverable debts (not able to be waived).

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[1] The Calculator is found in section 1067G of the *Social Security Act 1991* (subsequently called '*SSA 1991*').

[2] These decisions may be accessed at http://www.austlii.edu.au/au/cases/cth/AATA/

[3] *McDonald v Director-General of Social Security* [1984] FCA 59; 1 FCR 354; 6 ALD 6.

[4] Pursuant to an order made under subsection 39AA(5) of the *Administrative Appeals Tribunal Act 1975* (subsequently *AATA 1975*).

[5] An order under section 165 of the *Social Security (Administration) Act 1999* (subsequently *SS(A)A 1999*).

[6] See for example section 192 *SS(A)A 1999*. Regarding the purpose and breadth of this power see *Hendy v The Manager Centrelink (Ipswich)* [2004] FMCA 579 Rimmer FM] and (in respect of its predecessor) *Sheil v Secretary, Department of Social Security* [1999] FCA 1237 paragraph 39; (1999) 56 ALD 465, where Katz J explained 'Parliament's purpose in including the provision was to confer a power capable of being used in aid of the prevention or recovery of unjustified payments of social security benefits'. The power displaces privacy objections (*Rahman v Ashpole* [2007] FCA 1067 (Graham J) and includes the obligation to provide estimates: *Re Adkins and Secretary, Department of Family and Community Services* [2005] AATA 714, Senior Member Friedman at paragraph [18]. The exercise of the power was assessed on a test of reasonableness by Senior Member Fice in *Re Almosawi and Secretary, Department of Social Services* [2015] AATA 968 (at paragraph [17]. See also Deputy President Hotop in *Re Budalich and Secretary, Department of Employment and Workplace Relations* [2007] AATA 1258 on the issue of 'relevance' and of specification of what is required to be supplied (at paragraphs [30]-[31].

[7] *McDonald v Director-General of Social Security* [1984] FCA 59; 1 FCR 354; 6 ALD 6. FCR page references for this case are cited subsequently.

[8] See Woodward J at 356-358; Northrop J at 366; Jenkinson J at 368-369. The principle was reaffirmed by the Full Court in *Re Australian Telecommunications Commission v Shirley Else Barker* [1990] FCA 489 at paragraph [18].

[9] Woodward J at 358.

[10] Jenkinson J at 369.

[11] *Re Waller and Secretary, Department of Family, Community Services and Indigenous A*ffairs [2007] AATA 1902 then Member Frost at paragraph [23], cited with approval by Senior Member Walsh in *Re Parker and Secretary, Department of Education, Employment and Workplace Relations* [2011] AATA 98 at paragraph [34]. It was translated as a 'practical onus' by Senior Member Professor Creyke in *Re Russell and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2011] AATA 52 at paragraph [35].

[12] *Harris v Secretary, Department of Employment and Workplace Relations* [2007] FCA 404; (2007) 158 FCR 252; 45 AAR 247; Gyles J.

[13] Gyles J at paragraph [19].

[14] *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336. Also see the joint decision of the High Court in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 110 ALR 449 at 449-450, and of the Full Federal Court in *Rana v University of South Australia* [2007] FCAFC 188, at [31].

[15] Including agencies such as Dun and Bradstreet. See also ASX at http://www.asx.com.au/products/bonds/credit-ratings.htm

[16] See for example the analysis by Deputy President Jarvis in *Re Kambouris; Secretary, Department of Education, Employment and Workplace Relations* [2008] AATA 221 at paragraph [30]-[32] and also Senior Member Bayne in *Re Johnson and Department of Family and Community Services* [2000] AATA 424 at paragraph [39].

[17] Dixon J in *Briginshaw* at 60 CLR 362.

[18] *AATA 1975* subsection 33(1AA).

[19] The italicised words denote that in my view this is a principle of general application; even though on the facts before me [the applicant] did submit material casting doubt on the validity of the mode of calculation, I would have so found even in the absence of that evidence.

[20] *SSA 1991* Module J of section 1067G, points 1067G-J1 [diagram], 1067G-J3 [method statement].

[21] *AATA 1975* subsection 43(1)(c)(i).

[22] *AATA 1975* subsection 43(1)(c)(ii).

[23] *SS(A)A 1999* subsection 165A(1) (issuing a notice to any person with relevant information, requiring it to be supplied).

[24] *SS(A)A 1999* section 166 (directing the exercise of the information gathering powers of section 192).

[25] See *AATA 1975* subsection 40D(1).

[26] See the extended review of such principles by Deputy President Forgie in *Rana and Military Rehabilitation and Compensation Commission* [2008] AATA 558.

[27] *Department of Education, Employment, Training and Youth Affairs v Prince* (1997) 26 AAR 385 [152 ALR 127; [1998] ASSC 84,475 (¶92-162)] (Fed Ct), (Finn J at 387-388).

[28] *Jazazievska v Secretary, Department of Family and Community Services* [2000] FCA 1484, 65 ALD 424 (Cooper J), at paragraph [45].

[29] See *Secretary, Department of Family & Community Services v Sekhon* [2003] FCA 76.

[30] Ibid, paragraph [41].

[31] *Re Gagatek* [2012] AATA 255, Senior Member Walsh at paragraph [40].

[32] Ibid, also *Re Gerhardt* [1996] AATA 173.

[33] [2011] AATA 540.

[34] Ibid, at paragraph [34].

[35] *Re Callaghan* (1997) 45 ALD 435 at p 445; *Re Bitunjac* (1998) 52 ALD 674 p 687.

[36] Cases include: *Angelakos v Secretary, Department of Employment and Workplace Relations* [2007] FCA 25 (Fed Ct), Besanko J at [33]; *Ryde v Secretary, Department of Family and Community Services* [2005] FCA 866 (Fed Ct), Branson J; *Dranichnikov v Centrelink* (2003) 75 ALD 134; [2003] FCAFC 133 (FC Fed Ct); *Secretary, Department of Social Security v Hales* (1998) 82 FCR 154 (Fed Ct) French J at 162.

[37] See Besanko J in *Angelakos v Sec DEWR* (2007) 100 ALD 9; 44 AAR 436; [2007] FCA 25.

[38] See for example the decision of the AAT in *Re Baukes* [2011] AATA 645.

[39] For instance in *Re Schultz*, even though Deputy President Jarvis of the AAT wrongly excluded notional entitlement as a special circumstance, special circumstances waiver was applied on the basis of the other factors in play, such as departmental error [2004] AATA 705) at paragraphs [38]-[39].

[40] Deputy President Forgie of the AAT in *Re Timothy Davy* [2007] AATA 1114 at paragraph [80]; and Senior Member Dunne in *Re Hermann* [2013] AATA 711, at paragraph [35].